

POSTING OF WORKERS AND
COLLECTIVE LABOUR LAW:
THERE AND BACK AGAIN

Between Internal Market and
Fundamental Rights

Marco ROCCA



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FOREWORD

On the 27th of May 2014, Marco Rocca defended his Ph.D. thesis at the Law Faculty of the *Université Catholique de Louvain*. I had the privilege and the pleasure of being the supervisor of this thesis as well as the promotor of its author. The title of his thesis (Posting of workers and collective labour law: there and back again) refers to a phenomenon which has been regulated by a well-known EU Directive (96/71, PWD). This EU Directive essentially deals with the law applicable on an individual employment relation. It does not tackle the question whether or to which extent posted workers have access to the system of industrial relations of the Host State. However, in defining the law applicable to the individual employment relation, the Directive does take into account collective agreements which have been declared universally applicable for employers in the construction sector of the Host State.

By the end of 2007, the *Laval* judgement of the CJEU stirred the attention of labour lawyers around Europe for the impact of the PWD on existing systems of industrial relations in the Member States. Two subsequent judgment *Rüffert* and *Commission v Luxembourg* corroborated the impression that the freedom to provide services as fleshed out in the PWD restricted not just the ability of social partners but also of governmental actors to combat social competition between posted workers and workers of the Host State. Labour Law was being construed as a ceiling rather than as a floor. Though the case of the posted workers is not the first illustration of “negative integration” operated by economic freedoms to the detriment of fragments of the labour law *acquis* at member State level, it is unprecedented insofar as it affects a tension between fundamental economic freedoms and genuine fundamental rights. The subtitle of the Ph.D. thesis reads “between internal market and fundamental rights”. Insofar as some of the fundamental rights are crucial for the empowerment of workers and the progressive development of labour law, the case of the posted workers raises serious question as to the commitment of the EU to uphold fundamental (workers) rights. It might even be said that the relation of values and objectives of the Union as fleshed out in Articles 2 and 3 of the TEU is in fact reversed, since some objectives cease to be instrumental to the values the EU seeks to promote.

Though the case law which has inspired the Ph.D. research project had already been commented by an impressive amount of leading labour law scholars at the very start of the project, the Ph.D. thesis stands out for its attempt to contextualise the case law through the concepts of industrial relations in comparison to the concepts of collective labour law. Furthermore, it situates the recent case law on

posted workers in a broad historic perspective which predates the adoption of the PWD. During the drafting of the Ph.D. thesis, the tension between fundamental freedoms and fundamental rights within the EU became even more apparent due to the critical observations of supervising bodies of international instruments which enshrine these social rights within other international legal orders (Council of Europe, ILO). A tension between legal standards within the EU has thus amounted to a clash between legal orders and the (quasi) judicial bodies of these legal orders. The author also analyses the failed attempt of the EU (the so called “Monti II Proposal”) to deal with the discomfort the cases generated. The period of the drafting process also coincides with the financial and economic crisis. The approach of the new economic governance to national systems of collective labour law is being confronted with the judicial interpretation of the PWD.

Marco Rocca is the very first Ph.D. student to have survived me as a supervisor. I already knew that the defence of a Ph.D. thesis can be an emotional event for anyone trying to defend such a *magnum opus* during several consecutive hours. Marco has helped me to understand that such an event is moving as well for a supervisor. The notion of a Ph.D. *student* is an unfortunate one. During 5 academic years Marco has been in fact one of my closest collaborators. His assistance in the preparation of many scientific projects (seminars, conferences and the functioning of our labour law department) was invaluable. Marco has been an ideal collaborator. He does not await an instruction, but he proposes to solve practical problems, before you have actually sensed and identified them. I only had to dissuade him not to ask to carry my bags, since in Belgium we don't consider assistants to be our “*portaborse*”.

My decision to recruit him was one of my most fortunate professional decisions. I was happy enough to adopt that decision together with Pierre-Paul Van Gehuchten and Yves De Cordt who accepted my request to participate in a recruitment panel. Italy has generously offered its *meglio gioventù*. Marco has been able to integrate smoothly in a distinct academic environment enriching it with the grand tradition of Italian Academia. His double training as a lawyer at the University of Pisa and as a student enrolled in the prestigious *Scuola Superiore Sant'Anna* proved to be worthwhile. He has been able to function in two languages which were not his own by birth, teaching in French and publishing in English, (Italian) and French. His *magnum opus* provides proof of erudition profiting from the legal scholarship versed in all these European languages. His deeply rooted convictions which I was able to share to a large extent have helped him to be creative as a legal scholar, although never abandoning the technical skills of his art and reserving literate formula's to the original titles and subtitles of the various chapters. His confidence deprived of arrogance was reassuring to him and his supervisor. I am grateful to Pascale Vielle and Pierre-Paul Van Gehuchten for speaking out during the meetings of his *comité d'accompagnement* and to two outstanding European labour lawyers for joining the jury: Simon Deakin, “our” Doctor *honoris causa* and Giovanni Orlandini (whose scientific

work so wonderfully combines the European law issues of posting of workers and collective labour law). Furthermore, Philippe Pochet's (General Director of ETUI and guest professor at UCL) membership of the Jury, was salutary due to the meta-legal approach of the Thesis.

I am extremely grateful to Alexia Autenne of our Research Department for giving Marco the opportunity to continue his post-doctoral years after finishing his Ph.D. thesis. I am confident that we will be able to learn and read more of him in the years to come, wherever Fate will guide him.

Filip DORSSEMONT

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*‘Ci spetta il tepore dei bagni. Possano i giorni trascorrere senza meta.
Non si prosegue l’azione secondo un piano’¹*

— Luther Blisset, Q

First of all, I would like to thank wholeheartedly my supervisor, Filip Dorsemont, for his support, his encouragement and, above all, for his warmth. Though he always respected my autonomy and intellectual freedom, I profited enormously from our frequent discussions about law, history, arts, food, beer and wine. Indeed, as I sit here finalising these acknowledgments, I still cannot quite believe my luck in finding such a supervisor.

I am grateful to Pierre-Paul Van Gehuchten and Pascale Vielle, who, together with my supervisor, have composed the enriching *comité d’accompagnement* of my thesis. I owe also a great deal to the members of the jury: Simon Deakin, Giovanni Orlandini and Philippe Pochet. Their comments and critiques have greatly improved the final version of my thesis.

Funding for this project was provided by the *Fonds Nationale de la Recherche Scientifique* (FNRS) and by the *Atelier de Droit Social* of the *Université Catholique de Louvain*. Their financial support made possible the completion of the thesis. Further thanks are due to all the colleagues of the *Centre de Recherche Interdisciplinaire Droit Entreprise et Société* (CRIDES) who welcomed me with open arms, dispelling the initial loneliness as soon as the first *dîner du Centre*. Thanks, in particular, to the administrative staff, Catherine and Ariane, and to all the Ph.D. students and teaching assistants with whom I shared this epic quest: thanks to Auriane, my sister-in-research, to Aurélie, Elise, Alice, and to all the others.

I would also like to extend my thanks to the many wonderful researchers I met during the countless conferences and seminars which punctuated these years. If I should single any out, many thanks go to all the participants of the three editions of the Pontignano Seminar to which I had the occasion to participate.

As for every important achievement of my life, I owe a debt of gratitude to my friends, for their support ... and for all the rest. True to the situation of our generation, this support came often from far away, our little fellowship having been scattered to the four corners of Europe (and beyond). This only makes me

¹ “We deserve the warmth of baths. May the days be aimless/Do not advance the action according to a plan.”

all the more grateful for their continued presence in my life. Indeed, some of them went as far as to accept to proofread one or more chapters of my thesis, in a spectacular display of friendship if there ever was one. Thus, thanks to Alessandro, the brother in arms of many an online battle, to Cinzia, who often tries to interrupt those battles, to Rosa, my family-in-Brussels, and to the others who hopefully know that they are included here.

Special and heartfelt thanks go to my parents, Fabrizio Rocca and Elena Beisso, for their endless encouragement and for the pride they always showed for my work. Their own work as trade unionists and political activists has been and continues to be an inspiration to me. Thanks to my brother Luca, for counterbalancing all this inspiration with a healthy dose of chaos.

This research has been a truly transnational work. Indeed, it has been written as much in my office at the *Université Catholique de Louvain* as “up in the air”. Hence, 400 flights (and counting) later, my final thanks go to Margherita. Thank you, for being the sanctuary island for the pirate ship of my soul.

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