The Aftermath of the Laval Affair: The Swedish lex Laval before the European Committee of Social Rights

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WORKING PAPER

Introduction.

Essentially thought for and through the economics prism, the spectacular trade liberalisation of globalisation has nonetheless had a fundamental impact on the social organisation of States[1]. This impact is mostly perceived - at least in Northern countries - as essentially negative. Globalisation is the cause of a true downward spiral in the field of social rights; it allows for competition to exist between national social systems through the collapse of economic borders, enabling operators to organise production chains beyond borders and thus exerting a strong pressure on labour costs. This effect is even more vigorous as labour law rules, and, more broadly, the organisation of labour markets, have remained strictly national. The contrast between the internationalisation of capital and the strict maintenance of labour frameworks within national boundaries is striking.

Of course, such a situation has led to counter-reactions, the first of which are institutional. In this respect, the most accomplished structure is the European Union. By the twofold way of coordination and harmonisation, the EU is attempting to fulfil the mission it has set for itself: to become a "social market economy", aiming at "full employment and social progress "(Article 3 TEU). Its achievements are certainly not inconsiderable. However, they remain largely insufficient to counterbalance the strong asymmetry that continues to reign between economic and social concerns. The same could be said regarding other institutional initiatives, global like the ILO or regional such as NAFTA, whose social role, although not insignificant, is not likely to be an effective counterweight either[2].

Other responses involve the development of new standards for protagonists themselves, independently of any institutional framework. In this respect, the development of corporate social responsibility, no matter how slow and difficult, is undeniably a major step forward[3]. By developing standards that aim to overcome the double compartmentalisation of legal personalities and legal orders, corporate social responsibility is undoubtedly a path to the development of adapted social standards in the globalised context which is now that of corporations. In addition, the gradually increasing share of international framework

[1] On the whole, *see* M.-A. MOREAU, *Normes sociales, droit du travail et mondialisation*, Paris, Dalloz, 2006.

[2] On the ILO and its progressive marginalisation, even though the original project aimed at the reconstruction of a global economic system in which labour would have its place, *see* A. Supiot, *L'esprit de Philadelphie*, Seuil 2010.

[3] For a recent synthesis, *see* R. de Quénaudon et K. Martin-Chenut (dir.), *La RSE saisie par le droit – Perspectives internes et internationales*, Pedone, 2016.

agreements in this context, albeit still relatively modest, shows that the path of a transnational social dialogue, even if narrow, is not completely closed[4].

Mixing institutional considerations and specific norms intended for protagonists, the development of fundamental labour rights is also part of the response to a globalisation that cannot be solely economic. The abundance of standards in this area is spectacular[5]. It is well known that the International Labour Organisation, ever since the 1998 Declaration, has largely steered its action in favour of the development of these specific standards[6]. At the regional level, the 1994 North American Agreement on Labour (NAALC) complements the North American Free Trade Agreement (NAFTA) and lays down a number of fundamental rights inspired by the ILO Declaration, while expanding those rights already proclaimed[7]. For its part, the constitutive agreement of Mercosur is completed by a Social Declaration of 1998[8]. The effectiveness of these agreements remains disputed, but they do establish the reality of the progressive propagation of fundamental social rights.

But it is in Europe especially that fundamental social rights are diffused most effectively, through two essential instruments: the Charter of Fundamental Rights of the European Union and the European Social Charter. The first is distinctive for its substantial social chapter, likely to have a major influence on the EU as a whole[9]. The second has been adopted by the Council of Europe and is exclusively devoted to social issues. Far less famous than the European Convention on Human Rights, the European Social Charter has nonetheless gradually acquired a certain importance, to the point that we can now attempt to see it as a real "social constitution for Europe "[10].

These last two texts are distinctive in that they are backed by an institutional dispute settlement system: the Court of Justice of the European Union in the first case, and the European Committee of Social Rights in the other.

This myriad of fundamental norms and jurisdictional and para-jurisdictional forums inevitably generates confusion. However, it also testifies to the gradual emergence of new modes of dispute resolution, still largely under construction, compelling new methods of articulation of legal standards and legal orders.

The July 3d 2013 decision of the European Committee of Social Rights is emblematic in this respect[11]. Taken by an authority whose fame and legitimacy are still largely to be established,

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[4] A. van Hoek et F. Hendrickx, « *International private law aspects and dispute settlement related to transnational company agreements* », 20 october 2009, available on : ec.europa.eu/social/BlobServlet?docId=4815&langId=en (last accessed 10 Decembre 2017).

[5] On the whole, *see* I. Daugareilh (dir.), *Mondialisation, Travail et Droits Fondamentaux*, Bruxelles-Paris, Bruylant-LGDJ, 2005

[6] F. Maupain, « L'OIT, la justice sociale et la mondialisation », *Rec. Cours*, 1999. Vol. 278, p. 201.

[7] L. Compa, « L'ALENA et les droits fondamentaux des travailleurs des pays partenaires », in : I. Daugareilh, *Mondialisation, travail et droits fondamentaux*, supra, p. 83.

[8] G. von Potobsky, « La déclaration sociale du Mercosur », *in* : I. Daugareilh, *Mondialisation, travail et droits fondamentaux*, précité, p. 99.

[9] L. He, *Droits sociaux fondamentaux et droit de l'Union européenne*, Typed thesis, Paris 1, 2017.

[10] O. de Schutter, *La Charte sociale européenne : une constitution sociale pour l'Europe*, Burylant, 2010.

[11] CEDS, 3 juillet 2013, *Confédération générale du travail de Suède (LO) et Confédération générale des cadres, fonctionnaires et employés (TCO) c. Suède*, n°85/2012. On this decision, *see*, in French, K. Chatzilaou, « La réponse du Comité européen des droits sociaux aux arrêts *Viking* et *Laval* », *RDT*. 2014. 160 and N. Moizard,

devoid of the binding authority of a real international judicial decision and adopted in response to another decision which illustrated the limits of the fundamental rights of workers in a global economic context, the *LO and TCO v. Sweden* case is a most vivid illustration of the practical difficulties in protecting workers in a globalized world.

Let us be the judges of that.

From the Laval case to the lex Laval

The remote starting point of this procedure is the famous *Laval* judgment of the Court of Justice of the European Union[12]. This decision is specific to the EU, in that it can only be understood within the tightly woven network of economic liberties peculiar to the construction of Europe. In this sense, it does not concern the global labour market this chapter is about. It is nonetheless a particularly striking occurrence of the difficulties that market raises, even if this is only a local context. The mobility of labour is indeed at stake here, as well as the difficult confrontation between an economic sphere that bypasses borders and a social sphere firmly rooted within them.

The response of the Court of Justice to the refusal of a Latvian employer who had posted workers to a construction site to accept a Swedish collective agreement and to the subsequent blockade of the construction site is well known. The Court of Justice found that the employer was a victim of excessive interference with the freedom of movement. It considered, in its usual course of reasoning, that an obstacle to free movement of services was indeed established; that it could admittedly be justified by a fundamental right to collective action, which it sanctioned in passing; but that such justification entailed that a requirement of proportionality be met, which it was not in this case. The posting directive was of no assistance[13]: being a collective agreement that was not extended, but applicable only to its signatories, it could not benefit from the mandatory application mechanism provided for by the directive.

This summary does not do justice to the nuances and complexity of the case, but it shows how its stakes resided in the frontal shock between the liberalisation of trade – here free movement of services – and its social consequences. Most importantly, it explains that following this decision, Sweden adopted a law, significantly called the "lex Laval", whose purpose was precisely to restrict collective actions of employees aimed at the conclusion of collective agreements.

In practice, this law doubly limited the right to collective action against a company employing posted workers. Firstly, actions could only take place in a number of areas, essentially corresponding to the field of the posting directive; secondly, actions could have no other purpose than to require the employer to comply with minimum requirements, in particular with regards to remuneration, to the exclusion of more demanding claims.

« Le droit d'action collective en droit de l'Union après la décision *LO et TCO c. Suède* du Comité européen des droits sociaux », *RTDH*, 2015, p. 603.

[12] CJCE, *Laval*, aff. C-341/05 du 18 décembre 2007. Sur cette décision, v. dans le présent ouvrage l'analyse approfondie d'U. Grusic, « The Laval Case », *infra/Supra*, p. **XXX**.

[13] Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJEC*, n° L. 18 of 21 January 1997, p. 1.

The law thus constituted a restriction to the freedom of collective action of employees, which is yet undeniably a fundamental right. This is evident in the European Union: beyond the *Laval* case, the Charter of rights makes the right to collective action a fundamental right. In fact, the charter explicitly recognizes the right of workers "in cases of conflicts of interest, to take collective action to defend their interests, including strike action" (Article 28).

But it is not alone in this. This right to collective action is also enshrined in other fundamental rights instruments, notably in the European Social Charter, which sanctions in Article 6§4 "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike" [14].

It is on the basis of this charter that the Swedish lex Laval was challenged.

The Response of the European Committee of Social Rights

The European Social Charter includes a para-jurisdictional mechanism, in the form of an appeal to an expert panel, the European Committee of Social Rights. Its decisions have neither the binding force nor (for now) the prestige of the decisions of the European Court of Human Rights or, *a fortiori*, of the Court of Justice of the European Union. Nevertheless, they are an essential source for the interpretation of fundamental social rights.

Having activated the collective redress mechanism provided for in the Charter, some Swedish unions challenged the lex Laval's compliance with the Charter and, in particular, with Article 6§4. The Committee ruled in favour of the trade unions, in interesting terms that highlight the difficulties that may, in the future, characterize relations between the European Union and the Council of Europe in the social field. Three points are significant. The first two relate to the European Union in general, the third to the non-conformity of the national law with the Charter.

The first point is about the absence of a presumption of conformity of EU law with the Charter. It is well known that the European Court of Human Rights held in the famous *Bosphorus* case[15] that the compatibility of European legislation with the European Convention on Human Rights could be presumed. Taking note of the still minor place given to fundamental social rights in the Union, the Committee adopts here the opposite position, in stinging terms worthy of attention. It considers that (Nb. 74):

"Neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter".

Although the Committee also declares itself ready to change its position were the situation to evolve, it could hardly be clearer about the relative circumspection, if not suspicion, with which it contemplates EU law in social matters.

This is mostly due to the subordination in the EU legal order of social concerns to economic ones, which is the second point. The Committee here takes the exact opposite stance to the

[14] For a more systematic analysis of article 6, *see* part. F. Dorssemont, « Article 6: The Right to Bargain Collectively: A Matrix for Industrial Relations », in : N. Bruun et al., *The European Social Charter and Employment Relation*, Hart Publ., 2017.

[15] CEDH, 30 June 2005, *Bosphorus Airlines c. Irlande*, req. n° 45036/98

Court of Justice's in the *Laval* case. The latter, bound by its precedents and the mighty legal construction of the freedom of movement, started from the principle of freedom of movement to then assess whether an obstacle to it could be justified. In doing so, the Court prioritized economic requirements (freedom of movement) over social requirements (protection of fundamental rights of workers) by instituting a relationship of principle to exception. Yet this was not logically necessary, as the Committee decision very clearly shows. In fact, if one started reasoning from fundamental social law instead of freedom of movement, the reasoning would reverse. Thus, as stated by the Committee at number 121:

"Legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards."

The burden of proof reverses: it is for freedom of movement to not disproportionately affect the initial principle of workers' rights. The contradiction between these two reasonings is, of course, explained by the source of the interpreted norm: the EC Treaty in one case, the European Social Charter in the other. In this sense, this contradiction also illustrates the theory of constraints, which shows how much interpretation of the law is indissolubly linked to the configuration of legal systems and to the way protagonists think of it[16]. Nevertheless, by proposing the exactly opposite analysis, the European Committee of Social Rights offers argumentative resources to construct an alternative analysis to that of the Court, which can now apply to the EU system. Beyond the failed attempt of the *Monti II* proposal, which sought to establish equal treatment of freedom of movement and the right to collective action[17], the integration of the EU Charter of Fundamental Rights in primary law has enshrined a strict legal equality between fundamental rights and freedom of movement. Nothing but the historical precedence of the freedom of movement now imposes the hierarchy sanctioned in the *Laval* case. The European Committee of Social Rights here proposes an alternative route which could easily be taken by the Union.

The third point tackles the substance of the law. The condemnation of the Swedish law is final. After recalling the importance of the rights to collective bargaining and to collective action (Nb. 109), the Committee notes that "this statutory framework imposes substantial limitations on the ability of Swedish trade unions to make use of collective action in establishing binding collective agreements on other matters and/or to reach agreements at a higher level" (Nb. 112). It is therefore constitutive of a "disproportionate restriction on the free enjoyment of the right of trade unions to engage in collective action" (Nb. 123).

The opposition is thus total and the Swedish law, drafted as a simple application of the *Laval* jurisprudence and of the posting directive, is irrevocably condemned.

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[16] M. Troper, V. Champeil-Desplats, C. Grzegorczyk (dir.), *Théorie des contraintes juridiques*, LGDJ, Paris, 2005.

[17] European Commission, *Proposal for a council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, of 21.3.2012, COM(2012) 130 final.

One should be under no illusions about the immediate effectiveness of this ruling. If the lex Laval was indeed eventually repealed, it was only in April 2017, as the result of political changeover and not out of willingness to comply with the committee [18].

The fact remains, however, that the discussion in front of the European Committee of Social Rights clearly showcased a possible alternative discourse to a narrative that is all too often seen as reasonable or logically necessary. There is no logical necessity in the position of the Court of Justice, only a vision of the hierarchy of norms that can evolve.

The *LO and TCO v. Sweden* ruling, further than an isolated decision, should be viewed within a more general debate on the evolution of the articulation of standards in Europe and beyond, and on the emergence of a global jurisprudence of fundamental rights.

Articulating standards

The Laval debate arose out of a very technical issue: the posting of salaried workers, which is itself part of the larger debate on the law applicable to employment contracts in international situations.

In general, the model of labour mobility that underlies the conflict of law rules in labour law (Regulation 593/2008, Rome 1) is that of the long-term (if not definitive) integration of the worker in their host community. It is labour immigration that is first at issue. Such integration implies the application of the law of the place of performance of work, which will determine both the legal regime of the employment contract and, in the field of social security (Regulation 883/2004), that of social benefits. The innumerable advantages to the application of that law are well established. The fundamental requirements of a State's social cohesion entail that labour rules of that State be applicable to all workers in that territory and explain that these rules are very frequently mandatory. The predominance of the State of performance of work therefore justifies the applicability of its rules, in terms of labour law and of social protection.

But this scheduling gets blurred when employees are intrinsically mobile and thus have connections with several states. Workers employed in international transports, for instance, or, above all, posted workers, are attached to several legal orders at once, all of which, one way or another, may have an interest in imposing the application of their own rules. In the context of freedom of movement, this question fits within the issue of the competition between social systems, allowed by the encouragement of labour mobility, which causes concerns, as showcased in France with the irruption into public debate of the alien and nauseating figure of the Polish plumber.

The international private law question at stake remains fairly standard: it consists, in the face of a legal situation extending over different locations, in weighing the various connecting factors to find the most relevant one in order to designate the applicable law. But the relative neutrality of this technique is insufficient. The answer must consider both the substantial objectives of the European Union – ensuring free movement of workers - and the social concerns of States. Beyond the localisation process itself, the difficulty is to find an

[18] Danielsson, Michaela, Gustafsson, Anna-Karin, « Sweden : the repeal of Lex Laval », Eurowork, 14 July 2017, available at : https://www.eurofound.europa.eu/observatories/eurwork/articles/sweden-the-repeal-of-lex-laval.

equilibrium between opposing impulses: of the EU to enforce the free movement requirements, of States to uphold the fundamental principles of their social systems, and of individuals to benefit from the most advantageous rules. The extreme difficulty of reconciling these interests explains the great doctrinal attention paid to the question of the posting of salaried workers.

The search for this equilibrium led to the adoption of Directive 96/71 which, after decisions of the Court of Justice to that effect, enabled the host State to compel application of its laws as mandatory provisions in several specific cases, instead of the normally applicable law of the place of habitual performance[19]. The 1996 directive has had the practical advantage of putting an end to a major debate on the possibility of imposing application of the host State's rules, when in principle the home State laws applied; by providing a list of the specific cases concerned, it also put an end to a vast theoretical debate on the identification of these mandatory provisions.

But this answer was insufficient, as the *Laval* case showed. Beyond the applicability of collective agreements, which were at issue in the case, the real question was about the respect of the fundamental requirements of the host Stat's social relations system. The peculiarity of conventional labour relations in Sweden and the existence of a proactive model, alternative to the legicentric model at the heart of the 1996 directive, showed how inadequate this approach was. The question is not so much that of the mandatory provisions but whether to allow the social institutions of the host State to play the role which is theirs. In this respect, strictly regulating the possibility for trade unions to take collective action to improve working conditions, as required by the *Laval* case and the lex Laval, was a clear illustration of the pernicious influence on social systems of a too abruptly designed model of articulation of norms. More broadly, the debate showed how much the question is not merely the difficulty of the articulation of norms. There are, beyond coordination, substantial aims to preserve.

The European Union is now moving forward in this direction. The European Commission's proposal for the revision of the posting directive made on 8 March 2016[20] aims precisely to question the logic of pure articulation of standards, by introducing substantive considerations relating to equal treatment, particularly regarding remuneration. This solution goes directly against the *lex Laval*, which in terms of posted workers prohibited unions from claiming anything other than minimum wage through collective action.

The use of modes of articulation based on the reality of social relations in the country in question, not on an abstract view of the conflict rule, is a model to monitor closely. There is here, in our view, a more general sense of the evolution of private international labour law, by the progressive integration of substantive considerations into conflict of law rules.

A global case law of fundamental rights?

[19] Article 8§2 of the Rome 2 Regulation, which designates the law of the place of performance as applicable to the employment contract, adds that "The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country".

[20] Proposal for a directive amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final ; proposal then discussed within the Council (General Orientation 24 October 2017, 13612/17), then Parliament (Draft legislative Resolution of Parliament of 19 October 2017 (2016/0070(COD))

The decisions of the Court of Justice and of the European Committee of Social Rights are mostly about the legal order of the European Union. They can only be understood within the framework of the enshrinement of the freedoms of movement and, more broadly, of the economic integration specific to the European structure. In this respect, these decisions are but a milestone in a broader discussion that has gained momentum in the context of the economic crisis that has been rattling Europe since 2008.

The austerity measures implemented in many countries have led to such social regressions that they inevitably offend fundamental rights. In this respect, there is again a striking contrast between the Court of Justice and the European Committee of Social Rights.

The former sheltered behind the competence argument to justify extremely cautious – if not cowardly - solutions, which did not fail to disappoint. Several judgments held that determination between austerity measures and the protection of social rights was not within the scope of EU law[21]. This general statement is hardly convincing, especially as regards the Charter. The Court was not in any way asked to comment on the principle or the nature of the austerity measures themselves, but rather to compare some of their social provisions with the Charter. Those consequences undeniably fall within the scope of application of EU law, by virtue of Article 153 TFEU and extensive related secondary law. The competence argument, therefore, seems barely convincing[22].

The solution must, above all, be contrasted with the audacity of the European Committee of Social Rights, which ruled that the austerity measures imposed on Greece were contrary to the requirements of the Charter[23]. The particularly strong words of the Committee, deeming that the economic crisis could not justify the violation of fundamental social rights, are a striking contrast to the cautious technicality of the Court of Justice.

The generality of the Committee's words makes it possible to go beyond the European framework alone. The condemnation of the subordination of fundamental social rights requirements and the strong reaffirmation of their primacy, including against central economic freedoms, are part of the broader framework of development of international standards on fundamental social rights and arenas in which to invoke them. The multiplication of fundamental social rights has gradually led to the emergence of new para-jurisdictional actors, who will perhaps play their full role tomorrow. The OECD, the ILO and the Council of Europe are all opening today, with varying success, collective redress mechanisms allowing

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[21] v. CJUE, 27 décembre 2012, aff. C-370/12, *Pringle* ; more specifically on fundamental social rights see the cases relating to Portugal : ECJ, 7 march 2013, aff. C-128/12, *Sindicato dos Bancarios do Norte* ; ECJ, 26 june 2014, aff. C- 264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* ; ECJ, 21 october 2014, C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*.

[22] F. Martucci, « La Cour de justice face à la politique économique et monétaire : du droit avant toute chose, du droit pour seule chose », *RTDE*. 2013. 267.

[23] ECSR, 23 May 2012, *Fédération générale des employés des compagnies publiques d'électricité (GENOP-DEI) et Confédération des syndicats des fonctionnaires publics (ADEDY) c. Grèce,* n° 65/2011 et n° 66/2011). On these decisions, *see* part. J.-P. Marguénaud et J. Mouly, « Le comité européen des droits sociaux face au principe de non-régression en temps de crise économique », *Droit social*, 2013, p. 339 ; C. Deliyanni-Dimitrakou, « La Charte sociale européenne et les mesures d'austérité grecques : à propos des décisions nos 65 et 66/2012 du Comité européen des droits sociaux fondamentaux », *Rev. Dr. Trav* 2013, p. 457.

protagonists themselves, and in particular the unions, to challenge national rules and practices[24].

In this respect, the "case law" of the European Committee of Social Rights contributes to the creation of a "global case law of fundamental rights" in the sense of a process generating a stock of potential solutions, rendered in deterritorialised frameworks, and from which national or international judges could draw[25].

This gradual affirmation of fundamental human rights in labour thus shows that the creation of a global labour market does not inevitably lead to a weakening of the protection of workers. The path will of course be very long, but it is certainly one worth taking. This is also one of the lessons of the *LO and TCO v. Sweden* decision.

[24] I. Daugareilh, « Les modes de règlement para juridictionnels des différends relatives aux droits sociaux dans les organisations internationales », *in* : M.A. Moreau et al. (dir.), *Justice et mondialisation*, Dalloz, 2010, p. 235.
[25] E. CARPANO, « Réflexions sur l'idée d'une jurisprudence globale des droits fondamentaux », in *Mélanges en l'honneur du Professeur Dominique Turpin*, *Etat du droit, état des droits*, *L.G.D.J*, 2017, p.507.