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Constitutionalism between normative frameworks and the socio-legal frameworks of societies

NICOLE LINDSTROM

I Introduction

Writing in 2002, Fritz Scharpf warned: ‘the only thing that stands between the Scandinavian welfare state and the market is not a vote in the Council of Ministers or in the European Parliament, but merely the initiation of . . . legal action by potential private competitors before a national court that is then referred to the European Court of Justice for a preliminary opinion. In other words, it may happen one day’.¹ The day appeared to come with the referral of two cases to the Court of Justice of the European Union (ECJ) in 2005: *Laval*² and *Viking*.³ At issue in each case was whether industrial actions by unions to force firms to abide by nationally negotiated collective agreements constituted an infringement of free movement of services. Coming in the wake of contentious battles over the Services Directive⁴ and in ongoing political negotiations leading up to Lisbon, the cases attracted a great deal of attention as to how the Court would reconcile these competing economic and social demands.⁵ Moreover, given that the cases involved employers based in old Member States (Sweden and Finland) seeking to employ workers from new Member States (Latvia and Estonia), the cases also exacerbated ongoing concerns that eastward enlargement would spur a race-to-the-bottom in

¹ F. Scharpf, ‘The European Social Model: Coping with the challenges of diversity’ *JCMS* 40 (2002), 657.

² C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and ors. (Viking)* [2007] ECR I-11767

³ C-438/05 *International Transport Workers’ Federation and Finish Seamen’s Union v. Viking Line ABP and OU Viking Line Eesti (Viking)* [2007] ECR I-10779

⁴ Directive 2006/123/EC of 12 December 2006 on services in the internal market.

⁵ B. Bercusson, ‘The trade union movement and the European Union: Judgment day’, *ELJ* 13 (2007), 279.

wages and social protections. With the ECJ ultimately ruling in favour of the employers the cases appeared to vindicate concerns raised by Scharpf and others that direct interventions by the courts pose the most significant threat to existing national socio-legal frameworks.

This chapter considers the tensions between market liberalisation and social protection within the enlarged EU through an in-depth analysis of the *Laval* and *Viking* cases. It suggests that political conflicts surrounding these two principles are not limited to strategic interactions between member states seeking to preserve autonomy over social policy against intrusions by the Court, as some decoupling accounts might suggest. Instead it pursues a more disaggregated approach that considers how the cases provided windows of opportunity for a variety of societal actors – including supranational institutions, governments, and social partners – to advance two larger agendas: furthering economic liberalisation and protecting the principles underlying social Europe. With the ECJ ultimately ruling with the employers' positions, and against the expressed preferences of most old Member States, the rulings appeared to have strengthened the position of advocates of further liberalisation in the enlarged EU. Yet the rulings have also spurred a 'protective reaction' among societal actors seeking to retain and strengthen social protections against unfettered market forces.⁶ While some of these reactions have been framed in national terms of strengthening Member State autonomy over social policy, the cases have also bolstered demands to develop a more cohesive social policy at the European level.

II Between the Single Market and Social Europe

The revitalisation of the European project in the 1980s involved an explicit compromise: that the process of abolishing barriers to the free movement of goods, capital, services and labour (the single market) would proceed in tandem with maintaining social cohesion within and across its Member States (Social Europe). The so-called 'European Social Model' (ESM) has been heralded by its proponents as a unique, i.e. *European*, response to the competitive pressures of globalisation.⁷ While the concept of the ESM in the 1980s focused on developing a common social policy at the European level, in practice the results have

⁶ K. Polany, *The Great Transformation*, 2nd edn (Boston: Beacon Press, 2001).

⁷ A. Giddens, P. Diamond and R. Liddle, *Global Europe, Social Europe* (Cambridge: Polity, 2006).

been more modest. Subsequent constitutional arrangements have tended to grant EU institutions authority over economic integration while leaving most matters of social policy to Member States. The separation of regulatory policies at the European level from redistributive policies at the domestic level is argued to be both more efficient and legitimate.⁸ Fundamental decisions concerning taxing and spending are left to democratically accountable governments, while technocratic experts at the EU level focus on creating and overseeing the most effective market-making policies.

Numerous scholars argue that this tidy decoupling of economic integration and social integration is unsustainable.⁹ For one, some claim that market integration places numerous *indirect* pressures on social integration as governments seek to respond to increased economic competition by weakening national regulations, reducing corporate taxation rates, and constraining social expenditures.¹⁰ Secondly, others argue that national social policies and practices have been *directly* challenged by European institutions on the grounds that they are incompatible with single-market rules.¹¹ Neither outcome is unexpected to scholars like Gill who argue that the 'new constitutionalism' of the EU is indeed *designed* to 'separate economic policies from broad accountability in order to make governments more responsive to the discipline of market forces and correspondingly less responsive to popular-democratic forces'.¹² European integration, according to this view, is a political project that seeks to subsume all states and societies into a single logic of market competitiveness.¹³

⁸ G. Majone, 'The common sense of European integration', *JEPP* 13 (2006) 607; A. Moravcsik, 'Reassessing legitimacy in the European Union', *JCMS* 40 (2002), 603.

⁹ Scharpf (n. 1 above), p. 657; F. Scharpf, *Governing in Europe: Effective and democratic?* (Oxford: Oxford University Press, 1999); C. Offe, 'The European model of "social" capitalism: Can it survive European integration?', *The Journal of Political Philosophy* 11 (2003), 437; A. Follesdal and S. Hix, 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik', *JCMS* 44 (2006), 533.

¹⁰ A. Hemerijck, 'The self-transformation of the European Social Model(s)' in G. Esping-Andersen (ed.), *Why We Need a New Welfare State* (Oxford: Oxford University Press, 2002).

¹¹ S. Leibfried and P. Pierson, 'Social policy: Left to courts and markets?' in H. Wallace and W. Wallace (eds.), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2000); M. Höpner and A. Schäfer, 'A new phase of European integration: Organized capitalisms in post-Ricardian Europe', *West European Politics* 33 (2010), 344.

¹² S. Gill, 'European governance and new constitutionalism: Economic and monetary union and alternatives to disciplinary neoliberalism in Europe', *New Political Economy* 3 (1998), 5.

¹³ B. van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (London: Routledge, 2002).

Yet the question arises: does the process of European economic integration *inevitably* undermine social integration at the national and regional levels? The work of Karl Polanyi provides a useful framework to analyse the dynamic relationship between economic liberalisation and social protections. In *The Great Transformation*, Polanyi argued that every move towards market liberalisation is invariably accompanied by a countermove to embed markets within societies. Describing the rise of liberal market ideas in the nineteenth century, Polanyi argued that the attempt by early industrialists to portray the 'unshackling of the market' as an 'ineluctable necessity' was a move designed to naturalise what was an inherently political project.¹⁴ In other words, liberal proponents sought to transform the *idea* of the 'self-regulating market' into a kind of 'inexorable law of Nature' in order to justify abolishing barriers to unfettered market competition.¹⁵ But Polanyi famously decried this liberal creed as a 'stark utopia'.¹⁶ Market economies are always and necessarily embedded in societies. Those sections of society most threatened by the expansion of the market look to the state to provide protection. Failure to protect societies against market forces, according to Polanyi, would lead to a 'plunge into utter destruction', the kind of breakdown of social order that he witnessed from interwar Vienna.¹⁷ Writing in 1944, Polanyi thus sought to provide a warning of the dangers of unfettered liberalism and a prescription for more social and sustainable ways of organising economic life.

Post-war leaders heeded such lessons. John Ruggie, drawing on Polanyi, coined the term 'embedded liberalism' to describe this post-WWII order: a compromise that sought to promote liberal international trade and monetary regimes, but one predicated on embedding them within national societies.¹⁸ This explicit compromise was institutionalised to varying degrees and different forms in European social welfare states. European governments pursued liberalising agendas at the international and European levels. But they did so largely on their own terms.¹⁹ That is,

¹⁴ Quoted in J. Caporaso and S. Tarrow, 'Polanyi in Brussels: Supranational institutions and the transnational embedding of markets', *International Organization* 63 (2009), 596.

¹⁵ F. Block, 'Karl Polanyi and the writing of the great transformation', *Theory and Society* 32 (2003), 275–30.

¹⁶ Polanyi (n. 6 above), p. 139. ¹⁷ *Ibid.*, p. 163.

¹⁸ J. Ruggie, 'International regimes, transactions, and change: Embedded liberalism in the postwar economic order', *International Organization* 36 (1982), 379.

¹⁹ J. Best, 'From the top-down: The new financial architecture and the re-embedding of global finance', *New Political Economy* 8 (2003), 360.

states sheltered domestic industries from unfettered competition through trade protections, economic subsidies and regulations and protected societies by providing generous social welfare and regulating labour markets.²⁰ The objective of market liberalisation was thus subordinated to the goal of preserving domestic social security and economic stability. This embedded liberal compromise came under pressure first with the breakdown of Bretton Woods in 1971 and later with the passage of the Single European Act. Since then governments have gradually ceded autonomy over a wider range of economic policies to European and global authorities. Many observers argue that this shift marks a 'progressive disembedding of liberalism'.²¹ In other words, the objective of domestic social cohesion now appears subordinated to the principle of European or global economic integration.

Yet Polanyi argued that efforts to disembed markets from societies were ultimately unsustainable. Moves towards market liberalisation are always met by countermoves to protect society from its negative repercussions. A crucial question, however, is how we demarcate the boundaries of societies to be protected. Polanyi never provided an explicit definition of society. Whether describing it as a 'relationship of persons' or 'social tissue' Polanyi's notion of society was designed to offer a holistic account of economic life that challenged the *homo economicus* assumptions of classical economists.²² His empirical analysis of the double movement in *The Great Transformation* was clearly national in scope: how forces within British society reacted against the liberalising agenda of British industrialists and their allies in the British state. In his analysis of embedded liberalism, Ruggie also refers explicitly to the reassertion of 'national political authority over transnational economic forces' (my emphasis) as the foundation of the post-war embedded liberal compromise.²³ Yet if one conceives of society in broader terms as ties that bind individuals together in economic and social life, then nothing precludes considering how transnational markets might be embedded in *transnational* societies.

²⁰ D. Bohle and B. Greskovits, 'Neoliberalism, embedded neoliberalism and neocorporatism: Towards transnational capitalism in Central-Eastern Europe', *West European Politics* 30 (2007), 443, 445.

²¹ Best (n. 19 above), p. 363.

²² K. Gemici, 'Karl Polanyi and the antinomies of embeddedness', *Socio-Economic Review* 6 (2008), 22.

²³ Ruggie (n. 18 above), p. 381.

III Polanyi in Brussels? Transnational embedding of markets

Caporaso and Tarrow suggest that such a process of transnational embedding is underway in the European Union. In an article entitled 'Polanyi in Brussels' they argue that rather than disembedding markets, EU supranational institutions have sought to forge new social compromises at the European level. The authors examine the ECJ as one important agent in this process. Examining ECJ decisions on the free movement of labour the authors suggest that the 'ECJ is interpreting existing Treaty provisions and secondary legislation in an increasingly social way'.²⁴ In cases such as *S. E. Klaus*,²⁵ *Bronzino*²⁶ and *Mary Carpenter*²⁷ the Court considered whether Member States have the same obligations to workers and their families who cross nation-state boundaries as they do to workers within their national borders. In each case the Court ruled in favour of the worker. Caporaso and Tarrow summarise the Court's *S. E. Klaus* judgment as stating that 'the working life of the person concerned should be seen *as a whole*, and not just from the limited standpoint of a particular job in one country, at one period of time'.²⁸ They conclude that the ECJ and other EU institutions are emancipating labour-market exchanges from old (national) structures and re-embedding them in new (European) ones.

Caporaso and Tarrow thus seek to challenge the pessimistic accounts put forth by Scharpf, Gill and others that further European integration will necessarily threaten the historic social agreements that protected national societies from destructive market forces.²⁹ New compromises can be forged at the European level. These arrangements do not necessarily have to recreate a national welfare state model on a supra-national scale. Nor do they necessarily have to be channelled through popular politics. Caporaso and Tarrow argue that the institutionalisation of social rights and protections at the EU level will be achieved through the transnational mobilisation of a diverse set of societal actors whose socio-economic demands cannot be met at the national level

²⁴ Caporaso and Tarrow (n. 14 above), p. 611.

²⁵ C-482/93 *S. E. Klaus v. Bestuur van de Nieuwe Algemene Bedrijfsvereniging* [1995] ECR I-03551.

²⁶ C-228/98 *Giovanni Bronzino v. Kindergeldkasse* [2000] ECR I-00531.

²⁷ C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-06279.

²⁸ Caporaso and Tarrow (n. 14 above), p. 607.

²⁹ Scharpf (n. 1 above); Gill (n. 12 above).

alone.³⁰ This can include individuals pursuing their rights through the courts.³¹ It can also entail non-governmental organisations, interest groups, or social movements mobilising for expanded rights and protections at the European level working within and/or in co-ordination with supranational institutions.³²

Two problems arise. The first is whether this loose coalition of individual litigants and interest groups seeking stronger social protections at the EU level constitutes a 'European society'? In the thinnest Polanyian terms of different cross sections of society mobilising to seek protection from the market, perhaps so. Yet it is questionable whether such movements can be conceived, or whether they conceive of themselves, in more organic or solidaristic terms of 'society as a whole'.³³ Polanyi may be in Brussels (or Luxembourg or Strasbourg). But he's also in Stockholm, Paris and Riga. That is to say that the ties that bind individuals within national societies remain strong, far stronger to date than the ties that bind a European society comprised of twenty-seven diverse Member States. Moreover, the more citizens perceive EU institutions to be the primary agents pushing forward the painful process of market liberalisation (a popular perception that many national politicians are all too willing to nurture), the more we can expect that countermovements will be organised *against* the EU rather than within it. It is important to note here that Polanyi's conception of the countermovement was largely a defensive movement: arising spontaneously rather than following a coherent set of societal or political alternatives.³⁴ This insight helps to account for the seemingly spontaneous eruption of anti-EU sentiments across Europe that appear to have little in common except a desire to halt the advance of Europeanisation.

This leads to a second concern. One might argue that a significant barrier to the development of a coherent social policy at the EU level – and indeed the creation of a European society more generally – is the diversity of national welfare state models amongst its members. These differences are significant not only in institutional or policy terms.

³⁰ Caporaso and Tarrow (n. 14 above), p. 613.

³¹ L. Conant, 'Individuals, courts and the development of European social rights', *Comparative Political Studies* 39 (2006), 76.

³² R. Cichowski, 'Courts, rights and democratic participation', *Comparative Political Studies* 39 (2006), 50; D. Mabbett, 'The development of rights-based social policy in the European Union: The example of disability rights', *JCMS* 43 (2005), 97.

³³ B. Silver and G. Arrighi, '"Double movement": The *belle époques* of British and U.S. hegemony compared', *Politics & Society* 31 (2003), 327.

³⁴ R. Munck, 'Globalization and contestation: A Polanyian problematic', *Globalizations* (2006), 180.

Of equal importance, according to Scharpf are 'differences in taken-for-granted normative assumptions regarding the demarcation line separating the functions the welfare state is supposed to perform from those that ought to be left to . . . the market'.³⁵ That is, citizens are attached to, or are 'embedded' in, very different societal conceptions of the ideal relationship between the state, market and society. These different normative assumptions underlying national welfare states also carry a high degree of political salience.³⁶ Scandinavian leaders agreeing to modify the core structures and functions of deeply embedded welfare states often do so at their electoral peril. Tarrow and Caporaso conclude that 'whether national welfare states will be cut back, modified, strengthened, or simply supplemented by social programs on a regional scale has yet to be decided'.³⁷ But this begs the question: decided by whom? The future of the ESMs is not simply a matter of economic imperatives but of ongoing political struggles. The pertinent question then becomes how different actors – namely European institutions, Member States and social partners – are engaged in struggles at the national and European levels over the future of Social Europe.

The next section considers this question through an in-depth comparative analysis of *Laval* and *Viking*. The Court's rulings in these two cases challenge Caporaso and Tarrow's claim that the ECJ interprets existing Treaty provisions and secondary legislation in an 'increasingly social way'. By ruling in favour of private firms seeking legal redress against industrial action, the cases suggest that the ECJ may instead be interpreting existing Treaty provisions and secondary legislation in an increasingly *liberal* way. Yet a reading of ECJ opinions in dichotomous terms of a liberal versus social leaning Court is bound to be analytically limited as well as inconclusive. Indeed, for every case in which the ECJ appears to favour a market-making interpretation of Treaties and secondary legislation, we can identify a case where it interprets them in a market-shaping direction. However, rather than viewing the Court as an independent actor in its own right or, alternatively, as upholding the preferences of Member States, we can pursue a more disaggregated approach to examine how the legal process enables and constrains different sets of actors.³⁸

³⁵ Scharpf (n. 1 above), p. 650. ³⁶ *Ibid.*, p. 651.

³⁷ Tarrow and Caporaso (n. 14 above), p. 612.

³⁸ A. M. Burley, 'Europe before the Court: A political theory of legal integration', *International Organization* 47 (1993), 41; K. Alter, 'Who are the "masters of the Treaty?"': European governments and the European Court of Justice', *International*

IV Transnational disembedding of markets? *Laval* and *Viking*

The overarching legal question at stake in the *Laval* and *Viking* cases was how to adjudicate between two fundamental principles: the freedom of establishment and the free movement of services and the right of collective bargaining and action. The first is inscribed in EU Treaties (Articles 49 *et seq.* TFEU (ex Articles 43 *et seq.* EC) and Article 56 TFEU (ex Article 49 EC)) and the latter within the 2000 Charter of Fundamental Rights of the European Union (Article 28). At issue in each dispute was whether industrial action by unions to force firms to abide by nationally negotiated collective agreements violates EU laws overseeing the free movement of services and the right of establishment. Given that both cases involved firms based in old Member States (Sweden and Finland) seeking to employ workers from new Member States (Latvia and Estonia) at lower wage levels, the cases also involved political issues related to enlargement, namely the legality of actions taken to prevent social dumping. The following case studies trace the process through which different domestic and European actors sought to influence and frame the political and legal issues at stake in the two cases.

A *The Laval case*

In 2003 a Riga-based firm Laval un Partneri Ltd won a contract through its Swedish subsidiary (L&P Baltic Bygg AB) worth nearly €2.8 million to refurbish and extend a school in the Stockholm suburb of Vaxholm. Between May and December 2004 Laval posted thirty-five Latvian workers to carry out the contract. In June 2004 the Swedish construction union (Svenska Byggnadsarbetareförbundet, hereafter 'Byggnads') contacted Laval to argue that the Latvian posted workers should fall under existing Swedish national collective agreements for the building sector. By September 2004, Laval had not agreed to Byggnads' demands. Meanwhile Laval announced that it had signed a collective agreement with the Latvian Building Workers' Union that represented approximately 65 per cent of the Latvian workers posted to Sweden. Under this

Organization 52 (1998), 121; G. Garrett, D. R. Kelemen and H. Schultz, 'The European Court of Justice, national governments, and legal integration in the European Union', *International Organization* 52 (1998), 263; C. Carrubba, M. Gable and C. Hankla, 'Judicial behavior under political constraints: Evidence from the European Court of Justice', *American Political Science Review* 102 (2008), 435.

agreement Laval agreed to pay the Latvian workers approximately €9 per hour, in addition to covering accommodation, meal and transport costs. This wage was nearly double the average pay for construction workers in Latvia. Yet it was nearly half the rate of pay for Swedish construction workers in the Stockholm region. Under the Swedish national collective agreement, Swedish workers at the same site would make approximately €16 per hour, in addition to 12.8 per cent holiday pay.

In October 2004, five months after its first meeting with Laval, Byggnads announced it would initiate a blockade of the Vaxholm site. Laval organised a demonstration at the Swedish parliament on 3 December to protest at the impending action. But to no avail. A day later the blockade commenced, with Byggnads members preventing workers and deliveries from entering the site and picketing the premises with signs reading 'Swedish laws in Sweden'. In December the Swedish electricians union (Svenska Elektrikerförbundet) launched a solidarity strike and unionised cement suppliers ceased deliveries to the site. A month into the blockade, Laval went to the Swedish Labour Court (or *Arbetsdomstolen*) to argue that the Byggnad blockade and the electricians' solidarity strike were illegal and should cease immediately and requested compensation for damages. Two weeks later the court ruled that the blockade was legal under Swedish labour law. In January 2005, other unions launched sympathy actions. By February 2005, the Vaxholm municipality requested to terminate its contract. A month later L&P Baltic Bygg AB declared bankruptcy. In April 2005, the Swedish Labour Court referred the case to the ECJ for a preliminary ruling.

The Latvian firm did not pursue its case in isolation. Swedish employer associations were actively involved in supporting the Latvian firm's position in the case, not only politically but financially. Svenskt Näringsliv, the Confederation of Swedish Enterprise that represents 54,000 Swedish companies, contributed thousands of euros towards Laval's legal fees in bringing the case to a Swedish court.³⁹ The Latvian Minister of Foreign Affairs remarked at the time, 'Swedish lawyers are queuing to help us.'⁴⁰ Why Swedish employer associations and some Swedish opposition parties aligned themselves with the Laval position can be explained by internal political factors. Swedish employers have

³⁹ C. Jacobsson, 'Baxläxa för Sverige i EU domstol' *Dagens Nyheter* (19 December 2007).

⁴⁰ *Diena*, 'Zviedriem būs jātaisnojas par pāridarījumu Latvijas celtniekiem' ['The Swedes will have to defend themselves regarding the harm to Latvian builders'], 19 November 2004.

long sought to secure more firm-level autonomy in wage bargaining and increase the flexibility of the Swedish labour market more generally.⁴¹ Thus the *Laval* case presented an opportunity for Swedish employers to challenge existing Swedish labour and social policies at the EU level.

With respect to the union, to counterclaims made by both Swedish and Latvian critics that the Swedish unions' actions were discriminatory towards Latvian workers in Sweden (and foreign workers more generally) Byggands stressed that the action was designed to protect the rights of all workers to fair wages and working conditions. To appeal directly to Latvian audiences Byggands took out a full-page advertisement in a Latvian newspaper displaying the hands of Swedish and Latvian workers clasped in solidarity.⁴² The advertisement was met with contempt or indifference by Latvian unions. The chair of the Free Trade Union Confederation of Latvia argued that the advertisement was about the continuation of the boycott, rather than a genuine appeal for solidarity.⁴³ Representatives of the Latvian Union of Construction Workers, which represented the Latvian workers in Vaxholm, expressed concerns that Byggands had neglected to consult with them on the industrial action.⁴⁴ The head of Byggands retorted that Swedish unions were reluctant to discuss the case with Latvian unions since Latvian union officials were 'clearly under pressure by the Latvian government to support Laval against Swedish union action'.⁴⁵

In terms of the Swedish government, it waged a political battle on domestic and foreign fronts. The government knew that Laval presented a host of legal and political problems. Indeed, a 1994 report released before Sweden's accession to the EU had warned that many aspects of its Swedish social model did not conform to EU law. Yet such concerns were assuaged by an implicit understanding that the Commission would not actively pursue infringement proceedings against Swedish labour and social policies that may be in violation of EU directives. According to

⁴¹ J. Pontusson and P. Swenson, 'Labour markets, production strategies and wage bargaining institutions', *Comparative Political Studies* 29 (1996), 223.

⁴² C. Woolfson and J. Sommers, 'Labour mobility in construction: European implications of the Laval un Partneri Dispute with Swedish Labour', 12 *European Journal of Industrial Relations* (2006), 49–68.

⁴³ *Diena* (n. 40 above).

⁴⁴ *Diena*, 'Būvuzņēmums sniedz prasību Zviedrijas tiesā, valdība vērsīsies EK' ['Construction business makes a claim in Swedish court, government will turn to European Commission'], 7 December 2004.

⁴⁵ *Diena* (n. 40 above).

Anders Kruse, the head of the Swedish legal secretariat who prepared the Swedish position in *Laval*, it was only a matter of time before a legal case would be raised.⁴⁶ *Laval* presented such a case. Kruse argued that the government had only one choice to make: 'to defend the Swedish social model'.⁴⁷ Domestically the government faced pressure by Swedish employers and Swedish unions. On the one hand, the Swedish employers association accused the government of trying to pressure the labour court to rule against *Laval*. On the other hand, when the government publicly condemned picketer's slogans targeted against foreign workers, some union officials publicly condemned the government for abandoning Swedish workers. With the Social Democrats losing to a centre-right coalition in 2005, some trade unionists feared that the government would change its position in the case. Such fears proved to be unwarranted as the incoming government held steadfast to its position that collective action should prevail over economic freedoms. On the external front, Prime Minister Göran Persson argued during the blockade that Swedish unions had the 'right to take retaliatory measures' in order to 'ensure the survival of collective agreements'.⁴⁸ Later, leading up to the *Laval* hearings, in 2006 the Swedish government invited the agents of all the Member States to a special information meeting in the lead up to the *Laval* hearings aimed at presenting the Swedish position on the issues raised in the case. 'We were concerned that other member states didn't understand the Swedish social model', Kruse explains, 'so we invited them to come to Stockholm and ask questions'.⁴⁹

While the ECJ considered the case, political debates continued outside the courts. In December 2005 then EU Commissioner for the Internal Market and Services, Charles McCreevy, announced during a visit to Stockholm that he would oppose the Swedish government and Byggband position in the ECJ case, arguing that the Swedish unions' action against *Laval* violated free movement of services.⁵⁰ McCreevy's comments provoked outrage among trade unions across Europe, as well as among Swedish and Danish social democrats. Given that Denmark's industrial relations model is quite similar to Sweden's – based on voluntary collective bargaining rather than mandatory minimum wages – Danish actors weighed in on the impending decision. Former Danish Prime

⁴⁶ Personal interview, Gothenburg, Sweden, 19 March 2009. ⁴⁷ Personal interview.

⁴⁸ Quoted Woolfson and Sommers (n. 42 above), p. 55. ⁴⁹ Personal interview.

⁵⁰ Carsten Jørgensen, 'Swedish case referred to ECJ has major importance for the Danish model', EIROOnline (2004), www.eurofond.europa.eu/eiro/2005/11/feature/dk0511102f.htm.

Minister Poul Nyrup Rasmussen suggested that McCreevy's comment had seriously undermined Swedish and Danish support for the EU.⁵¹ This view that the dispute might have wider implications for Swedish support of the EU more generally was reinforced by the Swedish employment minister's comment that the question of Sweden's withdrawal from the EU would be raised. 'There are a lot of people out there', he said, 'who voted for EU entry in the belief that the Swedish model would stay intact.'⁵² When the European Trade Union Congress (ETUC) asked European Commission President Jose Manuel Barroso to clarify whether McCreevy's comments reflected the view of the European Commission as whole, Barroso responded that 'In no way are we going against or criticizing the Swedish social model.'⁵³ When asked in a European Parliament hearing on the dispute to expand on his position, McCreevy remarked: 'Latvian trade union members are entitled to have their interests defended as much as Swedish trade union members . . . The real issue to me is what we mean by an internal market.'⁵⁴

In its December 2007 decision, the ECJ recognised that the right of trade unions to take collective action is a fundamental right under Community law – and that the right to take collective action for the protection of workers against social dumping might constitute an overriding reason of public interest. However, the ECJ deemed that in the *Laval* case the Swedish unions' boycott violated the principle of freedom to provide services since the unions' demands exceeded minimal protections under national labour law. The ECJ decision thus reaffirmed the right to take industrial action under EU law, but was a blow to Sweden's voluntary collective bargaining system. The Swedish government expressed disappointment in the ruling. Swedish employment minister Sven Otto Littorin told the *Financial Times* that the centre-right government, which had supported the unions in the dispute, would now have to amend the law. 'I'm a bit surprised and a bit disappointed by the verdict', he said. 'I think things are working well as they are.'⁵⁵ Andres Kruse remarked: 'The free movement of services cannot take precedence over such fundamental rights as negotiating a collective agreement or staging an industrial action.'⁵⁶

⁵¹ S. James, 'Sweden: Lessons of the Vaxholm builders' dispute', World Socialist Web (2006), www.wsws.org/articles/2006/jun2006/swed-j27_prn.shtml.

⁵² James (n. 51 above). ⁵³ *Ibid.*

⁵⁴ EurActiv, 'McCreevy defends stance in social model row', 26 October 2005, www.euractiv.com/en/social/europe/mccreevy-defends-stance-social-model-row/article-146475.

⁵⁵ *Financial Times*, 'Europe loses when it legitimates low wages', 7 March 2008.

⁵⁶ BBC News, 'Latvian firm test EU labour laws', 9 January 2007.

Supporters of Laval's position voiced satisfaction with the ruling. The key counsel for Laval, Anders Elmér, remarked in the Swedish daily *Dagens Nyheter* that the ruling vindicated Laval's opposition to the blockade.⁵⁷ Svenskt Näringsliv also welcomed the decision. Its vice-president, Jan-Peter Duker, said: 'This is good for free movement of services. You can't raise obstacles for foreign companies to come to Sweden.'⁵⁸ Latvian public officials also weighed in on the debate. Latvian European Parliament Member Valdis Dombrovskis of the centre-right EPP-ED group suggested that the EU should consider putting protective mechanisms in place to safeguard companies that post workers from the 'arbitrary and unjustified demands of trade unions' and argued that 'the Laval ruling will shape the direction of the single market in the future'.⁵⁹ Jorgen Ronnest of the employers association Business Europe struck a more cautious note. While the ECJ ruling will contribute to 'improving the development of an internal market' by forcing legal clarity, Ronnest argued, policy-makers should first 'wait for member states to draw their own conclusions on what [the *Laval* and *Viking* judgments] mean for their national systems' – and 'only then we can see whether something has to be done at EU level'.⁶⁰

Swedish labour unions, Swedish opposition parties and the ETUC condemned the ruling. While many commentators made a point of emphasising that the ECJ had upheld the fundamental right to strike – as well as to take actions to preserve national protections against social dumping – they concurred that the ECJ ruling presented a setback to the Swedish collective bargaining system and the ESM more generally. Speaking in front of a packed audience at a 26 February 2008 hearing before the European Parliament's Employee and Social Affairs Committee on the *Laval* and *Viking* cases, ETUC General Secretary John Monks argued that the rulings challenge 'by accident or by design' the European Parliament's position that the Services Directive places fundamental social rights and free movement of services on an equal footing. He remarks:

The idea of social Europe has taken a blow. Put simply, the action of employers using free movement as a pretext for social dumping practices is resulting in unions having to justify, ultimately to the courts, the

⁵⁷ O. Carp, 'Motgång för Byggsands i EU-dom', *Dagens Nyheter*, 18 December 2007.

⁵⁸ Jacobsoon (n. 39 above).

⁵⁹ EurActive, 'European Social Model challenged by court rulings', 27 February 2008, www.euractive.com/en/socialeurope/european-social-model-challenged-court-rulings/article-170567.

⁶⁰ *Ibid.*

actions they take against those employers' tactics. That is both wrong and dangerous. Wrong because workers' rights to equal treatment in the host country should be the guiding principle. Wrong because unions must be autonomous. And dangerous because it reinforces those critics of Europe who have long said that liberal Europe would always threaten the generally excellent social, collective bargaining and welfare systems built up since the Second World War.⁶¹

The Latvian unions had been relatively silent during the course of the dispute. Yet after the ruling, the president of the Latvian Free Trade Union Confederation, Peteris Krigers, remarked that the ECJ ruling would require unions to improve their cross-border communication channels.⁶²

B The Viking case

In October 2003, Viking Line, a Finnish ferry company, gave the Finnish Seamen's Union (or Suomen Merimies-Unioni, FSU) notice of its intention to reflag its passenger vessel *Rosella*. One of seven Viking vessels, *Rosella* runs routes from Sweden and Finland through the Baltic Sea archipelago to the Estonian capital Tallinn. Viking argued that in order to compete with other ferries operating on the same route, it intended to register the vessel in Estonia, where it had a subsidiary, and employ an Estonian crew. Replacing the Finnish crew with an Estonian one promised to reduce Viking's labour costs significantly due to the far lower levels of pay in Estonia than in Finland. Once the existing collective agreement between Viking and the FSU expired on 17 November 2003, the FSU was no longer under the Finnish legal obligation to maintain industrial peace and soon after gave notice of its intention to strike in order to prevent the reflagging. The union put forth two conditions to renew the collective agreement: (1) that regardless of a possible change of flags on *Rosella* Viking would continue to follow Finnish laws and Finnish collective bargaining agreements and (2) that any change of flag would not lead to any redundancy and lay-offs of current employees or change in terms and conditions of employment without union consent. The FSU justified its position in press statements by arguing that they were seeking to protect Finnish jobs.

⁶¹ European Parliament, Hearing of Committee of Employment and Social Affairs, 26 February 2008.

⁶² Michael Whittal, 'Unions fear ECJ ruling in Laval case could lead to social dumping' (2008), www.eurofond.europa.eu/eiro/2008/01/articles/eu0801019i.htm.

The dispute soon took on a transnational dimension. Responding to a request for support from FSU, in November 2003 the London-based International Transport Worker's Federation (ITF) distributed a circular to all of its affiliates requesting that they refrain from negotiating with Viking line and threatening a boycott of all Viking Line vessels if they failed to comply. ITF, which represents 600 affiliated unions in 140 countries, had long campaigned against the use of 'flags of convenience' (or FOC). This policy seeks to establish genuine links between the nationality of ship owners and the vessel flag – in other words, combating the prevalent use of flags from tax and regulatory havens – and to enhance the conditions of seafarers on FOC ships. When Viking learned of the ITF circular it immediately sought an injunction to restrain ITF and FSU from the strike action. In the course of conciliation meetings Viking agreed that any reflagging would not lead to lay-offs. Yet the ITF and FSU refused to withdraw its circular.

A year later, in November 2005, Viking Line brought a case against the ITF in the UK courts. Viking could bring the case before the UK courts since its main objection was against the boycott threatened by ITF, which is headquartered in London. Viking claimed that the ITF, by threatening a boycott, infringed Viking's right of establishment with regard to the reflagging of the *Rosella*. The UK commercial court ruled in Viking's favour, granting an injunction against the unions. The ITF and FSU appealed the decision in the UK Court of Appeal, which subsequently lifted the injunction and referred a series of questions to the ECJ to resolve. The questions were twofold: (1) whether collective action falls outside the scope of Article 49 TFEU (ex Article 43 EC) – that is, whether the free movement of maritime services supersedes or is constrained by the right to take collective action – and (2) whether Article 49 TFEU (ex Article 43 EC) has a 'horizontal direct effect' in that private companies can appeal to Article 49 TFEU (ex Article 43 EC) in disputes with trade unions. In essence, the UK Court of Appeal asked the ECJ to decide, like in the *Laval* case, how to strike an appropriate balance between the right to take collective action and the fundamental freedom to provide services. ITF summarised the stakes of the case as involving 'an essential issue: whether, and to what extent, industrial action by unions in order to prevent the imposition of lower wage rates and terms and conditions of employment is permissible when ships transfer flags within Europe'.⁶³

⁶³ International Transport Workers' Federation, 'European Court to rule on landmark labour case', 10 December 2007, www.itfglobal.org/transport-international/ti27-viking.cfm.

The ECJ held a hearing on 10 January 2007. Fifteen states and the European Commission submitted observations in the case. ITF General Secretary David Cockroft commented: 'The number of submissions shows how many states have recognized just how deep the impact of this case could be, and we applaud the court's determination to settle it.'⁶⁴ He continued:

What's at issue here could hardly be more fundamental. The right to defend your job against the right of a business to do what it takes to up its profits; a Europe for the powerful or a Europe for its citizens. This is not about new entrants, or labor costs. It is about the rights and basic beliefs that most of us have always believed underpinned the European Union.⁶⁵

On 23 May 2007 Advocate General Miguel Poiares Maduro delivered a preliminary judgment. Concerning the fundamental point of whether collective industrial action falls outside the scope of Article 49 TFEU (ex Article 43 EC), Maduro took a compromise position, arguing that EU provisions on establishment and freedom to provide services are 'by no means irreconcilable with the protection of fundamental rights or with the attainment of the Community's social policies'.⁶⁶ Maduro expressed the view that trade unions could take collective action to dissuade a company from relocating within the EU, so long as it did not partition the labour market along national lines or prevent a relocated company from providing services in another Member State. Departing from the Commission's submitted opinion in the case, Maduro argued that Article 49 TFEU (ex Article 43 EC) does have a horizontal effect, giving an employer the right to pursue a claim against a trade union for violating free movement of services and the right of establishment. However, Maduro argued that Article 49 TFEU (ex Article 43 EC) does not necessarily preclude a trade union from taking collective action to protect the interests of its workers, even if the result of the action might restrict free movement of services. The question of the legality of particular actions should be left to national courts to decide, according to Maduro, provided that there is no difference in the treatment of national and foreign companies. In a press release following Maduro's opinion, the ITF welcomed affirmation of the right of trade unions to take industrial action, but also expressed concerns that the ruling 'might

⁶⁴ ITF (n. 64 above). ⁶⁵ ITF (n. 64 above).

⁶⁶ Case C-438/05 Opinion of Advocate General Maduro, delivered on 23 May 2007, 2.

encourage businesses to believe that they can override those rights through a kind of cross-border hopscotch'.⁶⁷

On 11 December, 2007 the ECJ handed down its eagerly awaited judgment. The ECJ stated, consistent with Maduro's opinion, that collective action may be legitimate if its aim is to protect jobs or working conditions and if all other ways of resolving the conflict were exhausted. Concerning horizontal direct effect, the ECJ argued that private companies can appeal to Article 49 TFEU (ex Article 43 EC) in seeking relief from industrial actions. With respect to the *Viking* case, however, the Court ruled that the strike action threatened by the two unions to force the employer to conclude a collective agreement amounted to a restriction of Viking's freedom of establishment as set out in Article 49 TFEU (ex Article 43 EC). According to the Court, FSU's demands to force Viking to abide by Finnish collective agreements made reflagging pointless, given that the aim of reflagging was to reduce *Rosella's* labour costs. Put another way, if Viking was prevented from reflagging its vessel to Estonia, then Viking, through its Estonian subsidiary, was denied the freedom to compete with other Estonian-based companies doing business under Estonia's lower minimum wage rates and laxer regulations. Yet the Court ruled that ITF's policy of combating the use of flags of convenience could, in general, be interpreted as a legitimate restriction of the right of freedom of establishment. The Court left it to the national courts to determine whether the objectives of collective action can be deemed proportionate to protecting workers' jobs and employment conditions and/or whether the action is in the public interest. If so, then collective action can infringe on the right of establishment and freedom to provide services. The ITF and FSU and Viking settled out of court in March 2008, the terms of which were not disclosed.

V Concluding remarks

We can draw three sets of conclusions from this analysis. The first concerns the ECJ as an embedding or disembedding agent or, in other words, the extent to which we can argue that Polanyi is in Luxembourg. The analysis of the cases points to a basic but important fact that the Court cannot initiate policy on its own; it must react to cases brought

⁶⁷ S. McKay, 'European Court gives preliminary ruling on union cases over conflicting rights', EIROOnline (2007), www.eurofond.europa.eu/eiro/2007/06/articles/eu0706029i.htm.

before it.⁶⁸ In the *Laval* and *Viking* cases, private firms appealed to the ECJ to intervene in industrial relations disputes. This suggests that while the ECJ may indeed provide new opportunities for individuals and interest groups to seek social protections at the European level, this opportunity also extends to private firms. Indeed, historically commercial interests have exploited these legal channels far more frequently and successfully to advance their interests at the domestic and European levels. This appears to leave trade unions in the defensive position of protecting national socio-legal frameworks against intrusions by the courts. Yet in both cases unions pursued more proactive and transnational strategies, with Swedish unions framing their actions as representing the interests of all European workers and the Finnish seaman's union joining forces with the international transport union. This suggests that trade unions' strategies are not only focused on preserving social bargains made in Stockholm or Helsinki. Unions increasingly recognise the need to invest in strengthening co-operation across national borders and forging new compromises in Brussels.⁶⁹

A second conclusion concerns the relationship between the Commission and the Court in advancing European policy agendas. Caporaso and Tarrow suggest that the Commission and the ECJ work together to promote a social agenda at the European level, with the Commission supplying the Court with a 'concrete set of social regulations'.⁷⁰ Yet they can also join forces in promoting liberalising agendas. The Services Directive passed by the Council and Parliament in 2006 had watered down many of the most ambitious proposals put forth by former Internal Market Commissioner, Frits Bolkestein. But it also left wide scope for advocates of service liberalisation to pursue this agenda through legal means. If the Court looks to the Commission as a 'political bellwether' then *Laval* and *Viking* could be viewed as quite consistent with the Commission's long-standing commitment to liberalising the European service sector.⁷¹ It is also notable that the Court went on to rule

⁶⁸ D. Wincott, 'A Community of law? "European" law and judicial politics: The Court of Justice and beyond', *Government and Opposition* 35 (2000), 3, 21.

⁶⁹ R. Hyman, 'Trade unions and the politics of the European Social Model', *Economic and Industrial Democracy*, 26 (2005), 9; A. Bieler, *The Struggle for a Social Europe: Trade unions and EMU in times of global restructuring* (Manchester: Manchester University Press, 2006); K. Gajewska, 'The emergence of a European labour protest movement?', *European Journal of Industrial Relations*, 14 (2008), 104.

⁷⁰ Caporaso and Tarrow (n. 14 above), p. 614.

⁷¹ W. Mattli, 'Revisiting the European Court of Justice', *International Organization* 52 (1998), 185.

in *Rüffert* (C-346/06) that a *Land Niedersachsen* provision that all public contracts must conform to collective wage agreements constituted an undue restriction on a Polish subcontractor's right to provide services.⁷² This lends support to Scharpf's claim that the most significant challenges to national labour and social policies do not stem from decisions made by the Council of Ministers or the European Parliament but the initiation of legal actions through the courts.⁷³ But this leads to a final conclusion concerning the practical and political consequences of the verdicts.

One outcome might be a process of 'contained compliance' whereby affected states make revisions to existing laws to conform to the rulings.⁷⁴ Some have argued that introducing minimum-wage laws, or making collective agreements legally binding, poses a threat to the socio-legal principles underlying the Swedish (and Danish) social model based on voluntary agreements.⁷⁵ Others have called for pursuing secondary legislation that would raise the level of social and labour protections now allowed under the Posting of Workers Directive (PWD)⁷⁶ or introducing a 'social progress' clause in the treaties.⁷⁷ In October 2008 the European Parliament passed a resolution calling for a 're-assertion in primary law of the law of the balance between fundamental rights and economic freedoms in order to avoid a race to lower social standards'.⁷⁸ In December 2008 employment ministers in the European Council refused to consider proposals to strengthen the PWD. Yet just months after UK ministers had rejected consideration of the proposal in the Brussels, the government was faced with a wave of

⁷² Case C-346/06, *Rüffert v. Land Niedersachsen* [2008] ECR I-1989.

⁷³ Scharpf (n. 1 above), p. 657

⁷⁴ L. Conant, *Justice Contained: Law and politics in the European Union* (Ithaca: Cornell University Press, 2002).

⁷⁵ I thank Marie Pierre Granger for bringing this point to my attention. See also 'Förslag till åtgärder med anledning av Lavaldomen, Betänkande av Lavalutredningen' ['Report of the Committee Consequences and action in response to the Laval judgment'], *Statens Offentliga Utredningar* (12 December 2008), 123, www.regeringen.se/content/1/c6/11/74/43/5d1a903d.pdf.

⁷⁶ 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.

⁷⁷ Bercusson (n. 5 above); J. Monks, 'European Court of Justice and Social Europe: A divorce based on irreconcilable differences?', *Social Europe Journal* 22 (2008), 26; C. Joerges and F. Rödl, 'Informal politics, formalized law and the "social deficit" of European integration: Reflections after the judgments of the ECJ in Viking and Laval', *ELJ* 15 (2009), 1.

⁷⁸ European Parliament A6-0370/2008.

strikes at home protesting the hiring of foreign workers at lower wages. Former UK Health Secretary Alan Johnson referred to the recent ECJ cases in his public response to the strikers' demands stating, 'As a result of those rulings we need to look again to make sure our intention of this free movement is actually being supported by workers themselves . . . and it is not based on [workers] being undercut on terms and conditions.'⁷⁹ Societal countermovements seeking to defend national socio-legal frameworks against moves towards further liberalisation are not confined to Member States with the strongest social protections to defend but are increasingly evident among the EU's most liberal members. The question remains whether this movement can be waged at the transnational level, spanning east and west.

⁷⁹ *Times Online*, 1 February 2009.