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Idealisation, de-politicization and economic due process: System transition in the European Union*

The new boat

One topic of this volume is the role of law in periods of system transition. In a sense, it evokes the pedagogical setup of the immediate post-Reagan era. Countries that have recently thrown off an authoritarian or totalitarian regime are seen as engaged in a dialogue with countries that have made a transition to democracy earlier. In this process, the former countries find themselves confronted with the expectation to catch up with a set of normative standards which has never been defined by them. In fact, the standards are believed to define the mark of civilised nations. It is understood that for the purpose of transition a break needs to be made from a regime where the law used to serve as a mere façade and where major decisions were arrived at by the party nomenclature. The law was taken to be an expedient tool for the attainment of political goals. Human rights existed only on paper. There was no protection from illegal detainment or no judicial safeguard against inhumane or degrading treatment. The transition is supposed to reestablish politics within legal constraints. An independent judiciary is to watch over their observance. No

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longer is the law to serve as a mere instrument for the attainment of political objectives, but to be respected as an end in itself.

Over the last few years, the situation of dialogue has changed, at any rate, in certain respects. Not only is the formerly leading pedagogical nation no longer in the position to educate others credibly about the protection of human rights¹ and the rule of law,² the meeting ground has altered, too. The formerly existing geopolitical line dividing burdened and assisting countries has more or less disappeared or, under an alternative description, shifted farther towards the East. In many instances, both types of country now belong to a larger unit which is widely assumed to be more than an international organisation and less than a state.

Membership to the European Union changes everything. Intriguingly, in this new situation—which one might have expected to amount to the triumph of constitutional democracy, the rule of law and human rights—it begins to dawn slowly upon the countries concerned that they may now jointly stand at the threshold of yet another transition. For the new Member States, this may come as no small surprise. Nevertheless, if my observations below are correct it may well turn out that, even from their perspective, with the accession to the European Union the original transition may eventually become superseded by another.

1. See Physicians for Human Rights, *Broken Laws, Broken Lives*, on people who endured torture at the hands of US personnel in Iraq, Afghanistan, and Guantánamo Bay (<http://brokenlives.info>).

2. On the finding of a violation of the Consular Convention by the United States by the International Court of Justice and the United States' subsequent withdrawal from Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, see Frederic L. Kirgis, 'President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights', <http://www.asil.org/insights/2005/03/insights050309.html>.

More precisely, I would like to point out, in what follows, that the European Union does not leave unaffected the ideals that it purports to serve. Through its operation these ideas are given a remarkable articulation. In an important respect, the law—constitutional law—is involved in this transformation. Three processes, in particular, merit to be taken into account.

To begin with, constitutional language has come to be used increasingly not in order to constitute legal processes, but rather for the purpose of refurbishing existing arrangements. I shall refer to this transformation as *idealisation*. It changes the nature of a constitution from establishing and limiting powers of collective agency³ to putting the best possible face on what there already is. The phenomenon is not unprecedented in European constitutional history. Bonaparte used constitutional form in order to gloss over a break with the substance of constitutionalism.⁴ Not that the Union is guilty of the latter, but the point of constitutionalisation appears to be changing in its case as well.

This strategy is related to a second phenomenon that can be described as a process of creeping *de-politicisation*. This affects the core of the European polity, namely, its position vis-à-vis democracy. Of the three phenomena sketched here, this one has been concomitant to the growth of the European Community and Union since their inception. I am taking it up, once more, simply because its effect becomes particularly pronounced in the face of a third process.

3. For a historically apt reconstruction of the concept of the constitution, see Dieter Grimm, 'The Constitution in the Process of Denationalisation' (2005) 12 *Constellations* 447-463 at 452-453.

4. See Dieter Grimm, *Deutsche Verfassungsgeschichte 1776-1866* (FrankfurtM: Suhrkamp, 1988) at 57-58.

De-politicisation needs to be seen as background condition for the rise of a new *economic due process*. In the European context it is manifest in the claim that any legally created restriction on the pursuit of economic aims, regardless of whether it originates from public or private acts, requires a showing of its rational and proportionate pursuit of public interests.⁵ The ascendancy of economic due process might trigger the most profound system transition in post-war Europe, that is, the transition from the co-existence of a variety of capitalisms to a more uniform and basically Anglo-American socio-economic system.⁶

I shall examine each of these processes in turn. Since the emergence of European economic due process is a more recent phenomenon, the analysis of the latter shall be more extensive than the discussion of idealisation and de-politicisation that precedes it.

Idealisation: The emergence of a post-constitutional order

If anything, then the unspectacular ending of the European constitutional project revealed what it must have been supposed to be. The Lisbon Reform Treaty, regardless of whether it should ever enter into force,

5. For the original formulation of *substantive* economic due process in the context of the United States constitution, see *Lawton v. Steele*, 123 U.S. 623 (1887) at 661. For a more nuanced formulation of European economic due process, to which I shall return below, see AG Miguel Maduro's Opinion in Case C-438/05, *The International Transport Workers' Federation & The Finish Seamen's Union v. Viking Line ABP & Ou Viking Line Eesti*, 23 May 2007, at para. 43, 48.

6. See Martin Höpner & Armin Schäfer, 'A New Phase of European Integration: Organised Capitalism in Post-Ricardian Europe' (2007) *MPIfG Discussion Paper* 07/4 at 21.

amounts essentially to the Constitutional Treaty stripped of constitutional ornamentation. This suggests strongly that in retrospect Haltern was proven right who had pointed out already several years ago that the constitutional project, then still restricted to the Fundamental Rights quarter, was basically a method of presenting a bleak technocratic project in a quaint disguise.⁷

The Lisbon Treaty ostensibly retreats from the ambition to create the aura of self-constitution. It is post-constitutional in both a straightforward and a cunning manner. On its face, it abstains from consolidating the authoritative legal texts—two treaties and a number of protocols—into one integrated whole. In what appears to be almost like an act of defiance, the Union reciprocates the rejection of the Constitutional Treaty with asserting its peculiar pre-modern complexity. The abstention from grand gestures is indicative of the nature of a constitutional arrangement. It is easier to hide inconsistencies and tensions when provisions are spread over several documents. Cunningly, the Union thereby conceals where it suggests to reveal.

At the most elementary level, modern constitutions are exercises in mapping existing powers. They can be understood as attempts to employ norms in order to render transparent the otherwise arcane practice of the state. Lending power greater visibility and bending it into manageable shape are two dimensions of one remarkable strategy. In addressing norms to those already wielding power, for example, a king, the power becomes reconstituted so that agents can be submitted to control. A king whose signature on a Bill of Parliament is countersigned by the minister is, even though thereby relieved of all responsibility, not longer the same

7. See Ulrich Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Union' (2002) 11 *European Law Journal* 19-38.

king who grudgingly conceded the constitution pursuant to which he now has to act. This is not to say that constitutions do not go beyond mapping existing structures and investing them with the authority of higher law. Indeed, a constitution takes a king and constrains his power by confirming the rights of parliament. A constitution bestows upon parliament the right of legislative override in order to contain an overconfident constitutional tribunal that relies all too heavily on the artificial reason of the law. In a word, constitutions establish countervailing forces in order to constrain agents and processes that already exist or whose presumptive pretense of supremacy needs to be held in check. Beyond introducing transparency, accountability and responsiveness (which are virtues of modern *administrative* law) they *create* responsibility for matters that would be experienced, were it not for constructions of agency, by the people as being beyond their control. Eventually, they introduce visibility not by illuminating machinations with a flashlight but by pushing responsible agents into the limelight of the political realm.

It is possible, however, to give even the more elementary mapping function of norms a scheming twist. Norms can be used to conceal matters. In the European post-constitutional situation, the Lisbon Reform Treaty provides ample evidence of this. Thereby, far from establishing new powers of agency, it even fails to render transparent what already exists.

First, the Reform Treaty deflects attention. It will be remembered that the Constitutional Treaty pushed pre-existing provisions into the foreground, which suddenly became controversial, such as free movement, the clauses on the flag and the anthem etc. The Reform Treaty leaves them buried in the existing treaty framework. The controversial issues are left in an invisible state.

Second, it is more than merely open to debate whether the Reform Treaty has made any progress with regard to social rights. Aside from the conditional clauses contained in the Charter and aside from the reservation made by Poland and England, the Charter never claimed to do more than render explicit already existing rights.⁸ We simply cannot determine what surplus is to be expected from the Charter.⁹

Third, outside the purview of the Treaty remains the plethora of arrangements associated with “new governance”.¹⁰ From a constitutional perspective, it is to be regretted that the Treaty that might have been a constitution does not address a method of co-ordination that appears to elude classification according to the distinction between hard and soft law.¹¹ Generally, addressing the “hybridity” of social policy would have reintroduced an issue that is evidently on the hearts and minds of Europeans who treasure long-established European modes of dealing with the threat of social exclusion.

Fourth, what is most remarkable about the post-constitutional ordering is the ease with which it uses legal texts in order to idealise realities (the old crit slogan of “law as ideology” comes to mind here). When matters cannot be changed they can still be cast in different light through the

8. The observation has been also made by the ECJ. See Case C-540/03, *European Parliament v. Council* [2006] ECR I-5769.

9. The ECJ has not infrequently appealed to the Charter in its jurisprudence, even though with caution. See, for example, Case C-131/03, *R.J. Reynolds Tobacco Holdings v. Commission* [2006] ECR I-7795.

10. For a critical discussion, see Christian Joerges, ‘Integration through delegalisation’ (2008) 33 *European Law Review* 291-312.

11. See, for example, David M. Trubek, Patrick Cottrell & Mark Nance, ‘Soft Law’, ‘Hard Law’ and EU Integration’ In G. de Búrca & J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publ., 2006) 65-94.

use of norms. It may be remembered, from Kelsen, that norms serve as a scheme of interpretation.¹² They invest events and structures with significance. From a legal point of view, x counts as y (an utterance as an oath, for example). Norms can be used, therefore, to idealise realities and thus to render social facts expressive of ideals or of something evil.¹³

Just like the Constitutional Treaty that preceded it, the Lisbon Reform Treaty allows the Union to claim to have resolved the democratic deficit. Article 8a (Article I-46 of the Draft Constitutional Treaty) proclaims merrily that the functioning of the Union is “founded on representative democracy” (section 1) and that citizens are “directly represented” in the European Parliament (section 2). Not that this is evidently untrue. But it is not a plain truth either. By glossing over the conflicted nature of existing realities it amounts to an idealisation. Similarly, the European Parliament is always mentioned before the Council when addressing legislative proceedings. This is a nice symbolic gesture, which also conceals that the European Parliament does not occupy the driving seat in the legislative process. Never mind that it is inconsistent with the “direct” representation of citizens of the European Union to have national parliaments in charge of exercising the subsidiarity early warning mechanism, which is laid down in a separate Protocol and mentioned in

12. See Hans Kelsen, *Reine Rechtslehre* (2d. ed. Vienna: Deuticke 1960) at 3.

13. We are all familiar with how this works from private law. The wealthy capitalist concludes an agreement with the penniless labourer. Evidently, such a situation is marked by unequal bargaining power. Nonetheless, through the lens of classical private law the situation is presented as though it involved two agents who are both equally free. The economic inequality is immaterial to the application of the norm pursuant to which both actors ought to be counted as free and equal persons entering voluntarily into an agreement. The underlying social facts become neutralised, and rendered irrelevant, owing to the influence of normative idealisations.

Article 8c(b) of the new EU Treaty. Why should not the representatives of the Member States, that is the members of the Council, resolve the issue? Apparently, there is something amiss in European democracy, possibly even a disconnect between the Union and more credible modes of democratic representation. When push comes to shove the true representatives, who have been the losers of the integration process,¹⁴ are given a voice again. Never mind that the new people's initiative disenfranchises citizens from merely one or two Member States from "inviting" the Commission to submit a proposal for a Union Act (Article 8c) even when Union law, for example, as divined by the European Court of Justice, impacts selectively on their national traditions.¹⁵ The Treaty idealises and conceals when it proclaims that the European Parliament elects the President of the Commission (Article 9A), suggesting that he is the equivalent of a Prime Minister. Of course, the Commission President is effectively selected by the European Council and not by parties contending for power.

This is the "democratic life of the European Union" (a phrase that used to be an ornamental heading of the draft Constitutional Treaty). Apparently, its presentation involved denial and idealisation. This may raise the suspicion that the political process of the European Union eludes constitutional form and maybe even, in order to be possible, needs

14. See J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) at 30-38.

15. See, for example, Case C-147/03, *Commission of the European Communities v Republic of Austria* [2005] ECR I-5969.

to remain unfettered by constitutional discipline, a matter that has been beautifully hinted at by Dehousse:¹⁶

The price of this governance by consensus is known: an opaque system, barely legible, in which it is difficult to identify with precision those responsible for a decision—and thus to censure them if necessary.

There is much to this observation. Its intuitive appeal, however, should not blind us to the alternative suspicion that the ironical twists and turns of constitutional forms may even bespeak the absence of a political ordering of society, at any rate, in a manner in which we have come to conceive of it.

De-politicisation

The members of the European Parliament represent the peoples of Europe. So far, so good. As a representative institution, Parliament has grown increasingly powerful and influential in the European political process.¹⁷ Nevertheless, it would be misleading to describe the European Union in terms of a parliamentary democracy. On the contrary, it is still more apt to describe the European Union as an organisation whose success implicates, and depends on, the reproduction of a democracy deficit.

The explanation is easily forthcoming.¹⁸ From the perspective of offering meaningful political choice, elections to the European Parliament

16. Renaud Dehousse, *The Unmaking of a Constitution: Lessons from the European Referenda* (2006) 13 *Constellations* 151-164, at 161

17. See Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation State* (Oxford: Oxford University Press, 2006).

18. On the following, see Mattias Kumm, 'Why Europeans will not embrace constitutional patriotism' (2008) 6 *International Journal of Constitutional Law* 117-136 at 128-133.

are more or less devoid of meaning. They are meaningless not because the peoples of Europe sense that the issues at stake in European policy-making are either overly technical or closer to the conduct of foreign affairs. What Europeans realise, rather, is that they cannot vote for a change. Elections are not decisive. Why should Europeans pay attention to developments that they suspect to be outside their reach and, what is more, would be susceptible to their control only if they chose coarse avenues of protest, such as a referendum over a Treaty amendment?

Elections to the European parliament do not offer European citizens an opportunity to vote for a change. In contrast to national politics, the competing parties fail to present different visions of the future of the European polity. There is nothing that voters can identify with. This matter is also the effect of an obvious constitutional deficiency. Political parties, if they were to form a coalition in the European parliament, would not set the agenda of policy making of the European Union. Indeed, the agenda is set by the Commission in close co-operation with the European Council. Therefore, in the eyes of some of its citizens the Union is perceived as if it were a spaceship traversing space-time oblivious to terrestrial life¹⁹. In the eyes of these very same citizens the only available mode of opposition is some inchoate rejection of the Union itself. Dissatisfaction has an outlet when it becomes misdirected against “Europe”. I wonder why European politicians are not more troubled by such a profound distortion.

Moreover, since legislative choices are arrived at with only minor and surprisingly rare opposition—it is not very vocal, at any rate—the overall political process becomes assimilated to the mindset of administration.

19. *Ibid.* at 133.

The phenomenon that I would like to invite attention to is a variation of a Majonian theme. Majone pointed out that much of European risk-regulation is explicable in terms of the basically apolitical work of the European regulatory state.²⁰ European legislation, he claims, does for the most part not redistribute resources but effectively protects diffuse consumer interests by having businesses internalise the costs. Of course, Majone's observation is debatable.²¹ But the point is not whether or not Majone is indeed right and that technocratic legitimacy truly accrues to European regulation; rather, Majone captures the de-politicising spirit²² with which policies are defined and pursued in the European Union. Instead of partisan contest and ideological conflict the democratic element of the European policy making process purportedly materialises in "stakeholder participation" and the involvement of "civil society". Instead of offering mutually incompatible political programs a venue of contest for implementation the process relies on variation and experimentation. The confidence that both lead to mutual learning suggests that the same overall paradigm is shared by all participants. Indeed, the constitution of the European Union is so strongly free market and competition oriented that it is embedded in a very homogenous basic consensus about certain values. What one gets, therefore, is small-scale optimization instead of a debate over fundamental shifts. Instead of the contest between political leaders who imagine different futures of the Union the visions of the

20. See Giandomenico Majone, 'Europe's 'Democracy Deficit': A Question of Standards' (1998) 4 *European Law Journal* 5-28.

21. See Christian Joerges & Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273-299.

22. For a critique, which is, however, directed at a different target, see Chantal Mouffe, *On the Political* (London: Routledge, 2005).

European Union are defined in White Papers. They are prepared by expert groups in the wake of learned exchanges with representatives of the academe. The papers not infrequently propose the pursuit of incompatible objectives, such as increasing competition and social inclusion, enhancing mobility and solidarity, enlargement and social cohesion. The overall process is deliberative, of course, beginning with the meetings preparing visionary perspectives all the way down to technical standard setting in committees²³ or argumentative exchanges before the European Court of Justice.

Overstating my point a bit, the European Union is a machine and not a body politic. It has internalised the ultimate goal of economic prosperity. This goal is growth, territorially and economically understood.²⁴ Its promotion is underpinned by an elementary neo-liberal consensus. Fancy talk about “governance without government” aside, Europe is not governed, but it is administered. The bon mot is Metternich’s, of course. It was supposed to describe the Austrian situation prior to what was to become the 1848 revolution. Even though it would be more than reckless to compare Europe’s current state to the situation of Europe during the reactionary period there can be no doubt that the European Union does not have a political process comparable to the processes that could be observed for constitutional democracies before they became increasingly disempowered. What “new Europe” gets, as a result, from the European Union is a depoliticised version of democracy. It is not a single party regime, to be sure, but nonetheless very much its liberal administrative

23. See Christian Joerges & Jürgen Neyer, “‘Deliberative Supranationalism’ Revisited’ 2006/20 EUI Working Paper Law.

24. See Sonja Puntsher Riekmann, *Die kommissarische Neuordnung Europas: Das Dispositiv der Integration* (Vienna: Springer, 1998).

equivalent. With voter turnouts particularly low in some of the new Member States,²⁵ one might wonder whether the inherited distrust in political institutions, and its demobilising thrust, is not likely to reinforce the already existing pattern of de-politicisation.

Economic due process

The extension of horizontal effect

It is no secret that the European Court of Justice has used the vocabulary of constitutional legality in order to attain integration objectives.²⁶ If one had to characterise its overall approach to the interpretation of Union law one would have to call it “pragmatist”.²⁷ That is, adjudication is taken to offer a trajectory for social reform. The law constrains only inasmuch as the path-dependence of judicial decision-making requires to present new ideas in the idiom of pre-existing legal language.

In the case of the interpretative exposition of free movement provisions, the social reform agenda has been tied to the attainment of approximation objectives.²⁸ One can see the Court concerned with facilitat-

25. See Richard S. Flickinger & Donley T. Studlar, ‘One Europe, Many Electorates?: Models of Turnout in European Parliament Elections After 2004’ (2007) 40 *Comparative Political Studies* 383-404 at 385.

26. For an attempt at a reconstruction, see Alexander Somek, *Individualism: An essay on the authority of the European Union* (Oxford: Oxford University Press, 2008) at 228-244.

27. See Ronald Dworkin, *Law’s Empire*, Cambridge, Mass.: Harvard University Press, 1986) 151-164. I am adopting Dworkin’s terminology without thereby suggesting that it is particularly well chosen.

28. In fact, the reform objectives have been articulated quite clearly by AG Maduro, note 5, at para. 35, as that of enabling “market participants throughout the

ing the smooth flow of transactions from one country to another. In this context, the preliminary reference procedure has increasingly come to serve as a vehicle for the judicial engineering of regulatory competition. The Court now offers economic activities opportunity to benefit from less stringent regulations that are in force in a Member State different from the state where the activities are carried out. In *Centros*²⁹ and *Laval*³⁰ alike, the conduct of a business and the provision of services were effectively invested with the power to “import” some of their constitutive laws into the country of performance (the incorporation of the company in one case and the lower pay scheme in the other).

But the selective importation of the more favourable regulatory regime, even though undoubtedly subservient to economic objectives, does not yet mark the decisive step toward the new economic due process that is the hallmark of the *Viking* decision.³¹ The new economic due process reads the horizontal effect of fundamental freedoms, such as freedom of establishment, broadly and submits intervening action, for example, a blockade by a trade union, to the strict demands of proportionality.³²

Since the *Walrave*³³ decision it has been a well-established principle of Union law that free movement provisions apply not only to the exer-

Community to have equal opportunities to gain access to any part of the common market.”

29. See Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

30. See Case C-341/05, *Laval un Partneri Ltd*, of 18 December 2007.

31. See Case C-438/05, *International Transport Workers Federation, Finnish Seaman’s Union v Viking Line ABP, OÜ Viking Line Eesti* of 11 December 2007.

32. See *Viking*, note 31 paras. 80-87.

33. See Case C-36/74, *Walrave and Koch* [1974] ECR 1405.

cise of public authority, but also to other rules aimed at regulating in a collective manner gainful employment. The extension, which originates first in the context of free movement of workers, does not allow the government of the Member State to steal itself away from its responsibility towards European workers by delegating the regulation of general terms of employment to a private or semi-private association. The most elementary idea underlying this extension is the old supranational argument from inequality of application. If the collective regulation of employment by social partners were not submitted to the same scrutiny as legislation, free movement rules would not have equal effect in all countries.³⁴

The horizontal effect of free movement provisions—intended as an exceptional extension of their *vertical* effect³⁵—was thus developed in order to protect the interest of workers or job applicants.³⁶ The special cases

34. See Somek, note 26 at 206, 213-215

35. This matter is even acknowledged by Maduro, note 5 at para. 36.

36. This path of development is rendered obscure by AG Maduro in his remarkably scholastic account of the case law. In a manner reminiscent of nineteenth century *Begriffsjurisprudenz*, he uses disparate case law from free movement of workers and occasional cases from free movement of goods in order to arrive at the following general principle (note 5, at para. 43): “[...] [T]he rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their right to freedom of movement.” *Begriffsjurisprudenz* was notorious for reasoning deductively from insufficiently grounded premises. Maduro revives this practice. His opinion is also distinguished by its casual use of logic. For example, Maduro introduces the condition of effectiveness in order to limit the horizontal scope of application of free movement rules by likening the impact of private acts to the efficacy of state regulation. He concludes that so long as one strange shopkeeper in England refuses to sell Irish products he does not interfere with free movement of (Irish) goods; he would, however, if on the basis of a shared aversion of the Irish all other shopkeep-

addressing free movement of goods aside (French farmer's protest case³⁷ and *Schmidberger*),³⁸ the horizontal effect of free movement rules was

ers would do the same (see *ibid.*, para. 42). The construction is strange. Why should the interference with rights by one person depend on the existence of a number of the same acts by others that may also only amount on an interference if that one additional person acts as all others do? For example, why should the existence of one hundred clever business people whose combined acts cause the ruin of a person without a “wealth talent” make the act of the last person into an interference with the impoverished person's right to subsistence, assuming, for the sake of the argument, that there is such a right? It does not make any sense to approach the matter from that perspective. The only difference that the aggregate effect of the exercise of rights makes is that it gives the state a better reason to intervene in order to protect the rights of others, such as a hypothetical right to subsistence. Aggregate effects matter from the perspective of public policy, but never from the perspective of individual right holders. Arguably, what Maduro should have said is that as soon as a situation arises where as a combined effect of a number of private acts an obstacle emerges that can not be reasonably circumvented by the trader (see *ibid.*, para. 48) the state is under an obligation to do something about it. Hence, contrary to what is claimed bravely by Maduro it is not by “implication” that the rules on freedom of movement apply directly to private persons as though they would become capable, as they march along with the crowd, of (collectively) interfering with freedom of movement. The only implication might be that at a certain *unspecified* point the state is under an obligation to do something about, say, the collective refusal on the part of shopkeepers to thwart Irish industry and craftsmanship. According to Maduro, the state obligation consists of giving free movement horizontal effect. This is the gist of the argument. It is, however, inconclusive, for it is open to debate whether direct horizontal effect, that is, an obligation to sell Irish products, is also the least restrictive means vis-à-vis the private autonomy of shopkeepers who are to decide for themselves which variety of products they would like to offer to customers. If that freedom were completely cancelled, free movement would indeed be tyrannical.

37. See Case C-265/95, *Commission v. France* [1997] ECR I-6959.

38. See Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659. Both cases can be read as involv-

supposed to give special force to the interest of workers. At least until *Agonese*³⁹ this has been the case. The same substantive thrust can be observed for the horizontal effect claimed for Article 141, from which, ever since *Defrenne*,⁴⁰ women (and men) were supposed to benefit directly. The Court severed the link with the interest of workers only in its most recent case law and extended, in an almost cynical reference to *Defrenne*, the horizontal effect of free movement provisions also to undertakings by pointing out that these provisions apply in particular to all agreements intended to regulate paid labour.⁴¹ This amounts to a stunningly formalistic *re-reading* of prior case law. All of a sudden, the *type of agreement* matters. It ignores an alternative rendition that would have focused on groups of persons whose interests have hitherto been deemed worthy of *special* protection.

The new approach to horizontal effect

The new approach is formulated, in *Viking*, in two different ways, one of which is narrow while the other is broad. Both are stated in one paragraph of the *Viking* opinion with the purport that what is formulated is one and the same idea.⁴² But it is plainly not.

According to the *narrow* formulation, non-state action, such as the blockade of a production site, comes within the purview of the horizontal

ing *Schutzpflichten* on the part of the state and can be thus distinguished from horizontal effect, narrowly understood.

39. See C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

40. See Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

41. See *Viking*, note 31 para. 58.

42. See *Viking*, note 31 para. 65.

effect of a fundamental freedom (other than free movement of workers) when the action is “inextricably linked to” or “aimed at” the conclusion of a collective agreement.⁴³ This formulation is novel. It does not actually base horizontal effect on the idea of securing equal treatment in a supra-national context of application.⁴⁴ On the contrary, it stretches the causal chain of interference to acts leading up to an agreement. Thus understood, even the narrow formulation sweeps more broadly than the original extension of horizontal effect to certain types of private party agreements.

The *broad* formulation is taking its cue from case law affecting free movement of goods, which deals mostly with how demonstrations interfered with that right.⁴⁵ In retrospect, the cases are presented as though they had introduced the principle of horizontal effect.⁴⁶ This is yet another instance of the Court’s practice of creatively misreading its own jurisprudence, for the prior case law ostensibly affects the *state’s* failure to protect the free flow of commercial traffic in Europe.⁴⁷ Even though the

43. See *Viking*, note 31 paras. 36, 60.

44. See *Walrave*, note 33.

45. See *Commission v France*, note 37, para. 30; *Schmidberger*, note 38 at para. 57 and 62. Both decisions are mentioned in *Viking*, note 31 para. 62.

46. See *Viking*, note 31 para. 62.

47. Here is what the Court concluded in *Commission v. France*, note 37 at para 66: “[I]t must be held that, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Government has failed to fulfil its obligations under Article 30, in conjunction with Article 5, of the Treaty and under the common organizations of the markets in agricultural products”. And here is what the Court said in *Schmidberger*, note 38, paras. 59-60: “Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but

difference between the state's duty to protect and horizontal effect may be imperceptible in certain instances,⁴⁸ it is noteworthy enough in both practice and principle. It affects the remedy.⁴⁹ Whereas horizontal effect would give rise to a remedy against another private party in an ordinary court of law—a tort claim, for example—a violation by the Member State of its obligation to protect a fundamental freedom pursuant to Article 5 EC Treaty against interference by private parties would give rise to a claim against the state. The remedy may indeed be a tort claim against

also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission v France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty. [...] Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods." From the reference to Article 5 EC Treaty and the language of the opinions emerges clearly enough that the Court is concerned with the obligation of Member States and not with horizontal effect.

48. See Mattias Kumm, 'Who Is Afraid of the Total Constitution?' (2006) 7 *German Law Journal* 341-369 at 360-362.

49. The matter is completely conflated in the AG Maduro's opinion who first (in para. 50) recognises a margin of discretion on the part of the Member States and then goes on (in para. 53) to claim that owing to the direct effect of purportedly horizontally effective Treaty provisions a claim against an other private party may in certain instances be based directly on the relevant Treaty provision.

the state that is based on the state's failure to comply with Community law.⁵⁰

It is quite obvious why the latter solution is congruent with Union Law. If the potential violation—as in the case of demonstrations—comes about as an aggregate effect of private individual action the remedy would be less effective if the affected party had to recover from a large group of non-associated individuals one by one. Indeed, the effectiveness of Union law counsels against horizontal effect in this type of case. If the state is the addressee of the obligation, it will be required to remove potential interferences whenever they arise. But assuming that the state is under this type of obligation it would have to be construed very narrowly from the outset, given that the state must not excessively interfere, in our case, with the freedom of association and the right to take collective action on the part of trade unions.

According to the broad formulation, which thus expands the focus to private acts more generally, the activity in question may be causally even farther removed from a collective agreement. The Court makes explicitly clear only that protection from interference is available not only against “quasi-public organisations” or “associations exercising a regulatory task and having quasi-legislative powers”.⁵¹ If this broad formulation will be followed in subsequent judgements, any form of collective action by trade unions might count as an interference with the freedom to provide services. In *Viking*, the Court made clear that freedom of establishment can be invoked against trade union acts seeking to pressure an undertaking

50. See, for that matter, Joined Cases C-6/90 and C-9/90 *Francoovich and Others v Italian Republic* [1991] ECR I-5357; Case C-224/01; *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

51. *Viking*, note 31 para. 64.

into negotiating a collective agreement.⁵² In fact, the Court counselled national courts to submit trade union action that counts as an exercise of the right to take collective action, to a very stringent proportionality test. In the course of this test, trade union action is likened to regulation.⁵³ Hence, the Court expects trade unions to espouse stated objectives and to pursue them in a suitable and non-excessive way. Remarkably, the Court even suggested that “less restrictive” means need to be exhausted first.⁵⁴ This is an incredible expectation, for it seeks to submit collective acts that are part of a struggle to a normative precept that has been developed for a context where those wielding sovereign rights are supposed to attain objectives in an unruffled and instrumentally fine-tuned way. Trade union action needs to be far cruder than bureaucratic rationality. In fact, necessarily it has to be excessive in order to attain its objective. It may well need to threaten to bring bankruptcy on an undertaking. Confronting trade union action with proportionality requirements makes it destined, from the outset, to lose out against business interests.

The conclusions that follow can scarcely be overstated. The right to establish businesses and to conclude agreements without being exces-

52. See *Viking*, note 31 para. 62: “This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups rather than caused by the state [...]”. In brackets follows a reference to *Commission v France* and *Schmidberger*.

53. For an apt critique, see Christian Joerges & Florian Rödl, ‘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 Judgements of the ECJ in *Viking* and *Laval*’ (2008, manuscript on file with the author) at 18.

54. See *Viking*, note 31 para. 88.

sively burdened by the protective legislation or industrial relations at the place of business operation introduces substantive economic due process into a transnational setting, for it effectively shields freedom of contract against efforts to protect the interest of workers. The economic due process mentioned above was even pushed further by the AG preparing the opinion in the *Viking* case elaborating, even though unasked, the horizontal effect of free movement positions.⁵⁵ This lifts, via the principle of private autonomy, free entrepreneurship to the level of a universal right, which is not unlikely to prevail over fundamental rights in case of collision.

Divided economies in a Common Market

Already in *Laval*, the Court's jurisprudence takes for granted a certain model of the freedom to provide services.⁵⁶ It is a model that actually divides employees and their interests along national lines. It thereby reveals a commitment to the type of economic nationalism that is perfectly congruent with Ricardo's political ontology. Businesses are seen as competing against one another on the basis of their national comparative advantage, of which industrial relations and a system of social protection are taken to be an integral part. The new element introduced by the Court is that the setup now allows for aggressive regulatory invasions.

The overall anti-internationalist thrust⁵⁷ of the Court's approach comes to the fore in how the *Viking* Court came to pick and choose those

55. See AG Maduro's opinion, note 5 at paras. 42-54.

56. For a sketch, see *Laval*, note 30 para. 73-76.

57. A particularly egregious example of this anti-internationalism is manifest in AG Maduro's opinion. Maduro suggests, in fact, that through internationally concerted action the stronger trade unions may extract from weaker counterparts concessions and thus rob the workforce of the latter of their comparative advantage. See AG

trade union action goals that are actually admitted to the proportionality test. The Court readily takes the protection and improvement of seafarers' terms of employment into account.⁵⁸ What does not play a part, even though it occupied a prominent place in the acts of the International Transport Workers Federation,⁵⁹ is the establishing and strengthening of international solidarity.⁶⁰ The story underlying the *Viking* litigation suggests strongly that trade unions are actually capable of co-operating across national lines in order to avert social dumping.⁶¹ The interest in strengthening trade union action across national borders in spite of differentials in wealth and opportunities does not enter the Court's assessment of the proportionality of trade union action. This raises the suspicion that the Court does not take the right of collective action seriously. An analogy to freedom of expression may elucidate the point. Freedom of expression is not taken seriously when respecting its exercise is made conditional upon it serving certain, and not other, ends. Freedom of expression is ill protected if, for example, it comprises communication with a political aim and not communication that appeals to the prurient inter-

Maduro, note 5 at 71. See also Norbert Reich, 'Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ' (2008) 9 *German Law Journal* 125-161 at 135-136; Catherine Barnard, 'Social Policy Revisited in the Light of the Constitutional Debate' In C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford: Oxford University Press, 2006) 109-151 at 151.

58. See *Viking*, note 31 para. 88.

59. See *ibid.*, at paras. 8-15.

60. See again, AG Maduro, note 5 at 71.

61. See *ibid.*, at para. 12, where it appears as though the trade union in Estland must have been ready to comply with the circular in which the International Federation asked them not to enter into negotiations with Laval.

est. In our case, the elimination of international solidarity from the purview of legitimate objectives of trade union action is the equivalent of such a prudish attitude.

The anti-internationalism is also revealed in the overall image of the relation between domestic and foreign workers that emerges from the relevant cases (*Laval*, *Viking* and most recently *Rüffert*).⁶² With regard to the Posted Workers Directive,⁶³ the ECJ insists, above all, that substantive standards have not been harmonised.⁶⁴ The Directive is also said to envisage a narrowly defined set of regulatory strategies which may be used in particular in order to determine the minimum wage. While Article 3(1) of the Directive lays down regulatory standard cases, such as laws, regulations or universally applicable collective agreements, Article 3(8)(2) contains a special rule for the case where no collective agreement has been declared universally applicable. On its face, it offers Member States discretion⁶⁵ to base themselves, “if they so decide”, on agreements which are, roughly speaking, de facto widely used in a geographical area for a certain industry of profession.⁶⁶ It makes sense to afford Member States discretion to select a standard, in whichever form, or to abstain from adopting one. Should the Member States decide to declare working con-

62. See Case C-346/06, Dirk Rüffert v Land Niedersachsen of 3 April 2008.

63. See Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L18 at 1.

64. In other words, the Directive does not harmonise the content of working conditions. See *Laval*, note 30 para. 60, 68.

65. This is completely overlooked by Reich, note 57 at 143, who believes that such a decision by the Member States needs to be expressly taken.

66. See Paul Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems’ (1997) 571-602 at 580-581.

ditions mandatory for service providers from another Member State it is reasonable to expect them to apply the standard that is generally used for domestic firms as well, for this avoids raising the spectre of discrimination; this explains why the requirement was put in to choose standards that are widely used in a certain sector. Should the Member States, however, decide to abstain from selecting such standards⁶⁷ they may do so for a number of good reasons. For example, they may want to gamble with regard to the competitiveness of domestic businesses or leave the determination of working conditions to the social partners wherever an established system of industrial relations would have them do so.

The ECJ, by contrast, apparently misconstrues discretion as an obligation on the part of the Member States to declare collective agreements relevant for firms posting workers where, pursuant to domestic practice, no collective agreement is universally applicable in a geographical area and profession. This obligation is even so narrowly construed by the ECJ in both the *Laval* and the *Rüffert* case that wage determination on a case-by-case basis by strong unions,⁶⁸ or a collective agreement for public contracts only (instead of a geographical area or profession or industry),⁶⁹ and even statutory wage determination outside a general minimum wage statute appear to be pre-empted by Union law.⁷⁰

67. To repeat, the Directive offers this discretion since Article 3(8)(2) explicitly determines that “Member States may, if they so decide, base themselves on [...]”.

68. See *Laval*, note 30 paras. 69, 71. For a comment, see Joerges & Rödl, note 53 at 21-22.

69. This is what Article 3 (8) of the Posted Workers Directive, narrowly construed, appears to require.

70. See *Rüffert*, note 62 paras. 24, 28.

The Court attributes to the Directive the pursuit of a social objective in a context defined by regulatory interaction. Unless the wages paid in accordance with the wage scale of the home state are relatively higher than minimum wages in the host state the posted workers are supposed to benefit from the higher minimal wage that is universally guaranteed in the country of service.⁷¹ The Court presents this guarantee as if it amounted to a social right. But the minimum wage introduces also a cap. Unless, of course, employers without exposure to collective action by unions voluntarily agree to pay more than the local minimum wage no action must be taken by a union of the host state in order to extract from employers higher compensation.⁷² Hence, established industrial relation systems in which (strong) trade unions have the liberty to attempt to extract concessions that are more favourable for workers than statutory minimal standards are in principle deemed incompatible with Union law.⁷³ Incompatible with this strict construction of the Directive is also a combined action of the workforces of both countries in instances of transnational service provision. On the contrary, it is assumed that the wage has already been determined in the host state. The service providers enter only later. If matters were up for grabs when they arrive they would find themselves burdened with an unpredictable situation, which would make the conduct of business for them “less attractive” or “more difficult”.⁷⁴

At first glance, it may appear even fair not to let trade unions attempt to move beyond a certain minimum wage as soon as foreign bidders enter

71. See *Laval*, note 30 para. 76.

72. See *Laval*, note 30 paras. 81, 108.

73. On the Swedish system, see *Laval*, note 30 para. 24.

74. See *Laval*, note 30 para. 99, 110.

the picture, for allowing them to do so might give rise to collusion with domestic competitors and hence, indeed, to protectionist effects. The interpretation by the ECJ is disturbing, nonetheless. When the provisions of the Directive are read in light of what is said in its preamble then they are to be construed “without prejudice to the law of the Member States concerning collective actions to defend the interests of trades and professions.”⁷⁵ Thus understood, it is a grave misunderstanding to read the provision on minimal wage such that the Swedish system of wage determination on a case-by-case basis comes out as contrary to Union law. The preamble suggests that where a conflict with established industrial relations arises, the Directive must yield. By contrast, the ECJ reverses the overall thrust of the Directive. The Directive’s aim is to protect posted workers against wage discrimination and to protect locally settled workers against social dumping. While the latter aim is indeed explicitly recognised by the Court,⁷⁶ the first aim drops out of the picture. In a case where trade unions would be in the position to protect the interests of *both* posted and domestic workers the Court effectively ends up protecting the interest of the service provider to break into the market in compliance with a “nucleus of mandatory rules for minimum protection”.⁷⁷ The vision of a divided economy comes to full fruition at this point. While posted workers receive the “nucleus” trade unions in internal situations would not encounter any constraints by Union law when it comes to extracting from employers greater concessions. The approach separates the interest of the domestic and the foreign labour force by assigning the latter, in principle, a lower status, which is only compensated

75. See Directive 96/71/EC, recital 22.

76. See *Laval*, note 30 para. 75, 103.

77. See *Laval*, note 30 para. 73-74.

by the *company's* competitive advantage.⁷⁸ This is how what might have been a social guarantee becomes in fact transformed into a vehicle of market access.

The *Schmidberger* trap and the social aims catch

It might be objected that what I have offered so far does not amount to a fair characterisation of the ECJ's position. The ECJ readily recognises the right to take collective action and merely stresses the equal relevance of fundamental freedoms.⁷⁹ The manner, however, in which the Court goes about recognising fundamental freedoms is remarkable, to say the least, for it absorbs fundamental rights adjudication into the holistic grasp of Union law.

The trap that is thereby created for national fundamental rights traditions has already been prepared in the *Schmidberger*⁸⁰ case. The underlying issue raised the question whether the blocking of road traffic by environmental groups and the local population illicitly interfered with free movement of goods. Instead of recognising that it is a valid public interest on the part of the Member State to maintain its own system and level of fundamental rights protection the Court effectively disowned *national* traditions and replaced them with the common constitutional tradition of the Member States. The case was thus transformed into a matter that is not about the potential collision between national constitutional law and

78. In *Laval*, note 30 para. 74, the Court states that the nucleus of minimal protection exists in order to “ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally [...]”.

79. See *Laval*, note 30 paras. 90-96.

80. See *Schmidberger*, note 38; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

Union law, but rather presented as fully internal to Union law.⁸¹ This transformation can be called the *Schmidberger* trap. Once the trap has snapped, the Union standard of fundamental rights protection applies.

It may be objected that what I refer to, flippantly, as the *Schmidberger* trap is an indispensable satellite of the supremacy of Union law. Otherwise Union acts would be held by national fundamental rights standards. The very point of introducing the Community standard into the case law since *Internationale Handelsgesellschaft*⁸² has been to avoid subordinating Union law to *national* fundamental rights scrutiny. But the matter is clearly different in the *Schmidberger* type of case. The question is not whether legislative or administrative acts adopted by the Union are considered void or in any other manner repugnant in respect of national fundamental rights, but rather whether the disruptive application of a fundamental freedom needs to come to an end out of the Union's respect for the diversity of national systems of fundamental rights protection. Of course, such respect would entail a difference of application, for it would also reflect the different weight that is attributed to rights pursuant to national traditions. While, for example, the right to strike is recognised in some constitutions⁸³ it is absent in others. A differential resolution of the relevant issue would lend credibility to the merry promise contained in Article 6(3) EU Treaty saying that the Union shall respect the national

81. See *Schmidberger*, note 38 at para. 71. In *Omega*, note 80, the Court wavered between absorbing the Member States' own fundamental rights standard (para. 34) and respecting legitimate differences with regard to the national level of protection (para. 38). Apparently, the matter was not settled among the judges themselves.

82. See Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

83. For example, the Swedish constitution. See *Laval*, note 30 para. 92.

identities of its Member States. In which respect should such identity more plausibly materialise, and be more deserving of respect, than in the case of the protection of fundamental rights? Evidently, this is a question affecting the proportionality principle.

However, this road was not taken by the ECJ. As a consequence, national fundamental rights regimes have become levelled into one Union standard. Hence, Member States can no longer appeal to their very own bill of rights as offering a legitimate overriding reason of the public interest for the defence of interferences with fundamental freedoms. Whatever rights they may have laid down in their own constitutional instruments, they are ground into the “common constitutional tradition” which is part of Union law.

The *Schmidberger* trap is closely associated with a competence coup to which I shall return below. The important role that it plays in the most recent jurisprudence of the Court is additionally confirmed by another amazing transformation to which I would like to refer to as the social aims catch. It affects the direction of justification in the relation of fundamental rights and fundamental freedoms.

With almost identical wording, the Court states in *Laval* and *Viking* that the activity of the Union extends to the social sphere.⁸⁴ The Court thus appropriates jurisdiction on matters affecting the interests of workers by invoking the aim pursued by the Union. It explicitly refers to Article 2 EC Treaty that speaks about promoting “a high level of employment and of social protection”. The reference to the overarching objective is used to quell doubts about whether the Union does not ride roughshod

84. See *Laval*, note 30 paras. 104-105; *Viking*, note 31 paras. 78-79.

over jurisdictional bounds when its law affects adversely the exercise of the right to strike and other forms of collection trade union action.

The move is not entirely novel. In a more restrictive form, the Court introduced it earlier to claim the relevance of fundamental freedoms as a side constraint on Member state acts in areas where the Union officially lacks power to adopt harmonising legislation.⁸⁵ It thus established jurisdiction in the area of negative integration, from which arose the usual asymmetry in the relation of powers of positive and negative integration. The latter exceeds the former.⁸⁶ The often invoked “scope of the application of the Treaty” is virtually boundless in the field of negative integration. This success of this move has pre-empted attempts to claim exemption from community competence on the ground that no jurisdiction has been conferred on it, for example, in certain social matters. The fundamental freedoms have come to apply to anything, subject to a noteworthy exemption,⁸⁷ that is a potential obstacle to intra-Community trade.⁸⁸

85. See, for example, Case C-158/96, *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931.

86. For a more nuanced discussion of the matter, see Gareth Davies, ‘Can selling arrangements be harmonized?’ (2005) 30 *European Law Review* 370-385.

87. See Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

88. Ironically, the point about the potentially universal reach of negative integration was made so vigorously by AG Maduro in his opinion (note 5 above) that he inadvertently stumbled over a potential restriction. After stressing that there seems to be no reason why the fundamental freedoms should not be applied to measures affecting social policy while they undisputedly constrain measures regarding the protection of public health, the environment or the consumer (para. 25), he went on to examine whether a parallel exemption ought to be made as had been made in the *Albany* case (para. 26). The AG concluded that while the exemption from competition rules was necessary in order to facilitate the conclusion of collective agreements no adverse effect

Nonetheless, the introduction of the social policy trap is an even bolder step. The Court now refers to an aim, and not to the constraining effect of fundamental freedoms, in order to cast aside the jurisdictional bounds as they have been defined in the respective policy chapters of the Treaty. In addition, the Court thereby also conquers the field of countervailing considerations that offer resistance to negative integration. They are no longer reasons of Member States whom it took decades to develop their very own models of social capitalism. They become transferred into the Union's very own reasons, for they reflect the Union's very own "social purpose". In principle, therefore, the Member States' systems of social protection find themselves demoted to a level where they represent different modes with which the Union attains its own objectives in the context of a multilevel system.⁸⁹

The direction of justification

It is to be expected that the Union's conquest of the social territory will not only come at the expense of the diverse national traditions of protecting social rights but also affect what I would like to refer to as the direction of justification. This was made clear by the Court in *Viking*:

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

on industrial relations and social dialogue was to be expected from the application of fundamental freedoms (para. 27). In light of the outcome of the *Viking* case the argument would now actually favour a parallel exemption. Hence, there is reason to treat social policy differently from the protection of health or the protection of the environment.

89. For a pertinent statement, see AG Maduro, note 5 at para. 59.

be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality [...]

The exercise of fundamental rights needs to be justified vis-à-vis the fundamental freedom and not the other way around. The situation would be manifestly different if the direction of justification were reversed. Then the question would have to be asked whether allowing companies effectively to undermine collective action by trade unions, even when exercising their right of establishment (*Viking*) or the freedom to provide services (*Laval*), would not fall below the level of social rights protection that needs to be guaranteed by any Member State. Business objectives would have to be weighty enough to justify an interference with the interests of labour. Moreover, the means chosen would have to be least intrusive.

Cast in constitutional terms, the question arising for fundamental rights affects reverse proportionality (*Untermaßverbot*), that is, whether or not the Union or the Member States have done *enough* to protect the interests of workers. Arguably, the Court held in *Laval* that in laying down the categories of workers interests (e.g. working time, remuneration, paid vacations) comprising “the nucleus of mandatory rules for minimum protection” the Union comports with reverse proportionality. That the Member States lack the jurisdiction to go beyond this level of protection—for example, by allowing strong unions to negotiate minimum pay at the local level—is congruent with the *Schmidberger* trap and the social aims catch, respectively. The Union, at any rate in the context of free movement, ascribes to itself the power to occupy the field for the protec-

tion of fundamental rights whenever it acts in fulfilment of the demands of reverse proportionality.⁹⁰

The application of reverse proportionality can be mirrored into the application of the proportionality principle vis-à-vis interference with fundamental freedoms. Union acts that interfere with transnational business operations can pass muster as long as they are required in order to give life to freedom of association. At this point, the asymmetry in the direction of justification kicks in. The more stringently the proportionality principle is applied vis-à-vis collective trade union action the more yielding becomes the requirement of reverse proportionality. In fact, reverse proportionality loses its force when it is effectively reduced to a mere refraction of the proportionality applied to interferences with fundamental freedoms. The purportedly pre-emptive Union standard for fundamental rights is then a by-product of what passes muster vis-à-vis the exercise of fundamental freedoms. Fundamental rights lose their bite. This is what happened in the *Rüffert* case. The level of protection became reduced to the minimum laid down in the Directive, for it is that which is deemed tolerable with regard to fundamental freedoms. The asymmetry in the relation of fundamental freedoms and fundamental rights could scarcely be greater. The social aims catch thus effectively subordinates social rights to the pursuit of economic objectives.

90. In a constitutional context, the application of reverse proportionality (*Untermaßverbot*) is usually very deferential with regard to the legislature. In the case of fundamental freedoms, the beneficiaries of deference, all of a sudden, are individual companies. They find themselves invested with ample power to decide. This power to decide becomes depoliticised, for while it makes sense to see a legislature under the positive obligation to protect the freedom of association on the level of its legislation it is more than odd to imagine a similar duty to rest on private actors. Economic due process is liberating for corporations.

The jurisdictional coup

In *Laval* the Court introduced an interpretation of the Directive on posted workers according to which minimum wage determination that relies on the force of trade unions alone is inconsistent with the Directive. Such a system would not allow the service providing company to make out the national wage level, which needs to be able to foresee in order to sustain its competitiveness.⁹¹ This interpretation goes to the core of the autonomy enjoyed by trade unions in Sweden.⁹² In a similar vein, the *Rüffert* case rules out laying down a minimal wage in a statute that governs the provision of services only for the public sector.⁹³

It should not come as a surprise that this development goes to the heart of how social policy has been organised, hitherto, in the European Union. It rested on what might be called the strategy of “domestication”, in the dual sense of the term.⁹⁴ First, even after the amendments introduced by the Amsterdam and the Nice Treaty social policy has remained to be—when one examines the complex interplay of conferral and reservation of competence in Article 137 EC Treaty—largely a domestic affair. Second, social policy has been domesticated in the sense that the operation of services is in principle subject to the discipline of competition law (with broad exemptions, however, which were formulated in the *Albany*

91. See *Laval*, note 30 para. 110.

92. See Joerges & Rödl, 20-21.

93. See *Rüffert*, note 62 paras. 26, 39.

94. On the following, see Fritz W. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) *Journal of Common Market Studies* 645-670.

case⁹⁵ for supplemental pension insurance)⁹⁶ and generally bound to observe the lines drawn by fundamental freedoms.⁹⁷

Since only matters of a non-commercial matter do not affect fundamental freedoms, as was made amply clear by the Irish abortion case, fundamental freedoms apply to any commercial activity having a cross-border aspect. Where does Union competence come to an end, then?

The stop that is usually invoked and that promises, at first glance, to be a true winner has not worked well in the past. What I have in mind are explicit exemptions from Community jurisdiction, such as Article 137(5) EC Treaty. This paragraph states explicitly that the provisions of Article 137 shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

The assumption underlying this strategy of jurisdictional containment is, hence, that fundamental freedoms do not apply to matters for which the Community has no jurisdiction. But in this simple form the argument does not work. As I tried to point out above, it is not evident why a jurisdictional restraint on positive integration, such as Article 137(5) EC Treaty, should automatically also translate into a stop for negative integration. Even worse, in the past similar stops have not worked for positive integration either. In those areas where the Community promises to attain, in the course of harmonisation, a “high level of

95. See Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

96. In *Viking*, note 31 para. 50, 53 the Court pointed out that the *Alabany* exemption cannot be transferred to the context of free movement for the mere fact that the “circumstances” are “different”. This statement does not reflect a serious effort at an explanation.

97. See, with rich references to the prior case law, *Laval*, note 30 para. 87.

protection”, the ECJ already found a way of working around explicit exemptions from Community competence. The story associated with tobacco advertisement and product regulations is the case in point. It does not have to be retold here.⁹⁸

Even though the creeping extension of Community competence cannot be accounted for without taking a separate constituent power into account and is hence, inexplicable in terms of an *exercise* of conferred powers,⁹⁹ one might expect the Member States to fare better in matters falling outside the protection of health, worker safety, consumer protection and the environment. Indeed, the stop argument can be given a stronger appeal when it is seen from a different angle. Article 137(5) excludes the regulation of strikes and lockouts. Assuming that, as was the case in *Laval* and *Viking*, free movement rights were applied in a manner that affected the matters mentioned in Article 137(5), the removal of obstacles on the basis of the four freedoms triggers harmonisation competence via Articles 14 and 95 of the EC Treaty. When it comes to strikes and lockouts, the Union all of a sudden simultaneously seems to possess and not to possess harmonisation competence. This is clearly an impasse. Whoever sticks to the wording of the Treaty has to see Article 137(5)—the *lex specialis*—prevail. Consequently, the Union cannot have harmonisation competence in this area. By implication, however, the application of fundamental freedoms does not extend to this field. The reason is straightforward. The Union has harmonisation competence partly because this power is needed to clean up the mess that is brought about by the application of fundamental freedoms. Even though the Union may have clean-up power without the power to make inroads into national le-

98. See Somek, note 26 at 111-137.

99. Or so I argue in Somek, note 26.

gal systems, it would be more than questionable to attribute to the Union the power to create the mess without seeing it also invested with the power to tidy things up. If the application of fundamental freedoms could be extended to matters where the Union lacks powers of positive integration the asymmetry in the relation of negative and positive integration would actually result in a deregulatory downward spiral. The Union would thus drift into the direction of a neo-liberal social model. This problem is concealed in the *Laval* and *Viking* cases, for the ECJ reads the Directive in a manner as though the Union legislature had already spoken on the issue of collective action.

I conclude, therefore, that Article 137(5), if read in conjunction with Articles 14 and 95, effectively excludes the application of fundamental freedoms to the matters which have been explicitly exempted from Community jurisdiction. What the Court should have said in *Laval* and *Viking*, hence, is that freedom to provide services and freedom of establishment do not apply to situations affecting trade union's rights to take collective action. What is more, if one were to maintain a doctrine of parallelism with regard to fundamental freedoms and powers conferred by the Treaty, the inroads made by the Court in national systems of social protection are flat-out unconstitutional, for they conflict with what has been set out in Article 137(4), which says that the provision of this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.

If the above argument is correct we cannot but conclude that the ECJ decided two major cases even contrary to the wording of the Treaty. One may wonder whether this type of "reasoning" is consistent with the task of the preliminary reference procedure which is to assist national courts in cases of Treaty *interpretation*. In fact, if the Court does not engage in Treaty interpretation its pronouncements raise the spectre of nullity.

Cunningly, the Court purported to engage in Treaty interpretation by inferring competence from a mere task. But the latter claim is patently absurd, for it effectively renders superfluous all specific and detailed attribution of jurisdiction in the later chapters of the Treaty. The Court went on, however, to undermine the autonomy of national systems of social protection and social rights, in this case affecting how Finland guarantees the right to strike, by submitting them to the scrutiny of a highly fragmentary Union social constitution.¹⁰⁰

The core of system transition

The concern obviously raised by the triad of idealisation, de-politicisation and economic process is that the Union, in order to attain market integration objectives, appears to be breaking away from its commitment to the rule of law. As the discussion has shown, the pursuit of market integration objectives is taking precedence over the constraints set by Treaty law; or, at any rate, over standards of their methodologically sound elaboration. The ECJ arrives at a new doctrine of horizontal effect with the purport to elaborate prior cases, but what it really does is to indulge in abstractions that are in no manner warranted by a contextual reading of these cases. The new doctrine is potentially oblivious to the difference between the direct horizontal application of fundamental freedoms to conduct by private parties and the failure on the part of the Member State to act on behalf of their protection. The ECJ treats action by trade unions as

100. For an apt observation, see Christian Joerges & Florian Rödl, 'Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem „sozialen Defizit“ des Integrationsprojekts, Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*', ZERP-Diskussionspapier 2/2008 at 17.

on a plane with the exercise of sovereign rights by submitting both to stringent requirements of proportionality. The ECJ ignores the wording of the Posted Workers Directive and has no qualms about construing it *contra legem*. The ECJ comes up with inventive legal designs in order to augment the Union's room for manoeuvre, such as the *Schmidberger* trap, the social aims catch and the competence coup. Apparently, the Court expects to get away with sloppy reasoning and the stretching of premises simply because it has the power to declare what the law is. But what it produces, instead, puts the rule of law in jeopardy.

This is a hazardous gamble. The demise of the rule of law would mark, undoubtedly, a development that is both surprising and disquieting. The Union's core claim to legitimacy might have been, at any rate at the outset, the idea that Europe was to emerge as a legal community (*Rechtsgemeinschaft*). According to Walter Hallstein, the "majesty of law" was supposed to accomplish what war and bloodshed were unable to achieve for centuries.¹⁰¹ Yet, the development may not be so surprising, after all, for it can be argued that with the launching of the internal market agenda the original emphasis on legality became superseded by a

101. See Walter Hallstein, *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse* (Stuttgart: Econ Verlag, 1969) at 33: „Die Gemeinschaft ist eine *Schöpfung des Rechts*. Das ist das entscheidend Neue, was sie gegenüber früheren Versuchen auszeichnet, Europa zu einigen. Nicht Gewalt, nicht Unterwerfung ist als Mittel eingesetzt, sondern eine geistige, eine kulturelle Kraft, das Recht. Die Majestät des Rechts soll schaffen, was Blut und Eisen in Jahrhunderten nicht vermochten. Denn nur die selbstgewollte Einheit hat Aussicht auf Bestand, und Rechtsgleichheit und- einheit sind untrennbar miteinander verbunden. Keine Rechtsordnung ohne Gleichheit vor dem Gesetz, Gleichheit aber bedeutet Einheit. Auf dieser Einsicht beruht der Vertrag von Rom, und darum schafft er eine Friedensordnung par excellence.

penchant for economic rationality.¹⁰² Gradually, the commitment to legality was to be replaced with the observance of an economic superlaw. It would be congruent with this development to see central components of legal form, such as *stare decisis*, turned into an empty vessel for the attainment of economic aims. Instead of constraining the future with regard to what has been decided in the past, the invocation of law conceals the discontinuity implicated in ever more volatile strategies of social re-engineering.

The matter can be given a far less grim outlook, however, when taking into account that the use of law as an instrument for the attainment of socially valuable objectives is itself part of a defensible or, at any rate, debatable jurisprudential creed, which is usually associated with American legal realism. In his *opus magnum*, Dworkin reconstructed its core under the name of “pragmatism”.¹⁰³ From the perspective of pragmatism, thus understood, legal rules and standards are valuable—or “valid”—inasmuch as they either render government action predictable or serve any other good end. The value of predictability is not absolute. It can be overridden by other considerations of public policy. Such an override may be justified, in particular, when a modification of rules promises to serve a certain end better than a rule that is currently in place.

As an approach to adjudication and regulation, pragmatism is defensible on its own terms as long as the engineering agency, be it a Commis-

102. See Christian Joerges, ‘Economic Law, the Nation-State and the Maastricht Treaty’ In R. Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?* (Munich: C.H. Beck, 1994) 29-62; Joerges & Rödl, note 53 at 7. For the claim that with the cases that have been under consideration here the European integration project is about to enter even a “post-Ricardian” age, see Höpner & Schäfer, note 6 at 8-9.

103. See Dworkin, note 27 at 151-164.

sion or a Court, pursues good objectives by rational means. Since pragmatism does not espouse faith in formal values, such as the pedigree of legal enactments from their relevant sources, its claim to legitimacy depends entirely on the substance of its policies. Predictability figures as one substantive value among others. Even though not absolute, it may be served in different ways. In the case of the ECJ, the overall neoliberal drift inherent in its jurisprudence allows one even to anticipate, within limits, various moves and turns that would remain completely unpredictable had one to rely on precedent and existing doctrine alone. The basic question is, then, whether the Court's jurisprudence pursues good aims with adequate means.

In a way, the new economic due process may appear to be desirable for new Member States, for it opens the door for them to benefit from comparative advantage.¹⁰⁴ Nonetheless, the respective levelling down ("social dumping"), which is to be expected from the disempowerment of trade unions, is of questionable political merit, to say the least. It is part of a shift in the integration process in whose course organised economies no longer count as equally valid production regimes".¹⁰⁵ Rather, the very existence of differences between and among systems of socially sustainable capitalism is taken to present obstacles to market integration. The Union pushes the Member States towards reforming their economies along the lines of universal economic liberalisation. Even outside the Court's jurisprudence, institutional differences are increasingly perceived

104. Accordingly, the Member States were very much split in these cases along the „old“ and „new“ divide. See Brian Bercusson, 'The Trade Union Movement and the European Union: Judgement Day' (2007) 13 *European Law Journal* 279-308.

105. Höpner & Schäfer, note 6 at 8.

to be obstacles to competition.¹⁰⁶ This is new. So long as neither the Commission nor the Court targeted the institutions of organised economies, such as an established system of industrial relations, the competition between and among Member States may have reinforced the respective differences provided that those produced relative strengths.

This shift may signal the adoption of commendable public policy. Determining whether this is indeed the case would require, however, a political choice. The ECJ is not the type of institution to which one would primarily entrust this choice. Indeed, one would not even do so provisionally, for the decisions by the ECJ affecting Treaty interpretation are officially subject to reversal only through Treaty amendment. Owing to the heterogeneity of national interests, these amendments are highly unlikely to come to pass.¹⁰⁷ But even if they would still remains unclear whether the Court would be responsive to constraints signalled by Treaty language. At this point, it is important to take into account what happened to the authority of constitutional law in the European Union. As I tried to point out above, owing to the prevalence of *idealisation*, constitutional amendments have been turned into means to refurbish, rather than to constrain, existing relations of power. Moreover, the European political process does not offer the forum where the peoples of Europe would have an outlet to debate and to choose the economic and social model relevant for their future. The *de-politicisation* of decision-making renders such a debate impossible. Hence, the triad of idealisation, de-politicisation and economic due process gives rise to a syndrome of dis-

106. See *ibid.*

107. The matter has been rightly pointed out by Fritz W. Scharpf, 'Reflections on Multilevel Legitimacy' (2007) 07/3 *MPIfG Working Paper* at 11-12.

empowerment that may well become explosive in the long term,¹⁰⁸ at any rate when the European economy should enter a downward slope.

If the overall quality of political objectives is cast into doubt, then the rule of law can no longer be claimed to be in good shape, pragmatically understood. As pointed out above, from a pragmatist perspective everything hinges on the substantive soundness of objectives and the rationality of the means to pursue them. Given that this decisive question cannot be settled by acceptable means, even from that point of view the rule of law has already taken a turn for the worse in the European Union.

Conclusion: Farewell Monnet?

Any critical legal analysis, unless belonging to the genre of critical legal studies proper,¹⁰⁹ is expected to conclude with suggestions for improvement. Hence, I would like to sketch, in conclusion, three options, the sequence of which betrays the author's diffident penchant for utopianism.

In my opinion, a mild reply to economic due process would use the preliminary reference procedure in order to challenge the precedential authority of questionable rulings.¹¹⁰ This strategy would avoid challeng-

108. On the unfeasibility of attempting to unify different aspirations and institutional models of Welfare capitalism in Europe, see Fritz W. Scharpf, 'Notes Towards a Theory of Multilevel Governing in Europe' (2000) 00/5 MPIfG *Discussion Paper* at 22.

109. See Michael Fischl, 'The Question that Killed Critical Legal Studies', (1993) 17 *Law & Social Inquiry* 779-820.

110. Of course, the questions regarding precedent would have to be officially addressed as questions of Treaty interpretation. But it cannot be denied that early on the ECJ established a system of precedent. See Case 283/81, CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415 at paras. 13-14.

ing the Court decisions head on and thus work around the disruptive effect involved in raising the spectre of nullity. In its most provocative form, nonetheless, the strategy would confront the ECJ with its own reasoning and have national judges ask whether the ruling, even though relevant for the parties, rested on too shaky foundations in order to establish a general rule. In milder form, the ECJ could simply be encouraged to distinguish cases on factual grounds.

In recommending that this strategy be chosen I do not want to deny that Court documents issued with the purport to be preliminary rulings can be null and void. In fact, with regard to the cases at hand, the respective claim can be made for reasons internal to European Union law and, hence, on a basis different from the *Solange*-logic that has come to pervade the relation between Highest Courts in the multilevel system.¹¹¹ The manipulation of existing law in the spirit of dogmatic pragmatism is not a sound basis for the creation of legal norms. For pragmatic reasons, nonetheless, it may be preferable to address specific questions to the ECJ by signalling that disregard of preliminary rulings might be the option that national courts may want to resort to should the ECJ fail to address adequately their concerns.

Alternatively, the Member States themselves may decide to adopt a political opt-out mechanism that is to be applied also to rulings by the

Conceivably, there is one even milder reply. It would permit the offending Member States to pay off damages to the firms that were allegedly harmed by them. The illegality of their behaviour would stem from failing to protect the interest of transnational service providers. I do not want to entertain this possibility here.

111. See Case 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] ECHR 440.

ECJ. A proposal to this effect has been made by Fritz Scharpf.¹¹² Its relative modesty suggests pessimism as regards political mobilisation at the Union level. According to Scharpf, an opt-out strategy would help Member States to defend concerns that reflect peculiarities of their very own situation in the European Union (the Austrian system of University admission is a case in point). Individual Member States should be granted an exemption, however, only if they find the support of a certain number of others. The prospect of an opt-out later “might facilitate agreement in the Council on new EU legislation and thus strengthen the political modes of EU policy-making.”¹¹³

Even though I find this proposal attractive I wonder whether it would not open the door to enduring and profound fragmentation. Alternatively, one may want to consider not an opt-out but a full legislative override by the Council. It seems to be the only way to end the arrogation of prerogative power by the ECJ with regard to Treaty interpretation, which according to seventeenth century Republican theory would have struck one as “tyrannical”, anyway.¹¹⁴ The Counsel of the European Union would be the appropriate institution for addressing the concerns raised by the ECJ’s ill-founded endorsement of economic due process. The relevant questions cut deeply into Europe’s political economy. Hence, a decision by a simple majority (of fourteen) may not be enough to quell doubts by the new Member States about the old guard ripping

112. See Scharpf, note 107 at 16.

113. *Ibid.* at 16.

114. See Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998) at 70: “[...] [I]f you live under any form of government that allows for the exercise of prerogative or discretionary powers outside the law, you will already be living as a slave”.

them of their comparative advantage. Hence, some supermajority, for example, the number of 17 states may be adequate to the task. Introducing at least the override of Court decisions into the primary law of the Union is a matter of great exigency, in particular if the first strategy would fail to have any effect. Hence, the Member States may in this case want to rely on the root operating system of European Union law, that is, public international law, in order to introduce the override rule *qua* abrogating regional customary law. In fact, responding to the Court's arrogation of authority by creating new law is the only manner of preventing acquiescence with its rulings to count as authoritative treaty interpretation through subsequent practice by contracting parties.¹¹⁵

Finally, the emerging crisis may be also indicative of the fact that the Monnet model of European integration has finally run its course.¹¹⁶ From the outset, it was not supposed to be maintained forever. The experience with the constitutional treaty has taught that constitutionalisation from above creates recalcitrance by European peoples. Conversely, the disgraceful failure of European governments to lend amended supranational arrangements the semblance of a constitution leaves an opportunity for the peoples of Europe to re-appropriate constitutional ideas for themselves. The pursuit of the Community method is creating a dangerous impasse. Adopting a real constitution may be the only way out.

115. See Article 31(3)(b) Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, vol. 1155, p. 331.

116. See Höpner & Schäfer, note 6 at 23, arguing that “integration by stealth” has reached its limits.