Special Issue: *Lisbon vs. Lisbon*

The European Court of Justice and "Total Market" Thinking

By Emilios Christodoulidis[*]

A. The Harmonic Law of the Market

The controversial decisions of the Court of Justice of the European Union (CJEU) in the quartet of cases that are grouped under its "Laval/Viking jurisprudence" are rapidly becoming entrenched as a key dimension of the European Union (EU) constitutional imaginary.[1] This comes with a certain "immunization" against challenge as they become much harder to treat as mistakes. In their elevated status they have aligned stances and expectational structures. They have also had significant impact on the "Nordic" models; Charles Woolfson shows, for example, how subsequent to the European Court of Justice (ECJ) decision, the rulings of the Swedish Labour court has "seem[ed] to confirm that the 'Swedish model' has, at the very least, been significantly redefined, if not fundamentally altered, in the light of *Laval.*"[2] While EU lawyers largely sit it out in relative passivity, wondering what the fuss is really about,[3] labor lawyers have been vocal in their disagreement.[4] But the latter's voices in this debate—if we can call it such—have in turn been drowned out by the ululations of lawyers and theorists from the "new," post-2004, EU countries loudly proclaiming a victory against the arrogance of the older Member States. If the workers of the Baltic states want to sell their labor—and their life—cheap,

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[1] *See generally* Case C-438/05, Int'l Transp. and Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779 [hereinafter *Viking*]; Case C-341/05, Laval v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767 [hereinafter *Laval*].

[2] Charles Woolfson, Christer Thörnqvist & Jeffrey Sommers, *The Swedish model and the future of labour standards after Laval*, 41 INDUS. REL. J., 333, 335 (2010).

[3] Roger Blanpain, *Laval and Viking: Who pays the price?*, *in* THE LEVAL AND VIKING CASES: FREEDOM OF SERVICES AND ESTABLISHMENT V. INDUSTRIAL CONFLICT IN THE EUROPEAN ECONOMIC AREA, xix, xxii (Roger Blanpain & Andrzej M. Swiatkowski eds., 2009) ("Was the industrial action, namely to boycott of Laval by the Swedish unions compatible with freedom of services? The Court said no, and rightly so."); Alicia Hinajeros, *Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms*, 8 HUM. RTS. L. REV. 714, 728 (2008) ("It is doubtful that the Court could have dealt with the conflict . . . in any other way.").

[4] For one of the best analyses, see generally Anne Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 INDUS. L. J. 126 (2008); Catherine Barnard, *A Proportionate Response to Proportionality in the Field of Collective Action*, 37 EUR. L. REV. 117 (2012); Claire Kilpatrick, *Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers*, 34 EUR. L. REV. 844 (2009).

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goes the "inclusionary" argument, why should they be constrained from doing so under protectionist regulatory policies that undercut their competitive advantage by those unwilling to rein in the exclusionary structures of social protection that limit access and opportunity for their workforce to join the Continent-wide economy? The massive impact that the decisions have had on the regulation of industrial relations in the countries of the European Union and on the position of the trade unions has hardly been ameliorated by the debacle that was the rapid withdrawal of the proposed *Monti II* Regulation in the face of resistance to it by national parliaments.

We will look at how these arguments about competitive advantage gain leverage from a spurious argument about inclusion that is part and parcel of what Alain Supiot has called the ideology of the "total market."[5] The spurious inclusionary argument mentioned above has found support from unlikely corners, with legal theorists in the analytical tradition of jurisprudence now joining in the debate. A tradition that has been historically reticent to get its hands dirty in the unspectacular field of social protection has been awakened by the theoretically pregnant issue of "proportionality."

I will discuss this "awakening" in this first section, but the focus is incidental; incidental, that is, to a much larger problem which our topic, "Lisbon versus Lisbon," nicely brings out. The title is about a competition: Social rights *against* economic freedoms. It is not much to hold on to, but hold on to it we must: The idea that there is still a conflict to be played out, that there is still a dilemma facing us that is not to be dismissed out of hand. The danger comes with the neo-liberal move that collapses the competition—between rights and freedoms—and that smoothes over their friction by elevating "market access" as underlying premise, underwriting and providing the measure of the "reconciliation" of social rights and economic freedoms on a common register.

I am not claiming that the question of a *social* Europe has always been at the forefront of its theorists' concerns, nor that it always, if in some cases ever, dented the triumphantalism about its aspiration. Joseph Weiler's vision, for example, in his highly influential "The Transformation of Europe"[6] with its sensitivity to the very peculiar "Janus-faced" European synthesis of the political and the law was, as Christian Joerges puts it, "surprisingly compatible with the benign neglect of the social deficit of the European order."[7] "Why is it, we are both inclined and entitled to ask," continues Joerges, "that it is precisely the welfare state traditions of European democracies that are not visible in the legal theories of European integration?," even though the institutionalization of welfare

[5] *See generally* ALAIN Supiot, L'ESPRIT DE PHILADELPHIE: LA JUSTICE SOCIAL FACE AU MARCHÉ TOTAL (2010).

[6] Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

[7] Christian Joerges, *Will the Welfare State Survive European Integration?*, 1 EUR. J. SOC. L. 4 (2011).

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commitments was "widely understood as the 'second pillar' of Europe's democratic conversion?"[8]

Since the motor of Europeanization that was increasingly picking up speed was understood primarily as "negative integration"— i.e. the removal of obstacles to the integration of markets, for example—the national regulation of social protection was not simply too weak to stem the supra-national tide but came to be seen increasingly as an anomaly to its logic; the logic of what Richard Hyman calls "actually existing Europeanisation."[9] The language of "subsidiarity" came to capture and redeem—and the "unity in diversity" formula to accommodate—a markedly uneven potential and/or willingness of European States to pursue objectives of distributional justice. The *Laval*/*Viking* quartet of cases exacerbates the problem by turning asymmetries in social protection between States productive as "comparative advantages."[10] Joerges's "solution" is interesting as a direct affront to "integration": Respect Finnish law, he suggests, and respect the efforts of trade unions to coordinate labor interests transnationally. "I fear," he says, "that there is no third way here except the stubborn insistence to protect the achievements of Finnish law in this case."[11]

No such pressing injunctions enter the more aloof discourse of the philosophers of European Law even when they engage directly with recent developments in the jurisprudence of European Courts. Take the example of the rather underwhelming collection *Philosophical Foundations of European Union Law* recently published by Oxford University Press.[12] Here, a number of contributors, who would not ordinarily have been too worried about such dilemmas, their technicalities, or the controversies that underlie them, take issue with *Laval* and *Viking*. Let me single out one contribution[13] that is indicative of a theoretical approach that misses the stakes and elides the dilemmas in an argument that purports to transcend them.

The explicit intention of George Letsas' paper is not to intervene in the discussion of pluralism, much less in that of a conflicts-approach such as Joerges'; it is instead to

[8] *Id.* at 10.

[9] Richard Hyman, *Trade Unions and the Politics of the European Social Model*, *in* 26 ECON. & INDUS. DEMOCRACY 9, 29 (2005).

[10] *See Laval* & *Viking*, *supra* note 1; Case C-346/06, Rüffert, 2008 E.C.R. I-1989; Case C-546/07, European Comm'n v. Fed. Rep. of Ger., 2010 E.C.R. I-439.

[11] Supiot, *supra* note 5.

[12] PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW (2012).

[13] *See* George Letsas, *Harmonic Law: The Case Against Pluralism*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 77–108 (2012).

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"debunk" pluralism itself. Pluralism is constitutively implicated with positivism, according to the author, in adopting the latter's assumptions about what constitutes law—typically a "rule of recognition." If there is a pluralism worth rescuing at all for the author, it must be a different kind of pluralism, one that does not pivot on systemic criteria of individuation of legal systems. Such criteria of individuation, involving the assertion of social fact rather than the exercise of moral judgment, are hallmarks of positivist thinking, and false. What we should understand as being at stake in the judicial thinking in *Laval, Viking,* etc., are legal arguments of a different caliber, evaluative judgments across the board that are neither based on, nor discriminate between, formal jurisdictional criteria. Where Joerges' injunction to "protect Finnish law" presumably goes wrong, then, is that Joerges thinks that there is, as a matter of fact, a "Finnish Law" to protect!

For the author, "the problem of normative conflicts is not a genuine one," and "as a matter of law there are no normative conflicts of fundamental rights in Europe."[14] It is a pity that so little attention is paid to the gravity of these conflicts that law is called upon to decide and what might count as the *right* answer. I say this because the author is a careful reader of Dworkin, and what appears to me to get lost here is Dworkin's complementary insistence that the developing story of (EU) law should remain loyal to its record: That integrity, in other words, also requires best "fit."[15] That may have inclined the decision makers of the CJEU toward following an older jurisprudence of the Court—and why not of the European Courts (in the plural)—more balanced, less driven by economic considerations alone. In any case, that is not what is of concern here. Let us stay with the question of why *Laval and Viking* might have been the object of critical acclaim in terms of an argument that no longer pits rights *against* freedoms, national legal protections *against* EU integration but instead, through the inclusionary device of proportionality, collects them as consonant:

> Suppose, for the sake of argument, that the political decision of the EU to create freedom of establishment is of equal moral weight to the national decision to grant workers the right to strike. Does it follow that when I go on strike to prevent you from hiring cheaper EU workers, your EU right necessarily clashes with my constitutional right? One reason that it does not is that the underlying moral principles support only an abstract legal right to freedom of establishment or strike . . . . [A]lso sensitive to other moral considerations such as the principle of proportionality,

[14] *Id.* at 78.

[15] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1998).

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> legitimate expectations, fairness, market efficiency, and many others . . . . Even if, other things being equal, the right to strike is of equal moral weight to freedom of establishment, it need not follow, all things considered, that the trade union had a right to strike. Hence it may be wrong to say that there was an unresolvable clash between national constitutional law and EU law. . . . Law, on the non-positivist account, will turn out to be essentially *harmonic*.[16]

It is hard to know where to begin with this, but let it be said that to read an underlying *moral* dimension into "freedom of establishment" and "market efficiency" makes no sense. Viking's decision to re-flag its ship in order to cut costs has nothing to do with morality. If anything it is immoral to sack your crew in order to replace it with a cheaper one, or to withhold life insurance from your workers (*Laval*); any further question as to the viability of companies is an economic not a moral one. I will return to this. But the real question is what exactly to make of the *melée* of "sensitivities" that comprises "proportionality, legitimate expectations, fairness, market efficiency, etc."? I suggest that the appeal to "harmony" here calls forth commensurability, dressed up as a question of morality, effected through the flattening device of proportionality and aligned to market rationality.

Recall Kant's major contribution to political philosophy, the radical disjunction he draws between things having either dignity or a price.[17] This is an insight that is largely lost in the literature on "cosmopolitanism" that owes its inspiration to him. It is the insight that outright disappears in the endorsement of proportionality, of which the "harmonic" principle, mentioned above, is an extreme instance, and is made a mockery of in the invocation of a moral register.

I will take up the former question, on proportionality, in the following section, when *Laval and Viking* are analyzed more closely. Suffice it for now to say that what is lost in that discussion is Kant's disjuncture between dignity and price. I will argue that proportionality both presupposes and delivers a certain confluence that purchases harmony at the price of dignity, a move insightfully resisted by Jürgen Habermas in his attack on "proportionality."[18]

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[16] *Letsas*, *supra* note 13, at 98–99.

[17] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 42–43 (1998) ("In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is above all price and therefore admits of no equivalent has a dignity.").

[18] JURGEN HABERMAS, BETWEEN FACTS AND NORMS 253–61 (1995).

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In regards to the second objection, it is an objection to the invocation of a *moral* register rather than a *political* one. My concern is that if we lose the *political* visibility of the competition between principles, between rights and freedoms, we are indeed half way to conceding "harmony" in the face of conflicts whose stakes involve us in a discussion of *political* constitutionalism about how to defend the dignity of work and how to protect the values that made post-War Europe humanly functional. This call, for political visibility, is sadly the corner one finds oneself defending.

Unless we keep these questions at the forefront of our approach, the resistance to both the assumptions that everything is (1) balanceable and (2) balanceable on a *moral* register, then our very ability to understand, let alone resist, social devastation is undercut. We lose our ability to prioritize existing standards of employment against the erosion of wages and conditions, and to prioritize them in advance and independently of criteria of market optimization. The political question is instead handed over, as in this argument, to the neo-liberal "Hercules" that is becoming the CJEU, disturbingly bent on the task of dismantling the careful architecture of compromise and relative humility that characterized the earlier jurisprudence of the Court.[19] It proves a task less Herculean that one might expect or might have hoped. In fact it is staggering how easily the edifice succumbs to the leveling test of proportionality, to market exposure, unmoored from any safeguard and subjected to the tests of "market access." This is looked at in detail in the following sections.

B. The *Laval* and *Viking* Decisions

Laval concerned a Latvian company that was awarded a contract to renovate a school in Vaxholm, Sweden using its own Latvian workers who earned about 40% less than comparable Swedish workers.[20] The local branch of the Swedish builders' union opened negotiations with Laval's Swedish subsidiary in order to extend the relevant sectoral collective agreement to the posted workers and negotiate wages for them. The Swedish Building Workers' Union demanded the company provide comparable wages and conditions to those of Swedish workers under the Construction sector Collective agreement. The negotiations failed. They were followed by a union picket at the school site, a blockade by construction workers, and sympathetic industrial action by the electricians' unions (all permissible under Swedish law), which eventually resulted in Laval's Swedish subsidiary going into liquidation.

[19] I refer here, among other examples, to what came to be known as "Albany" jurisprudence following the Court's decision in 1999 that granted collective agreements a clear immunity from anti-trust scrutiny and ring-fenced national systems of worker protection from the reach of EC internal market law. *See* Case C-67/96, Albany, 1999 ECR I-5751.

[20] *See generally Laval*, *supra* note 1.

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Laval brought an action in Swedish courts. The firm sought a declaration that the industrial action was unlawful, an injunction to stop the action, and compensation from the unions for the losses it had suffered. The Court referred questions to the ECJ on the interpretation of Directive 96/71/EC, the Posted Workers Directive and Article 49 EC, on the freedom to provide services.

Viking concerned a Finnish company wanting to reflag its ferry (that sailed the Helsinki–Tallinn strait) under the Estonian flag so that it could man the ship with Estonian crew, who would be paid considerably less than the existing Finnish crew.[21] The International Transport Workers Federation (ITF), known for its long-standing campaign against the use of flags of convenience, told its affiliates to boycott the Finnish vessel and to take other solidarity industrial action in order to prevent the firm from re-flagging the vessel. Viking sought an injunction in the English High Court to restrain the ITF and the Finnish Seaman's Union—now threatening strike action—from breaching Article 43 Treaty on the Functioning of the European Union (TFEU) on freedom of establishment. The English Courts referred the case to the CJEU.

In summary, the Court found that EU Law did apply to the cases; and that it applied in a way that implicated trade unions directly. It found that collective action was a restriction on fundamental freedoms and so presumptively unlawful unless it could be justified and was proportionate.

Both cases turned on what construction the ECJ would give to the articles protecting freedom to provide services (*Laval*) and freedom of establishment (*Viking*). The Swedish case, *Laval*, raised the additional issue, addressed at the very outset by the Court, on how to interpret the Posted Workers Directive given the well-established rule that directives cannot have horizontal direct effect meant that Laval could not rely on it in its action against the union. The main objection to the Court's competence to decide the case stems from the basic architecture of the distribution of competences between the European and the national level. The Court rejected this argument. It held that although the Member States were free to regulate the right to strike, they were obliged to do so in accordance with Community law, including the free movement provisions.

In order to decide on the applicability of Article 49 to the union's actions in *Laval*, the Court had to establish that the Article was capable of having *horizontal effect***.** It said that "[c]ompliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services."[22] Otherwise, the Court reasoned, if the free movement rules *only* applied to the Member

[21] *See generally Viking*, *supra* note 1.

[22] *Laval*, *supra* note 1, para. 98.

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States, they could easily be undermined "by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law."[23] The Court had no problem establishing that the collective agreement in the *Laval* case infringed Article 49 by making it "less attractive, or more difficult" for a firm established in another Member State to carry out construction work in Sweden using posted workers,"[24] on the grounds that the collective action taken by the union might have "forced" the employer to enter into a collective agreement containing terms going beyond the minimum laid down in Article 3(1) of the Posted Workers Directive and might have "forced" the employer to engage in "negotiations . . . of unspecified duration" to determine the minimum wage rates.[25]

The Court is prepared to concede that the freedom to provide services may be restricted where what is involved is the pursuit of a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. But proportionality is key here: While "the right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest . . .",[26] the unions' exercise of the fundamental right to strike in pursuit of the legitimate public interest objective of worker protection needed to be proportionate. This was a criterion that the Court decided had not been met by the unions: The substantive obligations contained in the collective agreement went beyond the minimum necessary to protect workers as defined in the Directive, and the requirement to enter into pay negotiations was too onerous and uncertain.[27]

The Court is crucially concerned with whether the unions' actions constituted a restriction on freedom of establishment under Article 43 TFEU. It held that the Seamen Union's action did constitute a restriction because it had "the effect of making less attractive, or even pointless . . . Viking's exercise of its right to freedom of establishment" because Viking would enjoy less favorable treatment than other firms established in the host state. It was also held that ITF's campaign against flags of convenience "must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment."[28]

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[23] *Id.*

[24] *Id.* para. 99.

[25] *Id.* paras. 99–100.

[26] *Id.* para. 103.

[27] *See id.* paras. 106–11.

[28] *Id*. paras. 72–73.

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The Court clearly recognizes the need to reconcile and balance the competing economic and social objectives of the Union:

> Since the [Union] has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article [151 TFEU], inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[29]

In this context "the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty".[30] The Court then performs the proportionality test to argue that strike action could be justified *only* where the jobs or conditions of employment of the trade union members were jeopardized or under serious threat, which in the case before the Court did not apply. More specifically, the Court indicated that it thought that the strike action would only be *suitable* where "collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members"; but that strike action might not be *necessary* and it is for the national court to examine whether the "FSU did not have other means at its disposal which were less restrictive of freedom of establishment" to bring to a successful conclusion the collective negotiations entered into with Viking, and finally, "whether that trade union had exhausted those means before initiating such action."[31]

We will return to the use of the terms "suitable" and "necessary" as well as to the logic of the deployment of the proportionality test.

In the meantime let it simply be re-iterated that for the Union to avoid being caught by Article 43, it would have to show that any proposed reflagging would have a harmful effect on terms and conditions of employment. The Court held that "to the extent that [ITF's]

[29] *Id.* para. 79.

[30] *Id.* para. 103.

[31] Barnard, *supra* note 4.

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policy results in ship-owners being *prevented* from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified."[32] The Court indicated that national courts should use the least restrictive alternative version of the proportionality test. Thus, the national court should consider whether "FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking and . . . whether that trade union had exhausted those means before initiating such action."[33]

C. The "Solution" of Proportionality

Let us take a brief look at the social background in which the decisions are taken. It involves the vexed process of transferring the European social model eastward, to environments—like the Baltic States—where massive deterioration of labor standards, including "safety crimes" are institutionally tolerated.[34] Lithuania currently has twice the rate of workplace killings compared to the EU and four times that of France. Latvia is in the process of suspending occupational health and safety regulation in response to the financial crisis. As a small price to pay perhaps for ridding the workplace of the over-protective state-socialist heritage and imbuing it with market discipline, the US-based Cato Institute's advice for the new EU member states is the creation of a dual standard regulatory system for health and safety, where "excessive regulation" emanating from the EU—not be allowed to hamper growth or reduce labor flexibility." The same report continues: "Over-regulation of conditions of employment will diminish the comparative advantage that CEE workers enjoy over their more highly paid western counterparts."[35]

I am not implying that whatever the neo-liberal advisers of the Cato Institute suggest directly impinges on our discussion of the public good, or the jurisprudence of the Court. I am suggesting something rather different: That the demand and argument for the "un-protecting" of labor as a comparative advantage marks a departure that could not have been previously possible, under a different conceptualization of the public good. It is the circulation of "social protection" or the "dignity of labor" as only two amongst many constitutional goods that makes it possible. It is circulated alongside and on a par with

[32] *Laval*, *supra* note 1, para. 88.

[33] *Id.* para. 87.

[34] On this, see generally Charles Woolfson, *The Sense of Measure and Societies "Without Limit,"* 19 SOC. & LEGAL STUD. 226 (2010); Epp Kallaste & Charles Woolfson, *The Paradox of Post-Communist Trade Unionism: 'You Can't Want What You Can't Imagine*,' 20 ECON. & LAB. REL. REV. 93 (2009); Charles Woolfson, *Labour Migration, Neoliberalism and Ethno-politics in the New Europe: The Latvian Case*, 41 ANTIPODE 952 (2009).

[35] Woolfson, *supra* note 34.

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other constitutional goods like property rights and economic security. The "social" constitution is released alongside the "economic" constitution, and the constitutional goods they each sanction and protect circulate as other commodities, with the coordinates of their competition undone from any overall framework.

But to have "circulation" at all, a principle of circulation and a common measure is required; and it is at this point that a default *market* constitutionalism installs itself. The common measure is the reduction of value to constitutional good. The proliferation of constitutions and the collapse of their internal hierarchizations as well as any hierarchization amongst them, in the name of pluralism, contribute to the *undistorted* circulation of constitutional goods as commodities. Preference, unmoored from any of these constitutions or any value system, becomes the principle of choice. A functionally integrated Europe repeats the logic of the self-regulating market, its promise of the freedoms of movement, of capital, and labor underlying the enforced flexibilization of labor. And not surprisingly, traditional "hard" enforcement strategies are being increasingly substituted across the board by "softer" law—forms of self-regulation and corporate responsibility. The tendency to rely on forms of corporate self-constitutionalization is strong. It is seen as a way to extract concessions from corporations through market discipline rather than through political routes. Most labor lawyers have been critical of the decisions of the CJEU, claiming that they have done very little to allay the fears that the price of integration involves precisely this form of distribution of the risks of production that is referred to as social dumping.

So what to make of the fact that the Court "intriguingly and without explanation," as Catherine Barnard puts it, addresses head-on the right to take collective action for the protection of workers in the host state against "possible social dumping" as "constituting" in the Court's words, "an overriding reason of the public interest?"[36]

My counter-intuitive suggestion is that the Court's statement is not to be understood as *lip service* paid to Europe's *social* market as being of "overriding" importance. Instead, it involves a re-conceptualization of the *social* in a way that "market access" is seen as its very fulfillment and overriding priority. At no point do the Judges in *Laval* or *Viking* concede a sacrifice, or even the yielding of the social to the economic. What they do is *undo* the opposition. It is not coincidental, in this vein, that those who are to gain "market access" from the decisions are the first to challenge an understanding of decisions over the clash of (social) "rights" and (economic) "freedoms" as privileging the one—economic—against the other—social. What is at stake instead, they argue, is the (social) right to work of the Estonian or Latvian workers against the (social) right of the privileged Nordic workers to increased protection. On the "access" register, the clash is no longer between rights and freedoms, the social and the economic, but between the social rights of two

[36] CATHERINE BARNARD, EU EMPLOYMENT LAW (2012) 223.

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constituencies seeking market access. It is now between those who are prepared to work for half the wage and those who are not. Incidentally, it does not matter to the advocates of this position that the halving of the salaries does not double the number of the workers but the profits of the entrepreneurs. That is why statements such as the following (from a public lecture delivered at Harvard under the eloquent title "Whose Social Europe?") are indicative:

> Like Wittgenstein's duck-rabbit picture, what appears as economic is social and what [is] social is economic, depending on the angle from which we see the dilemma. The debate could just as well be framed in terms of social rights of [Estonian] workers against the [Finnish] interpretation of the freedom of movement provisions which ignores their realisation.[37]

"While this argument has much merit," comments Catherine Barnard,

> [I]t distracts from the general thesis . . . that in terms of preserving the integrity of national social systems, the *Viking* judgment is severely damaging to rules developed by the states in the social field—the very area over which the initial Treaty of Rome settlement deliberately gave autonomy to the states—because fundamental (EU) economic rights take precedence in principle over fundamental (national) social rights.[38]

Barnard is right, of course. But she misses something profoundly disturbing about "the merit" of an argument that suggests a mutual substitution ("duck-rabbit") that *pivots* on market access, understood in its functionality of sustaining a downward spiral of lowering wages (social dumping); of an argument, that is, that assumes "market access" in this modality as *sole* guarantor of both social and economic rights. Social rights depend on political decisions. To hand them over to the market in this way, and assume that the social costs of the erosion of standards, conditions, and wages are *inevitable*, folds political thinking into the most reductive form of what Alain Supiot calls "total market" thinking.[39]

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[37] Damjan Kukovek, Remarks to Harvard University: Whose Social Europe? (April 16, 2010) (as quoted in Barnard, *supra* note 4, at 123).

[38] *Id.*

[39] Supiot, *supra* note 5.

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D. "Total Market" Thinking

It is possible to track this reconfiguration of legal thinking in the direction of "total market" thinking both at the national legal system and at the transnational level. At the municipal system level, the development finds expression in the shifting boundary between private and public law. In the past, before the "market turn" in legal thinking, we could at least agree that the distinction between private and public law involved a certain competition of rationalities, however meager the opportunities it afforded public law, and we could approximately delineate the terrain of this competition. "Constituent power," on the side of public law, captured something of the irreducibly political dimension that informed constitutional thought. However improbable the deployment of the "constituent" from within juridical thinking,[40] it was nonetheless pivotal to that thinking. Now, the "market turn" informs and underwrites a different constitutional imaginary, on a terrain it re-configures so as to make any meaningful sense of "the constituent" disappear. Gone is the notion of the common good understood on a political register; instead we have optimization of market outcomes. The market principle that was understood as the principle subtending the transactional nature of private law as distinct from public law, gradually becomes the arbiter of the separation itself and guarantor of the circulation—"balancing" in the preferred idiom—of public goods. If we are going to insist on the existence and the significance of the boundary, then we need to confront the pervasive move that no longer pits them against each other but in an inclusionary way underwrites them both.

At the transnational level, "proportionality" becomes the way in which, sometimes explicitly, more often implicitly, a logic of accommodation, or at least balancing, is invoked to cover over the sacrifice of social rights and public value to entrepreneurial freedom. Even in the most blatant cases of such sacrifice, a language of accommodation prevails:

> Since the [Union] has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article [151 TFEU], inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[41]

[40] For a fascinating argument on this point, see generally ANTONIO NEGRI, INSURGENCIES (1999).

[41] *Viking*, *supra* note 1, para. 79.

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While the wording here suggests that the economic face of the European Union—free movement of goods, persons, services, and capital—and its social dimension are potentially in conflict, it is nonetheless possible—and indeed desirable—to balance the two. Balance requires both a pivot and a metric in order to establish relative weights, a plain of commensurability on which equilibrium may be sought. The notion of reconciliation of these two dimensions now also enjoys Treaty support: Art 3(3) TEU identifies the creation of a highly competitive "social market economy" as one of the objectives of the European Union. What is the metric of the balance? What the cost of "reconciliation"? It is the *constitutional un-protecting of labor.*

In the words of one of its most fervent advocates, "proportionality is a universal *criterion* of constitutionality."[42] And, continues David Beatty,

> Impartially applied, proportionality permits disputes about the limits of legitimate lawmaking to be settled on the basis of reason and rational argument. It makes it possible to compare and evaluate interests and ideas, values and facts, that are radically different in a way that is both rational and fair. It allows judgments to be made about ways of thinking that are as incommensurable as reason and faith. It provides a metric around which things as dissimilar as length and weight can be compared.[43]

Key to any discussion of proportionality is what "circulates" as constitutional goods (metric) and the varieties of common structures that can be acknowledged and received as constitutional (criterion). In this we have a combination of elasticity and rigidity. On the side of elasticity we have a proliferation of values, rights and interests that are newly relevant to the constitutional sphere among an expanded plurality of constitutional actors: Individuals, governments, corporations, trade unions, etc. The competition is played out on a constitutional field reconfigured to accommodate this plurality by installing a metric, whereby constitutional goods circulate as constitutional commodities, crucially by establishing commensurability across the board. At this point, the extraordinary rigidity of the contextual conditions begins to become visible, the true "criterion" of constitutionality. Criterion and metric support each other, so that the released fluidity is tied to, and enabled by, forms of rigidity: The entrenchment of both the mechanism for the allocation of value and the coinage itself of value. Out of this mutual enablement, a new constitutional

[42] DAVID BEATTY, THE ULTIMATE RULE OF LAW 162 (2004).

[43] *Id.* at 165.

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imaginary hoists itself: Empty except for the promise of the optimization of goods, constitutional rationality so often referred to now, following Robert Alexy, in terms of Pareto-optimality.[44]

Karl Polanyi reminds us of the extraordinary effort it took to set in place and entrench the contextual conditions for the creation of a market system in terms of the subsumption of society to the market through the fictitious commodities of land, labor, and money.[45] The articulation of markets in the three commodities created the market system whose effect was the "disembedding" of the economy from society. The institutional separation of the political from the economic sphere as constitutive of market society, Polanyi insisted, was at the root of the "great transformation" of capitalist modernity. It is this same separation that we witness in the massive strategic intervention in the social field to create and sustain the European market. The point is that it is the same, a continuing story of establishing the conditions for the operation of capital. "Social exposure" is what, for Polanyi, results from the stripping back from society of all its protective mechanisms, the forms of solidarity that it harbors as constitutive of the social bond.

Polanyi's work is extraordinarily pertinent today, and it is perhaps surprising that it has so belatedly engaged theorists of the European integration. I refer to him in this context to specifically argue that the proliferation of constitutional goods and constitutional orders require conditions, and fluidity presupposes rigidities in terms of the coinage that establishes the conditions of commensurability and thus of circulation.

If the lesson about market fluidity is that it is underpinned, sustained, and policed by institutional structures that are rigid, massive, and violent, what modalities of political exchange does this new constitutionality allow us to envisage, as constitutional theorists to explore and as political actors to pursue?

This is no doubt depressing and sobering to those who had perhaps entertained a different vision of social Europe. I am suggesting that the demand and argument for the "un-protecting" of labor *as* comparative advantage marks a departure that could not have been previously possible, under a different conception of constitutionalism. It is the circulation of "social protection" or the "dignity of labor" as only one amongst many constitutional goods that makes it possible. They are circulated alongside and on a par with other constitutional goods like property rights and economic security, the coordinates of their competition undone from any overall framework.

[44] *See* Robert Alexy, *Constitutional Rights, Balancing and Rationality*, 16 RATIO JURIS 131 (2003).

[45] *See generally* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944).

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What of the attempts to hold onto the concept of the "social market" inscribed in our, nearly, constitutional treaties and fundamental documents? These attempts are hollow if they are divorced form the *tradition* of social market democracy as inseparable from the organizing ideals of the democratic running of the economy and the workplace: A tradition that comprehends the principles of social protection, of preservation of skills and the security of people at work as *qualifications to*, and controls of, rather than *products of* the market, and thus as irreducible to the logic of price.

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