

**Freedom of Association as a
Foundation for Trade Union Rights: a
Comparison of EU and ECHR
Standards**

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Abstract

The title of this thesis is *Freedom of Association and Trade Union Rights in Europe, Comparative Analysis of the ECJ and ECtHR Case Law*. There are several issues that the thesis will try to shed light on. Firstly, it will identify what level of freedom of association as a trade union right is deemed acceptable at the international and European levels. At the international level the ILO and ESC standards will be looked at, while at the regional level I will research the case law of the two European Courts – CJEU and ECtHR. Secondly, the standards of the CJEU and ECtHR will be compared to each other. This way, we will know which of the two protects trade union rights better and where there might be flaws. Thirdly, after comparing the CJEU and ECtHR standards with each other, they will be compared to the international standards of the ILO and ESC. This way I will check how the regional standards are in concert with the international standards that are respected worldwide. Finally, the prospects of EU accession to the ECHR will be looked at. Here I will investigate whether the accession might affect the protection of trade union freedoms in Europe, and if so, in what way.

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List of abbreviations

AA	Accession Agreement
AFL	American Federation of Labour
AG	Advocate General
ASLEF	Associated Society of Locomotive Engineers and Firemen
AEntG	Germans' Transposition of the Posted Workers Directive
CJEU	Court of Justice of the European Union
COE	Council of Europe
CESCR	Committee on Economic, Social and Cultural Rights
CDDH	Steering Committee for Human Rights
ECSR	European Committee on Social Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ESC	European Social Charter
ECOSOC	Economic and Social Council
ECSC	European Coal and Steel Community

EEC	European Economic Community
EURATOM	European Atomic Energy Community
EC	European Community
ECSCR	European Committee on Social Rights
ETUC	European Trade Union Confederation
FOG	Flag of Convenience
FSU	Finish Union of Seamen
HRC	Human Rights Committee
ILO	International Labour Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGC	International Governmental Conference
ILC	International Labour Conference
ITF	International Federation of Transport Worker' Union
LO	Swedish Trade Union Confederation
Lex Laval	Foreign Posting Employees Act
MBL	The Law on Workers' Participation in Decisions 1976
NGO	Non-Governmental Organization

QMV	Qualified Majority Voting
RMT	National Union of Rail, Maritime and Transport Workers
SEA	Single European Act
SPA	Social Policy Agreement
SPP	Social Policy Protocol
TEU	Treaty on European Union
TFEU	Treaty on Functioning of the European Union
TCO	Swedish Confederation of Professional Employees
TEC	Treaty on European Community
TULRCA	British Trade Union Consolidation Act 1992
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UCLH	University College London
WWII	World War II
WFTR	World Federation of Trade Unions

Chapter I – Introduction

The title of this thesis is *Freedom of Association and Trade Union Rights in Europe, Comparative Analysis of the ECJ and ECtHR Case Law*. There are several issues that the thesis will try to shed light on. Firstly, it will identify what level of freedom of association as a trade union right is deemed acceptable at the international and European levels. At the international level the ILO and ESC standards will be looked at, while at the regional level I will research the case law of the two European Courts – CJEU and ECtHR. Secondly, the standards of the CJEU and ECtHR will be compared to each other. This way, we will know which of the two protects trade union rights better and where there might be flaws. Thirdly, after comparing the CJEU and ECtHR standards with each other, they will be compared to the international standards of the ILO and ESC. This way I will check how the regional standards are in concert with the international standards that are respected worldwide. Finally, the prospects of EU accession to the ECHR will be looked at. Here I will investigate whether the accession might affect the protection of trade union freedoms in Europe, and if so, in what way.

Now, in a few paragraphs, I will explain how the idea of this thesis emerged and why this research might be interesting for future developments in the field of trade union freedoms in Europe. Everything started with the famous case law of ECJ on *Viking* and *Laval* in 2007. The Court sent several important messages with these cases: it recognizes the protection of human rights and particularly trade union freedoms as important aspects of EU law, which stem from the constitutional traditions of the member states and therefore constitute the general principles of EU law. However, the Court made clear that these rights must be

reconciled with the fundamental freedoms of the EU, which are the basic fundament of the Union. According to the Court, while human rights can trump fundamental freedoms in certain cases, the other way round is also possible, which is what happened in the *Viking* and *Laval* and later in the *Rüffert* and *Luxembourg* cases. The position of the Court on this issue has not changed since then; economic freedoms are a priority in the Union, which, after all, were the main reason behind its creation.

These cases are also alarming, since they do not only subordinate human rights to fundamental freedoms, but at the same time lower standards of protection for posted workers. The Posted Workers Directive, which was always understood to offer the minimum standards for states to comply with, was interpreted so narrowly by the Court that it can be easily argued that it now circumscribes the maximum level of protection for posted workers, and that states cannot introduce higher standards of protection even if they wish to do so. This position of the Court created more stability and certainty for companies posting workers, but it significantly lowered the standards of protection of these workers and put states willing to offer better protection for posted workers in a very difficult situation.

This position of the Court is justified by the creation of a single market economy without borders, as a result of which the creation of wealth will be intensified and better living conditions will be guaranteed for everybody in the future. But this is in future. In the *Viking Opinion* Advocate General Maduro acknowledges that the creation of the common market might have negative consequences for workers in

Europe. He thinks that society in general should commit itself to supporting such workers economically in this difficult period of transition.¹

As a response, another regional Court in Europe – ECtHR – started to further promote trade union rights protection within its jurisdiction. Soon after the ECJ judgments the European Court of Human Rights (ECHR) delivered two judgments (*Demir and Baykara* (2008) and *Enerji Yapi-Yol Sen* (2009)) on Article 11 ECHR. In these judgments the European Court overturned its previous case law on freedom of association, in which it had stated that the right to collective bargaining, the right to conclude collective agreement and the right to strike are means that the state may or may not choose to acknowledge for the protection of trade union freedoms (*National Union of Belgian Police v Belgium* 1975; *Swedish Engine Drivers' Union v Sweden* 1976; *Schmidt and Dahlström v Sweden* 1976; *Gustafsson v Sweden* 1996). Instead, in the cases of *Demir and Baykara* and *Enerji Yapi-Yol Sen* the ECHR embraced a right to collective bargaining, a right to conclude a collective agreement and a right to strike as essential elements of the freedom of association protected under Article 11 of the European Convention.

The *Demir* and *Enerji* cases can be considered as a step forward in the jurisprudence of the ECtHR. Even though the Court was not very explicit about recognizing the right to strike as an inherent element of the freedom of association, it still has improved its attitude towards this right by citing the international standards of the ILO and ESC where the right to strike enjoys the

¹ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007], Opinion of AG Maduro; Para. 57-59.

highest level of protection and is considered a very important tool for the trade unions to protect the interests of their members.

Certainly, these decisions fuelled the trade union rights protection in Europe with new energy. But they also served another, no less important purpose: they repudiated one of the main arguments of the ECJ mentioned in the *Viking* and *Laval* cases. In these cases, parties in support of trade unions claimed that a right to strike is a fundamental right and the freedom of movement provisions of EU should not oppress this right. One of the arguments used by the ECJ and Advocates General against this claim was that the ECHR does recognize it, but only as one of the means, necessary for the protection of trade union freedoms, that may or may not be used by states to achieve the protection of the freedom of association as a trade union freedom. The ECJ cited the previous cases of the ECtHR (before *Demir* and *Enerji*) where the Court was of the opinion that the right to strike is important but not necessarily the only means for the protection of trade union freedoms. In the case of *Enerji*, this was not mentioned again. Instead, the ILO and ESC standards were cited.

The ECtHR did not stop at that. In the RMT judgment issued in 2014 the Court, for the first time, recognized secondary strikes as strikes protected under Article 11 of the Convention. Even though the Court did not take full notice of the international standards and approved a total ban on this right by the UK, it still can be said that for the sake of future developments in the field this can be considered a progressive step.

One important thing about the ECtHR case law is that the Court actively started to refer to the standards of the ILO and ESC. In the cases of *Demir* and *Enerji* the

Court offered these standards without providing any interpretation of them. It means that the Court trusts the ILO and ESC on their interpretations and does not challenge them in any sense. Therefore, the ILO and ESC standards are also important to consider.

Despite the shift in the case law of the ECtHR, the position of the CJEU on the matter did not change. The CJEU still did not overturn its proportionality test on which it based its conclusions in the cases in 2007-2008. Trade union freedoms still need to be reconciled with economic freedoms. It is true, however, that unlike the CJEU, the ECHR does not have to deal with the economic freedoms of the EU. One might well argue that the situation of the ECtHR is much easier: it is a human rights court, without any other concerns.

In 2009 the Lisbon Treaty entered into force. It added a totally new dimension to the relationship between social rights and economic freedoms in Europe. The Treaty has a special focus on social Europe. According to article 2 (3) TEU the Union shall establish a social market economy “aiming at full employment and social progress”.

The Lisbon Treaty brought two major novelties: the prospect of accession of the EU to the ECHR and the binding effect of the EU Charter on Fundamental Rights. Article 6 (2) TEU provides the legal basis for the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, at the same time securing that the Union’s competencies shall not be affected.

The preparation for the accession started immediately after the Lisbon Treaty. Both European Courts were actively involved in the long process of negotiations

as a result of which the Accession Agreement was concluded in 2013. The agreement was sent to the CJEU for approval. Surprisingly, the CJEU did not approve it, on the grounds that it violated the autonomy of the EU and EU law. This was a result that not many commentators were expecting. The process of accession was seriously hindered, but I still believe that accession is an unavoidable outcome. The accession is provided for by the Treaty of Lisbon, it reflects the interests of all the parties (member states) who negotiated the Treaty among themselves. This is enough reason to believe that the accession is still going to happen. After accession the CJEU will have an explicit obligation to take a notice of ECtHR standards on human rights protection, including trade union freedoms. As a result, the CJEU might be formed as a more human rights-oriented court.

Another novelty of the Lisbon Treaty is the European Charter of Fundamental Rights 2000, which has acquired legally binding force. According to article 6(1) of the Lisbon Treaty the Union recognizes the rights, freedoms and principles set out in the Charter and gives them the “same legal value as the Treaties”. The Charter contains a comprehensive list of all sorts of human rights, including social and economic ones.

There is a detectable trend that after the Lisbon Treaty the ECJ started to make reference to the Charter as a main source of human rights in the EU legal order.² The question is how the CJEU interprets the rights mentioned in the Charter. As the discussion below shows, this is a problematic question. One thing that can be mentioned here is that the Charter, even though stating that the rights mentioned

² Steve Peers, *EU Justice and Home Affairs Law*, third edition, Oxford EU Law Library, 2012, p. 100.

in it have the same scope as the rights in the ECHR, also implies that the specific characteristics of the EU have to be respected. In other words, the CJEU has freedom to interpret the rights from the Charter differently, justifying it by preserving the specificities of the EU and EU law. After accession, the CJEU will be more motivated to interpret rights according to ECHR standards in order to avoid embarrassing situations, when the ECtHR establishes a violation of human rights standards by the EU organs.

As is clear from this brief description, the standard of trade union protection is not easy to establish in Europe. On the one hand there are two European Courts with different agendas. On the other hand there are existing standards established by the respective international organizations. Moreover, there are member states that of course are subordinated to the decisions of the institutions they are part of, but at the same time, are the ones (especially in the case of the EU) who create these organizations and define their agendas.

The uncertainties caused by these developments might confuse those member states that are members of both European organizations – the EU and the CoE – and therefore are subject to the jurisdiction of the both European Courts, acting within the framework of both these organizations. Therefore, it is very important to find what level of protection of trade union freedoms in Europe is considered acceptable.

1.1 Research Questions and Methodological Aspects

The divergent attitude of the two European Courts in relation to social rights combined with the fact that they operate in the same region and that, therefore, the same countries are subject to their jurisdiction makes it important to research

these issues. Therefore, the two main research questions of this thesis are the following: 1. **What is the lower acceptable level for freedom of association in Europe?** 2. **How can it be changed after the EU accession to the ECtHR?**

In answering these questions I will focus on two major aspects: firstly, I will analyze the jurisprudence of the European Courts and study what is the current situation in terms of recognition of freedom of association as a trade union right. By comparing the judgments of the Courts I will establish which aspects of the freedom of association are already recognized and applied in practice and which are not. Secondly, I will study the accession issue of the EU to the Convention and analyze the changes that social Europe might face in case of such an accession.

The methodology that I use in the thesis is mostly comparative. First, I compare the recent case law of the European Courts with their old judgments and this way will show the shift (in certain cases progressive) the Courts have made in their jurisprudence. In the second stage, the jurisprudence of the European Courts will be compared. The results of this comparison will be compared to the standards of the ILO and ESC, in order to see how the European Courts comply with the established international standards.

The thesis will consist of eight major chapters. The first chapter is the introduction. The following two chapters (II and III) will explain the notion of freedom of association as a trade union right from an international and an ILO perspective. The next two chapters (IV and V) will discuss the current developments in Europe and especially the case law of the ECJ and the ECHR. Chapter VI will make a comparison between ECJ and ECtHR case law. Chapter

VII will deal exclusively with the issue of EU accession to the European Convention. And finally, the last chapter, VIII, will summarize the findings of the thesis.

Chapter II – Freedom of Association from an International Perspective

2.1 The International Bill of Human Rights

The period after the Second World War is considered to be the period in which modern international human rights law starts to emerge. The atrocities committed during the war made clear to the international community that there was a need to establish strong institutional mechanisms in order to guarantee legal protection of human rights, and in this way to achieve world peace and security.³ It became evident that national governments could not guarantee the safety and liberty of their people; in fact, some of them even became the machinery for killing. Therefore a broad worldwide consensus was achieved to place the individual human being under the protection of the international community.⁴

At the San Francisco Conference in 1945 there was a request from some Latin American countries to include in the Charter of the United Nations a full code of human rights. The code was not included; however, the basic principles were set.⁵

In the preamble of the UN Charter the member states take obligation “to save

³ *International Human Rights Law: Six Decades after the UDHR and Beyond*, M.A. Baderin and M. Ssenyonjo (Eds.) Ashgate Publishing Co., 2010, p. 6

⁴ *Introduction, International Covenant on Civil and Political Rights, New York, 6 December 1966, Audiovisual Library of International Law*, by Christian Tomuschat, available at: <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html>

⁵ *Ibid.*

succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”.⁶ In the same preamble the member states also determine themselves “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” (Para 2). We also read in the Charter that one of the purposes of the UN, among others, is to “achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (Article 1.3). Furthermore, the Charter states to promote “universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (Article 55.1). In order to achieve these goals the Charter obligates all member states to “take joint and separate action in co-operation with the Organization” (Article 56).

The UN Charter, despite not listing the specific contents of human rights and freedoms, created an important basis for the further development of international human rights law. On the basis of the Charter an Economic and Social Council was created. The Council was asked to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all” (Article 62.2, UN Charter).⁷

During the first session the Economic and Social Council established a Nuclear Commission on Human Rights in order to propose terms of reference, size and

⁶ UN Charter, Preamble, Para. 1

⁷ *Supra note 3.*

membership of the new Human Rights Commission.⁸ The Human Rights Commission in turn established a drafting committee and the work on the International Bill of Human Rights was started.⁹

The first general Draft Outline of International Bill of Human Rights was prepared by the Secretariat of the United Nations and was presented to the Drafting Committee of the Commission on Human Rights.¹⁰ The Commission on Human Rights decided to divide the work on the International Bill of Human Rights and to set up three working groups: one group to work on the International Convention on Human Rights, a second group on the Declaration of Human Rights, and the last one on implementation issues.¹¹ During the working process the drafting committee considered the comments and suggestions of governments¹² and other international and national bodies. In the end, because of a lack of time, the Commission decided to deliver only a declaration to the General Assembly.¹³ After some deliberations it was decided to name the

⁸ *Nuclear Commission on Human Rights, 29 April-21 May 1946, Hunter Collage, New York, The Universal Declaration of Human Rights, an Historical Record of the Drafting Process*, available at: http://www.un.org/Depts/dhl/udhr/meetings_1946_nuclear.shtml

⁹ *Drafting Committee on an International Bill of Human Rights, 1st Session, 9-25 June, 1947, Lake Success, New York, The Universal Declaration of Human Rights, an Historical Record of the Drafting Process*, available at: http://www.un.org/Depts/dhl/udhr/meetings_1947_1st_draftcom.shtml

¹⁰ *Ibid.*

¹¹ *Commission on Human Rights, 2nd Session, 2-17 December, 1947, Geneva, The Universal Declaration of Human Rights, an Historical Record of the Drafting Process*, available at: http://www.un.org/Depts/dhl/udhr/meetings_1947_2nd_chr.shtml

¹² The United Kingdom representative on Human Rights Commission, Lord Dukeston submitted to the Commission the Draft of the International Bill of Human Rights in the form of legal instrument. It is notable that the draft did not mention trade unions, however, Article 16 of the Draft stated the protection of freedom of association where the term “association” is understood “as the widest possible term and is intended to include the creation of entities having juridical personality”, Commission on Human Rights, Drafting Committee, E/CN.4/AC.1/4, 5 June 1947

¹³ Peter Danchin, *Drafting History, Third Session of the Human Rights Commission*, Columbia University, available at: http://ccnmtl.columbia.edu/projects/mmt/udhr/udhr_general/drafting_history_8.html

Declaration ‘Universal Declaration of Human Rights’, and it was adopted on 10 December 1948 by the General Assembly with 48 members in favour and 8 abstaining.¹⁴ It was the first international document containing internationally agreed human rights drafted by the Commission on Human Rights.

However, it was understood that in order to effectively shape the lives of people there was a need to translate the substance of the Declaration into the hard legal form of an international treaty.¹⁵ Therefore, on the same day in which the Declaration was adopted, the General Assembly requested the Commission on Human Rights to continue its work and to prepare a draft for a human rights covenant and measures of implementation.¹⁶

In 1949 the Commission examined the draft of eighteen articles on civil and political rights. After the General Assembly declared that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” (Section E, Resolution 421(V), 4 Dec, 1950), the Commission drafted 14 more articles on economic, social and cultural rights in 1951. The Commission also drafted 10 articles on measures of implementation according to which state member parties to the covenant were obliged to submit periodic reports. After a long debate during the sixth session in 1951/1952, the General Assembly requested the Commission to draft two separate covenants, one on civil and political rights and the other on economic, social and cultural

¹⁴ General Assembly, 3rd Session, Paris, Plenary, 21 September to 2 December, 1948; The Universal Declaration of Human Rights – An Historical record of the Drafting Process, available at: http://www.un.org/Depts/dhl/udhr/meetings_1948_3rd_ga_plenary.shtml

¹⁵ *Supra note 4.*

¹⁶ *Towards the International Covenants, Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights,* available at: <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

rights. The Commission completed the drafting process in 1954; however, it was not until 1966 that the two Covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – were adopted by the General Assembly. Along with these Covenants the First Optional Protocol to the International Covenant on Civil and Political Rights was also adopted. In 1989 the General Assembly adopted the Second Optional Protocol to the Covenant on Civil and Political Rights.¹⁷ The two Covenants together with the First Optional Protocol have entered into force in 1976. The Second Optional Protocol entered into force in 1991.¹⁸

On 10 December 2008 the General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. After receiving ten ratifications from member states the Protocol entered into force on 5 May 2013.¹⁹

The long-lasting process of adoption of the International Bill of Human Rights has finished. As of October 2015 it consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, together with its Optional Protocol and the International Covenant on Political and Civil Rights together with its two Optional Protocols.²⁰

¹⁷ *Ibid. Second Optional Protocol.*

¹⁸ *Ibid. Entry into Force of the Covenants and the Optional Protocols.*

¹⁹ The ten states that ratified the Protocol are the following: Ecuador, Mongolia, Spain, El Salvador, Argentina, Bosnia and Herzegovina, Bolivia (Plurinational State of), Slovakia, Portugal, Uruguay; UN, Chapter IV, Human Rights, 3.a. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3-a&chapter=4&lang=en

²⁰ *Supra note 16.*

2.1.1 Trade Union Rights in the UDHR

The text of the first draft outline of the International Bill of Human Rights prepared by the UN Secretariat did not mention “trade union” at all. The only reference was made to freedom of association in Article 20 which was structured in the following way: “there shall be freedom to form associations for purposes not inconsistent with this Bill of Rights”.²¹

After considering the comments and suggestions of governments and other international and national bodies the Drafting Committee submitted the redrafted texts of the Declaration and Covenant to the third session of the Commission on Human Rights. For the First time the text of the draft Declaration mentioned trade unions in relation to freedom of association. Article 19 was formulated as follows: “everyone has the right to freedom of peaceful assembly and to participate in local, national, international and trade union associations for the promotion, defence and protection of purposes and interests not inconsistent with this declaration”. At that stage, Article 23 did not mention the right to form and join trade unions; however, France suggested adding the following sentence to Article 23: “he shall be free to join trade unions for the protection of his interests”. United States also suggested mentioning the right “to join trade unions of his own choice”.²² In the report of the third session of the Commission on Human Rights submitted to the Seventh Session of the Economic and Social Council the Paragraph 4 of Article 21 was construed in the following way: “everyone is free to form and join trade unions for the protection of his interests”.

²¹ Draft Outline of International Bill of Rights E/CN.4A/C.1/3, prepared by the Division of Human Rights of the UN Secretariat and presented to the Drafting Committee of Commission on Human Rights, 4 June 1947.

²² *Draft International Declaration on Human Rights*, Report of the Drafting Committee to the Commission on Human Rights E/CN.4/95, Commission on Human Rights, Drafting Committee, Second Session, 21 May 1948.

Finally, it was decided to structure Paragraph 4 Article 23 of the UDHR as follows: “everyone has the right to form and to join trade unions for the protection of his interests”.

2.1.2 Trade Union Rights in the ICESCR

The right to form and join trade unions is guaranteed by Article 8 of the ICESCR.

Paragraph 1(a) of the Article reads as follows:

1. The state parties of the present Covenant undertake to ensure:
 - a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restriction may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

Article 8 Paragraph 1 also guarantees the right of trade unions “to establish national federations or confederations” (Para 1.b), “to form and join international trade-union organizations” (Para 1.b) and “to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others” (Para 1.c). In order to ensure effective implementation of these rights in practice, Article 8, Para 1.d protects the right to strike “provided that it is exercised in conformity with the laws of the particular country”.

The Article offers a restriction clause. Paragraph 2 permits member states to restrict the exercise of these rights for the members of the armed forces, police or administration of the state.

Finally, Paragraph 3 refers to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize. According to the Paragraph, the state parties to that Convention shall not be authorized “to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention”.²³

2.1.2.1 The Travaux Preparatoires

During the drafting process of the Covenant there was debate about the need to include an article on trade unions. Those against the inclusion argued that the freedom of association was already mentioned in the UDHR (Article 20) and in the draft Covenant and that it was “unduly repetitious” to include the article on trade unions in the Covenant. It was also argued that mentioning only trade unions would put other forms of association (such as co-operative societies), which might equally be important, in a discriminatory position.²⁴

On the other hand, the supporters of the trade union article stressed the fact that trade unions were a “necessary instrument for implementing economic, social and cultural rights”. They argued that the implementation of economic, social and

²³ The main idea for the inclusion of such a provision in the article was to avoid any conflict between the Covenant and the Convention. Interestingly, it should be noted that no similar provision was adopted in relation to Articles 6 and 7 of the Covenant, which also guarantee labour rights.

²⁴ Mathew C. R. Craven, 7, *The Right to Form and Join Trade Union, The International Covenant on Economic, Social and Cultural Rights, A perspective on its Development*, Clarendon Press Oxford, 1995, p. 249-250.

cultural rights mostly depends on trade unions and therefore there is a need to include a separate article on trade union rights to guarantee better protection for these rights; and that merely mentioning the freedom of association could not guarantee that the intended purpose would be achieved.²⁵

The early draft of the article on trade union rights was limited to only one Paragraph containing only the right to form and join trade unions. Later, because of pressure from Latin American and socialist states, it was decided to expand the article.

During the discussion on states' obligations to "ensure" the rights enumerated in Article 8.1 it was agreed that progressive implementation²⁶ could not be invoked in relation to trade union rights, while there was no need of any expenditure on behalf of a state; the only action required from states was self-restraint and non-interference. The representative of the UK supported this approach. According to him, the rights enumerated in Article 8 should be subject to definite and immediate obligations and not progressive in character since the article requires the states "to undertake to ensure" the rights.²⁷

The representatives of some states indicated that the obligation to ensure was not solely negative. Referral was made to the obligation to promote trade unionism among workers, which required positive action from the state.²⁸ However, this

²⁵ *Ibid.* p. 250

²⁶ Under Article 2.1 of the ICESCR the rights mentioned in the *Covenants* are generally subject to progressive implementation, unlike the rights mentioned in the ICCPR. Trade union rights are mentioned in both *Covenants*. Therefore, for the purpose to avoid the situation when the same rights are interpreted by the ICCPR as immediately implemented and by the ICESCR as progressively implemented, it was decided that some rights from the ICESCR (including trade union rights) should be implemented in an immediate manner. *Ibid.* p. 261

²⁷ *Ibid.* p. 251

²⁸ *Ibid.*

can hardly be invoked as a reason for non-immediate application. According to the Committee on Economic, Social and Cultural Rights, Article 8 “would seem to be capable of immediate application by judicial and other organs in many national legal systems” and “any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain”.²⁹

The right to strike was one of the most debated issues during the adoption of Article 8. However, the majority of states thought that the right was essential for the protection of economic and social interests and that it was not possible to guarantee trade union rights without the right to strike. Furthermore, it was noted that the right to strike can be found in the legislations of many member states, and that this was “a social reality that had to be recognized”.³⁰ Finally, an agreement was reached: the right to strike was included in the article together with a limitation clause that made this right subject to “the laws of the particular country”.^{31,32}

Paragraph 2 of the article, which allows restrictions on the exercise of these rights by the members of the armed forces, police and state administration, also was subject to debate. Some states made referrals to ILO practice and argued that the ILO does not allow restrictions with respect to all public officials, but only for the

²⁹ *Par. 5, The nature of state parties obligations (Art 2, Par 1)*, 12/14/1990, CESCR General Comment 3

³⁰ *Supra note 24*, p. 257

³¹ *Ibid.*

³² It is notable to mention that in its annual report Human Rights Committee expressed concern in relation to Estonia about the restrictions on the right to strike. The Committee noted that the draft Public Service Act restricts the right of number of public servants to strike. The Committee states that “state party should ensure in its legislation that only the most limited number of public servants is denied the right to strike”, A/65/40 (Vol. 1) Report of the ninety-seventh session (12-30 October 2009), ninety-eighth session (8-26 March 2010), ninety-ninth session (12-30 July 2010), the Human Rights Committee.

armed forces and police, and only to the extent determined by law. However, it was assumed by the majority states that the ILO would play a significant role in the interpretation of the Covenant and that restrictions should be regarded as legitimate only insofar as they complied with the ILO standards. Therefore, the provision was accepted.^{33,34}

The article does not mention a right to collective bargaining. However, during the debate on the right to strike it became apparent that Paragraph 1 (c), which guarantees the right of trade unions to function freely, includes the right to collective bargaining.³⁵

In the end, one group of states did not welcome the elaborated version of the article and the other group of states was disappointed because of the restrictions on the rights. However, it can be said that the overall agreement was achieved and the article reflects the interests of the member states.³⁶

2.1.3 Trade Union Rights in the ICCPR

The right to form and join trade unions is guaranteed under Article 22 of the ICCPR. Paragraph 1 of the Article is structured in the following way:

³³ *Supra note 24*, p. 259-260

³⁴ In the annual report issued in 2012, the Committee on Economic, Social and Cultural Rights raises the issue of public servants in relation to Germany. The Committee is concerned by the fact that public servants are prohibited to strike. The Committee makes referral to article 8.2 of the ICESCR and the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize and reminds the state that “public officials who do not provide essential services are entitled to their right to strike”, Para 94, E/2012/22, E/C. 12/2011/3, Report on the forty-sixth and forty-seventh sessions (2-20 May, 2011, 14 Nov-2 Dec, 2011), the Committee on Economic, Social and Cultural Rights.

³⁵ *Supra note 24*, p. 256

³⁶ *Ibid.* p. 250 - 251

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Paragraph 2 of the article contains a restriction clause: restrictions are applicable if they are prescribed by law, are necessary in a democratic society, are in the interest of national security, public safety, or the public order (*ordre public*), and are for the protection of public health or morals³⁷ or the protection of the rights and freedoms of others. In relation to the armed forces and police it is stated that this article shall not prevent the imposition of “lawful restrictions” on their right to freedom of association.

Paragraph 3 repeats Paragraph 3 of the ICESCR Article 8 and refers to the ILO. It states that this article shall not prejudice the rights guaranteed by the ILO 1948 Convention on Freedom of Association and Protection of the Right to Organize.

2.1.3.1 The Travaux Préparatoires

During the 5th, 6th and 8th sessions of the Commission on Human Rights it was generally agreed to include the right to association in the Covenant.³⁸ However, divergent opinions were observed about the necessity of specifically mentioning the right to form and join trade unions. The major argument coming from those against inclusion was that trade union rights were already mentioned in the draft Covenant on Economic, Social and Cultural Rights and their inclusion in the ICCPR would make them subject to two different sets of limitations: the general

³⁷ It is interesting to note that “public health and morals” are not mentioned in the restriction clause of Article 8, ICESCR.

³⁸ Marc J. Bossuyt, *The right of association, Discussions, Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952), Article 22, Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, 1987 Martinus Nijhoff Publishers, p. 424.

limitations clause in Article 4 of the ICESCR³⁹ and the limitations mentioned in Article 22 itself, Paragraph 2. In the end it was decided to mention trade unions in the article. The decisive argument was that not mentioning trade unions would lead to the erroneous interpretation that trade union rights are not civil and political rights, but only economic and social rights.⁴⁰ The specific mention can also be explained by the fact that historically trade unions are persecuted. Advocating and protecting the rights of workers often has not been in the best interests of governments and big businesses.⁴¹

A general limitation clause was set in relation to the trade union rights exercised by the armed forces and police. It is notable that ICESCR also mentions state administration or public officials together with the armed forces and police, while in the ICCPR article we only have mention of the armed forces and police. There is no mention of other members of the state administration or public officials.⁴²

Not all state representatives supported the idea of making referral to the ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organize in Paragraph 3. The argument was that even without the cross-reference, well-known principles of international law would still prevent any conflict between these two treaties; and that it was not appropriate to have cross-reference in a general legal instrument. The counter-argument stressed the progress ILO had achieved in safeguarding trade union rights in international law

³⁹ According to article 4 the State parties may subject rights “only to such limitations as are determined by law only in so far as this may be compatible with the nature of this right and solely for the purpose of promoting the general welfare in a democratic society”.

⁴⁰ *Supra note 38*, p. 426.

⁴¹ Sarah Joseph, Jenny Schultz and Melissa Castan, *Trade Union Rights, 19 Freedom of Assembly and Association – Articles 21 and 22, The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, 2004, Oxford University Press, Second Edition, p. 577.

⁴² *Supra note 38*, p. 430-431.

and noted that without the cross-reference this progress could be interpreted as overlooked by the UN.⁴³

2.1.3.2 The Jurisprudence under Article 22 ICCPR

Under Optional Protocol I ICCPR, the Human Rights Committee is authorized to receive individual communications regarding any alleged violations of the rights mentioned in the ICCPR. The number of communications regarding trade union rights is small.

One of the few communications to the Human Rights Committee was presented against Belarus, by a citizens of Belarus. The facts of the case are the following: the Supreme Court of Belarus dissolved the non-governmental public association human rights centre “Viasna”. “Viasna” was registered by the Ministry of Justice of Belarus.

The Human Rights Committee considered that the state party was in violation of Article 22, Paragraph 1 of the ICCPR. According to the Committee, the mere fact that the association was allowed to register did not guarantee the protection of trade union rights envisaged in Article 22. In the Committee’s view, it is important that associations are able to carry out their statutory activities freely after registration. The Committee refers to the grounds that justify restrictions on trade union rights and explains under which circumstances the curtailment of trade union rights can be justified. The Committee starts with declaring that the existence and operation of the associations is a “cornerstone of the democratic society”. This also covers those associations whose peacefully promoted ideas are not favourably received by the government or the majority of the population. The

⁴³ *Supra note 38*, p. 435-436.

Committee then continues and offers a test for the state parties to follow. According to the test, after the dissolution of an association the state party should demonstrate that this was a necessary measure in order to avert a real danger to national security or the democratic order. The Committee emphasizes that the danger must not be hypothetical but real and that it is the state's responsibility to demonstrate that less intrusive measures would have been insufficient.⁴⁴

Another case interesting for our topic was issued by the Committee in regard to the right to strike. In the communication *J. B. et al v Canada (118/82)* the Committee examined the question of admissibility. The Committee considered the communication incompatible with the provisions of the Covenant and therefore declared it inadmissible. The question before the Committee was whether right to strike is guaranteed under Article 22. The authors of the communication argued that the prohibition to strike for public employees introduced by the Alberta Public Service Employee Relations Act 1977 was in breach of Article 22 of the ICCPR. They asserted that even though the right to strike was not *expressis verbis* mentioned in the Article 22, it was implied. In support of their argument the authors referred to the ILO Convention No. 87 and emphasized the importance the ILO organs give to the right to strike. Namely, they argued that in the interpretation of Article 22 the Committee should also take into account ILO Convention No. 87 and the fact that even though it is not mentioned in express terms, the right to strike derives from Article 3 of the ILO Convention. Taking this into account, the authors further argued that Paragraph 3

⁴⁴ *Aleksander Belyatsky et al. v. Belarus*, Communication No.1296/2004, UN Doc. CCPR/C/90/D/1296/2004, 7 August 2007, paragraphs 7.1; 7.2; 7.3; 7.4.

of Article 22 of the ICCPR would be breached if the Committee were to disregard ILO practice.⁴⁵

The Human Rights Committee decided that the right to strike is not implied in Article 22. The Committee stated that it has no qualms about accepting the interpretation of the ILO organs as correct and just, but that each international treaty has a life of its own and must be interpreted by the body entrusted with the monitoring of this instrument. The Committee examined the *Travaux Préparatoires* for the ICCPR and found no mention of the right to strike. The Committee made a comparison between the trade union rights mentioned in the ICCPR and the same rights mentioned in the ICESCR. It was noted that unlike Article 22 of the ICCPR, Article 8 of the ICESCR mentions the right to strike separately. This gave the Committee reason to believe that the right to strike is not an implicit component of the right to form and join trade unions. According to the Committee, the reason the right to strike is not included within the scope of Article 22 is that this right already enjoys protection under the ICESCR.⁴⁶

A minority in the Committee did not agree with the majority decision and presented a separate opinion. According to the minority the question before the Committee was “whether article 22 alone or in conjunction with other provisions of the Covenant necessarily excludes, in the relevant circumstances, an entitlement to strike”.⁴⁷ According to the minority, exercising the right to freedom

⁴⁵ *J. B. et al. v. Canada* (118/1982), ICCPR, A/41/40 (18 July 1986) 151, Para: 5.1.

⁴⁶ *Ibid.* Para. 6.3; 6.4.

⁴⁷ In the admissibility proceedings the majority of the Human Rights Committee particularly determined the scope of protection for trade unions, rather than focusing on the scope of protection for associations per se. The issues regarding the specific protection of trade unions under Article 22 should have been considered on the merits stage of proceedings. The minority on the Committee on the other hand focused on the scope of Article 22 protecting all associations in general, *Supra note* 41, p. 580-581.

of association requires certain actions to be allowed, and these actions cannot be listed *a priori*. Referral was also made to the *Travaux Préparatoires*, which, according to the minority, did not clearly determine the right to strike issue. The minority also mentioned the ILO Committee on Freedom of Association decision, where the ILO Committee found the Alberta Act not in conformity with Convention No. 87, Article 10, for the reason that a general prohibition of the right to strike “constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members.” According to the minority, while Article 22 calls for the protection of trade union members’ interests, it also allows the right to strike.⁴⁸

2.2 Conclusion

Prominent representative of the classical liberal school Alexis de Tocqueville, speaks about the particular role of the right to freedom of association in democratic society. In his famous writing *Democracy in America* he states that “the most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them”. Tocqueville believes that freedom of association is almost as inalienable in its nature as the right to personal liberty and that the foundation of the society will be impaired if freedom of association is attacked by the legislator. According to Tocqueville , democratically structured societies are mostly in need of the associations. In aristocratic nations the body of the nobles and the wealthy constitute a natural association and they can check the abuses of power. In democratic states where such natural associations do not exist the individuals have to make them. Otherwise, the most galling tyranny is inevitable

⁴⁸ Individual Opinion Submitted by Mrs. Higgins and Messrs. Lallah, Mavrommatis, Opsahl and Wako concerning the admissibility of communication No. 118/1982, J.B. et al. v. Canada.

and “great people may be oppressed with impunity by a small faction or by a single individual” (Alexis de Tocqueville, *Chapter 12, Political Associations in the United States in Democracy in America 1831*).

In modern jurisprudence the right to freedom of association is often seen as a vehicle for the exercise of many other civil, political, social, economic and cultural rights. In Resolution 15/21 of The Rights to Freedom of Peaceful Assembly and of Association, the Human Rights Council, guided by the Charter of the UN and the International Bill of Human Rights, endorsed freedom of association and freedom of assembly and recognized them as “essential components of democracy”. These two rights taken together provide individuals with opportunities to “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable”.⁴⁹

The importance of freedom of association as a trade union right is fairly well noted at the UN level. To facilitate better promotion and protection of these rights the Human Rights Council decided to appoint the Special Rapporteur on the rights of freedom of peaceful assembly and of association. In his first report the Special Rapporteur defines the right to freedom of association and states that it covers “any group of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests”. The Rapporteur makes reference to the ICCPR and ICESCR stating that the right to form and join trade unions is an inherent part of the freedom of association. In

⁴⁹ Preamble, the Resolution 15/21 on the Rights to Freedom of Peaceful Assembly and of Association, adopted by the Human Rights Council, 6 October, 2010.

the report specific emphases are made on the importance of the freedom of any associations to be formed and joined, to function freely, to determine their own status, structure and activities, to enjoy the right to privacy and to be able to access domestic and foreign funding.⁵⁰

Trade unions play an important role in the development of liberal democracies.⁵¹ Therefore, ensuring effective enforcement of trade union rights at an international level is of utmost importance.

Chapter III –Freedom of Association from an ILO Perspective

3.1 Historical Review

The Treaty of Versailles that was enacted in 1919 entails the establishment of the two international organizations: the League of Nations and the International Labor Organization. Later developments and WWII made it clear to everyone that the League of Nations did not meet the high expectations placed on it, and the organization was replaced by the United Nations. The International Labor Organization, however, still operates, aiming to establish adequate labour standards in the world.

The Treaty of Versailles declares that peace can only be established if social justice is provided and that unjust conditions of labour imperil the “great peace and harmony of the world” (Part XIII, Section I). The Preamble of the ILO Constitution offers the same wording regarding social justice. In both of the texts

⁵⁰ Maina Kiai, *Best Practices Related to the Right of Freedom of Association*, Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, A/HRC/20/27, 21 May, 2012.

⁵¹ Stuart White, *Chapter 12, Trade Unionism in Liberal State in Freedom of Association*, edited by Amy Gutmann, Princeton University Press, Princeton, New Jersey, 1998, pp. 339.

the recognition of the principle of freedom of association, together with other labour conditions, is listed as an important precondition for the achievement of social justice and, in turn, world peace.

Since 1919 the ILO has composed a number of documents on freedom of association and gathered a great expertise in the field. This may be one key reason why the ICCPR and ICESCR articles on trade union rights make explicit reference to the ILO instruments. Therefore, in order for the reader better to understand the international standards established by the International Bill of Human Rights, it is of utmost importance to analyse ILO standards first.

3.2 The ILO Declarations on Freedom of Association

The ILO declarations are used by the International Labour Conference to proclaim certain formal and authoritative statements and reaffirm the importance of the principles and values of the organization. The Declarations are not subject to ratification. Nevertheless, they have a wide application and have acquired symbolic and political value.⁵²

The first Declaration adopted in 1944 and incorporated into the ILO Constitution in 1946 was *The Declaration concerning the aims and purposes of the International Labor Organization* (the Declaration of Philadelphia).⁵³ It lists four fundamental principles on which the organization is based and which should inspire the policy of member states. One of these principles is that, "freedom of expression and of association are essential to sustained progress".

⁵² *ILO Declarations*, available at <http://www.ilo.org/public/english/bureau/leg/declarations.htm>

⁵³ Lee Swanston, *Adoption of Standards by the International Labor Organization: Lessons and Limitations*, Standard-Setting: Lessons Learned, International Council on Human Rights Policy and International Commission of Jurists Workshop, 13-14 February, 2005, p.4.

In 1990s, when globalization and technological change led to uneven economic growth and well-being,⁵⁴ the ILO decided to restate its long-standing commitment, and in 1998 it adopted the new *Declaration of Fundamental Principles and Rights at Work*. Together with the three other fundamental principles – namely, *the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation*, the Declaration recognizes *freedom of association* and the *effective recognition of the right to collective bargaining* as fundamental principles and puts an obligation on states “to respect, to promote and to realize” them in good faith, in accordance with the ILO Constitution. This obligation to respect, promote and realize concerns not only those states that have ratified the fundamental conventions, but also those that have not yet done so. The mere fact of membership in the ILO is enough to acquire this obligation.⁵⁵ The Declaration does not create new obligations for states; rather, it reaffirms the obligation of the ILO to respect the principles concerning fundamental rights.⁵⁶

Increased unemployment and insufficient social protection once again became a major concern in the beginning of the 21st century. The new challenges that the world of work faced inspired the ILO to strengthen its capacity to promote its Decent Work Agenda and to adopt the *Declaration on Social Justice for a Fair Globalization* in 2008. The Declaration emphasizes the important role of the

⁵⁴ *Background, ILO Declaration for Fundamental Principles and Rights at Work, ILO*, available at <http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm>

⁵⁵ Article 2, *ILO Declaration of Fundamental Principles and Rights at Work, 1998*.

⁵⁶ Hilary Kellerson, *The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future*, *International Labour Review*, Special Issue: Labour Rights, Human Rights, Vol. 137 (1998), No. 2, p. 224.

Declaration of Philadelphia and the principles mentioned therein. It restates the four strategic objectives of the Decent Work Agenda. These objectives are: promotion of employment by creating a sustainable institutional and economic environment; development and enhancement of sustainable measures of social protection adaptable to national circumstances; promotion of social dialogue and tripartism; and finally, respect, promotion and realization of the fundamental principles and rights at work. In relation to the fourth objective the Declaration clearly states that "freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives".

3.3 The ILO Conventions on Freedom of Association

The three Declarations of the ILO referred to above state the main principles and values of the Organization and emphasize the important role of freedom of association for the attainment of these principles. However, to really understand the essence of freedom of association as a trade union right one has to look at two ILO conventions: *Convention No. 87 on Freedom of Association and Protection of the Right to Organize* and *Convention No. 98 on the Right to Organize and Collective Bargaining*, which together constitute basic instruments governing freedom of association. These two Conventions are usually discussed together and they constitute part of the eight Conventions of the ILO that are recognized as fundamental.

3.3.1 Freedom of Association and Protection of the Right to Organize (Convention No. 87)

In 1945 the International Labor Organization decided to become a specialized agency of the UN in accordance with Articles 57 and 63 of the UN Charter. According to the agreement between the ILO and the UN, the ILO was recognized as a specialized agency “responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein”.

Shortly afterwards, a debate was held on the question whether protection of trade union rights and especially freedom of association should be safeguarded by the ILO or by a UN organ called ECOSOC. The American Federation of Labor (AFL) supported the ILO while the World Federation of Trade Unions (WFTR) was in favour of ECOSOC. Finally, it was decided by the ECOSOC itself to refer the subject of trade union rights to the ILO. The ILO, in turn, was advised to adopt a convention about the subject and together with the UN pursue work on the machinery to control the protection of trade union rights and freedom of association. This is how the *Convention on Freedom of Association and Protection of the Right to Organize No. 87* came into being.⁵⁷

As discussed above, the Preamble of the ILO Constitution and later the Declaration of Philadelphia already mentioned the principle of freedom of association. The Convention No. 87 translated this principle into specific rights

⁵⁷ Harold Dunning, *The Origins of Convention No. 87 on freedom of association and the right to organize*, International Labour Review, Special Issue: Labour Rights, Human Rights, Vol. 137 (1998), No. 2, p. 159-162.

that are capable of being enacted in national laws and that are applicable in practice.⁵⁸

The Convention sets the rights of workers and employers to establish and join organizations of their own choosing without previous authorization. Workers' and employers' organizations must be able to organize freely without undue interference from authorities, including the right not to be dissolved or suspended by administrative authorities. Workers and employer organizations shall also have the right to establish and join federations and confederations, which may affiliate with international organizations of workers and employers.

More specifically, Article 2 of Convention No. 87 guarantees the rights of workers and employers to *establish and join organizations of their own choosing and without distinction whatsoever*. There is no previous authorization required for the establishment of the organization.

In other words, the right to organize should be guaranteed without distinction or discrimination of any kind as to occupation, sex, skin colour, race, creed, nationality or political opinion. Any national law that prohibits the right to organize for the any workers (public servants, managerial staff, domestic staff or agricultural workers), other than those in the armed forces and the police (mentioned in Article 9 of the same Convention), is incompatible with the Convention.⁵⁹

⁵⁸ *Ibid.* p. 163.

⁵⁹ General Survey of the reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), International Labour Conference, 81st Session, 1994, Geneva, p. 23-24, 27, 47.

Workers and employers do not need previous authorization to establish an organization, except for the formalities provided by states necessary for the normal functioning of an organization. However, these formalities must not impair the rights guaranteed by the Convention and they should not be too complex or too lengthy. It is of a vital importance that such formalities be prescribed by law.⁶⁰

Any discretionary power of national authorities to refuse the registration of a labour organization is considered to be incompatible with this Convention. The ILO supervisory bodies emphasized repeatedly that refusal to register workers' and employers' organizations is very similar to the case in which previous authorization is required, and therefore is not acceptable.⁶¹ In case a violation happens, workers and employers must have the opportunity to appeal against any administrative decision to an independent and impartial body.⁶² However, it was recently noted by the Committee of Experts that the mere fact that the right to appeal to the court exists is not an adequate safeguard, and that competent judges should be able to review the grounds for refusal of registration and check whether it is contrary to the freedom of association principles.⁶³

Workers and employers shall have the right to establish and join organizations of their own choosing. This implies a possibility to form an independent

⁶⁰ ILO (ed), *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised edition, ILO, Geneva 2006, Para. 272.

⁶¹ Lee Swepston, *Human rights law and freedom of association: Development through ILO supervision*, *International Labour Review*, Special Issue: Labour Rights, Human Rights, Vol. 137 (1998), No. 2, p. 181.

⁶² *Supra* note 59, p. 34, 47.

⁶³ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report III (Part 1B), International Labour Conference, 101st Session, 2012, Geneva, p. 33.

organization in a climate of full security. It includes the right of workers and employers to freely determine the structure of the organization and membership of the trade unions, to freely choose the establishment of one or more organizations in any one enterprise, to choose their occupation or branch of activity and to establish federations and confederations. Excessive restrictions imposed by law, such as a minimum number of members, a system of trade union unity or trade union monopoly, are not in conformity with Article 2 of the Convention.⁶⁴ It is also prohibited to establish a limited list of occupations with a view to recognizing the right to associate.⁶⁵

In general, the requirement of minimum membership is a set standard in many countries and it is not *a priori* contrary to the Convention. However, "the number should be fixed in a reasonable manner", in order to avoid the complications for the establishment of the organization.⁶⁶

Article 2 requires that a diversity of organizations should be possible, if workers wish. This does not, however, mean that diversity is an absolute necessity. The supervisory bodies of the ILO observed that there is a fundamental difference between cases where unification is required by law and where the workers unite voluntarily, independently of any laws. In the latter case there is always a chance that workers establish a different organization in case they wish to do so.⁶⁷

National laws should be neutral towards trade unions. Favouring one of them might affect the choice of workers, who might seek to join trade unions that have

⁶⁴ *Supra note*, p. 38, 48.

⁶⁵ *Supra note* 60, Para. 217, 313, 315.

⁶⁶ *Supra note* 63, p. 33.

⁶⁷ *Supra note* 61, p. 182.

governmental support and therefore might serve them better. Therefore such favouritism is not compatible with the provisions of the Convention No. 87.⁶⁸ The notion of “most representative trade union” exists in many national jurisdictions. The concept is not in itself contrary to the Convention; however, there should be pre-established criteria that establish such organization. Moreover, the other, less represented organizations should not be deprived of the essential means to defend their members.⁶⁹

Article 2 only guarantees a positive right to join a labour organization, but it does not say anything about a negative right not to join. According to the ILO supervisory bodies it is up to the states to decide whether to introduce such a negative right in their legislation or not.⁷⁰

Article 3 of the Convention introduces collective rights for the employers’ and workers’ organizations. It guarantees the right of workers’ and employers’ organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and formulate their programme, thus protecting exercise of the socio-economic functions of the organizations. The article reaffirms the general autonomy of these organizations and states that there shall be no interference from public authorities.

This article aims to avoid legislative provisions which regulate in detail the internal functioning of the workers’ and employers’ organizations. Governments are only allowed to establish the overall framework within which the members will have wide autonomy to administer their organizations according to their will.

⁶⁸ Supra note 60, Para. 339.

⁶⁹ Supra note 63, p. 36.

⁷⁰ Supra note 61, p. 182-183.

Furthermore, if this right is violated organizations must have a possibility to appeal to an independent and impartial judicial body.⁷¹ In other words, the mere existence of a law about trade unions does not constitute a violation of trade union rights, since the state might want to ensure that the constitutions and rules of the organization are in conformity with national legislation. However, this law might not be such as to impede the right of freedom of association of trade unions.⁷² The members of the organization should be able to develop the rules of their organization according to their will.⁷³

In order for the autonomy of the organizations to be guaranteed, questions such as trade union elections, eligibility criteria, re-election and dismissal of leaders should be regulated by the organizations themselves in their respective constitutions.⁷⁴ In case supervision of the process is still necessary, it should be exercised by a judicial authority.⁷⁵ The organizations shall also be able to organize their administration without interference from the government. This includes the right to decide on the rules which should govern the administration of their organization. They must also be free to resolve disputes between each other by themselves, without governmental interference.⁷⁶

Workers and employers not only have the right to establish organizations freely, but these organizations also have a right to pursue lawful activities for the defence of occupational interests of their members. Any interference from the government which restricts the right of organizations to pursue such activities is

⁷¹ *Supra* note 59, p. 49, 60.

⁷² *Supra* note 60, Para. 370.

⁷³ *Supra* note 61, p. 184.

⁷⁴ *Supra* note 60, Para. 389-390.

⁷⁵ *Supra* note 61, p. 185.

⁷⁶ *Supra* note 60, Para. 454-460.

considered a violation of the freedom of association. For the free functioning of the organizations it is important that the assets and property that belong to these organizations are duly protected. The supervisory bodies of the ILO are very strict on this issue. A restriction of this principle should only be allowed if the interests of the members or the democratic processes in the organization are at stake.⁷⁷

One of the last issues that Article 3 covers is the freedom of organizations to organize their activities freely and to formulate their programs with a view to defend the occupational interests of their members. While respecting the law of the land, the members of the organizations should be free to hold meetings, to have access to places of work, communicate with the management and organize protest action.⁷⁸ The workers' and employers' organizations are allowed to participate in political activities and publicly express their opinions on the government's economic or social policy.⁷⁹ According to the Committee of Experts the national legislation should be flexible and should try to establish a balance between the legitimate interests of the organizations to express their opinions on the social and economic policies that affect their members on the one hand, and the separation of political activities and trade union activities on the other hand.⁸⁰

Article 4 of the Convention states that workers' and employers' organizations shall not be dissolved or suspended by any administrative authority. The suspension and dissolution of an organization constitutes an extreme form of

⁷⁷ *Supra* note 63, p. 43.

⁷⁸ *Ibid.* p. 45.

⁷⁹ *Supra* note 60, Para. 495, 496, 503.

⁸⁰ *Supra* note 63, p. 46.

interference of public authorities in the activities of an organization and puts an end to the exercise of trade union activities. However, arbitrary interference by authorities must be distinguished from interference that is allowed by law and that aims to avoid the existence of organizations undermining the internal or external security of the state.⁸¹ In this case a dissolution or suspension of the organization should be executed by the judicial authorities, providing all the legal guarantees to the organization concerned. It is of utmost importance that the judges are able to deal with the substance of the case.⁸² In any case, such extreme actions as suspension and dissolution of workers' and employers' organizations can only be taken as a last resort, after exhausting all possibilities that would have less serious effects.⁸³

Article 5 of the Convention guarantees the right of workers' and employers' organizations to establish and join federations and confederations. These federations and confederations have a right to affiliate with international organizations of workers and employers.

The rights guaranteed by Article 5 help organizations to better protect the interests of their members. It is up to the workers' organizations only to decide whether there is a need to join federations and confederations and it is up to federations and confederations only to decide whether or not to accept the affiliation of trade unions.⁸⁴ Any restriction that prohibits the federations and confederations to go on strike or bargain collectively violates Article 5. In case of an affiliation there should be no need for authorization from any authorities.

⁸¹ *Supra note 59*, p. 79.

⁸² *Supra note 61*, p. 190-191.

⁸³ *Supra note 60*, Para. 677-678.

⁸⁴ *Supra note 60*, Para. 713, 722.

National affiliates and international organizations should be able to collaborate freely, including national affiliates receiving financial assistance and subsidies, exchanging trade union publications and sending representatives to meetings.⁸⁵

The rights guaranteed to workers' and employers' organizations are equally applicable to federations and confederations of workers' and employers' organizations. As Article 6 of the convention states, the provisions of Articles 2, 3 and 4 also apply to federations and confederations.

Finally, Article 10 of the convention defines the term "organization" and states that any organization that furthers and defends the interests of workers and/or employers is referred to as "organization" in the convention. In other words, the distinguishing character of the organizations mentioned in the convention is that they defend and promote the rights of workers and of employers.⁸⁶

3.1.1 The Right to Strike

The right to strike is often used as one of the essential means for workers' and employers' organizations for the promotion and protection of the interests of their members. Nevertheless, there is no separate document on the right to strike adopted by the ILO; it is not mentioned in the core conventions on freedom of association (No. 87) and right to organize (No. 98). The ILO Constitution and the Declaration of Philadelphia are also silent about the issue. It is, however, mentioned in the *Resolution of 1970 Concerning Trade Union Rights and their Relation to Civil Liberties*, which calls for full and universal respect of trade union rights, with particular attention to the right to strike (Article 15).

⁸⁵ *Supra note 61*, p. 191-192.

⁸⁶ *Ibid.* p. 193.

Despite the fact that there is no specific mention of the right to strike in the core ILO Conventions and Declarations, the ILO supervisory bodies have reaffirmed many times that the right to strike derives from Convention No. 87 on Freedom of Association and Protection of the Right to Organize. They never accepted the criticism that preparatory work for the Convention does not support the inclusion of the right to strike. The Committee of Experts reiterated that the mere absence of a concrete provision regarding a right to strike in the Convention is not dispositive, as “the terms of the Convention must be interpreted in the light of its object and purpose”. According to the Committee even though preparatory work is an important interpretative source for the convention, it is not the only one. The Committee makes a referral to the Vienna Convention on the Law of Treaties (Articles 31 and 32) and states that when it comes to the right to strike a “subsequent practice” of the ILO Organs is considered an important source for the interpretation of the convention.

Both ILO Committees have recognized the right strike for decades. The Committee on Freedom of Association first asserted right to strike as an important principle in 1952.⁸⁷

Also, the Committee of Experts states that strike action is an “intrinsic corollary of the right to organize” protected by the Convention No. 87. According to the Committee, this is a collective right exercised by group of people who decide to make demands by not working and therefore it is an activity of the workers’ organization protected under Article 3.⁸⁸

⁸⁷ *Supra note 63*, p. 48.

⁸⁸ *Supra note 59*, p. 64-67.

The right to strike is a fundamental right enjoyed by the workers' and employers' organizations (trade unions, federations and confederations). It can be used as a legitimate weapon for the protection of the interests of members of trade unions and employers' organizations. The demands that can be pursued through strike action can be the following: occupational, trade union-related and political. In the case of the first two categories of demands no questions arise: the Committee on Freedom of Association has ruled them to be legitimate. As for the third category, political strikes, the Committee has made clear that strikes of a purely political nature are not protected under the principle of the freedom of association.⁸⁹ Strikes are legitimate only when they have economic and social objectives and not purely political ones.⁹⁰

In the case of sympathy strikes the Committee of Experts is of the opinion that a general prohibition on participating in sympathy strikes is itself not compatible with the freedom of association principle and workers should not be allowed to participate in such a strike. However, there should be no questions about the lawfulness of the initial strike.⁹¹

In many countries there are certain conditions and requirements that should be met before strike action is allowed. The Committee on Freedom of Association have declared some of such conditions lawful, providing that these pre-conditions are reasonable in practice and do not put substantial limitations on the means of action open to trade unions. The following conditions have been considered as

⁸⁹ *Ibid.* p. 77-78.

⁹⁰ Bernard Gernigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning the Right to Strike*, International Labour Office, Geneva, 2000, (first published in the *International Labour Review*, Vol. 137 (1998), No. 4), p. 14-16.

⁹¹ *Ibid.*

acceptable by the supervisory bodies of the ILO: the obligation to give prior notice; the obligation to have recourse to conciliation, mediation and voluntary arbitration procedures, providing that the proceedings are adequate and speedy and the parties concerned are able to participate at every stage; the obligation to observe certain quorum; the obligation to take strike decisions in a secret ballot; the adoption of measures to comply with safety requirements and for the prevention of accidents; the establishment of minimum service in particular cases; the freedom to work for non-strikers. According to the Committee on Freedom of Association a declaration of the illegality of a strike should lie with an independent body that has the trust of all the parties involved in the dispute. Governments should not be involved in this, especially in cases where the government is itself a party.⁹²

The protection against acts of anti-union discrimination in relation to strikes is a very important component of the right to strike. It is contrary to the freedom of association principle to dismiss or heavily penalize persons for their participation in strike action.⁹³

While cases of trade union discrimination should be examined on a case by case basis, the general rule is that those who think they have been discriminated against because of their trade union activities should have access to means of redress. These means should be expeditious, inexpensive and fully impartial. Furthermore, the guarantees against trade union discrimination should be provided by the legislation which should contain express provisions for appeals and establish sufficiently dissuasive sanctions in order to ensure the practical

⁹² *Ibid.* p. 25-32

⁹³ *Supra note 59*, p. 77-78.

application of Convention No. 98 on the Right to Organize and Collective Bargaining, Article 1 of which states that “workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment”.⁹⁴

In general the restriction on the right to strike can only be justified if the strike ceases to be peaceful. However, there are roughly three situations where a restriction on the right is acceptable under other conditions. In the first case, the restriction can be justified in relation to those public servants “exercising authority in the name of the state”. According to the ILO supervisory bodies, important is not the mere fact that the law on public service mentions employee as public servant, but the nature of functions that the public servant carries out; he/she should be exercising authority “in the name of the state”.⁹⁵

The second group of workers for which the right to strike can be restricted or prohibited are those working in essential services. According to the Committee of Experts “essential services are only those the interruption of which would endanger the life, personal safety, or health of the whole or part of the population”.^{96,97}

Finally, the restriction on the right to strike is justified in situations of acute national emergency or national and local crisis. Such situations can for instance

⁹⁴ *Supra note* 90, p. 37-41.

⁹⁵ *Ibid.* p. 17-19.

⁹⁶ *Ibid.* p. 21-22.

⁹⁷ *Supra note* 60, Para. 528, 570, 573, 581.

be a coup d'état or a serious conflict, insurrection and natural disaster, where the normal conditions for the functioning of the society are not present.⁹⁸

3.3.2 The Right to Organize and Collective Bargaining Convention (No. 98)

The right to collective bargaining is a fundamental right. It is a key instrument for supporting non-discrimination and equality in the workplace. Because of its great importance it was mentioned in the Declaration of Philadelphia as one of the aims to be achieved.

Convention No. 98 on the Right to Organize and Collective Bargaining is one of the eight core ILO Conventions. Because it covers similar issues, Convention No. 98 is often mentioned together with Convention No. 87 on Freedom of Association and Protection of the Right to Organize.

Convention No. 98 has three main objectives: it protects against acts of anti-union discrimination; it also protects against acts of interference in the internal affairs of workers' and employers' organizations; and lastly, it promotes collective bargaining. The principal elements of the Convention are that any parties to collective bargaining should be independent and the bargaining process should be free and voluntary; the involvement of public authorities in the process of the bipartite negotiations between employees and employers must be reduced to a minimum; and the primacy in the negotiation process should be given to the representatives of the employers and workers.⁹⁹

According to Article 1 of the Convention workers shall enjoy adequate protection against acts of anti-union discrimination. These are acts that aim to create such

⁹⁸ *Supra note 90*, p. 24.

⁹⁹ *Supra note 63*, p. 67-68.

working conditions that an employee is dissuaded from joining trade unions or encouraged to relinquish trade union membership; acts aiming to cause dismissal by reason of union membership or because of participation in union activities outside working hours or with the consent of the employer within working hours.

Anti-union dismissal must be treated differently from other types of dismissals since they might be tantamount to a denial of the rights mentioned in the Convention No. 87 and may eventually jeopardize the very existence of the trade unions. Workers shall enjoy protection against measures of anti-union discrimination at the time of taking up employment, in the course of their employment and during the termination of their employment. In order for the provisions of this article to be effectively applicable in practice it is desirable that some machinery for preventive protection exists in the country, such as prior authorization of the labour inspectorate or judicial authorities in case of a worker's dismissal. Placing the onus on the employer to prove that a dismissal is not connected to any trade union activities of the worker is another way to ensure effective protection of workers from anti-union discrimination.¹⁰⁰

All acts of anti-union discrimination in respect of employment shall be forbidden by law and penalized in practice. Legislative provisions prohibiting acts of anti-union discrimination must be broad enough to cover all the possible types of such discrimination such as refusal to hire, dismissal, transfer, demotion, or refusal to train.¹⁰¹ The legislation should further provide effective means for the dismissed worker to get compensation and to be reinstated. It should be noted that even

¹⁰⁰ *Ibid.* p. 72-77.

¹⁰¹ David Tajgman And Karen Curtis, *Freedom of Association: A user's guide, Standards, principles and procedures of the International Labor Organization*, ILO, Geneva, 2000, p. 33.

though the Convention offers protection for all workers, the protection is particularly important for trade union activists because they are usually the ones who encounter difficulties.¹⁰²

Article 2 of the Convention states that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other. The second Paragraph of the same article clarifies that these acts of interference might be designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations; or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations. Governments are not only required to exercise great restraint in relation to intervention in the internal affairs of trade unions, but moreover, in case there is such a need governments have an obligation to take specific action, for instance, through the legislative means, to ensure that guarantees provided by this article are effective in practice.¹⁰³ According to the Committee of Experts "adequate protection" means that rapid appeal procedures and sufficiently decisive sanctions against acts of interference must be established.¹⁰⁴

Article 3 of the Convention speaks about the establishment of machinery appropriate to national conditions in order to safeguard the right to organize. This article covers protection of workers against acts of anti-union discrimination as well as protection of organizations against acts of interference.¹⁰⁵ In case of anti-union discrimination, independent, expeditious and in-depth investigation is

¹⁰² *Supra note 59*, p. 93, 100-101.

¹⁰³ *Ibid.* p. 106.

¹⁰⁴ *Supra note 63*, p. 81.

¹⁰⁵ *Supra note 59*, p. 103.

required. For this to be achieved, a strong labour inspectorate and an independent and effective judicial system in the country are needed.¹⁰⁶

According to Article 4 of the Convention measures appropriate to national conditions must be taken in order to encourage and promote machinery for voluntary negotiations between workers' and employers' organizations with a view to regulate terms and conditions of employment by means of collective agreements. This article consists of two essential elements: one is action by the public authorities to promote collective bargaining and the other is the voluntary nature of the negotiations which implies autonomy of the parties.

The Committee of Experts states that governments are free to establish machinery that will support a voluntary bargaining process. Such machinery can be a conciliation, mediation and voluntary arbitration.¹⁰⁷ It is prohibited to necessitate that a collective agreement be approved before it can enter into force, or to cancel it on the ground that it runs against the economic policy of the government. Governments, however, can endeavour to convince parties to voluntarily pay heed to major economic and social policy considerations of the country. Public authorities can intervene if the collective bargaining takes place in the public or semi-public sector, but even in this case they should leave enough space for bargaining.¹⁰⁸

It is important to note that Convention No. 98 does not regulate such situations where the interests of the negotiating parties are in conflict with the interests of the country. These are situations where, in extremely serious economic crises,

¹⁰⁶ *Supra* note 63, p. 78.

¹⁰⁷ *Ibid.* p. 82-83.

¹⁰⁸ *Supra* note 59, p. 118.

governments resort to restrictive policies on wages and incomes. This might be necessary for combating inflation, for achieving a balance of payments or for combatting unemployment. These sorts of policies often directly affect collective agreements, which become subject to modification or even annulment. In situations like this, the position of the ILO supervisory bodies is that changes to the content of collective agreements that are already concluded are not acceptable. However, governments can intervene in future negotiations, providing that the situation is urgent, that the measures are applied only exceptionally and to the extent that is necessary. Also the restrictions should not exceed a reasonable period and there should be certain guarantees in order to protect the standard of living of the workers concerned, who are likely to be most affected. All this must be preceded by consultations with the workers' and employers' organizations.¹⁰⁹

Preliminary work for the adoption of Convention No. 98 stresses the importance of the capability of independent organizations to freely conclude collective agreements.¹¹⁰ In case no agreement is concluded, it is strictly forbidden to impose compulsory arbitration. The situations where states are allowed to impose compulsory arbitration are the following: a. In case of essential services in a strict sense of this term; b. In case of public servants engaged in the administration of the state; c. In a case where negotiations last for a long period of time and the deadlock is not going to be overcome without the interference of the authorities; d. In case of acute national crisis.¹¹¹

¹⁰⁹ *Supra note 90*, p. 46-47.

¹¹⁰ *Supra note 60*, Para. 881, 882, 884, 925, 935.

¹¹¹ *Supra note 90*, p. 52.

The purpose of collective bargaining is to regulate the relations between employer and employee and to set the terms and conditions of employment. Such terms and conditions of employment can also be established by law, but they should not prevail over collective agreements, unless they offer more favourable conditions for workers. This logic is also applied to the private contracts – they prevail over collective agreements only if they offer more favourable provisions. The principle of good faith is decisive in the process of collective bargaining. The organizations representing the parties must engage in genuine and constructive negotiations and mutually respect the commitments entered into the negotiation.¹¹²

3.4 Conclusion

Conventions No. 87 and 98 (like most of the other international labour standards) include flexibility clauses. Both conventions give the state the freedom to decide on the extent to which the provisions are applicable to the armed forces and police. Furthermore, the soft language such as “where necessary” used in Articles 3 and 4 of Convention No. 98 gives the states greater leeway of giving effect to the content of the instrument.¹¹³ The idea behind the introduction of flexibility clauses is that different countries have different cultural and historical backgrounds, legal systems, and levels of economic development, and therefore standards must be flexible enough to be translated into national law and practice.¹¹⁴

¹¹² *Ibid.* p. 51

¹¹³ Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 *Comp. Lab. L. & Pol’y J.* 35, 2004, p. 38.

¹¹⁴ International Labor Office, *Rules of the Game, a brief Introduction to International Labor Standards*, revised edition 2009, p. 18.

The right to collective bargaining is linked to the right to freedom of association, which is a major prerequisite for collective bargaining and social dialogue. Together they constitute enabling rights that make it possible to promote and realize decent conditions at work. The exercise of these rights requires a conducive and enabling environment, the main elements of which are a strong legislative framework, institutions to facilitate collective bargaining, efficient labour administrations and strong workers' and employers' organizations. Governments have a major responsibility in providing for such an environment.¹¹⁵

In general, the main idea behind the freedom of association is that workers and employers are equally represented in the negotiation process, that they enjoy equal rights which are protected and respected and that only in case of mutual respect social justice is achievable. At the same time, ILO takes into consideration the necessary measures that states have to refer to sometimes in order to save the economy, and allows for some restrictions to the freedom of association, providing that these restrictions are reasonable, last no more than is necessary and are agreed with the workers' and employers' organizations.

¹¹⁵ *Freedom of Association in Practice: Lessons Learned*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, ILC, 97th Session, 2008, p. 5

Chapter IV – Freedom of Association in the European Union

4.1. History of the Creation of the European Union and its Social Policy

The founding fathers of the European Union most probably did not foresee that the Union would be structured and shaped the way it is now; however, the idea of a peaceful, united and prosperous Europe that they envisaged has proved to be achievable.

In his speech in Zürich in 1946, one of the founding fathers of the European Union, Winston Churchill, proposed to create a sort of “United States of Europe”. His French colleagues Robert Schuman and Jean Monnet believed that in order to avoid military confrontations on the territory of Europe and to lead to further economic integration it was necessary to integrate strategically important sectors of the economy by removing them from national control. These ideas were further elaborated in the document called the ‘Schuman Plan’, presented in May 1950.¹¹⁶

The Schuman Plan was followed by the Paris Treaty that established the European Coal and Steel Community (ECSC) in 1951. The organization comprised of six European states: France, Germany, Italy and the Benelux countries – Belgium, the Netherlands and Luxembourg. The idea behind the creation of such an Organization was to create interdependence in coal and steel

¹¹⁶ August Reinisch, *Essentials of EU law*, Second Edition, Cambridge University Press, 2012, p. 3-4.

production and thus to make military confrontation materially impossible; one state could no longer mobilize its armed forces without others knowing.¹¹⁷

Until the year 2009, a number of treaties were enacted in the European Union. Each of them played its role in the formation of the EU. The Treaties of Rome set up the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957.¹¹⁸

These Treaties aimed at deepening general economic cooperation within Europe by establishing a common market of goods, workers, services and capital. The novelties brought by the EEC Treaty were manifold, but the main aim was the establishment of a common market. For this purpose it abolished all customs duties and charges, having an equivalent effect on the movement of goods among member states and established a common external tariff. The four freedoms of movement of goods, workers, services and capital were included in the extended interpretation of the common market, and it was prohibited to put restrictions upon them.¹¹⁹ While concerned mainly with the economic aims, the Rome Treaty provided little about the social policy of the Union. It contained the Title on Social Policy; however, the provisions of the Title were “largely exhortatory and conferred little by way of direct rights on citizens”.¹²⁰

The Single European Act 1986 was mainly concerned with the realization of the four freedoms – free movement of goods, workers, services and capital. However,

¹¹⁷ EU Treaties, available at: http://europa.eu/eu-law/treaties/index_en.htm, last visited: 22 Jul. 13.

¹¹⁸ Edit. Sonia Morano-Foadi and Johanna Diekmann, *European Union Law 2011-2012*, Routledge, 2011, p. 3-4.

¹¹⁹ Damian Chalmers, Gareth Davis, Giorgio Monti, *European Union Law, Cases and Materials*, Second Edition, Cambridge University Press, 2010, p. 12-13.

¹²⁰ Catherine Barnard, *EU Employment Law*, Fourth Edition, Oxford University Press, 2012, p. 4.

some positive changes were also introduced in the field of social policy of the Union. The qualified majority voting was extended in relation to measures adopted in the field of health and safety of workers, the area regulated under Article 118a EEC (now Article 153 TFEU). Article 118a EEC acquired a role even greater than initially anticipated – at a time when a number of the member states of the Union were pursuing a deregulatory agenda of the labour law, Article 118a created a legal basis for the successful adoption of important Directives on Working Time (*Council Dir. 93/104/EC (OJ [1993] L307/18)*), Pregnant Workers (*Council Dir. 92/85/EEC (OJ [1992] L348/1)*) and Young Workers (*Council Dir. 94/33/EC (OJ [1994] L216/12)*). In other words, Article 118a supported the construction of a larger social Europe.^{121,122}

The Maastricht Treaty signed in 1992 brought some important changes to the social policy of the Union. The original plan to amend the EEC Treaty and expand the EU's social competence had failed because of fierce resistance of the UK.¹²³ A solution was found and a separate Protocol (the Social Policy Protocol (SPP)) and a separate agreement (Social Policy Agreement (SPA)), referred to jointly as the 'Social Chapter', were introduced. The SPA further increased the competence of the Union in the social field and increased the area in which measures could be taken by qualified majority vote. Note should be made of Article 2 (6) of the SPA, which clearly states that the provisions of the Article do

¹²¹ *Ibid.* p. 10-11.

¹²² Speaking about social policy of the Union it is important to mention the Community Social Charter enacted soon after the SEA in 1989. The Charter itself was not incorporated in Union law and therefore did not obtain a binding legal force, however, it was supported through the Social Charter Action Program which in turn relied on the EEC Treaty and led to the enactment of important pieces of social legislation including the Posted Workers Directive (*Council Dir. 96/71/EC (OJ [1997] L18/1)*), which I will refer to later in this chapter.

¹²³ However, later, when the Labor government came to the power in 1997, the UK made a decision to sign up for the Social Chapter in 1997, *Supra note* 120, p. 20.

not apply to “the right of association, the right to strike or the right to impose lock-outs”.¹²⁴

The next Treaties aimed at improving the functioning of the European institutions were the *Treaty of Amsterdam 1997* and the *Treaty of Nice 2001*. The aim of these Treaties was to make sure that EU institutions would function well after the EU enlargement. Therefore, the main focus was on institutional reforms.¹²⁵ However, some other important changes also took place. With the Treaty of Amsterdam the Schengen Agreement was integrated into the legal framework of the TEU, and QMV was significantly extended, covering new fields.¹²⁶

The next Treaty that brought significant changes to the social policy of the Union was Amsterdam Treaty 1997. As I mentioned in Footnote 123, the UK changed its decision and opted back into the Social Charter. Therefore, it was decided on Amsterdam IGC to amend the chapter on social policy by incorporating Article 117-121 EEC and the SPA into the EC Treaty in a new section entitled “The Union and the Citizen”. Also, a new Title on Employment was added to the EC Treaty. Under Article 2 EC the Union acquired a new task to ensure a high level of employment. According to some commentators, the inclusion of the *Employment Title* in the Treaty was a recognition of the fact that the economic policies of the Union and the social policies of the states are largely interdependent and that social policy was no longer only a matter of domestic concern.¹²⁷

¹²⁴ *Supra* note 119, p. 15-17.

¹²⁵ Klaus-Dieter Borchardt, *The ABC of European Union Law*, European Union, 2010, p. 12.

¹²⁶ *Supra* note 119, p. 28-29.

¹²⁷ *Supra* note 120, p. 20-23.

At the preparation stage of the *Treaty of Nice* there were two major issues on the agenda: the adoption of the *EU Charter of Fundamental Rights and Freedoms* and the institutional reform of the organization. The Charter was adopted, containing civil, political, economic and social rights; however, agreement on the legal status of the Charter was not reached.¹²⁸

Slowly but steadily Europe was moving to a more integrated, constitutional union. In 2001 the Heads of State adopted a *Declaration on the Future of the European Union* which opened a way to a *Constitution* for Europe. The Constitutional Convention was created which produced a Draft Treaty for a Constitution for Europe. The status of the EU Fundamental Rights Charter was one of the issues. However, the Constitutional Treaty was openly rejected by French and Dutch voters in national referenda.¹²⁹

The idea of common constitution had failed, but the EU leaders were convinced that reform of EU was still needed. Therefore, in 2007 the member states agreed on the *Lisbon Treaty* that entered into force in 2009. The Lisbon Treaty incorporated many aspects of the 2004 Draft Constitution, however, it abandoned the “constitutional concept”. The provisions about the primacy of EU law were removed from the main body of the Treaty together with the detailed text of the EU Charter of the Fundamental Rights and Freedoms. Instead a Declaration was annexed to the Treaty setting out the primacy of EU law and requiring the Union to respect the rights, freedoms and principles enumerated in the Charter.¹³⁰ Under Article 6 (1) of the Treaty on European Union (TEU) the Charter acquires the

¹²⁸ *Supra* note 119, p. 34-35.

¹²⁹ *Supra* note 116, p. 11.

¹³⁰ *Supra* note 119, p. 42.

same legal value as the Treaties;¹³¹ Paragraph 2 of the same Article further details the accession of the Union to the *European Convention for the Protection of Human Rights (ECHR)*. Importantly, according to Article 6 (3) the rights guaranteed by the ECHR result from the constitutional traditions of the member states and therefore constitute the general principles of EU law. The reference to the ECHR is also made in the Declarations that are annexed to the Lisbon Treaty. The Declaration on Article 6 (2) of the Treaty on European Union provides further details about the accession of the Union to the ECHR. It states that despite the accession, the specific features of EU law should be preserved. The text of the Declaration also affirms the regular dialogue between the European Court of Human Rights and the Court of Justice of the EU and makes a prediction that the dialogue is reinforced after the Union actually accedes to the European Convention (an issue that will be dealt later in this thesis).

Important changes were brought by the Lisbon Treaty with regard to the concept of Supremacy of the Community law. This concept was the foundation of the Community from the very beginning. It means that some powers are transferred from the national states to the jurisdiction of the Community. However, nothing specific was mentioned about the concept in the EC Treaties. The ECJ took a leading role and in its case law developed a concept of supremacy of the EC law.¹³² The very first such case was *Van Gend en Loos* where the ECJ stated that the Treaties had a direct effect. At the same time the Court took the opportunity

¹³¹ In terms of social and economic rights it is important to note that together with Poland the United Kingdom agreed to enact The Protocol (No 30) On the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, annexed to the Treaties, where both state parties stated that the Charter IV does not create justiciable rights within their jurisdiction, unless, the same rights are provided by their national legislation.

¹³² Mike Cuthbert, *European Union Law 2011-2012*, Routledge, 2011, p. 40.

to declare the supremacy of EC law over the national law, stating that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields”.^{133 134}

In the field of social policy the main contribution of the Lisbon Treaty was to grant the Charter of Fundamental Rights legal force. The Treaty also gave social policy a more prominent role, as Article 2 TEU identifies pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men as common values of the Union. Furthermore, Article 3 (3) TEU articulates the aims of the Union, stating that it shall establish an internal market and build “a highly competitive social market economy, aiming at full employment and social progress”. According to certain commentators, the mention of the social and economic provisions in the same article is not a coincidence and it emphasizes a link which was first identified in the Amsterdam Treaty.¹³⁵

¹³³ Case 26-62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963].

¹³⁴ Speaking about the supremacy of the EU law it is notable to mention the developments of the case law of the member states constitutional courts and notably the German Constitutional Court. In case of *Manfred Brunner and Others v The European Union Treaty* [1994] 1 C.M.L.R. 57 the Federal Constitutional Court seriously questioning the democratic credentials of the Union, expressed concern over the fact that the organizational structure of the Union was not democratic enough. For this reason the Court was sceptical about the transmission of the national powers to the Union. This decision was issued right after the entrance into force of the Maastricht Treaty which established the political Union with more competences than the EC enjoyed; the pathos of the German Constitutional Court was the same in the case of 2BvE 2/08 *Gauweiler v Treaty of Lisbon*, 30 June, 2009 where the Court is sceptical about granting the excessive powers to the Union on the bases that it does not guarantee the democratic process available on national level.

¹³⁵ *Supra* note 120, p. 27.

4.2 The four Fundamental Freedoms in the EU

Part Three of the TFEU enumerates the major principles and rules that provide for the establishment of the internal, common market of the EU. Article 26 (2) (Ex 14 TEC) TFEU defines the internal market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty”.

Article 28 (ex 23 TEC) TFEU speaks about the free movement of goods. The Union in this article is referred to as a customs union which covers all trade in goods and which excludes customs duties on import and export and any charges “having equivalent effect”. Article 45 (ex 39 TEC) TFEU provides for the freedom of movement of workers with the Union without any discrimination based on nationality between workers of the Member States in relation to employment, remuneration and other conditions of work. These rights are however subject to limitations on the grounds of public policy, public security and public health. Article 56 (ex 49 TEC) TFEU prohibits restrictions on the freedom of Union citizens to provide services within the Union, whether they are established in the same country where they provide services or not. Also, Article 63 (ex 56 TEC) TFEU guarantees that there are no restrictions on the movement of capital among Union member states.

The right of establishment is often mentioned in relation to these four freedoms. According to article 49 (ex 43 TEC) TFEU the citizens of one member state shall be able without any restrictions to set up agencies, branches or subsidiaries in another member state. This right to establishment also includes the right to self-employment and establishment of legal persons which can be qualified as

companies and firms under civil or commercial law and which are governed by public or private law.

The idea behind the four freedoms of the Union is to ensure that demand and supply of goods, workers and services coincide, on the whole territory of the EU, and this way wealth creation is maximized. This is achieved through two techniques. Firstly, EU law prohibits those national discriminatory laws that hinder cross-border trade or render access to the national market difficult. This technique is broadly known as *negative integration*. Secondly, the EU overcomes national diversity laws by enacting the Directives that harmonize the national laws. This can be called *positive integration*.^{136,137}

The ECJ contributed to the creation of a single market. Through the Article 258 TFEU and by using the direct effect doctrine the Court interpreted the Treaties in support of a single market (*Cassis de Dijon, 1979*).¹³⁸

4.3 The EU Charter of Fundamental Rights

The final recognition of human rights as general principles of Community/Union law was reached. Yet, there was no one legal document of mandatory character within the Community that clearly enumerated the fundamental rights widely recognized by the Community and the ECJ.

In 1996 the ECJ was asked to decide if the Community as a whole had competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court gave the opinion that “as

¹³⁶ Nigel Foster, *EU Law Directions*, Oxford University Press, 2nd Edition, 2009, p. 249.

¹³⁷ Paul Craig and Grainne de Burca, *EU Law, Text, Cases, And Material*, Fifth Edition, Oxford University Press, p. 582.

¹³⁸ *Ibid.* p. 583.

Community law now stands, the Community has no competence to accede to the European Convention”.¹³⁹ In other words, it was necessary to amend the Community Treaties in order to accede to the Convention. This was a complicated procedure as it required the unanimity of member states. While accession to the ECHR did not seem plausible at the time, the idea emerged that the EU write a Charter of Fundamental Rights of its own.¹⁴⁰

In the Presidency Conclusions of the Cologne European Council an agreement was reached that for the further development of the European Union there was a need to consolidate those fundamental rights applicable at the Union level in a single Charter, and thus to make them more evident and visible to the Union’s citizens. The Council repeated the view of the Court and stated that “protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy”.¹⁴¹

The Charter was not incorporated into the Treaties as there was no unanimity about its legal force. However, the Charter was incorporated into the Draft Constitution 2004, which failed. In the process of deliberations over the Lisbon Treaty it was decided in 2007 not to include the Charter in the Treaties any more. Instead, it was slightly amended and Article 6 (1) TEU was formulated in the following way, “the Charter ... shall have the same legal values as Treaties”.¹⁴²

¹³⁹ ECJ Opinion 2/94, on *Accession by the Community to the ECHR* [1996] ECR I-1759.

¹⁴⁰ David Anderson and Cian C Murphy, *The Charter of Fundamental Rights* in Ed. Andrea Biondi, Piet Eeckhout, Stefanie Ripley, *EU Law After Lisbon*, Oxford University Press, 2012, p. 155.

¹⁴¹ Cologne European Council, *Presidency Conclusions*, 3 and 4 June 1999.

¹⁴² *Supra note* 140, p. 156-159.

The content of the Charter is all-inclusive. As is stated in its Preamble, the Charter contains “rights, freedoms and principles”. The Charter consists of seven Titles, the first six of which enumerate the rights and freedoms and principles (I – Dignity; II – Freedoms; III – Equality; IV – Solidarity; V – Citizens’ Rights; VI – Justice). The last Title (VII - General Provisions Governing the Interpretation and Application of the Charter) contains the horizontal provisions according to which the Charter must be interpreted.¹⁴³

Remarkably, Article 6(1) of the TEU and Article 52(7) of the Charter make referral to the “explanations” – the guidance notes that do not have a status of law, but to which the European Court and the member states should pay “due regard” while interpreting the Charter’s rights, freedoms and principles. The “explanations” set out the sources of the provisions mentioned in the first six Titles of the Charter. From the sources mentioned in the “explanations” (EC and EU Treaties; the European Social Charter; the Community Charter on the Fundamental Social Rights of Workers etc.), one of the most cited in relation to Titles II and VI is the ECHR.¹⁴⁴

Article 51 of the Charter clarifies to whom the Charter applies. According to this article the Charter’s provisions are addressed to the institutions, bodies, offices and agencies of the Union “with due regard for the principle of subsidiarity”. As for the member states, the provisions of the Charter are only addressed to them “when they are implementing Union Law”. This formulation with regard to the states is often a subject of discussion and deliberations.

¹⁴³ *Ibid.* p. 159-160.

¹⁴⁴ 2007/C 303/02, *Explanations Related to the Charter of Fundamental Rights*, Official Journal of the European Union, 14.12.2007.

4.3.2 Trade Union Rights in the Charter of Fundamental Rights

For the purposes of this thesis two Articles of the EU Charter are of particular interest: Article 12 on Freedom of Assembly and Association and Article 28 on the Right of Collective Bargaining and Collective Action. The former is from Title II on Freedoms and the latter from Title IV on Solidarity.

4.3.2.1 Article 12 – Freedom of Assembly and of Association

According to article 12.1 of the Charter:

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

The most important information that we can read in Article 12 from the *Explanations*¹⁴⁵ prepared under the authority of the Presidium of the Convention drafting the Charter is that “the meaning of the provisions of paragraph 1 of this Article 12 is the same as that of the ECHR”. However, it is stated in the *Explanations* that the scope of the application of the article is wider as it applies at all levels including the European level and the national one. The *Explanations* also make clear that in accordance with article 52(3) of the Charter only those limitations considered legitimate by virtue of article 11(2) of the ECHR can be applicable to article 12(1) of the Charter.

¹⁴⁵ According to the Explanations itself, it does not bear a legal value but is “a *valuable tool of interpretation intended to clarify the provisions of the Charter*”, *Ibid.*

Other than the ECHR the *Explanations* also mention Article 11 of the Community Charter of the Fundamental Social Rights of Workers 1989¹⁴⁶ as a basis for Article 12(1). Article 11 of the Charter 1989 guarantees the freedom of employers and workers of the European Community to constitute profession organizations or trade unions “of their choice”, “for the defence of their economic and social interests”. According to the same article employers and workers should be free to join or not join such organizations and not to suffer any personal or occupational damage thereby.

While speaking about the field of application of Article 12(1), it is important to have a look at Article 153 (ex 137) TFEU, which enumerates the competencies of the EU in the field of social policy. Paragraph 5 of the article explicitly excludes the right of association from the competencies of the Union. At first sight this kind of formal exclusion severely limits the practical relevance of Article 12 for the matter of material EU law and its implementation by member states. However, according to some commentators (e.g. Filip Dorssemont) this impression can be mitigated: firstly, because there are limits to exclusion; an understanding of the right of association cannot be generic and needs to be situated in a social policy context. Exclusion should not extend to civic, political, commercial or economic matters. However, this is not advantageous for the workers and employers whose rights are violated; they cannot refer to the other Policy Titles in the TFEU. Secondly, exclusion does not preclude or invalidate

¹⁴⁶ The Charter was shortly referred above. As mentioned in Footnote 129, the Charter did not acquire the legally binding force because of the fierce resistance from UK (which eventually signed it under a new government). Nevertheless, it has played an important role in the formation of the social policy of the Community and Union. Further information regarding the Charter can be found on the following link: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharterofthefundamentalsocialrightsofworkers.htm>

legislative interventions that can be indirectly related to the trade union issues. Exclusion of pay, for instance, does not prevent the prohibition of unequal treatment in the field of pay. Thirdly, despite the exclusion, conflict between the right to organize and fundamental economic freedoms of the EU was still an issue for discussion in the cases of *Viking* and *Laval*. Freedom of association was taken into account by the Court of Justice as it is recognized in the Charter. And fourthly, irrespective of the exclusion of freedom of association Article 12 continues to be relevant because of the freedom of assembly.¹⁴⁷

4.3.2.2 Article 28 – Right to Collective Bargaining and Action

The next article of the Charter that deserves our attention is Article 28:

Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

The term “appropriate levels” is defined in the *Explanations* as “levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides.” The *Explanations* further provide that limits on the exercise of collective action are an issue of national law.¹⁴⁸

¹⁴⁷ Filip Dorssemont, *Article 12(1) Freedom of Assembly and of Association*, in *The EU Charter of Fundamental Rights, A Commentary*, edited by, Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Hart Publishing, 2014, p. 343-344.

¹⁴⁸ *Supra* note 144.

As we can see, the article consists of two rights: the right to bargain collectively for the purposes of concluding collective agreements and the right to collective action, including the right to strike for the protection of the interests of workers and employers. Below I discuss these two separately.

4.3.2.2.1 Right to Bargain Collectively

The right to bargain collectively was not recognized as a separate right at first. In the Opinion of Advocate General Jacobs in the *Albany* case it was stated that the mere fact that the right to bargain collectively is included in Article 6 of the European Social Charter 1961 of the Council of Europe does not mean that the right is generally recognized as a fundamental right. According to the Advocate General, the rights set out in the Charter represent policy goals and are not necessarily enforceable rights; the state parties to it are free to select which of the rights specified they undertake to protect. In support of his argument the Advocate General referred to ILO Convention No. 98 and ECHR case law. According to him, Article 4 of the ILO Convention is “carefully drafted” and it imposes an obligation on the contracting states “to encourage and promote” collective bargaining, rather than grant any rights. He also cited the ECHR case law (*National Union of Belgian Police v Belgium, 1975; Swedish Engine Drivers’ Union v Sweden, 1976; Schmidt and Dahlström v Sweden, 1976; Gustafsson v Sweden, 1996*) in support of his position, stating that according to the ECHR “trade union freedom is only one form or a special aspect of freedom of association and that article 11 does not guarantee any particular treatment of trade unions”.¹⁴⁹ The Advocate General pays much attention to the case of *Gustafsson*

¹⁴⁹ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]; Opinion of AG Jacobs, Para 146-156.

where the European Court stated that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action although “the state has a choice as to the means to be used” and that considering the wide degree of divergence between the domestic systems “the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed”.¹⁵⁰ The conclusion of the Advocate General was that the community legal order protects freedom of association. The right to form and join trade unions is at the heart of that freedom. The right to take collective action is also “indispensable for the enjoyment of freedom of association”. However, collective bargaining is not recognized as a specific right.¹⁵¹

Recently, though, the position of the ECJ in relation to collective bargaining has changed. In the case of *Commission v Germany*, the Court expressly stated the right to collective bargaining is a recognized right under Article 6 of the European Social Charter 1961 (Council of Europe) and also under Article 2 of the Community Charter of the Fundamental Social Rights of Workers’ 1989 (EU level). The Court also mentioned Article 28 of the EU Charter of Fundamental Rights and reaffirmed that under Article 6 TEU it enjoys the same legal value as the EU Treaties.¹⁵²

While recognizing the right to bargain collectively the Court in the *Commission v Germany* case also stated that although fundamental, the right is not absolute and can be limited. In support of the statement the Court referred to the famous *Viking*

¹⁵⁰ Interestingly, in the Opinion on the *Albany* case the Advocate General also mentions the Dissenting Opinion of Judge Martens, Joined by Judge Matscher in relation to *Gustafsson* case where the judges argued that the right to collective bargaining is an inherent part of the right to freedom of association guaranteed under Article 11 of the ECHR.

¹⁵¹ *Supra note* 149, Para 158-160.

¹⁵² Case C-271/08 *European Commission v Federal Republic of Germany* [2010]; Para. 37.

and *Laval* judgments. According to the Court, the right to bargain collectively must be reconciled with the requirements stemming from the fundamental freedoms protected under TFEU and should be in accordance with the principle of proportionality used in the *Viking* and *Laval* cases; an issue that will be discussed in more detail later in this thesis.¹⁵³

The general definition of collective bargaining is that it encompasses all kinds of bipartite or tripartite discussions that directly affect workers' groups. However, the more specific definition of collective bargaining is that it is a negotiation process between an individual employer or his/her representative on the one hand and a workers' group or their representatives (trade unions) on the other hand. The agreement they reach is usually compulsory. The content of the agreement can be agreed between the negotiating parties but it usually includes 1) normative clauses; and 2) contractual or obligatory clauses. Normative clauses are usually those that refer to the terms and conditions of work (working conditions, wages, fringe benefits, job classifications, working hours, time off, training, job security, non-contribution benefits schemes) that must be observed in individual contracts; the contractual and obligatory clauses spell out the rights and duties of the parties.¹⁵⁴

The benefits of collective bargaining are spelled out in the *Albany* case already mentioned above. As was stated by the Advocate General: "It is widely accepted that collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation

¹⁵³ *Ibid.* Para. 43,44.

¹⁵⁴ Catherine Barnard, *Article 28 Right to Collective Bargaining and Action in The EU Charter of Fundamental Rights, A Commentary*, edited by, Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Hart Publishing, 2014, p. 784.

process and promote predictability and transparency”; the emphasis was also on the high probability of a “balanced outcome” of negotiations as a result of bargaining power on both sides.¹⁵⁵

In this respect it is interesting to note a judgment delivered by the EU Civil Service Tribunal in 2011. In this case the Court directly referred to Article 28 of the EU Charter of Fundamental Rights and Article 11 of the ECHR and stated that these articles do not entail an obligation to establish a procedure of collective bargaining nor any obligation to confer to the mentioned unions the power of co-decision for the improvement of the employee’s working conditions.¹⁵⁶

4.3.2.2.2 Right to Collective Action

The second part of Article 28 concerns the right to collective action, which also includes the right to strike. Collective action can have different forms: firstly, it can be either *primary* (action taken by employees against their employer with whom they are in dispute) or *secondary* (action taken by the employees against their employers with whom they are not in dispute, but on whom they aim to put pressure); and secondly, the forms of action itself may vary: work bans; going slow; working to rule; stopping work meetings; picketing; lockouts and strikes.¹⁵⁷

It is important to establish whether the right to collective action, and most importantly the right to strike, are collective rights only or can also be taken up by individuals. It is argued by some commentators that while the ILO has allowed imposing prohibitions on so-called “wildcat strikes” it does consider a right to

¹⁵⁵ *Supra* note 149, Para. 181.

¹⁵⁶ Case F-121/10 *Michael Heath v European Central Bank (ECB)*, Civil Service Tribunal, 29 September 2011, point 121.

¹⁵⁷ *Supra* note 154, p. 786-787.

strike as a collective right and therefore reserves it for the trade unions.¹⁵⁸ However, in case of the Charter, it is less clear. Article 28 makes a distinction between “workers” and “organizations” and also makes reference to different practices in the member states. It shows that the practices of member states are not always the same; for instance, France and Sweden recognize an individual right to strike as well.¹⁵⁹ Tonia Novitz thinks that the tendency to regard civil and political rights as individual, and social rights as collective (the division initially supported by the ICCPR and ICESCR) is already old-fashioned. The fact that ICESCR has now introduced an individual mechanism of complaints suggests that the right to collective action can be regarded as both, a right of individual worker to exercise it at his/her own discretion and a right of workers’ organizations to exercise it collectively.¹⁶⁰

As stated in Article 28, the rights mentioned therein are subject to national laws and practices (which vary from one state to another) and Union law (which regulates industrial action by the ECJ case law (*Viking, Laval, Rüffert and Luxembourg*); detailed analyses of which follows later in this thesis). Notably, Article 52 (1) TFEU sets limits to limitations. According to the Article any limitation must “be provided by law”, “respect the essence of those rights and freedoms”, should be “necessary and genuinely meet objectives of general interest recognized by the Union”, or “need to protect the rights and freedoms of others”.

¹⁵⁸ Örjan Edström, *The Right to Collective Action – in Particular the Right to Strike – as a Fundamental Right in Labour Law, Fundamental Rights and Social Europe*, Edited by Mia Rönnmar, Hart Publishing, 2011, p. 58-59.

¹⁵⁹ *Ibid.* p. 67.

¹⁶⁰ Tonia Novitz, *A Human Rights Analysis of the Viking and Laval Judgments* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008, P. 544-545.

According to Filip Dorssemont these restrictions can be formulated as internal restrictions without any substantive limit. In other words, it means that Union law and national law define to what extent the freedom of collective bargaining and the right to take collective action are recognized under the Charter.¹⁶¹ On the other hand, Article 12 on the freedom of association does not provide for such a restriction.

While interpreting the Charter provisions, proper regard should also be made to the ECHR. As Article 52(3) of the Charter puts it, the meaning and scope of the rights which correspond to the rights guaranteed by the ECHR “shall be the same as those laid down by the said Convention”. The Presidium clarified this provision further by stating that “the legislator, in laying down the limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union Law and of that of the Court of Justice of the European Union”. From this, one may conclude that the EU Charter and the ECHR are broadly linked with each other.

Speaking of the general principles of the EU and the Charter, it is interesting to mention an observation made by Steve Peers: prior to the coming into force of the Lisbon Treaty, the Court of Justice hardly ever referred to the Charter, and then only as “a subsidiary measure reaffirming the right which formed part of the general principles of EU law”. It was not clear whether the Charter had any role

¹⁶¹ *Supra* note 147, p. 346.

other than this. After the Charter acquired legally binding force, it came to substitute the “general principles” in the Court’s case law.¹⁶²

4.4 ECJ Jurisprudence on Fundamental Rights and Fundamental Freedoms

4.4.1 Human Rights in the EU developed by the ECJ

The creation of a single market initially was the core idea of the European Community. Human rights were considered to fall within the sphere of national law. Therefore there was no mention of human rights protection in the original Treaties of the Community.¹⁶³

However, at some point the European Court of Justice came to the idea that for the further development of the Community law it was necessary to develop a Community approach towards human rights and that it was no longer possible to disregard it. Through its case law the ECJ acknowledged human rights as part of the Community legal order. In one of its early decisions the ECJ stated that “the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community Law and protected by the Court”.¹⁶⁴ In another case, decided soon after, the ECJ emphasized the importance of fundamental rights as an “integral part of law protected by the Court of Justice” and held that “the protection of fundamental rights, whilst inspired by the constitutional traditions common to the Member States, must be

¹⁶² Steve Peers, *The Rebirth of the EU’s Charter of Fundamental Rights*, The Cambridge Yearbook of European Legal Studies, Volume 13, 2010-2011, Edited by Catherine Barnard and Okeoghene Odudu, Hart Publishing, 2011, p. 286-289.

¹⁶³ Margot Horspool & Matthew Humphreys, *European Union Law*, 5th Edition, Oxford University Press, 2008, p. 136-138.

¹⁶⁴ Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969].

ensured within the framework of the structure and objectives of the Community”¹⁶⁵. Thus, the Court gradually moved to the perception that human rights are part of the Community legal order as a general principle of Community law.

In the ECJ judgment on *Nold* the Court stated that those international treaties to which the Community member states were party shall be a source of inspiration for fundamental rights within the Community. According to the Court rights derived from international treaties and agreements might “be subject to certain limits justified by the overall objectives pursued by the Community”, however only “on condition that the substance of these rights is left untouched”.¹⁶⁶ In later case law the Court started to refer to the ECtHR and took the position that Community law has to be interpreted in reference to the ECHR.¹⁶⁷

The ECJ played a greater role in establishing standards of freedom of association. The first high profile case of this kind was *Bosman*, in which the Court recognized freedom of association as a general principle of EU law. The case was about the freedom of a football player to move around the Union as a worker. The internal rules of the federation to which his club was affiliated did not allow him to do this. The player alleged a violation of his freedom to movement as a worker, while the Federation pointed to its freedom of association that included the right to elaborate internal rules. The Court made referral to Article 11 ECHR, the

¹⁶⁵ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle fur Getreide und Futtermittel* [1970].

¹⁶⁶ Case 4/73 *J Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities* [1974].

¹⁶⁷ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002]; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003].

constitutional traditions common to the member states, the Preamble of the Single European Act and Article F(2) of the Treaty on European Union, and stated that the principle of freedom of association is protected in the Community legal order. However, the Court did not consider the internal rules of the sporting associations necessary for the enjoyment of the freedom of association.¹⁶⁸ According to some commentators, the fact that the Court recognized the freedom of association does mean that it saw the link between this freedom and the autonomy of the associations in laying down rules. What the Court avoided to do though was a balancing exercise. The Court did not examine whether free movement of workers could justify restrictions on the internal autonomy of professional organizations and whether this restriction was proportionate.¹⁶⁹

The next case of the ECJ that deserves our attention and which can be considered a continuation of the *Bosman* case is the famous case of *Albany*. While in *Bosman* the ECJ recognized the freedom of association as a general principle of EC law, in *Albany* Advocate General Jacobs went further and considered a more specific “right to form and join trade unions” (the formulation given in article 12(1) of the Charter) to be a general principle of EC Law. The AG based his conclusion on the famous cases *Bosman* and *Maurissen* and stated that “the Community legal order protects the right to form and join trade unions and employers’ associations which is at the heart of freedom of association”.¹⁷⁰ In the same Paragraph 139 the AG also states that together with the right to form and join trade unions, the right to collective action is recognized with respect to freedom of association. The AG,

¹⁶⁸ C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995]; § 79-80.

¹⁶⁹ *Supra* note 147, p. 354.

¹⁷⁰ *Supra* note 149, para. 139, 158.

however, stated that it was not yet certain if the right to bargain collectively is a fundamental right.

An interesting case in relation to the freedom of association in the context of industrial relations is the case of *Werhof*. The judgment in this case is criticized by commentators, as the Court established that freedom of association also entails a negative right of employers not to organize and ruled that such a right was at stake because employers were being forced to apply the employment conditions stated in a collective agreement and signed by an employers' organization to which they were not affiliated.¹⁷¹ Despite this negative approach of the Court there still is something positive to be seen in this judgment: the Court once again reaffirms that the freedom of association is one of the fundamental rights that is protected in the Community legal order, and saying this, makes reference to Article 11 of the ECHR.¹⁷²

After the ECJ developed its case law in favour of human rights, the moment had come to mention human rights also in the Community Treaties. The first such Treaty that explicitly mentioned human rights was the Maastricht Treaty, Article 6 (1) of which declared that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”. In the second paragraph of the same Article 6 the Union takes obligation to “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... as they result from the constitutional traditions common to the member states, as general principles of Community law”.

¹⁷¹ *Supra* note 147, p. 356.

¹⁷² C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006]; para. 33.

Later, with the amendments of the Treaty of Amsterdam and the Treaty of Nice, Article 7 TEU set a procedure for determining instances of breaches of fundamental rights principles declared in Article 6. According to this procedure, the member state breaching these principles shall face certain sanctions, including the suspension of voting rights.¹⁷³

It is clear that EU institutions pay due regard to human rights, including social rights. However, it is interesting to observe what happens when fundamental rights and fundamental freedoms collide and when EU institutions and specifically the ECJ have to rule on the relationship between them. Such collisions of fundamental rights (the right to industrial action) and fundamental freedoms (freedom of establishment and freedom to provide services) is the main topic of my research. Below, I will analyze how the ECJ deals with such cases.

4.4.2 The *Viking* Case

The first case of the ECJ that inspired discussion on the collision of fundamental rights, namely social rights and fundamental freedoms of the EU, was *International Transport Workers Federation v Viking Line ABP*, issued by the Court in 2007. A short summary of the case: *Viking* is a large ferry company operating under the Finnish flag. The *Rosella* is one of the vessels *Viking* operates, and it plies the route between Tallinn (Estonia) and Helsinki (Finland). The crew of the *Rosella* are members of the Finnish Union of Seamen (FSU), which, in turn, is affiliated with the International Federation of Transport Workers' Union (ITF). The ITF is a large trade union federation grouping together 600 unions from 140 different states.

¹⁷³ *Supra* note 163, p. 145-146.

While the Rosella sailed under the Finnish flag, Viking was obliged to pay the crew wages according to Finnish standards. The Rosella ran at a loss because of direct competition from Estonian vessels running on the same route and paying the crew Estonian wages, which were much lower than the Finnish. Therefore, in October 2003 the Viking administration has decided to reflag the Rosella and register it in either Estonia or Norway in order to be able to enter into a new collective agreement with the trade union in one of those states. This led to litigation.

The FSU opposed the plan of Viking and sought support from the ITF, which in turn sent a circular to its affiliates asking them to refrain from negotiations with Viking.¹⁷⁴ FSU gave notice of the strike and requested Viking to increase the manning with the eight people and to give up the plans of reflagging the Rosella. Viking agreed on the increase of manning, but not on the reflagging. FSU made clear that it would only accept the reflagging if the working conditions were not changed and if Viking continues to abide by the Finnish law. Viking made it clear that the reflagging would not involve any redundancies. However, no agreement was reached, and because of the fear of strike action Viking was forced to accept trade union demands and abandoned its plans to reflag. The judicial proceeding initiated by Viking at the Finnish Court during the process of conciliation was also discontinued.

¹⁷⁴ “*Flag of Convenience*” is one of the outstanding policies of the ITF according to which a genuine link should be established between a real owner of the vessel and a flag the vessel uses in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS); and only unions established in the state on beneficial ownership have the right to conclude a collective agreement covering the vessel concerned. Further information is available at: *What are Flags of Convenience?* <http://www.itfglobal.org/flags-convenience/sub-page.cfm>

This happened in the year 2003 when Estonia was not yet a member of the European Union. In May 2004 the situation changed: Estonia acquired EU membership. Viking brought an action before the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court) alleging a violation of rights under Community law and requesting the withdrawal of the ITF circular which was still in force. The Court granted the form of order sought by Viking on the basis that the actions orchestrated by the FSU and ITF caused unjustified restrictions on the freedom of movement of workers, freedom of establishment and freedom to provide services guaranteed to Viking under Articles 39, 43, 49 EC.

The FSU and the ITF appealed, arguing that the right of trade unions to take collective action for preserving jobs of workers is a fundamental right recognized under the EC Treaty itself, where Article 136 (now Article 151 TFEU) makes a reference to the 1961 European Social Charter and 1989 Community Charter of the Fundamental Social Rights of Workers and sets the following objectives for the member states “the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labor, the development of human resources with a view to lasting high employment and the combating of exclusion”. While the case was about the interpretation of EU law, the Court of Appeal of the UK decided to stay the proceedings and refer the questions to the ECJ for a preliminary ruling.¹⁷⁵

¹⁷⁵ Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* [2007]; Para. 6-27.

Ten questions were referred to the ECJ, which Advocate General Maduro grouped into three major questions. The first issue was about the analogy with the *Albany* case decided by the ECJ, and the question asked was whether collective action organized by the FSU and the ITF falls outside the scope of Article 43 EC (now Article 49 TFEU) on the right of establishment by virtue of Community social policy. The second issue was about the horizontal direct effect, and the question was whether Article 43 EC confers rights on individuals that can be used against trade unions in respect of collective action. The final issue was about restrictions and their justification. More specifically, the question was whether the collective action taken by the trade unions constituted a restriction on freedom of movement in the EU and if so, whether this is justified. In other words, whether such activities of the trade unions allow to strike a fair balance between the freedom of establishment and provision of services on the one hand, and a fundamental social right to take a collective action on the other.¹⁷⁶

Regarding the first question the opinion of the ECJ was that the actions of the trade unions were not excluded from the scope of Article 43 EC. About the horizontal direct effect the Court was of the opinion that Article 43 EC confers rights on private undertakings that can be relied on against trade unions. And finally, the Court decided that the actions of the trade unions in the present case constituted a restriction on the freedom of establishment; however, this restriction might be justified if there is an “overriding reason of public interest, such as the protection of workers”, but only if the “restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is

¹⁷⁶ Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* [2007], Opinion of AG Maduro; Para. 13-15.

necessary to achieve that objective”. The final conclusion whether the actions of the FSU and ITF were justified or not, the ECJ left to the national court.

4.4.2.1 Discussing the Judgment

While discussing the first issue on the applicability of the Community law the Court rejected the argument that while according to Article 137(5) EC (now 153(5) TFEU) the right of association and the right to strike are explicitly excluded from the competences of the EC, these issues should fall outside the scope of Article 43 EC. The Court stated that even if an issue falls out of EC competence, member states are still free to introduce conditions governing the existence and exercise of the rights under discussion; but even in this case, States still have to comply with EC law.¹⁷⁷

The next argument in relation to the first issue of applicability of Community law was that the right to strike constitutes a fundamental right and therefore should fall outside the scope of Article 43 EC. Notably, the ECJ explicitly recognized the right to strike as a fundamental right, but stated that the exercise of this right nonetheless may be subject to certain restrictions. The Court cited its previous case law of *Schmidberger*¹⁷⁸ and *Omega*¹⁷⁹ and noted that even though the

¹⁷⁷ *Supra* note 175, Para. 39-41.

¹⁷⁸ In Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] the ECJ made a balancing exercise between the free movement of goods on the one hand and the freedom of expression and the freedom of assembly on the other hand and reached the conclusion that because of the overriding public interest freedom of expression and the association prevail over the EC rules on free movement of goods; Para. 77-94.

¹⁷⁹ In Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] the ECJ had to use a balancing tool between the freedom of provision of services on the one hand and the respect for human dignity as a general principle of EC law on the other. Here the Court stated that protection of human dignity ensured by the national constitution can justify restriction on the provision of services; Para. 34-41.

protection of fundamental rights can justify restrictions on fundamental freedoms (the freedom of establishment and provision of services), this does not mean that fundamental rights are outside the scope of EC law, and in this particular case outside the scope of Article 43 EC.¹⁸⁰

The final argument regarding the first issue provided by trade unions was that the reasoning in *Albany*¹⁸¹ should be applied by analogy. In *Albany* the ECJ found that certain restrictions to competition are inherent in collective agreements between workers' and employers' organizations; nevertheless, the Court stated that the social policy objectives pursued by such agreements can seriously be undermined if subjected to the rules on competition under Article 85(1) EC (now, Article 101(1) TFEU). The Court refused to extend the *Albany* reasoning to the present case, stating that the Treaty rules about competition are different from the Treaty provisions on freedom of movement and the fact that agreement or activity is excluded from the competition rules does not mean that it is also excluded from the free movement provisions, as these two sets of provisions are applicable in different circumstances.¹⁸²

Having ruled that Community law does apply to the circumstances of the case, the next question the Court dealt with was whether the Treaty provisions on free movement created a horizontal obligation for private actors; whether Treaty provisions confer rights on private individuals that can be invoked against the trade unions. The conclusion of the Court was that Article 43 EC is certainly capable of conferring rights on private undertakings which may be relied on

¹⁸⁰ *Supra* note 175, Para. 42-47.

¹⁸¹ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999].

¹⁸² *Supra* note 175, Para. 48-54.

against trade unions. To the argument that trade unions are not public entities, and since the Treaty creates obligations only for member states Article 43 EC should not create any obligations for trade unions, the Court replied that for the realization of the freedom of provision of services it does not matter if the obstacles result from acts by public entities or by associations and organizations not governed by public law. Here the Court relied on previous case law (Case C-265/95 *Commission v France* [1997] ECR I-6959; *Schmidberger*; *Walrave and Koch*).¹⁸³

Advocate General Maduro developed a very interesting approach regarding direct horizontal applicability in the *Viking* case. He asked a question: can the action of the private entities (in other words, those entities that are not public) actually cause a disruption to the realization of the provision of services? He made a comparison between the competition rules and the fundamental freedom of free movement, and stated that while competition rules usually have horizontal effects and the freedom of free movement vertical effects, the freedom of free movement can also have direct horizontal effects, but only in cases where market access is denied.¹⁸⁴ In other words, according to the Advocate General the Treaty can be relied on only against those private actions that are “capable of effectively restricting others from exercising their right to freedom of movement”.¹⁸⁵ The Advocate General further explains that the fact that private actors are now subject to the Treaty rules on freedom of movement does not necessarily mean that they are now held to exactly the same standards as state authorities; instead, “the Court may apply different levels of scrutiny, depending on the source and seriousness of

¹⁸³ *Supra* note 175, Para. 56-66.

¹⁸⁴ *Supra* note 176, Para. 37-38.

¹⁸⁵ *Ibid*, Para. 43.

the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy”.¹⁸⁶

This approach of Advocate General Maduro was criticized by Catherine Barnard, who thinks that this is a provocative approach that opens up a host of problems. Legal certainty now is replaced by flexibility. According to her, the facts of the case allowed the Advocate General simply to say that “taken together the actions of the FSU and the ITF are capable of effectively restricting the exercise of the right to freedom of establishment of an undertaking such as Viking”.^{187,188}

Furthermore, Catherine Barnard considers the *Viking* judgment problematic for two major reasons. Firstly, it puts trade unions in the same position as states, with the same responsibilities. She thinks this is not fair to trade unions, because, unlike states, trade unions are mainly concerned with the protection of the interests of their members and do not have to balance the interests of those losing their jobs with the interests of society as a whole having cheaper services. For Barnard it is problematic that trade unions are now subject to the same obligations as states, while at the same time they cannot invoke any of the defences in Article 46 EC (now, Article 52 TFEU), for instance public policy, because these were drafted with states in mind.¹⁸⁹

A more detailed analysis of the horizontal direct effect of the Treaty provisions is offered by Alan Dashwood. He starts by differentiating between the approaches

¹⁸⁶ *Ibid.* Para. 49.

¹⁸⁷ *Ibid.* Para. 55.

¹⁸⁸ Catherine Barnard, *Viking and Laval: An Introduction* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008, P. 472.

¹⁸⁹ *Ibid.*, p. 472.

taken by the Advocate General Maduro and the ECJ in the case of *Viking* and also *Laval*. According to Dashwood the Advocate General attempted to formulate a general theory of the horizontal direct effect of the free movement provisions in the Treaty and applied it to *Viking*; while the ECJ decided the cases of *Viking* and *Laval* by analogy by making reference to established case law.¹⁹⁰

Dashwood states that free movement provisions certainly do apply directly in some cases, but the problem is to know which these cases are. No answer to this question is provided by the Advocate General, so it must be decided on a case-by-case basis. The case-by-case approach criticized by Barnard, who did not support the idea that legal certainty is now replaced by flexibility, is also problematic for Dashwood. It is difficult to strike a balance between the need of subjecting certain private actors to the Treaty provisions on freedom of movement and the need to respect the private autonomy of these private actors as protected under domestic law. Similar to Barnard, Dashwood is also of the idea that it is not appropriate to hold individual actors to the same strict standards as national authorities, which usually enjoy a margin of discretion in the steps that should be taken to prevent obstacles to free movement resulting from the conduct of private actors.¹⁹¹

Having answered the first and the second questions the Court then went to consider whether the industrial action breached the Treaty and if so, whether this was justified. The Court started with the statement that freedom of establishment is one of the fundamental principles of the Community, the purpose of which is to

¹⁹⁰ Alan Dashwood, *Viking and Laval: Issues of Horizontal Direct Effect* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008, p. 531.

¹⁹¹ *Ibid.* p. 533-534.

ensure that foreign nationals and companies are treated in the host member state the same way as nationals of that state, and that the fact that a national or company is originally from a particular member state should not prevent them from settling or being established in another member state. The Court then refers to the definition of the freedom of establishment, which according to its previous case law involves “the actual pursuit of economic activity through a fixed establishment in another Member State for an indefinite period”. The Court concluded that the registration of a vessel actually falls within this definition, as a vessel serves as a vehicle for the pursuit of economic activity.¹⁹²

As a result, the Court reached the conclusion that both actions of the FSU and the ITF constituted restrictions on the freedom of establishment. In relation to the FSU the Court stated that the collective action envisaged by the FSU had had the effect of making Viking’s exercise of its right to freedom of establishment less attractive or even pointless, as the action of the FSU prevented Viking from enjoying the same treatment in the host member state as other economic operators established in that state.¹⁹³ In regard to the ITF the Court stated that the policy of the ITF which aims at combating the use of flags of convenience “must be considered to be at least liable to restrict Viking’s exercise of its right of freedom of establishment”.¹⁹⁴

Having established that the actions of the trade unions constituted a restriction on the freedom of establishment, the next question the Court dealt with was whether or not this restriction was justified. Advocate General Maduro started by pointing

¹⁹² *Supra* note 175, para. 68-70.

¹⁹³ *Ibid.* para. 72.

¹⁹⁴ *Ibid.* para. 73.

out the benefits of the rules of establishment for the economic welfare of all member states within the Union. At the same time he stressed the importance of the social rights of workers and endorsed these by recognizing the right of workers to associate and act collectively in order to make their voices heard. The Advocate General also noted the negative consequences that are inherent in the creation of a common market, in exchange for which the society must commit itself to the general improvement of the living conditions of workers who personally experience the difficulties caused in the process of common market creation.¹⁹⁵

After carefully balancing the interests of the common market and the workers' rights the Advocate General moved on to establishing whether the industrial action undertaken by the ITF and proposed by the FSU went too far. Here the Advocate General distinguished between two types of industrial action: collective action in the interests of the jobs and the working conditions of the current crew, which was the situation of the FSU, and collective action to improve the terms of employment of seafarers throughout the community, which concerned the ITF.

Regarding the first type of collective action the Advocate General was of the opinion that this is compatible with EC law, provided that intra-community relocations are not treated less favourably than relocations within national borders. However, relocations shall not be initiated purely for the reason to prevent an undertaking to provide services in the member state where it had previously been established. In other words, the FSU action could be justified if Viking had planned to relocate from Finland. But while Viking had planned to

¹⁹⁵ *Supra note 176*, para. 57-60.

relocate from Finland to Estonia (within the EC Community) the action by FSU is not appropriate, because “blocking or threatening to block, through collective action, an undertaking established in one Member State from lawfully providing services in another Member State ... entirely negates the rationale of the common market”.¹⁹⁶

Regarding the second type of industrial action the Advocate General recognized the need for the coordinated collective actions from the trade unions in order to protect workers’ rights. However, he distinguished between situations where trade unions have a choice in deciding on their own whether to participate in collective industrial action and where trade unions are compelled to participate in such an action. The later one might constitute an abuse, he noted, and thus contravene Article 43 EC because it enables any national union to seek the support of other trade unions in order to block the relocation of a company from one member state to another if its own preferred standards are not respected.¹⁹⁷

The ECJ offered a more careful observation. The Court had not justified the restriction on the freedom of establishment, nevertheless, its ruling gave the national court strong leverage on making a final decision on whether the collective action was really about the protection of workers. The Court reiterated the position of the Advocate General that the protection of the jobs and conditions of employment of trade union members can fall within the objective of protecting workers, and therefore can justify the restriction on freedom of movement clauses; noting, however, that “such a view would no longer be tenable if it were established that the jobs or conditions of employment were not jeopardized or

¹⁹⁶ *Ibid.* para. 67-68.

¹⁹⁷ *Ibid.* para. 70-71.

under serious threat”. The Court referred to Viking’s undertaking not to terminate the employment with any person as a result of reflagging, at the same time stating that while the exact legal scope of the undertaking is not clear it is the national court that determines “whether the jobs or conditions of employment of that trade union’s members who are liable to be affected by the reflagging of the Rosella were jeopardized or under serious threat”.¹⁹⁸

The Court offered a proportionality test for the national court to apply: if the national court reaches the conclusion that jobs were “jeopardized or under serious threat” and the collective action by FSU was necessary to protect these jobs, the national court further has to ascertain whether the FSU action “was suitable for ensuring the objective pursued and does not go beyond what is necessary to attain that objective”.¹⁹⁹

Interestingly, the Court makes referral to European Court of Human Rights (ECHR) case law (*National Union of Belgian Police v. Belgium*, no. 4464/70, ECHR, 1975; *Wilson, National Union of Journalists and Others v. United Kingdom*, ECHR, 2002), stressing the importance of the right to strike and the right to collective agreement and collective bargaining for the protection of workers’ rights as “one of the main ways” in which trade unions can protect their members. However, in the next paragraph the Court considers whether the collective action in the case of Viking goes beyond what is necessary to achieve the objective. Here the Court is of the opinion that for this to be established “it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did

¹⁹⁸ *Supra note* 175, para. 81-83.

¹⁹⁹ *Ibid.* para. 84.

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, on the other, whether that trade union had exhausted those means before initiating such action”.²⁰⁰

According to Catherine Barnard this test of proportionality will cause significant problems for trade unions in the future. It suggests that industrial action is the last resort and that national courts have to check whether the union has exhausted all other avenues under national law, before finding the industrial action proportionate.²⁰¹

While I share the position of Catherine Barnard that such a proportionality test seriously undermines the opportunity for trade unions to protect the interests of workers, I want to draw a parallel between *Viking* and an ECHR case which the Court does not mention: the case of *Schmidt and Dahlstrom*. In this case the issue was also the right to strike, and the Court ruled that the “Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. Article 11.1, nevertheless leaves each State a free choice of the means to be used towards this end”. The ECHR further continued that “the grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right which is not expressly enshrined in Article 11 may be subject under national law to regulation of a kind that limits its exercise in certain instances”.²⁰² The reading of this paragraph

²⁰⁰ *Ibid.* para. 86-87.

²⁰¹ *Supra* note 188, p. 483.

²⁰² *Schmidt and Dahlstrom v. Sweden*, no. 5589/72, ECHR, 1976, Para. 36.

shows that before the ECJ the ECHR also considered the right to strike as *one of the means*, which might be restricted in certain situations under national law. Interesting is how the ECJ responds to the recent developments of the ECHR jurisprudence (where the position of the Court has changed in relation to the trade union right of freedom of association and it is now interpreted according to the ILO standards). This is to be discussed in the following chapter.

Continuing with the *Viking* judgment, the Court shared the unfriendly attitude of the Advocate General towards the ITF action and stated that the restriction on the freedom of establishment caused by the ITF policy – which resulted in ship owners being prevented from registering their vessels in a state other than the state of which the beneficial owners of those vessels are nationals – cannot be justified. The Court nevertheless notes that the objective of the policy is to protect seafarers and to improve their terms and conditions of employment; however, from the file submitted to the Court it is apparent that according to the Flag of Convenience (FOC) policy the ITF is required to initiate strike action against an employer when asked by one of its members irrespective of whether that employer's exercise of the right to establishment has a harmful effect on the working conditions of workers. It means that the FOC policy is also applicable to a situation in which the vessel is re-registered in a state that guarantees the workers higher protection than they had enjoyed in the first state. In other words, the policy is indiscriminate.²⁰³

²⁰³ *Supra* note 175, para. 88-89.

The case of *Viking* was returned to the Court of Appeal and the parties settled the case. Although the terms of settlement remain confidential, it is known that the *Rosella* is now registered in Sweden.²⁰⁴

4.4.3 The *Laval* Case

The second case that covered the issue of the relationship between social rights and economic freedoms and that was decided by the ECJ together with *Viking* was *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets, avd. 1, Byggettan, Svenska Elektrikerförbundet*. The facts of the case are the following: Laval is a Latvian company that has a wholly owned subsidiary L&P Baltic Bygg, a company incorporated under Swedish law. Baltic won a contract to refurbish and extend a school in Sweden (in the Stockholm suburb of Vaxholm). Laval posted 35 Latvian workers to Sweden to fulfil the contract. The workers earned 40% less per hour than comparable Swedish workers. Therefore, even though Laval was in a collective agreement with the Latvian trade unions, the major Swedish construction trade union wanted Laval to join the Swedish national agreement. The negotiations started in June 2004. Laval was requested to join the collective agreement for the building sector signed between the Swedish trade unions and the Swedish Building Employers' Association. The agreement covered a number of issues, including the obligation for Laval to pay a special building supplement to an insurance company in order to finance group life insurance contracts. Importantly, the pay for workers was not defined and was left to be negotiated at the local level between the local trade union (*Byggettan*) and the employer on a

²⁰⁴ *Supra* note 188, p. 484.

case-by-case basis after the tie-in to the Swedish collective agreement. The negotiations were unsuccessful. Laval refused to sign the agreement, for the reason that the obligations with regard to wages were not clear. *Byggettan* (a local trade union) requested *Byggnads* (a major Swedish construction trade union) to initiate strike action against Laval by blockading the building site (preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site). Subsequent mediation was not effective and the collective action against Laval intensified; other trade unions in Sweden announced sympathy strikes (*Elektrikerna* joined the action, with the result that Swedish undertakings belonging to the organization of electricians' employers were prevented from providing services to Laval). As a result, the town of Vaxholm terminated the contract with the Baltic company, which eventually went bankrupt. The Latvian workers returned to Latvia.²⁰⁵

In December 2004 Laval commenced proceedings in the Swedish national court (*Arbetsdomstolen*) against *Byggnads*, *Byggettan* and *Elektrikerna*, asking the Court firstly to declare the blockade and sympathy actions illegal and issue an order to seize the actions, and secondly, to issue an order to the trade unions to pay compensation for the damage. The national court dismissed the application for an interim order to bring the collective action to an end.

However, the national court was interested to know whether Articles 12 EC (now article 18 TFEU) and 49 EC (now article 56 TFEU) and the Directive on Posting Workers 96/71 preclude trade unions from attempting, by means of strike action,

²⁰⁵ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets, avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007]; Para 27-38.

to force a foreign company posting workers to Sweden to apply a Swedish collective agreement, and referred the following two questions to the ECJ:

1. Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC ... for trade unions to attempt, by means of collective action in the form of a blockade (“blockad”), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of Arbetsdomstolen of 29 April 2005 (collective agreement for the building sector), if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

2. The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. The prohibition applies, however, pursuant to a special provision contained in part of the law known as the “Lex Britannia”, only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia,

mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?²⁰⁶

The judgment of the Court was accordingly structured in two paragraphs:

“1. Article 49 EC and Article 3 of 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 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade (“blockad”) of sites such as that at issue in the main proceedings, to force a provider of services established in another member state to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the Directive. 2. Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Article 49 EC and 50 EC preclude that prohibition from being subject to

²⁰⁶ *Ibid.* para 39-40.

the condition that such action must relate to terms and conditions of employment to which the national law applies directly”.²⁰⁷

²⁰⁷ After the *Laval* judgment the Swedish government decided to make changes to the existing law in order to make it correspondent to the ECJ jurisprudence. Therefore, section 5a of the *Foreign Posting of Employees Act (Lex Laval)* was formulated so that, no form of collective action can be taken by trade unions if the employer shows that workers enjoy conditions of employment (*including wage levels and other essential aspects of work*) that are at least as favourable as the minimum conditions established in agreements at central level. Section 5b of the same Act was structured in the following way, no form of collective action can be taken by trade unions if the employer shows that workers enjoy conditions of employment (*including wage levels and other essential aspects of work*) that are at least as favourable as the minimum conditions established in agreements at central level or in the user undertaking. Furthermore, Section 41 of the Co-determination Act provides that collective action taken in violation of section 5a and 5b is unlawful and trade unions acting in breach of *Foreign Posting of Employees Act* shall pay compensation for any loss incurred. The changes entered into force in April, 2010.

Changes concerned also the *Foreign Branch Offices Act*. Under Section 2 of the Act foreign companies which conduct their economic activities in Sweden are not obliged to create a branch office with independent management in Sweden if the economic activity is made subject to the provisions on free movement of goods and services in the Treaty on the Functioning of the European Union or the corresponding provisions of the Agreement on the European Economic Area (EEA).

The obvious influence of the *Laval* put Swedish trade unions in a hard condition. They started to fight back and in a couple of year’s times after *Laval* they have achieved tangible results. On May 22, 2013 Swedish parliament approved the proposed bill of the government (Prop. 2012/13:71) making amendments to the Act on Posting of Workers. According to this amendment foreign service providers are requested to register at the Swedish Work Environment Authority and to appoint a contact person in Sweden. There is an exemption to this rule, if the work in Sweden lasts for maximum of five days (European Labor Law Network, http://www.labourlawnetwork.eu/national_labour_law_latest_country_reports/national_legislation/legislative_developments/prm/109/v_detail/id_3151/category_1/index.html).

In 2012 Swedish trade unions lodged a complaint against Sweden to the European Committee of Social Rights, complaining about the violation of Article 6 on the right to bargain collectively and the right to collective action (para 2, 4) and Article 19 on the right of migrant workers and their families to protection and assistance (para 4a, b) of the European Social Charter (revised) of 1996. The Committee established violation of the Charter on all four aspects. The decision was made public on November 20, 2013. In Paragraph 18 the Committee states that “*the facilitation of free cross-border movement of services and the promotion of the freedom of an employer to provide services in the territory of other states ... cannot be treated ... as having a greater a priori value than core labor rights, including the right to collective action to demand further and better protection of the economic and social rights and interests of workers*” (85/2012 – *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*).

These recent developments show how successfully the Swedish trade unions acted against the *Laval* restrictions. How far can this go and whether trade unions manage to restore the pre-*Laval* status quo remains to be seen.

4.4.3.1 Posting Workers Directive

While the ECJ was asked to interpret Directive 96/71 on Posting of Workers, I consider it useful to mention several provisions of the Directive that the Court was specifically concerned with. In the Preamble we read that because of the internationalization of employment relationships sometimes it becomes harder to decide which legislation is applicable in employment relationships (Recital 6). Therefore, member states should coordinate in the framework of the Community in order to set mandatory rules for minimum protection to be observed by employers posting workers to other member states (Recital 13). At the same time, it is stressed that these minimum protection rules should not prevent the application of terms and conditions of employment more favourable to workers (Recital 17). In the same Preamble reference is made to collective action, specifying that the Directive is without prejudice to the national law on collective action for defending occupational interests (Recital 22).

As for the scope of the Directive, it is applicable to companies that post workers from one member state to another. It is also applicable to situations similar to *Laval* when companies post workers to an establishment or to an undertaking owned by a group in the territory of a member state and when there is an employment relationship between this undertaking and the worker during the period of posting (Article 1).

Directive 96/71 binds undertakings to respect the terms and conditions of employment of the host country provided either by law, regulation or administrative provision, or by the collective agreements or arbitration awards that are declared universally applicable. The issues that can be covered by these documents also include the rate of pay (Article 3.1).

Directive 96/71 defines universally applicable collective agreements and arbitration awards as “collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned”. In case member states do not have a system of declaring these as universal they may rely on “a. collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or b. collective agreements which have been concluded by the most representative employers’ and labor organizations at national level and which are applied throughout national territory.” The importance of equality of treatment is stressed in the same paragraph, meaning that national undertakings are subject to the same obligations with the same effect as the undertakings posting workers (Article 3.8).

It is also stressed that the application of more favourable terms and conditions of employment to posted workers shall not be prevented. It is also specified that allowances specific to the posting shall be considered to be part of the minimum wage unless paid in reimbursement of expenditure incurred on account of the posting (Article 3.7).

On the basis of equality of treatment and in the case of public policy provisions member states are allowed to apply to national and foreign undertakings the terms and conditions of employment not mentioned in national laws, regulations and administrative provisions. On the same ground member states are also allowed to apply terms and conditions of work to the national and international undertakings that are mentioned in universally applicable collective agreements and arbitration awards but are not specified in Article 3.1 (Article 3.10).

4.4.3.2 Swedish legislation

As to the Swedish legislation, it is important to mention that Sweden does not have a system for declaring collective agreements universally applicable, and in order to avoid a discriminatory approach Sweden does not require foreign undertakings to apply Swedish collective agreements because not all Swedish workers are bound by collective agreements. The Directive 96/71 was transposed by the Law on the Posting of Workers (*lag om utstationering av arbetstagare* (1999:678)). However, Swedish legislation does not provide for minimum rates of pay as mentioned in Article 3.1 of the Directive. As required under Article 4.1 of the Directive, a liaison office (*Arbetsmiljöverket*) was established for informing interested persons about the existence of the collective agreements and providing them with the necessary information.²⁰⁸

The right to take collective action is guaranteed by the Basic Law of Sweden. The Law on Workers' Participation in Decisions 1976 (*Medbestämmandelagen*, 'MBL') provides rules concerning the rights of association, negotiation, collective agreements, and mediation of collective labour disputes, as well as the obligation of social peace. It also contains a provision on the restrictions on engaging in collective action. According to Article 41 MBL there is a mandatory social truce between the employer and the employee bound by a collective agreement and it is prohibited to take collective action with the aim of changing the terms and conditions of this agreement. Collective action is allowed when the management and labourers are not bound by any collective agreement. Article 42 of the MBL prohibits any kind of participation in illegal collective action. In the case law Article 42 is defined as prohibiting trade unions to take collective action

²⁰⁸ *Supra* note 205, para 7-9.

with the purpose of having a collective agreement between other parties set aside or amended. In the case of *Britania* (1989, No 120) it was held that this “prohibition extends to collective action taken in Sweden in order to have a collective agreement concluded between foreign parties in a workplace abroad set aside or amended if such collective action is prohibited by the foreign legislation applicable to the signatories to that collective agreement”. The “*Lex Britania*” which entered into force in 1991 reduced the scope of the principle expounded in *Britania* judgment, saying that collective action against a foreign employer is no longer prohibited if “the particular situation suggests that the link with that member state is too tenuous for the MBL to be deemed to apply directly to the terms and conditions of employment in question”.²⁰⁹

The collective agreement for the building sector that Laval was asked to join was an agreement concluded between *Byggnads* (a trade union which groups together workers in the construction sector in Sweden) and *Sveriges Byggindustrier* (a central organization for employers in the construction sector). Other than setting terms and conditions of employment the agreement also required the signatory undertakings to accept a number of pecuniary obligations, such as a sum equal to 1.5% of gross wages for the purposes of the pay review this section of the trade union carries out. Also undertakings were obliged to pay sums to the insurance company, FORA, firstly, 0.8% of total gross wages for the purposes of a “special building supplement” (intended to finance group life insurance contracts and the research fund for Swedish building undertakings, Galaxen, that had the purpose of the adaptation of the work places for persons with reduced mobility) and secondly, 5.9% for the purposes of a number of insurance premiums

²⁰⁹ *Ibid.* para 10-16.

(guaranteeing workers supplementary retirement insurance; payment of health benefits; compensation for accidents at work; and financial assistance for relatives in the event of the death of a worker).²¹⁰

The determination of wages in Sweden takes place on a case-by-case basis, as a result of negotiations between the management and individual workers, considering the qualification of the worker and also the work to be performed. In the construction sector performance-related pay is standard. New pay agreements should be concluded in respect of each construction project. However, employers and local trade unions may agree on the application of an hourly wage in respect of a specific site. There is no system of monthly wages applicable to the workers in the construction business. If the local trade union and the employer cannot agree on the issue of pay, the central trade union (in the case of Laval this was *Byggnads*) can intervene as a party on the side of employees. If the negotiations are still unsuccessful the basic wage is determined according to a *fall-back clause*. This is a negotiation mechanism of the last resort and in 2004 the amount suggested by the clause amounted to SEK 109 (approximately 12 EUR) per hour.²¹¹

4.4.3.3 Discussing the Judgement

The questions raised in *Laval* were structured in the same order as the questions in *Viking*. The first question was about the applicability of EC law to the exercise of fundamental social rights. The Danish and Swedish governments submitted to the Court two main reasons for the inapplicability of EC law: firstly, according to Article 137(5) EC (now Article 153(5) TFEU) freedom of association and the

²¹⁰ *Ibid.* para 17-23.

²¹¹ *Ibid.* para 24-26.

right to strike fall out of the scope of the Community; secondly, the right to strike is a fundamental right guaranteed by various international instruments and therefore cannot be trumped by freedom of movement provisions. The position of the Advocate General about these issues was that it would be indefensible and anachronistic if EU law generally did not apply to the social laws of member states, because firstly, in exercising power in the social sphere member states must still comply with Community law and secondly, under Title XI, the Community itself also retains certain powers, albeit limited, in the social sphere.²¹²

As for the second issue concerning the fundamentality of the right to strike the Advocate General was of the opinion that the right to strike is a fundamental right and a general principle of Community law.²¹³ However, according to the Advocate General this right is not absolute, and certain restrictions can be put on it. Here he cited case law of the ECHR in which it is recognized that the right to strike can be one of the means by which states might or might not choose to guarantee the right to freedom of association for trade unions protected under Article 11 ECHR. It is stressed that the right to strike is not upheld by Article 11 of the ECHR and that it might be subject to national laws and regulations that limit its exercise.²¹⁴

The Advocate General suggested that with regard to particular situation in *Laval* the exercise of the trade unions' right of collective action falls within the scope of

²¹² Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets, avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007], Opinion of AG Mengozzi, Para. 48-50.

²¹³ *Ibid.* para. 78.

²¹⁴ *Ibid.* para. 72.

Community law, namely, provisions on the freedom of providing services.²¹⁵ The Court shared this opinion and stated that Community law is applicable to the strike action taken by the trade unions in *Laval*.²¹⁶

The next issue raised in the case was whether EC law applies to trade unions; in other words, the issue of direct horizontal effect of the EC provision on freedom of movement. The opinion of the Advocate General was that the prohibition of discrimination laid down in Article 49 EC (now Article 56 TFEU) applies not only to public authorities, but also to rules of a non-public nature which “are intended to regulate, collectively, the work of self-employed persons and the provision of services”. Relying on previous case law he stated that the abolition of obstacles to the free movement of services among member states would be compromised if such obstacles were allowed to be created by associations and bodies that enjoy legal autonomy and that do not come under public law. He also noted that considering the differences in legal systems of the member states sometimes working conditions are governed not by provisions of laws and regulations, but by acts and agreements concluded by private persons.²¹⁷ It is interesting to note that despite the fact that Advocate General Mengozzi wrote about direct horizontal effect, the ECJ did not mention this issue in the judgment.

The next issue that the Court dealt with was whether the industrial action taken by trade unions constituted a restriction on the Treaty provisions on services. Here the Court stated that Article 49 EC (now Article 56 TFEU) was breached. According to the Court, trade union action designed to force service providers to

²¹⁵ *Ibid.* para. 91.

²¹⁶ *Supra note* 205, para. 86-95.

²¹⁷ *Supra note* 212, para. 156, 157.

sign a contract that contains more favourable terms and conditions than the Directive 96/71 Article 3(1) “is liable to make it less attractive or more difficult for such undertakings to carry out construction work in Sweden and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC”.²¹⁸

The justification of such a restriction was the next question the Court dealt with. The Court stated that the activities of the Community include not only the creation of an internal market without boundaries but also policy concerning the social sphere, and that these two activities should be balanced against each other. According to the Court the restriction on fundamental freedoms is justified by application of the right to take collective action for the protection of the workers of the host state against possible social dumping, because it may constitute an overriding reason of public interest within the meaning of the case law of the Court. In the present case of *Laval* the Court observes that the blockading action by trade unions, aimed at ensuring that posted workers have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers. However, according to the Court, forcing a foreign undertaking to sign a collective agreement creates such an obstacle that it cannot be justified by this objective. The level of protection guaranteed by Directive 96/71 is limited to what is provided by Article 3(1), unless the foreign undertaking itself voluntarily signs a collective agreement in the host member state which provides more favourable terms and conditions of employment. The Court then makes referral to public policy provisions under Article 3(10) of the Directive, explaining that if there are issues other than those provided under

²¹⁸ *Supra* note 205, para. 99.

Article 3(1) of the Directive (in the present case these were the pecuniary obligations mentioned in the Swedish collective agreement), that the host state wants to apply under public policy provisions, it is necessary that the state first opt in to Article 3(10), which Sweden in the present case did not do.²¹⁹ Therefore, Laval is only required to observe the nucleus mandatory rules for minimum protection in the host member state.²²⁰

The Court separately mentions the imposition of negotiations concerning minimum pay by trade unions on the foreign undertaking, and states that in general such action is not prohibited by Community law; however, in the particular circumstances of the case the collective action cannot be justified in the light of the public interest objective that obtains when the host state does not have in place any laws or regulations that are sufficiently precise and accessible and render it possible for the undertaking to determine the obligations with which it is required to comply as regards minimum pay.²²¹

Based on these assumptions, the Court answered the first question in favour of Laval: that Article 49 EC and the 96/71 Directive on the Posting Workers did preclude the trade unions in the present case to take industrial action for the purposes of forcing the undertaking to sign the Swedish collective agreement and agree on minimum rates of pay.²²²

²¹⁹ *Ibid.* para. 81-84.

²²⁰ *Ibid.* para. 99-108.

²²¹ Regarding this point it is interesting to cite the hypothetical question of Catherine Barnard who asks the following: “*had Swedish law been compatible with the Directive, would collective action to force Laval to sign a collective agreement transparently laying down minimum rates of pay be compatible with Article 49?*” *Supra* note 195, p. 477-478.

²²² *Supra* note 205, para. 109-111.

As for the second question on the applicability of the provision of the MBL (the system introduced to combat social dumping, pursuant to which a service provider does not have to expect any account to be taken of the obligations set down in collective agreements signed in the member state where it is established) the opinion of the Court is that such a system is discriminatory because it legalizes the collective action against the foreign undertaking, subject to the law (or collective agreement) of another member state in the same way as such action is authorized against national undertakings that are not bound by any collective agreement. The Court reiterates that discrimination arises when different rules are applied to comparable situations and also when same rule is applied to different situations. Therefore, in the present case of *Laval*, the Court is of the opinion that the national rules give rise to a discriminatory situation, because they do not take into account whether a foreign undertaking is already bound by a collective agreement in the home member state and put them in the same position as national undertakings that might not be bound by any collective agreement. This kind of discrimination can only be justified on grounds of public policy, public security and health, which, according to the Court, are not at issue in the present case. Therefore, the discrimination is not justified.²²³

Catherine Barnard is very critical of the Court's reading of the Directive. She thinks that the Court read the Directive provisions very strictly. For Barnard, Article 3(7) ("Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers") always meant that Directive provided a "floor" of rights, while the states (in general presumably the host state) could go further by imposing higher standards, subject to the

²²³ *Ibid.* para. 112-120.

ceiling of Article 49. She criticized the position of the Court that Article 3(7) applies to the situation of foreign service providers only if they voluntarily sign a collective agreement in the host state which offers superior terms and conditions for their employees, a scenario that is very unlikely. Therefore, she thinks that the Court came very close to making Article 3(1) not a floor but a ceiling. The strict reading of Article 3(1) and Article 3(8) of the Directive is also problematic. Matters listed in Article 3(1) must be laid down in laws and regulations or in collective agreements or arbitration awards satisfying the conditions laid down in Article 3(8). Otherwise, they cannot be applied to posted workers.²²⁴

Mia Rönnmar shares the view of *Barnard* that after *Viking* and *Laval* Directive 96/71 came to set only the minimum protection of a nucleus of mandatory rules. In other words, the Directive is not only a minimum Directive as it is stated in Article 3(7) and Recital 17 of the Preamble, but also a maximum Directive, “establishing a ceiling for the terms and conditions of employment that a trade union or a state may require foreign service providers to apply to employees”.²²⁵

Rönnmar also clarifies that in *Laval*, the lack of transparency and case-by-case negotiation of wages were not acceptable for the ECJ. In connection to this she mentions the Swedish discussion on the compatibility of *Lex Britannia* with EC Law, which took place before Sweden joined the EU, in 1994. The conclusion of that discussion was that “the *Lex Britannia probably* was compatible with EC

²²⁴ *Supra* note 188, p. 475-476.

²²⁵ Mia Rönnmar, *Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008, P. 523.

Law”. Therefore, the conclusion of the ECJ in *Laval* that the *Lex Britannia* was discriminatory and in contravention with Articles 49 and 50 is not surprising.²²⁶

Tonia Novitz focuses on the definition of the term “protection of workers” (which according to the ECJ can be used to justify restrictions on the freedom of movement provisions of the EU) from the perspective of the *Viking* and *Laval* cases and also the ILO. The observation she makes is that in contrast to the ILO the interpretation offered by the ECJ in these two cases is very restrictive and narrow. Inspired by the company’s promise that reflagging would not lead to redundancies, in *Viking* the ECJ states that the actions of the trade union (FSU) cannot be considered to be protection of workers, “if it were established that the jobs and conditions of employment were not seriously under threat”. Based on the same argument that the reflagging did not have harmful effects on a particular group of workers, the Court did not consider the ITF “Flags of Convenience” policy justified.²²⁷

A similar restrictive interpretation was offered by the Court in *Laval*. The Court recognized that the blockading action fell within the objective of protecting workers. However, collective action was not justified because negotiations on pay form part of a national context which lacked sufficient precision and accessible provisions allowing the undertaking to determine the obligations with which it was required to obey with regard to minimum pay.²²⁸

In contrast to the ECJ approach, the interpretation offered by the ILO organs in regard to the scope of the legitimate aim of the industrial actions was much

²²⁶ Ibid. p. 512, 518, 519.

²²⁷ *Supra note* 160, p. 557-558.

²²⁸ Ibid. p. 556-557.

broader. Novitz observes that according to ILO jurisprudence legitimate protection of workers' interests also includes the pursuit of economic and social policy objectives. She cites the Digest of Decisions of the Freedom of Association Committee of the ILO, which states that the exercise of the right to strike can be used not only for the defence of occupational and economic interests, but also for "seeking a solution to economic and social policy questions and problems facing the undertakings which are of direct concern to the workers". The same Committee considers that trade unions should be allowed to refer to strike action "to support their position in the search to solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living".^{229,230}

The ILO also expressed its concern regarding the *Laval* judgment and subsequent developments. In its 2013 report the Committee of Experts on the Application of Conventions and Recommendations stated that it is not its task to judge the correctness of the ECJ rulings in *Viking* and *Laval*, as they set out an interpretation of European Union law. Rather, the Committee was to check whether the impact of these rulings was such that they impeded the enjoyment of the rights guaranteed under Convention No. 87 at a national level. In the case of *Laval* the Committee said to be deeply concerned by the fact that the trade unions were held liable (and forced to pay punitive damages (€342,000) to Laval's Latvian trustee in bankruptcy) for a strike action that was lawful under national law at the time and for which it could not have been reasonably presumed that the

²²⁹ *Ibid.* p. 558-559.

²³⁰ A more detailed interpretation of the principle of freedom of association according to the ILO organs can be found in Chapter III above.

action would be found in violation of EU law. The Committee recalled that the imposition of sanctions on trade unions for leading a legitimate strike is a grave violation of freedom of association principles. Therefore, the Committee requested the Swedish government to review this matter with the social partners concerned so as to study possible solutions for compensation of the two unions. The Committee also criticized the amendments to the *Lex laval* already mentioned here and requested the government to review the changes made in 2010.²³¹

If the ECJ had referred to ILO instruments, the *Viking* and *Laval* outcomes could have been different. In a later case, however, issued by the ECJ in 2009, reference to ILO instruments was made. Particularly, while interpreting the Working Time Directive 2003/88 the ECJ relied on the ILO Convention No 132 concerning Annual Holidays with Pay.²³²

Nevertheless, even though the Posting Directive was interpreted as a cap for the protection of posted workers' rights and the legal basis of it was decided to be Article 49 EC in the case of *Laval*, the pre-emptive approach of the Court may have little impact outside posting cases, while most of the social policy directives have a Treaty basis in the Social Policy Title and cannot be said to be interpretations or expressions of Article 49 or any other free movement provisions of the EU Treaty.²³³

²³¹ *General Report and Observations concerning particular countries, Report III (Part IA)*, International Labour Conference, 102nd Session, 2013.

²³² Joined Cases C-350/06 and C-520/06 *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs* [2009]; Para. 37-38.

²³³ Simon Deakin, *Regulatory Competition after Laval* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008, P. 602.

4.4.4 The *Rüffert* Case

The next case after *Viking* and *Laval* on the relationship between fundamental rights and fundamental freedoms was *Dirk Rüffert v Land Niedersachsen*. The factual circumstances of the case are the following: after a public invitation to tender, the company *Objekt und Bauregie GmbH & Co* was awarded a contract for structural work in Niedersachsen. The contract included a declaration regarding compliance with the collective agreements, specifically mentioning the obligation to pay workers on the building site the minimum wage set by collective agreements, applicable at the place where the services were performed. *Objekt und Bauregie GmbH & Co* subcontracted to a Polish firm with the provision that it would ensure compliance with wage rates already in force on site through collective agreements.²³⁴ It was discovered, however, that the Polish firm was paying its posted workers 46.57% of the applicable minimum wage for the construction sector. The Niedersachsen authorities withdrew the contract and demanded payment of contractual penalties from the subcontractor. The company took legal action. The appeal regional Court of Hannover (the *Oberlandesgericht Celle*) considered that the resolution of the dispute was dependent on whether the application of the *Landesvergabegesetz* was precluded on the ground of an incompatibility with the freedom to provide services laid down in Article 49 EC. While the issue of interpretation of Community law was raised, the national court stayed the proceedings and referred the following question to the ECJ: “does it

²³⁴ According to the Law of Niedersachsen on the award of public contracts (*Landesvergabegesetz Nds*) “contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective agreement” (Paragraph 3(1)); this obligation on minimum wages applies also to subcontractors if services are assigned to them (Paragraph 4(1)).

amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?”²³⁵

Similar to the *Viking* and *Laval* the ECJ favoured single market rules. The Court stated that “Directive 96/71, interpreted in the light of article 49 EC, precludes an authority of a Member State ... from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public work contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed”.²³⁶

4.4.4.1 Discussing the Judgment

It is interesting to note that the opinion of Advocate General Bot was contradictory to the Court’s judgment. He thought that the Directive 96/71 EC should be interpreted as not precluding national legislation (*Landesvergabegesetz*) to award such public contracts, which requires contractors and subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, even if the collective

²³⁵ Case C-346/06 *Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008]; Para 10-16.

²³⁶ *Ibid.* para. 43.

agreement to which the legislation in question refers is not declared to be universally applicable.²³⁷

For Advocate General Bot the Posting Directive 96/71 offered a nucleus of minimum protective rules that are guaranteed to posted workers. Article 3.7 allowed member states to enhance the social protection of posted workers (Para. 83). The fact that the collective agreement in the construction industry (*TV Mindestlohn*, which is universally applicable on the whole territory of the Federal Republic of Germany) offered lower wages than requested by the local collective agreement (which is not universally applicable but is mentioned in *TV Mindestlohn*) referred in the law of Niedersachsen on the award of public contracts (*Landesvergabegesetz*) was explained by the Advocate General as a member state using the option offered under Article 3.7 (Para 90-95). Therefore, a national measure such as the one at issue in the main proceedings, which made a local collective agreement mandatory for posted workers as well, was consistent with the Directive (Para 95).

Advocate General Bot thought that any enhanced protection under Article 3.7 of the Directive should also be in concert with Article 49 EC, which is interpreted by the ECJ as a provision requiring the elimination of any kind of discrimination against service providers on the basis of nationality; a provision that requires the abolition of any restriction that prohibits, impedes or renders less attractive the activities of a foreign service provider (Para 84, 100).

According to Advocate General Bot there was no doubt that a restriction on the freedom to provide services did take place; the question was whether that

²³⁷ Case C-346/06 *Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008]; Opinion of AG Bot, Para 136.

restriction was justified (Para 102). According to the established case law of the Court, the protection of workers, which also includes the prevention of unfair competition by undertakings paying their workers less than the minimum wage (social dumping), can be a justification for a restriction on the freedom to provide services (Para 106-108). In the present case the Advocate General asked the question whether the rules under the *Landesvergabegesetz* actually confer a genuine benefit on the workers concerned. Taking into account the gross amount of wages, he stated that if applied properly under the law of the *Landesvergabegesetz*, the workers would have received significantly higher wages. Therefore the law provides protection for posted workers and prevents social dumping as it ensures that local and foreign workers on the site are paid equally (Para 118-119). The objectives of worker protection and the prevention of social dumping could not be achieved with less restrictive means than the *Landesvergabegesetz* (Para 124).

The Advocate General disagreed with the position of the Commission that there is discrimination between posted workers in the construction industry according to whether the primary contractor is a public or a private one, as the law (*Landesvergabegesetz*) applies only to public contractors. The Advocate General was of the opinion that this argument was not valid, because under Article 49 the *Landesvergabegesetz* was required to comply with non-discrimination on the basis of nationality, which it did; it applied equally to national and foreign workers in a given workplace (Para 127-131).

The conclusion of Advocate General Bot was that while the contract performance condition relating to the minimum remuneration of workers laid down in the disputed provisions of the *Landesvergabegesetz* complied with the principle of

non-discrimination (on the basis of nationality) and while it also complied with the principle of transparency, it had to be considered consistent with Community law (Para 134).

The ECJ did not agree with Advocate General Bot.²³⁸ The Court started with a question: was the rate of pay laid down by a measure such as in the case of *Rüffert* (when the law of Niedersachsen concerning the public contract sought to make a collective agreement providing for the rate of pay binding for undertakings such as subcontractor *Objekt and Bauregie*) fixed in concert with one of the procedures described under Directive 96/71 (Articles 3.1 and/or 3.8) on posting workers (Para 23)? The answer to this question was negative. Firstly, it was negative because the law on public contracts could not be considered as a law implementing the Directive. Secondly, while the Germans' transposition of the Posted Workers Directive (*AEntG*) contained a reference to collective agreements that are declared universally applicable, the collective agreement at stake (on "Building and Public Works") had not been declared universal and was not capable of being treated as universally applicable within the meaning of the second indent of the first subparagraph of Article 3.1 read in conjunction with the first subparagraph of Article 3.8 of the Posting Directive (Para 25-26). Thirdly, the collective agreement at issue does not fit within the second subparagraph of Article 3.8 either, because this subparagraph applies to states without a system for declaring collective agreements universal, which is not the case in Germany. In addition, the collective agreement in the case does not respond to the

²³⁸ It is interesting to observe that the judgments of *Viking* and *Laval* are similar to the one in *Rüffert*, in a way that in all three cases the Court gave privilege to fundamental freedoms over fundamental social rights. However, they are different in terms of the Courts taking into account the opinion of the Advocate Generals. While in *Viking* and *Laval* the Court mainly agreed with the positions of Maduro and Mengozzi, in *Rüffert* the Court totally disregarded the opinion of Bot.

requirements of general applicability “to all similar undertakings in the geographical area and in the profession and industry concerned”, specified under the second subparagraph of Article 3(8), while it applies to public contracts only and not to private ones, and also is applicable only within the geographical area of the agreement (Para 27-29). Therefore, the Court concludes that the minimum rate of pay in the case is not fixed in accordance with the Directive requirements and cannot be considered to be a term or condition of employment that is more favourable to workers under the meaning of Article 3(7) of the Directive (Para 30-33).

Interestingly, the Court copies Paragraph 81 of the *Laval* judgment, which states that the level of protection guaranteed to posted workers is limited to that provided for in Article 3(1), first subparagraph (a) to (g) of the Posting Directive, unless it is provided otherwise by host state laws or collective agreements and unless the posting undertaking commits itself to voluntarily sign the collective agreement in the host state guaranteeing the posted workers more favourable conditions of work (a situation that is described by Catherine Barnard as very unlikely) (Para 34).

The Court stated that this interpretation of the Directive is compatible with Article 49 EC and guarantees freedom to provide services. According to the Court, restriction on this freedom, cannot be justified by the objective of ensuring protection of workers (Para 38). Protection for independence in the organization of working life by trade unions was also rejected by the Court (Para 41). The argument that the effectiveness of the social security system depends on the level of workers' salaries was also not accepted (Para 42). The conclusion of the Court

is that the law of Niedersachsen (*Landesvergabegesetz*) is incompatible with the Posting Directive 96/71, interpreted in the light of Article 49 EC.

4.4.5 Luxembourg Case

One more case interesting for our discussion is *Commission v Luxembourg*. The case concerned the transposition of Directive 96/71 by Luxembourg. The proceeding against Luxembourg was initiated by the European Commission. Luxembourg was accused of acting on a wider interpretation of the Directive than was allowed by the Directive and the EU Treaties. The Commission considered that the national legislation of Luxembourg that transposed the Directive violated the Directive on four points. Firstly, according to the Commission the public policy provision under Article 10 was interpreted too broadly by the national legislation of Luxembourg,²³⁹ including the requirement of a written employment contract or a written document established in accordance with Directive 91/533;²⁴⁰ automatic indexation of remuneration to the cost of living; the regulation of part-time work and fixed-term work; and respect for collective agreements. Secondly, the Commission was of the opinion that Luxembourg did not make a proper transposition of Article 3(1) (a) of Directive 96/71 on the notion of minimum rest periods. The government of Luxembourg acknowledged this and amended its legislation accordingly. Thirdly, Commission thought that the national law provision that asked foreign companies to provide information

²³⁹ Reference was made to Declaration No. 10 enacted together with Posting Directive 96/71, which defines “public policy” as “provisions covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labor or the involvement of public authorities in monitoring compliance with legislation on working conditions”.

²⁴⁰ Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship.

on posted workers created legal uncertainty for foreign undertakings and put undertakings at risk of infringing the law, and therefore, that this law constituted an unjustified restriction on freedom to provide services. The law was considered a prior notification requirement and thus incompatible with Article 49 EC. And lastly, the Commission was not satisfied with the requirement of the national law of Luxembourg according to which service providers should appoint a representative, residing in Luxembourg, to keep the documents necessary for labour inspections.²⁴¹

The ECJ Court agreed with the Commission on all four points. The Court stated that the “Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 3(1) of Directive 96/71, read in conjunction with Article 10 thereof and Articles 49 EC and 50 EC”.²⁴²

4.4.5.1 Arguments for and against the Judgment

On the first point Court made several observations: about the requirement of the Luxembourg law to have a written employment contract or a written document in accordance with Directive 91/533, the Court was of the opinion that since the Directive 91/533 applies also to the home state, which means that posted workers already enjoy the same protection in the country of origin, the requirement becomes redundant (Para 41-44). A similar conclusion was drawn about the regulation of part-time work and fixed-term work, which the Court considered to be already regulated by the country of origin of the undertaking (Para 60). In relation to the requirement of automatic indexation of remuneration to the cost of

²⁴¹ Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] Opinion of AG Trstenjak, Para 20-32.

²⁴² Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008]; Para 98.

living the Court was not convinced by the argument of Luxembourg that this measure falls under public policy provisions under Article 10 of the Posting Directive (Para 53-55). As for the obligation to consider collective agreements under public policy provision, the Court noted that it must be the content and provisions of the collective agreements that can be considered as public policy and not the collective agreement *per se*. Also, Article 3(10) applies only to collective agreements that are declared universally applicable (Para 65-68). For these reasons the Court considered the first complaint of the Commission well founded.²⁴³

Regarding the second question the ECJ was brief because Luxembourg acknowledged that the transposition of Article 3(1) (a) of Directive 96/71 on maximum work periods and minimum rest periods was not complete and made subsequent changes to the national legislation. However, since these changes were not made on time the Court still considered the second complaint well founded.²⁴⁴

As for the third issue Court was of the opinion that the provisions of the national law on the monitoring arrangements of the work of undertakings were not sufficiently clear and precise to accord to Article 49 EC. On the one hand, the extent of the rights and obligations of foreign companies is not apparent (which creates legal uncertainty for companies), and on the other hand, failure to comply with those obligations incurs considerable penalties. Therefore, the demands are

²⁴³ *Ibid.* para. 69.

²⁴⁴ *Ibid.* para. 72-73.

incompatible with Article 49 EC. Therefore, the Court also considered this argument well founded.²⁴⁵

As for the final complaint of the Commission, the Court also found it well founded. According to the Court, Luxembourg failed to justify that national authorities could not carry out their supervisory tasks unless the foreign company had designated a representative in Luxembourg to keep the necessary documents for labour inspections. The Court suggested less restrictive measures for the freedom to provide services, such as to entrust the documents to one of the posted workers in Luxembourg. In any case, this kind of restriction on fundamental freedoms of movement is, according to the Court, not necessary when Article 4 of Directive 96/71 provides for an organized system of cooperation or exchange of information between member states.²⁴⁶

Unlike *Rüffert* and more similar to *Viking* and *Laval* in this case of *Luxembourg* the opinions of the Advocate General and the Court were in accord with each other. The only point that differentiates the Advocate General's opinion from that of the ECJ judgment is the automatic adjustment of remuneration in accordance to developments in the cost of living. Here the Commission did not agree with the government that making the minimum wage subject to the general adjustment mechanism was compatible with Article 3(1) (a) of Directive 96/71. Advocate General Trstenjak was of the opinion that even though the wording of the national legislation transposing the Directive was different from the language of the

²⁴⁵ *Ibid.* para. 77-82.

²⁴⁶ *Ibid.* para. 85-96.

Directive it was “neither ambiguous nor does it allow for an interpretation which is contrary to the Community law”.²⁴⁷

In relation to these four cases it has to be mentioned that the margin of appreciation of states in terms of social policies is strictly restricted by the Court of Justice. In contrast, the Court itself has a very wide margin of appreciation when deciding on issues of social rights and economic freedoms. On the one hand, it can make reference to national laws and practices relying on Protocol 30 (in case of certain states) or Article 52(6) of the EU Charter of Fundamental Rights or to the constitutional traditions under Paragraph 4 of the same article. On the other hand, the Court can refer to the general principles of EU law and the supremacy principle, and declare that national laws and practices are in breach of the EU *acquis* and therefore null and void. The Court can also refer to ECHR case law on the basis of the first sentence of Paragraph 3 of Article 52 of the Charter. But the Court can also disregard the ECHR by referring to the second sentence of the same Paragraph 3 of Article 52.

4.5 The Monti II Regulation

In 2010 a new vision on the relationship between economic freedoms and social rights was presented by Mario Monti, former commissioner of the EU. The Report suggests clarifying the implementation of the Posting of Workers Directive 96/71, disseminating information on the rights and obligations of workers and companies, strengthening the cooperation between national administrations, and better sanctioning of abuses. According to the Report, issues as important as the relationship between social rights and economic freedoms

²⁴⁷ Supra note 242, para. 53-54.

must not be left to future occasional litigation before the ECJ or national courts; rather, political forces should intervene and seek a solution in line with the Lisbon Treaty objective of a “social market economy”. The report suggests to introduce a provision which guarantees the right to strike, modelled after European Council Regulation 2679/98 (the so-called *Monti I* regulation) and a system for informal solutions of labour disputes concerning the application of the Posting of Workers Directive 96/71.²⁴⁸

As a continuation of the Monti Report a 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 (the so called *Monti II* Regulation) was prepared in the beginning of 2012. The proposal reiterates that there is an “inherent conflict” between the freedom of establishment and provision of services protected by the EU Treaties, and the exercise of the fundamental right to take collective action. According to the proposal there is no primacy of the one over the other, and this equal status implies that freedoms may have to be restricted in the interests of the protection of fundamental rights, while in certain cases the same freedoms may justify restrictions on the effective exercise of fundamental rights. Further, in case of conflict the exercise of fundamental rights and fundamental freedoms may have to be reconciled in accordance with the principle of proportionality “in line with standard practice by courts and EU case law”.²⁴⁹

²⁴⁸ *A New Strategy for the Single Market at the Service of Europe’s Economy and Society, Report to the President of the European Commission Jose Manuel Barroso*, by Mario Monti, 9 May 2010, p. 68-72.

²⁴⁹ *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*, Explanatory Memorandum, Brussels, 21.3.2012.

The proposal did not get support. As a result of strong opposition from trade unions and employers the Commission started the withdrawal procedure of the *Monti II* regulation in September 2012.²⁵⁰

Niklas Bruun and Andreas Bucker were among those who criticized the proposal. They think that equality between fundamental rights and fundamental freedoms is not acceptable and that fundamental rights must have priority over fundamental freedoms. They further argue that the proposal should no longer adhere to the principle of proportionality recognized by the ECJ in the ill famous case law (*Viking, Laval*), but instead make a clear commitment to international law and labour standards. In support of their position the authors emphasize that “whereas the major objective of economic freedoms is ‘merely’ to realize an internal market, fundamental social rights protect citizens’ freedoms”.²⁵¹

4.6 Conclusion

Different scholars and institutions express different views on how the situation with regard to social rights protection in EU should be regulated. The Lisbon Treaty, which entered into force in 2009, is a solution for some scholars when it comes to the clash between fundamental rights and fundamental freedoms in the EU. According to Advocate General Villon “working conditions constitute an overriding reason relating to the public interest justifying derogation from the freedom to provide services” and therefore should not be interpreted strictly after entry into force of the Lisbon Treaty. This assumption is based on the fact that Lisbon Treaty speaks about the construction of an internal market by using

²⁵⁰ Sophie Petitjean, *Commission withdraws Monti II Proposal*, available at <http://www.europolitics.info/social/commission-withdraws-monti-ii-proposal-art342821-25.html>

²⁵¹ *ETUI Policy Brief, European Economic, Employment and Social Policy, #4/12, Critical assessment of the proposed Monti II regulation – more carriage and strength needed to remedy the social imbalances* by Niklas Bruun and Andreas Bucker, ETUI aisbl, Brussels, April 2012.

policies based on a social market economy “aiming at full employment and social progress” (Article 3(3) TEU). Also, it is based on the fact that with the entry into force of the Lisbon Treaty the European Charter of Fundamental Rights became a legally binding law. The Charter, which clearly states the social obligations for the Union, provides in Article 31 that “every worker has the right to working conditions which respect his or her health, safety and dignity”.²⁵²

However, not everyone seems to be optimistic regarding the clauses on social guarantees in the Lisbon Treaty. Filip Dorssemont argues that the fact that the Lisbon Treaty refers to the Charter of Fundamental Rights is not a guarantee that the ECJ will change its position and introduce a new balance between fundamental rights and fundamental freedoms in the EU. Instead, Dorssemont thinks that such a shift in ECJ case law is more likely to take place in case of EU accession to the ECHR. In that case the ECHR, which puts genuine fundamental workers’ rights at the heart of the matter, will force EU institutions, including the ECJ, to abide by the judgments delivered in Strasbourg. Dorssemont thinks that even though the accession procedure is very complicated it is still an unavoidable process.²⁵³

Simon Deakin explores the current situation regarding the clash of fundamental rights and freedoms from different angle. According to Deakin the *Viking* and *Laval* cases are a result that followed from the shift of the EU economic constitution from an ordoliberal to a neoclassical model. Both models oppose

²⁵² C-515/08 *dos Santos Palhota and Others*, [2010]; Opinion of Advocate General Villon.

²⁵³ Filip Dorssemont, *How the European Court of Human Rights gave us Enerji to cope with Laval and Viking*, in *Before and After Economic Crisis, What Implications for the “European Social Model”?*, edited by Marie-Ange Moreau, Edward Elgar Publishing Limited, 2011, p. 231-232.

direct state intervention in the economy. However, neoclassical thought is more extreme and sees markets as essentially self-equilibrating. Neoclassical approaches view labour law rules and collective bargaining practices as inherently inefficient and therefore in the neoclassical approach the principal role of courts is to remove legislative interventions through deregulation. The view that labour regulations are inherently restrictive is what underlies the *Viking* and *Laval* cases. The growing influence of neoclassical thought was a fact that over time found expression in the case law of the ECJ. The author also refers to the term “social market economy” mentioned in the Lisbon Treaty and considers it an echo of the 1950 ordoliberal thought. However, Deakin thinks that this cannot be used as a “bulwark against further deregulation” and suggests that there is a need to consider alternative law-market relationships.²⁵⁴ The deregulation of the market means less intervention of state or other actors capable to cause harm to business to act freely. In the *Viking* quartet this seems to be the main motivator for the court; actions of the trade unions hindering the business did not get support; the proportionality test established by the court does give business much freedom to act. If we consider the previous cases of *Schmidberger* and *Albany* the position of Deakin seems to have a strong basis.

In regard to the *Viking Quartet* the ILO Committee of Experts also expressed its view in the British case of *BALPA*. According to the Committee the doctrine the ECJ had elaborated in the *Laval* and *Viking* cases is very likely to have a significant restrictive effect on the exercise of the right to strike, which is

²⁵⁴ Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy"* in *The Lisbon Treaty and Social Europe*, edited by Niklas Bruun, Klaus Lorcher and Isabelle Schoman, Hart Publishing, 2012, p. 29-31.

contrary to ILO Convention 87.²⁵⁵ This position once again signals the need for changes.

In its General Survey 2012 the Committee of Experts comments on the ECJ cases on *Laval* and *Viking* and expresses its concern over the fact that the right to strike can be restricted where its effects may disproportionately impede an employer's freedom of services or freedom of establishment. However, the Committee did not react on the request of the ETUC (European Trade Union Confederation) which asked to determine if these decisions were compatible with the Conventions No. 87 and 98; the Committee recalled that its mandate is limited to reviewing the application of Conventions in a given state.²⁵⁶

The European Trade Union Confederation prepared its response to the *Viking quartet* – a draft amendment to the Lisbon Treaty, called the *Protocol on the Relation between Economic Freedoms and Fundamental Social Rights in the Light of Social Progress*. The Protocol states that a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all (Article 1). With this aspiration Article 3(1) states that neither economic freedoms, nor competition rules shall have priority over fundamental social rights and in case of conflict the latter shall take precedence. This approach however was criticized in the Monti report, where it was stated that changes to the Treaty do not seem realistic in the short term.²⁵⁷

²⁵⁵ Report of the Committee of Experts on the Application of Conventions and Recommendations, iloex No. 062010GBR087, 2010.

²⁵⁶ *Supra note* 63, p. 52.

²⁵⁷ *Supra note* 248, p. 70.

The principle of freedom of association as a trade union right has gone a long way in the European Community, from being recognised as a general principle of EC law in the *Bosman* case (1995) to the acknowledgement of the right to strike as an inherent element of the freedom of association in the *Viking* case (2007). However, more still needs to be done and the formal recognition of freedom of association has to be put in practice alongside the fundamental freedoms of the EU.

Chapter V – Freedom of Association in the Council of Europe

5.1 History of the Creation of Council of Europe

The outrages of the Second World War stimulated the establishment of one more international organization – the Council of Europe (hereinafter COE). Unlike the European Union which became concerned with human rights at a relatively later stage, the COE was seen from the very beginning as an organization created for the purposes of human rights protection.

The COE was founded on 5 May 1949. The aim of the organization is “to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress” (COE Statute, Article 1.b). It was believed that one of the key elements for achieving this aim was “the maintenance and further realization of human rights and fundamental freedoms” (COE Statute, Article 1.b).

Article 3 of the Statute obliges member states to “accept the principles of rule of law and of the enjoyment by all persons within its jurisdiction of human rights

and fundamental freedoms”. By disregarding the obligations under Article 3 member states risk to be suspended of the representation right. Members can also be removed from membership of the Organization if the Committee of Ministers decides to do so (Article 8, COE Statute).

The COE did not become a European Federation of States, as the European Movement had planned it. As Ed Bates puts it, “the Preamble of the Statute may have alluded to European Unity; however, a close look at the statute itself revealed that the Council was but a forum in which steps toward that end might be discussed, if and when the governments of the member States regarded this as desirable”.²⁵⁸ Nevertheless, the role of the COE in the development of human rights on a regional level is immense.

Under the umbrella of the COE dozens of human rights instruments were created. For the purposes of my research I concentrate only on two of them: the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) and the European Social Charter 1961 (hereinafter ESC), revised in 1996. While the ECHR is mainly concerned with civil and political rights, the ESC’s main domain is social and economic rights, as its name suggests.

5.1.1 The European Convention and the European Court

The first proposal of the European Convention text prepared by the European Movement was very different from the one that we know now. One of the reasons is that the drafters of the very first text wanted to create a system of collective security against tyranny and oppression. They believed that the European

²⁵⁸ Ed Bates, *The Evolution of the European Convention of Human Rights: From Its Inception to the Creation of the Permanent Court of Human rights*, Oxford University Press, 2010, p. 51.

community already enjoyed democratic values. Therefore, the aim of the Convention and the Court was not to create new values but to safeguard already existing ones. The Convention, together with the Court as an institution for implementation was originally seen as an alarm bell instrument in case something were to “go wrong”, the aim of which was to “preserve the human rights status quo in Europe and to prevent backsliding into dictatorship”.²⁵⁹

The rights guaranteed under the original text of the convention were listed only in two articles (Articles 1 and 2)²⁶⁰ and were not defined with legal precision. This was explained by the fact that more precise definitions of the rights would require long discussions and consultations between the European states. It was also suggested that it was easier for the Court to adjudicate on the more limited questions “as to whether the liberties of the citizens of the country concerned had been infringed or diminished, either by passing of a certain new law or by some specified act of government”.²⁶¹

Nevertheless, the idea of creating a detailed human rights bill was not abandoned. It was believed that it was not yet the right time for this, but that that time might come later. Therefore, Article 5 of the draft envisaged the conclusion of a “Supplementary Agreement” in a due course for defining the rights enumerated in Articles 1 and 2.²⁶²

²⁵⁹ *Ibid.* p. 58-59.

²⁶⁰ Article 1(f) of which was on the freedom of association and assembly.

²⁶¹ Doc. INF/5/E/R, pp. 13-15 in *Preparatory Work on Article 1 of the European Convention on Human Rights*, 31 March 1977, Cour (77) 9 Bilingue, Council of Europe, p. 2-3.

²⁶² Doc. INF/5/E/R, pp. 6-8 in *Preparatory Work on Article 1 of the European Convention on Human Rights*, 31 March 1977, Cour (77) 9 Bilingue, Council of Europe, p. 1.

The first draft of the Convention went through many revisions before achieving its final state. It was first submitted to the *Consultative Assembly* (now, Parliamentary Assembly) for further considerations. The *Committee on Legal and Administrative Questions* embraced the idea of a collective pact against totalitarianism as it was suggested by the European Movement. It also welcomed the idea of a European Bill of Rights as it was envisaged in the *Supplementary Agreement* in the first draft of the Convention.

Parallel to the Convention text debates were held about the enforcement mechanism – the European Court. Despite opposition, it was decided that a European Commission and a European Court would be established. Individual petitions would go first to the Commission and only after that to the Court in case the Commission were to so decide.

The Draft produced by the Consultative Assembly was sent to the Committee of Ministers of the COE for the final approval. The Committee did not immediately embrace the idea of an international human rights instrument. In 1950 the Committee convened two bodies (a *Committee of Legal Experts* and a *Conference of Senior Officials*) for discussing the text of the Convention. Fierce debates were held on several issues, including the need for a detailed definition of the rights in the Convention. Certain state representatives advocated for a more detailed construction of the articles. The reason behind this was a distrust of the concept of the Court, an institution that was seen as a future interpreting mechanism of generally formulated rights. The idea of creation of a Court and the necessity of individual petitions²⁶³ were hotly debated. These questions were considered

²⁶³ As the Irish Minister of External Affairs Sean MacBride correctly noted during the debates, without a right of individual petition the Convention is “not worth a paper it was written on”.

political as they were seen as a mechanism that would restrict the sovereignty of the states.²⁶⁴

Finally, the participants agreed on the following: the original text of the Convention would not include a detailed description of rights; a European Commission of Human Rights and a European Court of Human Rights would be set up under Article 19 of the Convention; according to Article 44 of the Convention only High Contracting Parties and the Commission were allowed to bring a case before the Court; individual petitions were permitted “provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions” (Article 25.1). One Optional Protocol was also prepared by the Committee. The Protocol guaranteed three additional rights: the right to property (Article 1), the right to education (Article 2) and an obligation of contracting states to hold free elections, at reasonable intervals by secret ballot in a free environment (Article 3).

On 4 November 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed by thirteen states²⁶⁵ at the Palazzo Barbarini in Rome. The Convention entered into force in 1953. By 1955 the Commission had achieved the competence to receive individual petitions and the Court was set up in 1959. This way, long and (for some states) embarrassing debates on the creation of the Convention together with its enforcement mechanisms had ended.

²⁶⁴ *Supra note 266*, p. 80-82, 89, 90.

²⁶⁵ The contracting states were: Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Saar (incorporated into the Federal Republic of Germany in 1957), Turkey and the United Kingdom.

Instead, a new era had started – an era of progression and development of the Convention.

The Convention was not a very effective mechanism during its first two decades. Only few talked about it in professional circles. Nor did the Commission and the Court receive many applications. This situation changed gradually. In the period 1959–1998 the Court delivered 837 judgments. While in 2012 alone the same Court delivered 1093 judgments.²⁶⁶

Two major changes that the Court has undergone since its establishment were brought by the Additional Protocols 11 and 14. Under Protocol 11 adopted in 1998, the two-tier system of Commission and Court was abolished. Instead, a single full-time Court was created. According to the Preamble of the Protocol there was an urgent need to restructure the control machinery in order to maintain and improve the efficiency of the Convention challenged by the increase in numbers of applications and also by the growing membership of the COE. It is important to note that before Protocol 11 the decision on the merits of cases could be taken either by the Court if the case was referred to it, or by the Committee of Ministers (while the Commission was mainly concerned with friendly settlement procedures). Protocol 11 removed the Committee of Ministers from its role of taking final binding decisions on the merits. The permanent Court was designated for this role. However, the Committee of Ministers retained the role of supervising the execution of judgments.²⁶⁷

²⁶⁶ The European Court of Human Rights, *Overview 1959-2012 ECHR*, June, 2013, p. 4.

²⁶⁷ Soren C. Prebensen, *Inter-State Complaints under Treaty Provisions – The Experience under the European Convention on Human Rights in International Human Rights Monitoring Mechanisms*, *The Raoul Wallenberg Institute, Human Rights Library* edited by Gudmundur Alfredsson, Volume 35, Martinus Nijhoff Publishers, 2009, p. 442.

The increase of the workload of the Court became a reason for the adoption of another important protocol: Protocol 14, which entered into force in 2010. Under this Protocol new judicial formations were introduced for the simplest cases. This meant that, admissibility decisions could also be taken by a single judge (Article 27). Also, a new admissibility criterion was established under Article 35, which allowed the Court to declare the application inadmissible if an applicant did not suffer a “significant disadvantage”.

By 1990 all the member states to the Convention had accepted the jurisdiction of the Court and the right of individuals to petition. With the enactment of Protocol 11, speculations about the recognition of the right of individual petitions and the jurisdiction of the Court ended, as both of them became compulsory features of the membership of the Convention.²⁶⁸ By this time the transaction of the Convention from a collective pact to a European Bill of Human Rights was obvious. However, the Convention never ceased to be seen as a guarantor for democracy in the region. In the 2004 Declaration of the Committee of Ministers, the Convention was referred to as a “constitutional instrument of European public order, on which the democratic stability of the Continent depends”.²⁶⁹

5.1.2 The European Social Charter

Initially, the ECHR was mainly perceived as an instrument for the protection of civil and political rights; social and economic rights were not mentioned in the text. At that time this seemed logical, as the main concern of the founding fathers of the Convention was to rescue democratic values, which are mainly expressed

²⁶⁸ *Supra note 258*, p. 22.

²⁶⁹ Declaration of the Committee of Ministers, ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels, adopted by the Committee of Ministers on 12 May 2004 at its 114th session.

in civil and political rights. Therefore, an idea emerged to prepare a separate treaty on social and economic rights – the European Social Charter (ESC).

The ESC was adopted in 1961 and revised in 1996. Since its adoption it was complemented by three Protocols.²⁷⁰ The Charter is considered to be a complementary document to the ECHR, which unlike the ECHR is concerned with the social and economic rights of the citizens of the respective parties. However, some of the rights (such as the prohibition of forced labour, the right to a family life and the right to organize) are present in both texts. Most of the rights mentioned in the Charter are also present in the EU Charter on Human Rights. The revised Charter contains rights that reflect the ILO Conventions.

The ESC provides a monitoring mechanism to ensure its proper implementation. The European Committee of Social Rights consists of 15 independent experts (it had started with seven experts; the number was gradually increased) elected by the Committee of Ministers of the Council of Europe. The European Committee of Social Rights works mainly in two directions: firstly, it examines annual reports submitted by states and makes legal assessments of the conformity of the national situation to the Charter. As a result, it adopts “Conclusions”. Secondly, it examines collective complaints lodged under the 1995 Protocol, decides on their admissibility and examines merits. In this respect, it provides “decisions”.

Unlike ECHR, there is no individual complaint procedure in relation to ESC; it only provides the possibility for collective complaints. A collective complaint can be lodged against a state party that has accepted this procedure under the

²⁷⁰ Additional Protocol of 1988 extending the social and economic rights of the 1961 Charter (CETS No. 128); Amending Protocol of 1991 reforming the supervisory mechanism (CETS No. 142) and Additional Protocol of 1995 providing for a system of collective complaints (CETS No. 158).

Additional Protocol of 1995, providing for such a system. Article 1 of the Protocol gives an exhaustive list of those organizations that are entitled to lodge a complaint against a state alleging an unsatisfactory application of the Charter:

- International (European) organizations of employers and trade unions that participate in the work of the Governmental Committee in pursuance of Article 27(2) of the Charter;²⁷¹
- Other international (European) non-governmental organizations that have consultative status with the Council of Europe and have been put on a list for this purpose by the Governmental Committee;
- Representative national organizations of employers and trade unions of the state concerned.

In addition, any state may authorize national non-governmental organizations to lodge complaints against it. The only criterion for the selection of such organizations is that candidates have to show “particular competence in the matters governed by the Charter” (Protocol, Article 2(1)).

The role of the Committee of Ministers in the activities of the ESC Committee is bigger than in the ECHR. Unlike the ECHR, the Committee of Ministers is not only concerned with the execution of the decisions of the ESC Committee, but also, as already mentioned, selects the members of the ESC Committee. It gives the Committee of Ministers better leverage and more control.

One aspect that the Charter shares with the ECHR is that they both were not popular in the beginning. Only in the wake of the 1990s reforms the Charter

²⁷¹ The European Trade Union Confederation (ETUC), Business Europe (former Union of Industrial and Employer’s Confederations of Europe (UNICE)) and International Organization of Employers (IOE).

attained a certain degree of effectiveness. Now it is signed by all 47 member states of the Council of Europe and ratified by the majority of them.

5.2 Trade Union Rights in the ECHR

5.2.1 Article 11

Trade union rights are protected in the European Convention for the Protection of Human Rights and Fundamental Freedoms under Article 11(1): “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including *the right to form and to join trade unions for the protection of his interests.*”

The second paragraph of the Article explains that the rights in Paragraph 1 are not absolute and that their exercise can be restricted, but only when these restrictions are “prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder and crime, for the protection of health and morals or for the protection of the rights and freedoms of others”.

The text of Article 11 as we have it now in the Convention is a result of long discussions and deliberations among the founding fathers. The very first draft of Article 11 was presented by Rapporteur Teitgen to the Committee of the Consultative Assembly on Legal and Administrative Measures in August 1949.

The proposal contained the following passages:

The Convention and the Procedure to be determined later by the Committee will guarantee the fundamental rights and freedoms listed

below to every person residing within the metropolitan territory of a Member State:

[...] Freedom of meeting, as laid down in Article 20 of the Declaration of the United Nations.

Freedom of association, as laid down in Article 20 of the Declaration of the United Nations.

The right to combine in trade unions, as laid down in paragraph 4 of Article 23 of the Declaration of the United Nations.²⁷²

The proposed text went through a harsh scrutiny in the Council of Europe. The UK government submitted its own proposal to the Committee of Experts on Human Rights. Paragraph 1 of the Article combined the right to freedom of assembly with the right to association. The second paragraph provided the restrictions on the rights mentioned in Paragraph 1. There was no mention of trade union rights in the UK proposal; however, it was explained by the Committee of Experts that these right were implied in the right to associate. Because the topic was considered to have a political character, the Committee of Experts avoided to take responsibility for choosing between the two versions, and sent the text to the Committee of Ministers, which in turn convened the Conference of Senior Officials (government representatives) to make a choice. Finally, the UK version of the Article was adopted, with an amendment to explicitly mention the right of trade unions to associate. It was explained that such a formulation brings the Article into conformity with the UDHR, which

²⁷² DH (56) 16, European Commission of Human Rights, *Preparatory Work on Article 11 of the European Convention on Human Rights*, Information Document prepared by the Secretariat of the Commission, Strasbourg, 16th August, 1956, p. 2.

mentions a right to form trade unions separately from a general right to associate. However, unlike the UDHR, Article 11 did not mention the right not to be compelled to belong to the association. This was explained by the difficulties caused by “closed-shop” practices in certain countries. On November 3, 1950 the Committee of Experts made minor changes to the text of Article 11 and the next day the Convention was signed.²⁷³

Article 11 recognizes the right to form and join trade unions as an element of freedom of association. Unlike other international instruments in the field (ESC, ILO, ICESCR), the Convention does not recognize a right to organize separately, but only as part of the freedom of association.²⁷⁴

The Convention is very brief on trade union freedoms. No specific trade union freedoms are expressly guaranteed. Unlike the ESC and ILO Conventions 87 and 98 (where rights are attributed to the workers and employers) the Convention does not reveal the identity of the rights-holder concerned (workers or employers), but mentions “everyone” instead.

The Convention is also brief on the objective of the trade union rights, only generally mentioning “protection of interests”. In this regard other international instruments are much more specific.²⁷⁵ However, this objective still provides scope for teleological interpretation. Even though Article 11 is silent on the collective dimension of trade union rights (the article only explicitly mentions an

²⁷³ *Ibid.* p. 8-12.

²⁷⁴ Filip Dorsemont, *The Right to Form and Join Trade Unions for the protection of His Interests under Article 11 ECHR, An Attempt “to Digest” the Case Law (1975-2009) of the European Court of Human Rights*, European Labor Law Journal, Volume 1 (2010). No. 2, p. 186.

²⁷⁵ Article 5 ESC – “for the protection of their economic and social interests”; Article 8 ICESCR – “for the promotion and protection of his economic and social interests”; Article 10 ILO Convention 87 – “for furthering and defending the interests of workers and employers”.

individual's right to form and join trade unions), it is the opinion of some scholars that "protection of interests" would be deprived of substance if it were to be stripped of the possibility to engage in trade union action in order to "protect" the interests at stake.²⁷⁶

Even though the Convention is brief on trade union freedoms and does not mention specific trade union rights, this is still not much of a problem. As it is recognized by the Court the Convention is a "living instrument", which must be interpreted in the light of present-day conditions".²⁷⁷ This enables the Court not only to bypass the *Travaux préparatoires* but also to adapt and re-state its case law.²⁷⁸

By relying on the concept of a "living instrument" the Court has gradually developed corollary rights that, according to the Court, are "essential" for the protection of workers' interests. These essential rights have to be differentiated from another category of means, qualified as "important means" for the protection of the same interests.²⁷⁹ The difference between these two sets of rights is that in the case of essential elements of freedom of associations' restrictions need to be considered less necessary. In other words, the margin of appreciation of states with regard to essential means is smaller.²⁸⁰

²⁷⁶ Filip Dorssemont, *The Right to Take Collective Action under Article 11* in Filip Dorssemont, Klaus Lorcher and Isabelle Schomann (eds.), *The European Convention on Human Rights and the Employment Relations*, Hart Publishing, 2013, p. 335.

²⁷⁷ *Sigurdur A. Sigurjonsson v. Iceland*, application no. 16130/90, §35, ECHR 1993.

²⁷⁸ *Supra* note 274, p. 197.

²⁷⁹ *Supra* note 274, p. 211.

²⁸⁰ *Supra* note 276, p. 336.

5.2.2 ECHR Case Law on Trade Union Rights

The first case in which the Court started to recognize inherent elements of the right to form and join trade unions for the protection of workers' interests was *National union of Belgian Police v. Belgium* 1975.²⁸¹ In this case the national union of the Belgian police alleged a violation of Article 11 (together with Article 14 and 17), because the Belgian government refused to recognize the union as a representative organization and stripped it of the right to consultation.

The Court shared neither the opinion of the majority (that the right to consultation comes within the scope of Article 11) nor the minority of the Commission (which described the phrase "for the protection of his interests" as redundant). According to the Court the "right to be consulted" is not mentioned in Article 11, is not incorporated in the national law or practice of every member state and is not indispensable for the effective enjoyment of trade union freedom. Therefore, the Court was of the opinion that the right to consult is "not an element necessarily inherent" in Article 11.²⁸²

The Court was not convinced that Article 6.1 ESC 1961, according to which states are bound to promote joint consultations, creates a real right to consultations. Furthermore, Article 20 of the Charter permits a contracting state not to accept an undertaking in Article 6.1. According to the Court, the inclusion of the right to consult into the Article 11 would automatically amount to

²⁸¹ This was also the first case in which the Court dealt with the trade union freedom of association.

²⁸² *National union of Belgian Police v. Belgium*, application no. 4464/70, §38, ECHR, 1975.

admitting that the Charter took a retrograde step in this domain by making this right optional.²⁸³

The opinion of the Court was that the phrase “for the protection of his interests” mentioned in Article 11 is not redundant, but shows the purpose of the Convention to “safeguard freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible”. It follows that members of a trade union should enjoy a “right to be heard” in order to protect their interests. States are free to choose the means to achieve this end. According to the Court, “while consultation is one of these means, there are others”.²⁸⁴

A similar approach was used by the European Court in the case of *Swedish Engine Drivers' Union v Sweden* 1976. Here an independent trade union unionizing 20-25% of the employees of the Swedish State Railways claimed a *right to enter into a collective agreement*. According to the trade union the government agency (the Swedish National Collective Bargaining Office) concluded collective agreement on terms of employment and conditions of work only with the Railwaymen's Section of the State Employees' Union (comprising 75-80% of the employees). This led to stagnation and a drop in trade union membership.²⁸⁵

The Court stated that Article 11.1 does not secure any particular treatment of trade unions or their members by the state. This also includes the alleged obligation for a state to conclude a collective agreement with them. This right is

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* §39.

²⁸⁵ *Swedish Engine Drivers' Union v. Sweden*, application no. 5614/72, §8, 9, ECHR, 1976.

not mentioned in the Article 11, does not constitute a practice of contracting states and is not indispensable for the effective enjoyment of trade union freedom. Therefore, it is *not an element necessarily inherent* in a right guaranteed in the Convention.²⁸⁶

According to the Court Article 6.2 ESC affirms the voluntary nature of collective bargaining and collective agreements. It does not provide for a real right. Furthermore, the Court again (similar to *National union of Belgian Police*) emphasized the retrograde step taken by the ESC in allowing states not to accept undertakings, mentioned in Article 6.2. Therefore, the Court considered that such a right cannot be derived by implication from Article 11.²⁸⁷

In the next paragraph the Court continued in the same vein as in the *National union of Belgian Police* case and stated that trade unions have the right to be heard and that Article 11.1 leaves states a choice to choose the means for attaining that purpose. In the opinion of the Court “while the concluding of collective agreements is one of these means, there are others”.²⁸⁸

In the case of *Schmidt and Dahlström v. Sweden 1976* the issue was a right to strike. The applicants were complaining that because their trade unions went on strike (even though they themselves did not participate) they were denied certain retroactive benefits paid to the members of other trade unions and those without trade union membership.²⁸⁹

²⁸⁶ *Ibid.* §39.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.* §40.

²⁸⁹ *Schmidt and Dahlström v. Sweden*, application no. 5589/72, §9, ECHR, 1976.

The Court in this case took the similar stand as in the cases mentioned above. The Court recognized that right to strike constitutes one of the most important means for trade unions to protect occupational interests of their members. However, the Court is of the opinion that there are also other means and that states are free to choose.²⁹⁰

The right to strike was an issue in one other case, which the Court declared inadmissible: *Unison v. The United Kingdom 2002*. University College London Hospitals (UCLH) was in the process of transferring parts of the hospital from the public to the private sector. The trade union Unison demanded guarantees that transferred workers and also new workers recruited by the transferee would be assured the same employment conditions as the beneficiaries of one of the transferor's collective bargaining agreement for more than 30 years. Unison did not get such guarantees and gave notice of a strike. UCLH obtained an injunction from the national court prohibiting the strike. Interesting here is the fact that employer subjected to the strike was considered a "third party" in the conflict. The dispute was considered to be one between the union and the transferee. According to the British Trade Union Consolidation Act 1992 (TULRCA) unions enjoy immunity only if the industrial dispute at hand is between an employee and "their employer".²⁹¹

The Unison argued before the Strasbourg Court that the structural prohibition of strike action in the national law of the UK impeded it from effectively defending the interests of its members. The union challenged the conclusion reached in the case of *Schmidt and Dahlström v. Sweden* and stated that the right to strike was

²⁹⁰ *Ibid.* §36.

²⁹¹ *Supra note 274*, p. 226.

not just one of the means among others to protect the interests of the workers, but rather, a prohibition to strike affected the very core of the right to organize. In order to show a close link between a right to organize and a strike the applicant pointed to reports and conclusions of the ILO and the ESC. The Court did not accept the arguments and repeated its previous case law that strike action is one of the relevant means and states have a wide margin of appreciation in choosing the means.²⁹²

The novelty of the *Unison* case that distinguishes it from *Schmidt and Dahlström* is that the Court in *Unison* considered the prohibition of a strike by the UK as a restriction on the applicant's power to protect the interests of its members. The Court explicitly reviewed such restriction against principles governing restrictions in Article 11.2. In previous case law such a review had taken place only in relation to core or essential aspects of the freedom of association, which the right to strike, at the time, was not.²⁹³

One more interesting case for my research is *Wilson, National Union of Journalists and Others v. The United Kingdom 2002*. The applicants in this case were offered by the employer personal contracts with salary in return for relinquishing trade union recognition and representation. Unlike the previous three cases mentioned, the Court in this case decided that there had been a violation of Article 11.1 regarding the use of financial incentives to induce

²⁹² *Unison v. The United Kingdom*, application no. 53574/99, ECHR, 2002.

²⁹³ *Supra* note 274, p. 227.

employees to give up on the right of union representation for collective bargaining.²⁹⁴

The Court reaffirmed that the right to collective bargaining might be one of the means by which trade unions protect the interests of their members, but it is not indispensable for the effective enjoyment of trade union freedoms. Compulsory collective bargaining is not acceptable for the Court as it imposes an obligation on employer to conduct negotiations with trade unions. The Court continues with acknowledgment that it is not yet prepared to hold that a freedom of a trade union to make its voice heard extends on imposing an obligation on employer to recognize a trade union. Here the Court came up with a new concept; it introduced a right for a union “to seek to persuade the employer to listen to what it has to say on behalf of its members”.²⁹⁵

One importance of this judgment lies with the fact that the Court took account of the soft law instruments in deciding on violation of Article 11.1. The Court notes that the UK law at the relevant time provided for possibility for an employer to effectively undermine or frustrate a trade union’s ability to protect its members’ interests. Court paid attention to the fact that, these aspects of the UK law were criticized by the Social Charter’s Committee of Independent Experts and the ILO’s Committee on Freedom of Association.²⁹⁶

²⁹⁴ *Wilson, National Union of Journalists and Others v. The United Kingdom*, applications nos. 30668/96, 30671/96, 30678/96, §9-19, ECHR, 2002.

²⁹⁵ *Ibid.* §44.

²⁹⁶ *Ibid.* §48.

5.2.2.1 Demir and Baykara v. Turkey

Until 2008 the position of the Court with regard to the right to bargain and the right to enter into collective agreements (i.e., that these constitute important means of “the right to form and join trade unions for the protection of his interests” but not essential elements thereof) expressed in the cases above, remained unchanged. In 2008 the Grand Chamber of the Court had to adjudicate a case against the Turkish government – *Demir and Baykara v. Turkey 2008*.²⁹⁷ The facts of the case were the following: the trade union (Tum Bel Sen), founded in 1990 by civil servants, entered into a collective agreement with the Gaziantep Municipal Council for a period of two years (1993-1995). Because of a failure of fulfilment of certain obligations on account of the Council, the trade union brought civil proceedings against it. The case went through several court proceedings. According to the Court of Cassation even though certain rights and freedoms are mentioned in the Constitution, some of them are not directly applicable and require the enactment of further legislation. Without such specific legislation these rights (including the freedom to join a trade union and to bargain collectively) could not be exercised. In the view of the Court the trade union could not rely on the ILO Conventions as they were not yet incorporated into domestic law; no implementing legislation had been enacted. The Court noted that the legislation at that time when the trade union was founded did not permit civil servants to form a trade union and bargain collectively. The union had never enjoyed legal personality since its foundation and therefore did not have a capacity to take or defend court proceedings. According to the Audit Court the

²⁹⁷ *Demir and Baykara v. Turkey*, application no. 34503/97, Grand Chamber, ECHR, 2008.

members of the trade union *Tum Bel Sen* had to reimburse the additional income they received as a result of the defunct collective agreement (Para 26-29).

The case was referred to the ECHR. In 2006 a Chamber judgment was delivered in which the Court established a violation of Article 11 on account of the domestic courts' refusal to recognize the legal personality of the applicants' trade union and the annulment by the national courts of the collective agreement between the trade union and its members' employers. The case was referred to the Grand Chamber.

The preliminary objections of the Turkish government before Grand Chamber were twofold. Firstly the government argued that international instruments to which the state is not party cannot be considered. In response to this, the European Court mentioned a number of examples where it had used international instruments (ILO, ESC, ICESCR, and ICCPR) to reach conclusions. The Court noted that in searching for common ground among the norms of international law it had never distinguished between sources of law according to whether they are signed and ratified by member states (Para 78). According to the Court, in defining the meaning of terms and notions in the text of the Convention, it "can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values". (Para 85)

The second preliminary argument that the government raised was that the application was incompatible *ratione materiae* with the provisions of the Convention, based on the ground that Article 11 is not applicable to "members ... of the administration of state", as is provided by the second paragraph of the

Article. The Court did not accept this argument either. According to the Court the restriction should be construed strictly and must not impair the very essence of the right to organize; and states have to show the legitimacy of any restriction to people's right to organize. In the opinion of the Court, municipal civil servants not engaged in the administration of the state cannot in principle be treated as "members of the administration" of the state. In support of its position the Court referred to the previously mentioned international (ILO, ICESCR, ICCPR) and regional instruments (ESC, EU Charter). In conclusion, members of the administration of the state cannot be excluded from the scope of Article 11 of the Convention. National authorities are only entitled to impose "lawful restrictions" on those members. In the present case, however, the opinion of the Court was that the government failed to show how the nature of the duties performed by the applicants, as municipal civil servants, required them to be regarded as "members of administration of the state" subject to such restrictions (Para 96-108).

In deciding on the right of the municipal civil servants to form trade unions, and on the question whether the action of the government in this regard was in compliance with Article 11, the Grand Chamber, similarly to the Chamber, was not convinced that the absolute prohibition on forming trade unions imposed on civil servants by law, as it had applied at the material time, met a pressing social need. In the opinion of the Court the mere fact that the legislation at that time did not provide a possibility for civil servants to form a trade union was not sufficient to warrant as radical a measure as the dissolution of the trade union. The position of the Court was supported also by the fact that at the material time Turkey was already a contracting party of the international instruments (ILO Convention 87,

ICESCR, and ICCPR) that recognize a right of civil servants to form trade unions (Para 117-124).

The Court noted that the combined effects of the restrictive and the formalistic interpretation by the Cassation Court (without taking into account developments in international law) regarding the domestic legislation on forming legal entities and the inactivity of the legislator after ratifying ILO Convention 87 (only after 8 years of ratification of the ILO Convention 87 the government enacted a law for its implementation) prevented the state from fulfilling its obligation to secure for the applicants the enjoyment of their trade union rights. Therefore, the state's behaviour could not be justified as "necessary in a democratic society" within the meaning of Article 11.2 of the Convention. Therefore, the Court established a violation of Article 11 on account of the failure to recognize the right of the applicants, as civil servants, to form a trade union (Para 125-127).

Similar to the Chamber, the Grand Chamber also considered that the complaint regarding the annulment of the collective agreement must be considered separately, as it raised separate legal questions from those raised by the applicants' right to form a trade union. The position of the government was that the right to enter into a collective agreement was not a right guaranteed by Article 11, but is just one of the means that states may or may not choose to guarantee the right to form and join trade union under Article 11 (Para 133-137), as is obvious from the previous case law of the Court.

The Court started from considering the general principles on this subject. It cites its previous case law in which it was stated that trade unions should be heard and that states have a free choice of the means (of which the right to conclude a

collective agreement is one) to be used towards this end. The Court mentioned two guiding principles that mark the evolution of the case law regarding the substance of the right of association: firstly, the Court takes into account the totality of the measures taken by the state in order to secure freedom of association, subject to its margin of appreciation; and secondly, the Court does not accept restrictions on the essential elements of the freedom of association, without which that freedom would become devoid of substance. The Court continued that the essential elements of the right of association thus far were the following: the right to form and join a trade union, the prohibition of closed-shop agreements (*Sørensen and Rasmussen v. Denmark*, 2006) and the right of a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. The Court makes clear that the list is not finite. It emphasizes the “living” nature of the Convention and the importance of the development of international law (Para 140-146).

With regard to the right to collective bargaining the Court made reference to the International Labor Organizations Conventions (98 and 151) which recognize such a right, including for public servants, except for those directly involved in the administration of a state. Reference was also made to the European Social Charter Article 6.2 (an article that was not taken seriously by the Court in the previously mentioned cases) which affords all workers and trade unions the right to bargain collectively and thus imposes an obligation on states to promote collective bargaining in order to ensure broad coverage of the collective agreements. The Court also mentioned Article 28 of the EU Charter of Fundamental Rights according to which workers and employers and their organizations have a right to negotiate and conclude collective agreements. The

Court also takes note of the common practices of member states, the majority of which allows for public servants (those not holding state powers) to engage into collective bargaining for determining wages and working conditions (Para 147-152).

Based on these developments in international law and domestic legal systems of states the Court thought that its previous case law, where the right to bargain collectively and the right to enter into collective agreements were considered as mere means, should be reconsidered, and that *these two rights should constitute essential elements of the freedom of association* protected under Article 11. Even though it is in the interests of legal certainty and foreseeability not to depart from precedents, the Court was of the opinion that sometimes it is a necessary step in order to embrace reforms and improvements (Para 153).

While applying these principles to the present case, the Court decided that the annulment of the collective agreement constituted an interference with the applicants' trade union freedom (Para 157). According to the Court the refusal to accept the applicants' right to enjoy the right to bargain collectively and to persuade the authority to enter into a collective agreement did not correspond to a "pressing social need" and was not "necessary in a democratic society". This conclusion was based on several factors: collective bargaining and the right to enter into collective agreements are recognized by international instruments; Turkey ratified ILO Convention No. 98; there is no evidence that supports that the public servants in the present case belonged to the category of public servants in relation to which ILO allows restrictions (officials whose activities are specific for the administration of the state); the omission of a law, caused by the delay of the legislator, cannot be accepted as a justification for the annulment of a

collective agreement. Therefore, the Court established a violation of Article 11 on account of the annulment *ex tunc* the collective agreement entered into force by the trade union Tum Bel Sen following collective bargaining with the employing authority (Para 162-170).

5.2.2.1.1 Discussing the Judgment

Judge Zagrebelsky wrote a separate opinion on the right of trade unions to bargain collectively and on the issue of the Court's departure from precedent. The judge referred to the fact that the Court from that point on will regard a right to collective bargaining as an essential element of the freedom of association. This move was explained by "the perceptible evolution in such matters, in both international law and domestic legal systems". What captured my attention here is the statement of the judge that the new and recent fact that may be regarded as indicating an evolution internationally appears to be only the proclamation of the EU Charter of Fundamental Rights 2000. It's difficult to disagree with the judge on this point, as the international documents on the basis of which the Court derived its conclusions in the judgment (ILO Conventions, ESC, ICESCR, and ICCPR) date back to 1950s and 1960s. As for the evolution of the domestic legislation the Judge was of the opinion that it is difficult to assess the time and period in which a significant change became perceptible. Therefore, the conclusion of the judge was that the "the Court's departure from precedent represents a correction of its previous case-law rather than an adaptation of case-law to a real change, at European or domestic level, in the legislative framework or in the relevant social and cultural ethos" (Para 2).

The judgment was fast recognized by commentators as a landmark, and different comments followed. In an article, Ewing and Hendy offered a detailed analysis of the *Demir and Baykara* judgment, explaining the way the Court reached its conclusion. In the view of the authors, while interpreting the rights under Article 11, the Court abandoned the “original intentions of the drafters” and embraced the idea of a “living document”. However, this still left a question for the Court: how to get from a broad convention right to freedom of association (including the right to form and join trade unions) to the more specific right to engage into collective bargaining. According to the authors this was done by building on previous case law (*Wilson, ASLEF*²⁹⁸) and by referring to ILO Conventions No. 98 and 151, ESC 1961 (Article 6(4)), the EU Charter of Fundamental Rights (Article 28) and the practices of European states.²⁹⁹

The same international and regional standards were used by the Court in determining the content of the right to bargain and also the permissible restriction upon that right. According to the Court the states are free to determine their own systems but at the same time should respect the requirements of the ILO and the ESC (Para 147-149). The decision not to accept the restrictions was based on the same considerations (Para 165).³⁰⁰

²⁹⁸ Here the ECHR stated that “As an employee or worker should be free to join, or not join a trade union without being sanctioned or subject to disincentives (e.g. *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, *mutatis mutandis*, *Wilson & the National Union of Journalists and Others*, cited above), so should the trade union be equally free to choose its members”, *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. The United Kingdom*, application no. 11002/05, §39, ECHR, 2007.

²⁹⁹ K.D. Ewing and John Hendy QC, *The Dramatic Implications of Demir and Baykara*, *Industrial Law Journal*, Vol. 39, No. 1, 2010, p. 6.

³⁰⁰ *Ibid.* p. 7.

Authors moreover note that in treating the ECHR as a living instrument, the Court also considered the other treaties (ILO Conventions, ESC) as living instruments. The Court relied not only on the texts of those treaties but also on the respective interpretations of its supervisory bodies.³⁰¹

For some scholars, by reconciling multiple conceptions of the right to collective bargaining, the Court in *Demir and Baykara* underlines the convergence of international and European sources. Because of the comparative method it applies the Court makes it compulsory for states to comply with the obligations emanating from the ILO standards and the ESC. In the opinion of the same author, the Strasbourg Court, by writing the *Demir* judgment, explicitly embraced the international context of the right to collective bargaining, which is intended to safeguard domestic labour laws and social guarantees against economic values and international competition.³⁰²

In the opinion of Barnard, one of the striking features of the *Demir* judgment is the extensive reference made to international sources, particularly the ILO Conventions and the EU Charter of Fundamental Rights, in justifying the reversal of its previous case law on the scope of Article 11. She makes a comparison with the ECJ rulings in *Viking* and *Laval*, which disregarded international instruments, and thinks that the ECHR is more open to international sources than the ECJ.

³⁰¹ *Ibid.* p. 8.

³⁰² Antoine Jacobs, *Article 11 ECHR: The Right to Bargain Collectively, under Article 11 ECHR* in Filip Dorssemont, Klaus Lorcher and Isabelle Schomann (eds.) *The European Convention on Human Rights and the Employment Relations*, Hart Publishing, 2013, p. 312.

Therefore, she is of the opinion that the accession of the ECJ to the ECHR is a significant move in terms of the protection of social rights.³⁰³

Some of the commentators are rather sceptical to this new interpretative approach of the ECHR. Jacobs writes on the harmonization issue regarding the right to bargain collectively. He is of the opinion that the ECHR should not go further in harmonizing national laws in regard to collective bargaining, because these laws have their roots in the historical development of collective bargaining (different from one country to another) and are expressions of power relations, touching upon which will disturb power balances in states. The author makes reference to the EU Treaties where emphasis is placed on the diversity of the national systems (Article 152 TFEU), and suggests that the ECHR in its future case law on the right to bargain collectively should instead restrict itself and leave certain aspects of trade union rights to the discretion of national authorities.³⁰⁴

Jacobs is of the opinion that by the *Demir* judgment the Court interfered in the national laws on collective bargaining of member states. However, he thinks that such intervention is not a problem if it concerns flagrant violations of trade union freedoms, such as in the case of *Demir*.³⁰⁵

5.2.2.2 Enerji Yapi-Yol Sen v Turkey

One more case that came soon after *Demir* and *Baykara* and caused much discussion among scholars and commentators was the case of *Enerji Yapi-Yol Sen v. Turkey 2009*. The case concerned the right to strike of civil servants who were

³⁰³ Catherine Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests* in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds.) *The Protection of Fundamental Rights in the EU after Lisbon*, Hart Publishing, 2013, p. 43-44.

³⁰⁴ *Supra* note 302, p. 314-315.

³⁰⁵ *Ibid.* p. 330-332.

banned from taking part in a national one-day strike planned by trade unions in order to secure the right to a collective bargaining agreement. The circular prohibiting public sector employees from such action was published by the Prime Minister's Public Service Staff Directorate. Some of the trade union members still took part in the strike action and received disciplinary sanctions as a result.³⁰⁶

In this case, the Court established a violation of Article 11(1). The Court disapproved of the general character of the circular, which prohibited all public servants to take part in the strike action. According to the Court these sanctions were likely to discourage union members and anyone else wishing to participate legitimately in such a day of strike or action to defend the interests of their members.³⁰⁷

The Court repeated that strike action, which enables a trade union to be heard, constitutes an *important aspect* of the protection of trade union members' interests (*Schmidt and Dahlström v. Sweden 1976*, §36). However, in contrast to its previous case law the Court made reference to ILO and ESC instruments stating that ILO supervisory bodies recognize the right to strike as an *indissociable corollary* of the right of trade union association protected under ILO Convention 87 (here the Court refers to *Demir and Baykara* which mentions in detail the international law instruments in this regard). The Court also recalls the ESC recognizing a link between collective bargaining and the right to strike, and considers the right to strike a means for ensuring the effective exercise of the right to collective bargaining.³⁰⁸

³⁰⁶ *Enerji Yapi-Yol Sen v. Turkey*, application no. 68959/01, §6-15, ECHR, 2009.

³⁰⁷ *Ibid.* §32.

³⁰⁸ *Ibid.* §24.

5.2.2.2.1 Discussing the Judgment

The last paragraph of the Court ruling gave labour rights supporters hope. According to Ewing and Hendy, the fact that the Court referred to the ILO and the ESC and recognized strike action as a corollary to the right to bargain collectively (which in turn was recognized as an essential element of the freedom of association protected under Article 11; *Demir and Baykara*, §153) strongly suggests that the Court recognized the right to strike, insofar as it was exercised in furtherance of collective bargaining, as *equally essential*. The commentators also paid attention to the fact that the Court in this case did not mention that the right to strike was one of the important means and that there are other means at the disposal of states. Instead, by using the rationale of *Demir and Baykara*, the Court stated that the government interfered with the applicants' right to strike and this interference alone was enough to establish a violation of Article 11(1). The authors also placed emphasis on the fact that the linkage between collective bargaining and strike action had long been recognized in international law and therefore the conclusion of the Court in this case was logical.³⁰⁹

Dorssemont shares the view that the Court in *Enerji implicitly* recognized the right to strike as an essential element of trade union freedom. He finds it unfortunate that the language of the Court in *Enerji* is not the same as in *Demir and Baykara*, and that the right to strike is still formulated as an *important means* only, instead of essential. However, he pays attention to the fact that the Court prefers to tackle the justified character of the prohibition under the angle of

³⁰⁹ *Supra* note 299, p. 14-15.

proportionality. The prohibition of strike was not justified, because of its generic character.³¹⁰

The *Enerji* arguments, however, did not convince the Appeal Court of the UK. In the case of *Metrobus Ltd v Unite the Union* (2009) the Court dealt with restrictions of UK law on the right to strike (Part V, TULRCA 1992). The conclusion was that there was no undue restriction on the exercise of the right to strike in the UK; that the legislation has been carefully adapted throughout the years in order to balance the interests of all stakeholders; and that its provisions are therefore proportionate.³¹¹

The British Court also considered ECHR jurisprudence in regard to the right to strike. In the view of the Court *Demir and Baykara* was not strictly on the right to strike and therefore could be disregarded. It did not take into account the conclusions in *Enerji* either. Justice Lloyd paid attention to the differences between the *Demir and Baykara* judgment, which according to the Justice was “full and explicit” and *Enerji* judgment, which the Justice articulated as a “summary discussion”. According to the Justice it is not prudent to proceed on the basis of the “less fully articulated” judgment (*Enerji*), which developed the Court’s case law through the recognition of the right to strike as an essential element of trade union freedoms under Article 11.³¹²

More positive is Barnard in her article published in 2013. She compares *Demir* and *Enerji* (ECHR) to the *Viking* (ECJ) judgment and emphasizes the fact that in *Viking* the Court adopted an essentially single-market approach and found strike

³¹⁰ *Supra* note 274, p. 230.

³¹¹ *Metrobus Ltd v Unite the Union* [2009], EWCA Civ 829 (31 July 2009), §101-113.

³¹² *Ibid.* §35.

action unlawful unless justified and proportionate. While the ECHR cases adopted a human rights perspective according to which strike action is lawful and any restriction to it must be narrowly construed.³¹³

I totally agree here with the position of Barnard on this issue; but at the same time I have to say that the position of the UK judge in the *Metrobus* case also makes a lot of sense. The ECtHR is certainly a human rights oriented court but in the case of *Enerji* it could have been more explicit. It could easily recognize right to strike as an essential element of freedom of association, like it has done in *Demir and Baykara* with collective bargaining and right to conclude collective agreements.

5.2.2.3 Cases after *Demir and Enerji*

An interesting judgment delivered by the Grand Chamber in 2013 was case of *Sindicatul "PĂSTORUL CEL BUN" v. Romania, 2013*. The case concerns a refusal of the Romanian authorities to register a trade union formed by priests of the Romanian Orthodox Church. The Grand Chamber in this case quashed the Chamber judgment and decided that the refusal of the authorities to register the trade union was a direct consequence of the right of the religious communities to organize their activities in accordance with the provisions of their own statute.

In its assessment the Court made reference to the ILO Conventions and *Demir and Baykara* only in that part of judgment where it had established that clergy men were involved in the employment relationship and therefore fall within the scope of Article 11.³¹⁴ This way the Court established an interference in the right of applicants to form trade unions. There was no mention of *Demir and Baykara*

³¹³ *Supra note 303*, p. 43.

³¹⁴ *Sindicatul "PĂSTORUL CEL BUN" v. Romania*, application no. 2330/09, §142, ECHR, 2013.

or any ILO Conventions in the Court decision whether such interference was necessary in a democratic society.

One intriguing aspect that this judgment offers is found in the paragraphs where the Court speaks about general principles on the right to form and join a trade union. The Court lists the essential elements of the right to organize: the right to form and join trade unions; the prohibition of closed-shop agreements; the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members; and the right to bargain collectively. The Court does not mention the right to strike among the essential elements. However, noticeable is the fact that the Court refers to this list as “non-exhaustive”.³¹⁵

A very recent case concerning the violation of the right to strike was the case of *The National Union of Rail, Maritime and Transport Workers v. The United Kingdom 2014*.³¹⁶ The case concerned a right to secondary strike action where the applicant was a representative of a very small number of employees in the workplace, organizing striking action among whom would not have any disruptive effect on the work and would not lead to any results. According to the applicant, the union could better protect the interests of its members if it were to be allowed to organize a secondary strike action in support of the workers concerned (Para 16). Secondary action was expressly excluded from statutory protection by Section 224 of the Trade Union and Labor Relations (Consolidation) Act 1992.

³¹⁵ *Ibid.* §135.

³¹⁶ *The National Union of Rail, Maritime and Transport Workers v. The United Kingdom*, application no. 31045/10, ECHR, 2014.

For the first time in its jurisprudence the Court recognized that *secondary strike action is a right protected under Article 11.1*. Reference was made to Article 31(3) (c) of the Vienna Convention on the Law of Treaties and also to the *Demir and Baykara* passage acknowledging the importance of established international norms (ILO, ESC) in the interpretation process of the Convention rights (Para 76, 77).

The Court accepted the argument of the UK government and stated that unlike primary action, secondary action has the potential to impinge upon the rights of persons not party to the industrial dispute, to cause broad disruption of the economy and to affect the delivery of services to the public. Therefore, by enacting the law banning secondary strikes the UK Parliament pursued the legitimate aim of protecting “the rights and freedoms of others” mentioned in Article 11.2. Here the Court offered one more novelty: it distinguished between primary and secondary strikes and stated that in case of primary strikes the term “the rights and freedom of others” supposes only the employer’s interests, while in case of secondary strikes the same term is not limited to employers only, but entails the broader interests of public (Para 82).

The position of the applicant was that the margin of appreciation of the UK government in deciding whether the interference with the applicant’s right was necessary in a democratic society must be limited, as it was in the case of *Demir and Baykara*. The Court stated that in order to decide on the margin of appreciation of a state the particular facts of the case should be taken into account. In case of *Demir and Baykara* the interference with the freedom of association (dissolution of a trade union) was far-reaching, intruding its inner core (Para 86). According to the Court, when interference affects the core of trade

union activity, the margin of appreciation of states is narrow. However, the other way round, if not core but secondary or accessory aspects of trade union activity are affected, the margin of appreciation is wider (Para 87). In the present case, the Court considered that the core elements of the freedom of association (which according to the Court can be primary strike action) were not at stake and therefore the state had a wide margin of appreciation (Para 88).

The Court also considered common European practices in relation to secondary strike. According to the Court the UK, with its outright ban on secondary action, stands at one end of a comparative spectrum; however, this does not mean that domestic authorities stepped outside their margin of appreciation (Para 91).

The Court took note of the applicant's argument that the ECSR and ILO bodies regularly criticize the UK government for its current ban on secondary strike action. The Court made reference to the *Demir and Baykara* case, stating that international consensus that emerged from specialized international instruments may constitute a relevant consideration for the Court when it interprets the Convention. However, considering the circumstances of the present case the Court explained that "the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention" (Para 99).

Based on these arguments the Court concluded that the restriction on the right to secondary strike served a pressing social need and was necessary in a democratic society. Therefore, there was *no violation* of Article 11.1 (Para 104-105).

Several points should be emphasized in this judgment. Important is the fact that for the first time in its jurisprudence the ECHR recognized secondary industrial action within the scope of Article 11. This recognition of secondary strike seems logical as the Court continued the trend started in 2008 by Grand Chamber in *Demir and Baykara*, and shared the practice of the ILO and ESC, which recognize such right.

However, when it came to restrictions upon this right, the Court gave the UK government a wide margin of appreciation. This time, the Court disregarded the position of the ILO and ESC and supported a total ban on secondary strikes by the UK government. The rhetorical question here is: what sense does it make to recognize a right and then allow states to put a blanket ban on it?

Important here is also the fact that this selective approach of the Court to accept some aspects of the soft law instruments and to disregard the others creates a lack of certainty. It is not clear now what role the soft law instruments (ILO, ESC) play in the interpretation of the Convention.

Notable in this judgment is also the fact that primary strike action was explicitly recognized by the Court as a core element of freedom of association. If the restriction upon the secondary strike action was justified by the fact that it was not a core, but a secondary or accessory aspect of trade union activity, it follows logically that in case of primary strike action states should enjoy a very narrow

margin of appreciation, because they deal with a core element of the freedom of association.

One further important aspect in this judgment is the proportionality issue. I share the argument of the UK government and the Court that secondary strike action has a potential to seriously harm the economic situation in a country and cause disruption to the work of others not related to the industrial dispute. The argument that the economic and social aspects of a state are better known to the government than an international judge also makes sense. It is also a well-known fact that the Court is mainly concerned with civil and political rights. However, I still think that the Court should have used a case-by-case approach (which it mentions several times in the judgment) in relation to secondary strikes, instead of supporting a total ban upon it. It could have allowed the UK government to strictly regulate such actions, while at the same time giving trade unions a chance (at least theoretical) to claim such right. Such a decision would have been closer to the soft law instruments the Court embraced in previous case law.

In conclusion, I have to say that the position of the Strasbourg Court in this case reminds me of the *Viking* judgment: in both cases right to strike was recognized (in *Viking*, primary strike; in *RMT*, secondary strike) and in both cases restrictions upon this right were justified and soft law instruments disregarded. This might be a pure coincidence that has nothing to do with the statistics, but it is still noteworthy that when it comes to the protection of secondary strikes the ECHR has now more to share with the ill-famous ECJ rulings than its own previous case law.

5.3 Trade Union Rights in the ESC

As mentioned earlier, despite the classical distinction between the ECHR and the ESC, trade union rights are protected under both instruments. As we have seen from the jurisprudence of the ECHR when it comes to the definition of trade union rights and particularly freedom of association, the European Court widely refers to the ESC. Therefore, the following pages of this thesis are devoted to the notion of freedom of association as mentioned in the ESC.

Article 5 of the ESC guarantees the right to organize:

With a view to ensuring and promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, the contracting parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom.

The Article 5 separately mentions two categories: the police and the armed forces. The extent to which the guarantees provided by this article apply to these categories shall be determined by national laws and regulations.

Another article of the ESC that speaks about labour rights is Article 6 of the ESC. It provides for the right to bargain collectively and for the effective exercise of this right, obliging contracting parties:

1. To promote joint consultations between workers and employers;
2. To promote where, necessary and appropriate machinery for voluntary negotiations between employer and employers' organizations and

workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

3. To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labor disputes; and recognize:
4. The right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

5.3.1 Article 5

The European Committee of Social Rights (ECSR) provides detailed explanations of the terms and concepts mentioned in the two articles on collective labour rights. Regarding Article 5, the Committee makes it clear that because of the importance of the right to organize it is important that it is guaranteed by national law. Gaps in legislation or case law cannot be filled only by practice.

Article 5 provides protection for organizations of *workers and employers*. So far the Committee has not engaged itself in with issues concerning employers' rights to organize, but only workers' rights.³¹⁷ Civil servants are not separately mentioned in the article, which means that they are entitled to the full range of guarantees. Any restriction on the enjoyment of the rights under Article 5 should be justified under Article 31 of the Charter, which allows restrictions and limitations, but not the total suspension of the right.³¹⁸ Workers who are not

³¹⁷ Andrzej Marian Swiatkowski, *Charter of Social Rights of the Council of Europe*, Kluwer Law International, 2007, p. 189.

³¹⁸ According to Article 31 of the Charter, the rights mentioned in the Charter shall be subject to restrictions and limitations specified in the Charter, except for those restrictions and limitations which are "prescribed by law and are necessary in a democratic society for the protection of the

protected by Article 5 are those in the armed forces and to some extent the police.³¹⁹

As for *organizations*, according to the Article 5 workers and employers can form and join organizations for the protection of their economic and social interests. This usually means trade unions.³²⁰ The involvement of trade unions in political processes is not necessarily outside the frame of the Article 5. Here it is relevant to mention the 1952 resolution of the ILO on the Independence of the Trade Union Movement. According to this resolution, trade unions can undertake political activities for the advancement of their economic and social interests. Nevertheless, such political involvement “should not be of such a nature as to compromise the continuance of the trade union movement or its social and economic functions, irrespective of political changes in the country”.³²¹

Article 5 contains both *negative and positive obligations* for states. Negative obligations oblige states not to violate or restrict the freedom of association of trade unions. Member states may introduce formal demands to be fulfilled by workers forming a trade union. If there is a need for the registration of a trade union, any precondition, including fee requirements, must be reasonable. The obligation to register only does not violate the requirements of Article 5 if the national law provides sufficient protection for the organization during the

rights and freedoms of others or for the protection of public interest, national security, public health, or morals”.

³¹⁹ David Harris, John Darcy, *The European Social Charter*, 2nd edition, Transnational Publishers, Inc., 2001, p. 88-90.

³²⁰ *Supra note* 317, p. 189.

³²¹ Article 5, ILO Resolution of 1952, concerning the independence of the trade union movement.

registration process. A minimum membership requirement may infringe Article 5 if it is too high.^{322,323}

Workers should also be allowed to join organizations *of their own choice*. They should have the freedom to organize at whichever level they wish; local, national or international.³²⁴ The trade unions that they establish should enjoy broad autonomy. They should freely regulate their internal organizational affairs, including organizational structure and requirements for membership, disciplinary methods, or denial of membership. Trade unions must be able to freely elect their representatives and administer their property. However, as I have already mentioned, member states are allowed to introduce some restrictions on the trade union right to organize in the name of the protection of the rights and freedoms of others and the public order.³²⁵ In relation to the UK, the Committee considered that very complex national legislation in the area may in itself impair the right to organize.³²⁶

Article 5 guarantees not only the right to organize but also *the right not to organize*. Initially the Committee considered not touching upon closed-shop practices, but later it changed its mind. The Committee took notice of an ECHR case in which it was stated that closed-shop practices are in violation of Article 11 of the European Convention. According to the Court “permitting every kind of compulsion in the field of trade union membership would strike at the very

³²² *Supra note 317*, p. 190-193.

³²³ *Supra note 319*, p. 93-94.

³²⁴ *Ibid.* p. 94.

³²⁵ *Supra note 317*, p. 194-196.

³²⁶ *Supra note 319*, p. 96.

substance of the freedom it is designed to guarantee”.³²⁷ The Committee shared the reasoning of the European Court and applied it to Article 5 of the ESC. As a result, it is now settled case law that closed-shop practices are neither authorized nor tolerated. This applies equally to pre- and pro-entry closed shops.³²⁸

Even though the right to collective bargaining is mainly protected under Article 6, Article 5 also pays particular attention to it. It is considered that compliance with Article 5 is a precondition of compliance with Article 6(2) on the right to collective bargaining.³²⁹ According to the Committee, trade unions should enjoy the right to negotiate the collective agreements on which the wages and social protection of the workers usually depend. A lack of negotiating rights in collective agreements undermines the existence of trade unions as a whole. Establishing excessive requirements for trade unions in order to receive negotiating rights (for instance, a minimum membership requirement of at least 500 or 1000 members; an administration fee for the license to negotiate of 20,000-60,000 Irish Pounds) is considered by the Committee as a violation of Article 5.³³⁰

As for the *positive obligations* under Article 5, it protects workers’ organizations from interference by their employers. The focus of the Committee in this regard is on discrimination based on trade union membership (or non-membership) and a state’s obligation to protect trade unions and its members against such

³²⁷ *Young, James and Webster v. the United Kingdom*, Application no. 7601/76; 7806/77, §52, 1980.

³²⁸ *Supra* note 319, p. 95.

³²⁹ *Ibid.* p. 97.

³³⁰ *Supra* note 317, p. 200-202.

discrimination. In particular, states are required to have national laws in place that makes such activities illegal.³³¹

5.3.2 Article 6

Article 6 promotes collective bargaining. For this purpose state parties are required to take certain steps. The first such step under Article 6.1 is to promote *joint consultations* between workers and employers. According to the Committee this applies to all kinds of consultations between employees and employers or their organizations, with or without involvement of the government (particular emphasis is put on occupational issues). The main idea is that such consultations should be on an equal footing, both parties should enjoy an equal say in the matter. Such consultations should take place in all sectors and at all levels; local, regional and national.³³²

There is no need for a state to intervene if consultations between the sides of an industry are adequate. If this is not the case, state must take positive steps to encourage consultations. States might ask trade unions to meet representativeness criteria. However, such a requirement must be reasonable and must not excessively limit the possibility of trade unions to participate. In order not to be in violation of Article 6.1, states should prescribe these requirements in law. The requirements must be objective and subject to judicial review.³³³

The second step that states are required to undertake in order to promote collective bargaining is to provide machinery for voluntary negotiations between parties with a view to regulate occupational issues by collective agreements

³³¹ *Supra* note 319, p. 98.

³³² Matti Mikkola, *Social Human Rights of Europe*, Legisactio Ltd, 2010, p. 256-257.

³³³ *Ibid.* p. 257.

(Article 6.2). The national law should recognize the right of employer and employee to regulate their relationship by collective agreements. According to the Committee both parties should be “at liberty to conclude collective agreements”. States must actively promote the conclusion of such agreements if spontaneous development of collective bargaining is not sufficient. States need to ensure that each side is prepared to bargain collectively. States may intervene in the bargaining process. This intervention is justified only according to Article G of the Charter and it should stop immediately after return to the normal situation in which the parties can exercise their right to collective bargaining freely again.³³⁴

The third step to promote collective bargaining is to establish machinery for conciliation and voluntary arbitration in the case of labour disputes. In other words, states are required to establish and use appropriate techniques for the out-of-court settlement of collective labour disputes. This should be supported by national law. The emphasis of the Committee is on the peaceful nature of the settlement of such collective disputes. If such a dispute is regulated independently by stakeholders then there is no need for a state to intervene. It is also important that the social arbitrage created for settling such disputes should be organized in a manner that ensures that states cannot affect the outcome of the arbitration decision. Therefore, it is a requirement of the Committee that domestic regulations must not provide any instructions or guidelines or suggest any criteria that should be followed by arbitrator when handling down the judgment. Also, crucial is that peaceful techniques of settling collective labour disputes should not be replaced by labour court proceedings.³³⁵

³³⁴ *Ibid.* p. 260-262.

³³⁵ *Supra note* 317, p. 222.

The Charter is the first international convention in force that explicitly recognized, in Article 6.4, the right of workers to go on strike in case of conflicts of interests. It also generally guarantees the right of employers and workers to collective action. In case of employers, such action could be a lockout. In the case of workers, other collective actions can be refusals to do overtime or working to rule and going slow. Both the right of an employer to lockout and the right of an employee to strike can be regulated by national law, but only to such an extent that the very existence of a right is not threatened. However, according to the Committee the right to strike and the right to lockout do not necessarily enjoy legal equality.³³⁶

The right to strike is not absolute, and states may restrict its exercise under Article G of the Charter. States can also introduce common requirements for strike, such as an obligation to give notice; an obligation to allow settlements of labour disputes and to postpone strikes while in settlement (cooling-off period); limitations on a strike if its consequences of it are too dangerous for the state, for the development of society, to its citizens or to a third party.³³⁷ However, according to the Committee, intervention in the exercise of the right to strike on the part of state authorities is a very serious measure and should be justified under Article 31.1 of the Charter. Moreover, such intervention should be stopped as soon as the situation goes back to normal.³³⁸

According to the wording of the Article 6.4 collective action is restricted by the collective agreements concluded previously. The Committee is of the opinion that

³³⁶ *Supra note* 319, p. 104-105.

³³⁷ *Supra note* 332, p. 280.

³³⁸ *Supra note* 319, p. 107-108.

such an obligation can only affect the right to take collective action of those workers who were part of the previous collective agreement and only in respect of those matters covered by that agreement.³³⁹

One more important aspect is the fact that Article 6.4 permits workers to go on strike only in the case of a *conflict of interests*. It means that in case of a *conflict of rights* it cannot be invoked. In other words, disputes concerning valid collective agreements are not covered by this article and should be settled by negotiations or voluntary arbitration or a specialized Court with jurisdiction in such matters. Even if the collective agreement purports to permit strike action in disputes concerning rights, this does not mean that states are obliged under the Charter to render such action legal.³⁴⁰

The Committee interprets the provision in a restricted way and allows neither sympathy strikes nor political ones. It should be noted that the ILO allows for both sympathy strikes and political strikes. However, ILO case law prohibits a party to advance its own interests, if those are bound by collective agreements, with the sympathy strike. Sympathy strikes should not be allowed for use as a roundabout way to take collective action that is against the peace obligation.³⁴¹

Article 6.4 does not mention any category of workers who might be denied the right to strike. Therefore, public officials are entitled to go on strike as well. The only exception in this regard that the Committee allows are those officials who are members of the police or the armed forces, judges and senior officials. The right to strike of these employees might be restricted. However, a denial of the

³³⁹ *Ibid.* p. 106.

³⁴⁰ *Ibid.*

³⁴¹ *Supra note* 332, p. 283-284.

right to strike for public servants *per se* is not acceptable under the Charter. The right of workers to strike in essential or minimum services can also be restricted. However, similar to the case of public servants these restrictions cannot cover everybody working in those services as a group, especially if the services are defined broadly.³⁴²

In the opinion of the Committee, strikes cannot be considered a violation of contractual obligations entailing a breach of a worker's employment contract. The termination of an employment contract on the basis of engagement in strike action violates Article 6.4 of the Charter unless strikers are fully reinstated after the strike, meaning that their previously acquired entitlements (such as issues of pension, seniority and holidays) are not affected.³⁴³ According to the Committee, civil or criminal liability for participating in a strike has considerable bearing on the right to strike. Nevertheless, such liability is not precluded as long as it is in keeping with the Charter.³⁴⁴

5.4 Conclusion

In conclusion, the content of the right to organize and right to strike under the ESC can be summarized as follows:

The right to organize

1. Freedom to form (easy notification and registration procedure, moderate fees, low membership requirements, open for non-nationals);
2. Freedom to join or not to join (ban of pre- and post-entry closed shops);
3. Right to act freely (bye-laws, membership, hold meetings at work together)

³⁴² *Ibid.* p. 287-289.

³⁴³ *Ibid.* p. 290-291.

³⁴⁴ *Supra note* 319, p. 110.

with trade union officials); 4. Any recognition as privileged partner (representativity criteria) should be reasonable and objective, based on pre-established criteria and be subject to suspension by an independent body and regularly reviewed, and other trade unions should not be deprived of all essential prerogatives; 5. Restrictions of the rights of police and armed forces, as well as highest civil servants; 6. Non-discrimination of any worker, whether unionized or non-unionized, representative of other workers, migrant worker or on any other grounds.³⁴⁵

The right to strike

1. Entitlements: should be guaranteed by law in cases of conflicts of interests; should cover also public employees and civil servants; sectoral bans – not proportionate; prior approval – not in compliance; any group of employees should be entitled to call a strike; requirements for representativity – not in compliance; procedural requirements (ballot method, quorum, majority requirement) should not limit the exercise of the right; any employee should be entitled to join the strike. 2. Restrictions: illegitimate reason; as a clause of a collective agreement (expressed will of the parties needed); minimum service – (conditions of article G); notice and cooling-off periods or prolonging the conciliation may not limit the exercise of the right (days or weeks, not months); compulsory arbitration not accepted (except of article G). 3. Effects:

³⁴⁵ *Supra* note 332, p. 255.

prohibition of dismissal or full reinstatement required; proportionate deductions of wages; equal rights for those joining the strike.³⁴⁶

Chapter VI – Comparative Analysis of ECJ and ECHR Jurisprudence

6.1 The Two Regional Organizations and Human Rights

As I mentioned in the previous chapter on the ECJ, the main idea of the Schuman Plan was to create an organization that would mobilize control over the natural resources (steel and coal) of the member states of this organization, and in this way make sure that one state would not be able to wage a war without others knowing about it. This is how the idea of the European Union emerged. The idea was realized in a number of Treaties that united a certain number of European states and set internal rules. The rules were mainly concerned with deepening general economic cooperation by establishing a common market among member states, where goods, persons, services and capital could flow freely without any custom control. The human rights agenda appeared in the Treaties at a later stage.

The first Treaty that explicitly mentioned human rights was the *Maastricht Treaty* 1992, Article 6 of which declared that the Union is founded on the principles of human rights and has to respect them. The *Treaty of Lisbon* finalized this process. It declared the Charter legally binding (Article 6(1) TEU) and created legal basis for the accession of the EU to the ECHR (Article 6(2) TEU). The Treaty of Lisbon also provided that the focus of the Union is to build “a highly competitive social market economy, aiming at full employment and social progress” (Article 3(3) TEU).

³⁴⁶ *Ibid.* p. 292.

The human rights discourse appears in the *jurisprudence of the ECJ* also at a later stage. As I mentioned in the previous chapter the very first cases on the issue were discussed in the late 1960s and early 1970s where the Court considered human rights to be general principles of Community law and recognized the international human rights treaties to which member states were party at that time.

The situation with the European Convention on Human Rights and the European Court was different. From the very beginning the Council of Europe was seen as an organization the main purpose of which was to protect human rights. According to the Statute of the Organization “the maintenance and further realization of human rights and fundamental freedoms” was considered one of the major means “to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress” (COE Statute, Article 1.b). Article 3 of the Statute obliges member states to “accept the principles of rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”. This led to the creation of dozens of human rights instruments under the umbrella of the COE, from which the ECHR was probably the most successful one.

In short, the EU was created for economic purposes, and human rights became a concern at a later stage, while the COE was considered a human rights protecting mechanism from the very beginning. I believe that this difference between the EU and the COE has shaped the approach that the institutions under their structure have developed over time towards human rights. The ECJ has to take note of human rights as well as to guarantee proper functioning of EU law, whose main

focus is to provide economic stability in the union; while the ECHR is only concerned with human rights protection.

6.2 Freedom of Association as a Trade Union Right from the Perspective of Two European Courts

The issues related to freedom of association are scattered in the EU among different documents and judgments, including EU Treaties, the EU Charter and ECJ jurisprudence. In contrast, the COE is more systematic on the freedom of association. It is protected under three major articles in the two major human rights instruments (ECHR, ESC). Both instruments are backed by supervisory institutions (the European Court, the ECSR) that consistently interpret the provisions of this right. This makes it easier to identify the content of the freedom of association in the COE.

The case law of the ECJ regarding the freedom of association takes a start in the case of *Bosman*.³⁴⁷ In this case the Court established that the freedom of association constitutes a general principle of EU law. Among other sources reference was made to the ECHR.

The next phase of the Court was the case of *Albany*.³⁴⁸ The AG based his conclusion on the famous cases of *Bosman* and *Maurissen* and stated that “the Community legal order protects *the right to form and join trade unions* and employers’ associations which is at the heart of freedom of association”. The AG also recognized *right to take collective action* as “indispensable for the enjoyment of freedom of association”. The AG, however, was not sure whether the *right to bargain collectively* is a fundamental right. His position was supported by ECHR

³⁴⁷ *Supra* note 168.

³⁴⁸ *Supra* note 149.

case law (*National Union of Belgian Police v Belgium*, 1975; *Swedish Engine Drivers' Union v Sweden*, 1976; *Schmidt and Dahlström v Sweden*, 1976; *Gustafsson v Sweden*, 1996) in which the Court was of the opinion that Article 11 did not guarantee any particular treatment of trade unions and that states had a wide margin of appreciation in order to choose the means for the protection of the occupational interests of workers.

In the case of *Werhof*³⁴⁹ the Court recognized a *negative right of employees to organize*. It was again confirmed that the right to associate is a general principle of EU law and once again reference was made to the ECHR.

The *right to strike* was also recognized by the ECJ. In the *Viking* case the ECJ explicitly recognized the right to strike as a fundamental right; however, it stated that the exercise of this right nonetheless may be subject to certain restrictions. The Court noted that even though the protection of fundamental rights can justify restrictions on fundamental freedoms (the freedom of establishment and the freedom of provision of services), this does not mean that fundamental rights are outside the scope of EC law.

Finally, the *right to bargain collectively* was also recognized by the ECJ in the case of *Commission v. Germany*.³⁵⁰ Here the Court stated that the right to collective bargaining is recognized by various international instruments that member states of the EU have ratified or signed, including Article 6 of the ESC, Article 12 of the Community Charter of the Fundamental Social Rights of Workers, and Article 28 of the EU Charter (in relation to the Charter it was emphasized that it has the same legal value as the Treaties). In the same case, the

³⁴⁹ *Supra* note 172.

³⁵⁰ *Supra* note 152.

Court implicitly recognized *the right to conclude a collective agreement* by mentioning it together with the right to bargain collectively and by recognizing that the collective agreement under dispute met the social objective of the EU Treaties.

From this brief description we see that the ECJ became active on freedom of association issues only during the last two decades. Before that the Court was not concerned much with trade union freedoms.

On the other hand, the situation with the ECHR was slightly different. As we saw from the previous chapter, it took slightly more than three decades for the ECHR to recognize all the mentioned elements of freedom of association as *inherent in the right to form and join trade unions* guaranteed under Article 11. *National union of Belgian Police v. Belgium 1975* was the first case where the Court recognized a *right of trade unions to consultations*. The *Swedish Engine Drivers' Union v Sweden 1976* was a case where the Court recognized a *right to enter into collective agreement*. The right to strike was recognized in the case of *Schmidt and Dahlström v. Sweden 1976*. In the case of *Wilson, National Union of Journalists and Others v. The United Kingdom 2002* the Court confirmed the importance of the *right to bargaining*. However, none of these cases recognized these rights as inherent elements of Article 11.

Only in 2008 with the case of *Demir and Baykara* the ECtHR made clear that the right to *collective bargaining* and the right to *enter into a collective agreement* are inherent elements of the freedom of association protected under Article 11.

About the *right to strike* the discussion was in the *Enerji* case. Here the Court was not very explicit in its recognition of the right to strike. The Court still repeated

its previous case law and states the strike action is an important (*not inherent*) aspect for the protection of trade union members. However, unlike its previous case law the Court makes reference to ILO and ESC practice, where the right to strike has very strong protection.

The *RMT* judgement shed some more light on the right to strike. For the very first time, the Court made clear that secondary industrial action falls within the scope of Article 11. The Court, however, allowed a restriction of this right in the case, and justified it by saying that the ability to strike is not a core aspect of trade union activity, but secondary; implicitly recognizing that primary strike action has to be regarded by states as a *core element* of the freedom of association. Nevertheless, the Court was still not very explicit about the recognition of the right to strike, and it did not use the established term “inherent element” in relation to the right to strike. However, even though the Court was not as explicit here as in the case of *Demir*, it still needs to be mentioned that progress is evident.

At first glance it seems that the case law of the ECJ and the ECHR equally recognize the freedom of workers and employers to associate and that there is not much divergence in their positions. The impression has a valid basis because freedom to associate was recognized step by step by the ECJ. The same also happened in the ECHR, which in the beginning did not recognize the inherent elements of the freedom of association. Even though the language of the two Courts has not been exactly the same (the ECHR has used the term “inherent right”, while the ECJ has spoken about general principles of the EU) the content is very similar.

However, as it is well established in the legal scholarship, the recognition of legal norms is one thing and their application in practice is another. In the case of *Viking* the Court had to make a balancing exercise between the right to strike and the right of establishment (freedom of movement in the EU). The *proportionality test* was introduced by the Court, according to which the national courts must first assess if the jobs of the workers were “jeopardized or under serious threat” and if the collective action by trade union was necessary to protect the jobs. After establishing this, national courts further have to ascertain whether the trade union action “was suitable for ensuring the objective pursued and does not go beyond what is necessary to attain that objective”. The Court in this case did not suggest any particular judgment to the national court, but the proportionality test itself was considered to be very strict by legal scholars, putting trade unions in a very difficult situation in which strike becomes a last resort.

The ECJ in its previous cases (*Albany*, *Viking*) made reference to the ECHR in order to support the idea that some elements of the freedom of association are not inherent. However, after the ECHR recognized these elements as inherent, the ECJ still did not change its trend and still favoured fundamental freedoms of movement over freedom of association issues. In the case of *Commission v Germany* the Court makes reference to the *Viking* case and the proportionality test introduced by the Court therein. According to the Court the exercise of the fundamental right to bargain collectively must be reconciled with the EU freedoms of movement stemming from the EU Treaties. The Federal Republic of Germany was said to violate the EU Directives (92/50 and 2004/18) on freedom of establishment and the freedom to provide services in the field of public procurement.

It is very true that freedom of association is not an absolute right and its restriction is allowed by all international and regional instruments. However, the restrictions upon it should be strictly limited and justified on a case-by-case basis. The proportionality test enacted by the ECJ in the *Viking* does not offer sufficient protection for the freedom of association. The test is very strict and does not leave much room for manoeuvre.

The ECHR on the other hand does not have to deal with economic issues or the fundamental freedoms of movement of the EU. The task of the ECHR is simpler compared to its counterpart; it is only concerned with human rights protection. Not surprisingly, the approach of the ECHR is more human rights-oriented and the standards the Court offers are much higher.

The *similarity* between the case law of the two Courts is that both of them provide a detailed definition of the rights that constitute elements of the freedom of association. The ECHR explicitly refers to the ESC and the ILO and takes note of the definitions they provide. The ECJ also refers to international instruments, including the ECHR. The language of the ECJ is not as explicit as the language of the ECHR, but the very fact that they refer to international instruments suggests that they are willing to take the interpretations of the latter into consideration.

6.3 How do the ECJ and ECtHR Standards Comply with the ILO and ESC?

As was already mentioned in the second chapter, freedom of association as a trade union right is protected under the International Bill of Human Rights. However, the jurisprudence of the Human Rights Committee and Committee on Economic, Social and Cultural Rights does not shed much light on the definition

of freedom of association. Instead, reference is made to ILO standards. Both the ICESCR and ICCPR make explicit reference to ILO Convention 87 on Freedom of Association and Protection of the Right to Organize. Both supervisory organs (the Human Rights Committee and the Committee on Economic, Social and Cultural Rights) pay due regard to the ILO standards.

The preparatory work of the ICESCR shows that, for instance, in relation to the right to strike, it was decided that the legitimacy of the restrictions for public officials have to be decided according to the ILO standards.

In 2012 the Committee expressed concern about the fact that public servants in Germany are prohibited to strike. The Committee makes referral to Article 8.2 of the ICESCR and to ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize and reminds the state that “public officials who do not provide essential services are entitled to their right to strike”.

Several years before that, in 2009, the Human Rights Committee also expressed similar concerns in relation to Estonia. The Committee noted that the draft *Public Service Act* restricts the right of a number of public servants to strike. The Committee states that “state party should ensure in its legislation that only the most limited number of public servants is denied the right to strike”.

This is very much in concert with *the ILO concept of the right to strike*, which considers strike as a fundamental right, necessary for the employers’ and employees’ organizations to protect the interests of their members. The ILO Committees do allow restrictions on this right, but are very strict in this sense. In the case of public servants, restriction on the right to strike can only be justified if

the relevant public servant is engaged in “exercising authority in the name of the state”.

The ILO allows restrictions in relation to one more group: those working in essential services can also have their right to strike restricted. Essential services are strictly defined and can mean only those “the interruption of which would endanger the life, personal safety, or health of the whole or part of the population”.

A general ban on sympathy strikes is also not allowed by the ILO organs. Workers should be allowed to take part in sympathy strikes. The only condition is that the initial strike should be legal.

In general, according to the ILO, strikes can only be banned if they cease to be peaceful. Also, strikes of a purely political character are not supported by the ILO supervisory organs. Strikes are legitimate if they pursue economic and social objectives.

In relation to *Viking* and *Laval* the Committee of Experts expressed a concern that the ECJ allows restrictions on the right to strike if the strike disproportionately impedes fundamental freedoms of the EU (e.g. the freedom of service and establishment). The Committee of Experts did not discuss the compatibility of the ECJ judgments with ILO Conventions 87 and 98, recalling its mandate, which is limited to reviewing the application of ILO Conventions in member states.

The Committee’s conclusion is not a surprise. *Viking* recognized the right to strike and in this respect made reference to international standards, including those established by the ILO. The Court in *Viking* also noted that the right to

strike, again according to international standards, can be restricted. This was acceptable for the ILO. But then the ECJ came up with a new condition for restriction of a right to strike: fundamental freedoms of the EU. Of course, the ILO does not recognize such a restriction. It allows restrictions, but only if strikes are purely political, or violent, or concern certain groups, mentioned above. On this issue, the ways of the ECJ and the ILO divide.

In *Laval*, sympathy strikes were condemned by the ECJ. However, the ILO explicitly allows such strikes if they are not used by a party to advance interests that go against the collective agreement conditions and therefore are a violation of peace obligation. It is interesting to mention that ESC does not allow sympathy strikes. So, even though the ECJ was in violation of ILO standards, it still complied with ESC standards.

At the same time, the ECtHR looks at the right to strike from slightly different angle. In the *Enerji* case, the Court did not really recognize the right to strike as *inherent* in the freedom of association protected under Article 11. It only reiterated that the right is an *important aspect* of the protection of trade union freedoms. However, the Court here also cited ILO and ESC standards. This created a bit of uncertainty: on the one hand the Court did not consider strike action important enough to grant it the status of being *inherent*, on the other hand, the Court cited international standards which in fact consider strike action as an “intrinsic corollary of the right to organize”.

The recent *RMT* judgment is also not very explicit. Even though, for the first time, the Court did recognize secondary industrial action as protected under Article 11, it did not openly state that the right to strike is *inherent* in the freedom

of association. The Court again in this case decided to stay on safer ground: it implicitly recognized the right to strike as a core element of the freedom of association, by justifying restrictions on secondary strike action by considering this type of strike an accessory aspect of trade union activity.

The respective roles of the ILO and the ESC in the interpretation of Convention rights have also become confusing with the *RMT* judgment. Even though the ECtHR recently started to rely on these international standards, in *RMT* the Court did not apply them, but accepted a total ban on secondary strikes; a position that is not in concert with the ILO and the ESC.

The right to strike is equally recognized by both courts. However, both courts admit that this is not an absolute right and both courts show certain precaution when judging on the right to strike. The reason for this precaution is economic well-being. In case of Luxembourg fundamental freedoms of movement are usually balanced against strike action; in case of ECtHR, even though fundamental freedoms are not mentioned, the economic argumentation of the UK in *RMT* was taken into consideration by the court. This means that neither of the court's jurisprudence is in total compliance with the ILO standards. Nevertheless, I think Strasbourg is still in a better position to protect right to strike as it does not officially have to take into account an economic argument.

Other than the right to strike we also have to look at *the right to collective bargaining* and *the right to conclude collective agreement*. The ILO sets standards on these issues. Convention No. 98 on the Right to Organize and Collective Bargaining encourages states to promote collective bargaining and collective agreements. Governments are not allowed to intervene in the

bargaining process even if the process runs against the economic policies of the government. Authorities are allowed to intervene only if bargaining takes place in the public sector, but even in this case they have to leave enough space for the parties to bargain.

The ILO organs strictly condemn any changes to a collective agreement by a government once it is concluded. Governments can intervene, though, in future negotiations, but only if this is absolutely necessary to combat economic crisis. And even these interventions are very limited.

If we look at the ECJ cases, the right to bargain collectively was not recognized at first. Only in 2010³⁵¹ the ECJ explicitly recognized such a right, but it imposed restrictions upon it. While the right to bargaining is not an absolute right, the restrictions do not seem to be a big issue. However, the Luxembourg Court justified these restrictions by referring to the principle of proportionality, developed in the *Viking* and *Laval* cases. The Court said that the right to bargain must be reconciled with the fundamental freedoms of the EU.³⁵² This position, again, cannot be in agreement with the ILO standards, which say nothing about such a restriction.

On the other hand, the case law the ECtHR developed recently is very much in concert with the ILO standards and also the ESC. With the *Demir and Baykara* case, the Court significantly raised the standard of trade union rights protection and stated that the right to bargain collectively and the right to conclude collective agreement are, from now on, *inherent elements* of the freedom of

³⁵¹ *Supra* note 152, Para. 37.

³⁵² *Ibid.*

association protected under Article 11. Such a shift in the case law gave labour rights advocates hope for the future.

The fact that in 2010 the ECJ recognized a right to bargain collectively (which, of course, can be considered a progressive development) could easily be the result of the *Demir and Baykara* judgment. However, neither ECtHR jurisprudence nor ILO standards are mentioned in the ECJ case.

The standards set by the ESC are basically the same as the ILO. The ESC asks states not to create artificial barriers for trade unions that aim to protect the interests of their members by using legitimate means.

In conclusion, even though neither the ECJ nor the ECtHR fully comply with the international standards of the ILO and the ESC, the ECtHR is still closer than its European counterpart. However, the situation can change with any upcoming case, and hopefully with the accession of the EU to the ECtHR.

6.4 Conclusion

In conclusion, it can be said that the EU went a long way to establish a human rights discourse in its institutions, including and probably most importantly in the ECJ. Human rights gradually became a concern of the EU. It took some time before the recognition of trade union freedoms actually happened. It can be said that human rights, including the freedom of association, are protected under EU law and ECJ jurisprudence. The problem arises when these human rights are in contradiction with the EU's fundamental freedoms of movement. In these cases the ECJ, though trying to introduce a balance between these competing rights and freedoms, in fact abandons the human rights approach and focuses more on the interests of the internal market.

The fact that the EU Charter acquired legally binding force did not change the attitude of the ECJ. The last bastion is the EU's accession to the ECHR. Accession (which I deal with in the next chapter) has the potential to shed light on many aspects of human rights, including trade union freedoms. Whether Europe becomes more human rights-focused, however, remains to be seen.

Chapter VII – Accession of the EU to the ECHR and Trade Union Rights

7.1 History of Accession of the EU to the ECHR

In 1979 the European Commission issued a Memorandum on the then-Community's possible accession to the ECHR. The Commission noted that the European Community had increasing direct legal relations with individual citizens, which created a need to reinforce fundamental rights protection at the Community level. In the view of the Commission, in order to have immediate reinforcement the Community should formally adhere to the ECHR. At the same time, the Commission did not rule out the future possibility of an enactment of a human rights catalogue particular to the Community, which at that point was considered to be a long process, because the members could not agree on the definition of economic and social rights.³⁵³

The proposal of the Commission was unheeded and lay dormant until 1993.³⁵⁴ In 1993 an *ad hoc* group was created under the Belgian presidency. The task of the group was to examine the three key issues related to the accession: the

³⁵³ Commission of the European Communities, *Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' Bulletin Supplement 2/79*, COM (79) 210 Final, p.5.

³⁵⁴ Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 6.

competence to accede; the preservation of the autonomy of EU law; and the exclusive jurisdiction of the CJEU. However, the Luxembourg Court dealt a detrimental blow to these efforts. In *Opinion 2/94* the Court discussed the compatibility of accession with the EU Treaties. The Court simply concluded that as the law of the Community stood back then, the Community had no competence to accede to the ECHR. The Court confirmed the Community's respect for human rights and the special significance of the ECHR. However, it stated that accession to the Convention would require substantial changes to the Community legal system, requiring Treaty amendment.³⁵⁵

Coincidentally, the European states were in the process of negotiating the terms of the Amsterdam Treaty at the time, and it would have been possible to insert an express legal basis for accession in the Treaty. However, this did not happen.³⁵⁶

In the late 1990s the idea emerged to adopt a bill of rights for European citizens. The initiator of this idea was then-German Foreign Minister Joschka Fischer. This led to the creation of the EU Charter of Fundamental Rights. In this process the old idea of accession was also rediscovered. In the Draft Constitution of the EU the legal basis for the accession first appeared. The formulation of a provision speaking about the accession changed over time. It started with "the Union may accede". Later the wording was changed to "the Union shall seek the accession".

³⁵⁵ *Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, Para. 33, 34, 35, 36.

³⁵⁶ Rick Lawson, *A Twenty-First-Century Procession of Echternach: The Accession of the EU to the European Convention on Human Rights in The European Convention on Human Rights and the Employment Relation* edited by Filip Dorssemont, Klaus Löcher and Isabelle Schömann, Hart Publishing, Oxford and Portland Oregon, 2013, p. 48.

But because the drafters wanted to give a strong signal that the accession should happen the final wording was “the Union shall accede to the ECHR”.³⁵⁷

In 2007 the Venice Commission issued comments about the accession of the EU to the ECHR. It is confirmed in the text that human rights standards were incorporated in the legal order of the EU. However, the Commission emphasizes that the interpretation and application of these standards by EU institutions might not always be the same as the ECtHR. After the accession, the ECtHR will have direct jurisdiction over the EU institutions. This will enhance uniformity of interpretation and application of the ECHR.³⁵⁸

Therefore, immediately after the Lisbon Treaty entered into force, negotiations about the accession of the EU to the ECHR started. Article 6(2) TEU states that the Union shall accede to the ECHR, however, on the condition that such accession shall not affect the competences of the Union as defined in the Treaties. Six months after the Lisbon Treaty entered into force, Protocol 14 to the ECHR also saw the daylight. It amended the ECHR and created a legal basis for the accession: Article 59(2) of the Convention came to read that the EU may accede to the Convention.

The Explanatory Report to the Protocol 14 provides that for the actual accession to take place there is a need for further modifications of the Convention. This can be done either through one or more amending Protocols or by an accession agreement concluded between the EU and the COE. It is further explained that at

³⁵⁷ *Ibid.*

³⁵⁸ European Commission for Democracy through Law (Venice Commission), *Comments on the Accession of the European Union/European Community to the European Convention on Human Rights* by Pieter van Dijk (Member, The Netherlands), CDL(2007)096, Strasbourg, 12 October 2007, Para 14.

the time of negotiations for Protocol 14 the EU still lacked the competence to enter into negotiations and/or conclude an agreement.³⁵⁹

More details on accession were provided in Protocol 8 to the Treaties, attached by the Treaty of Lisbon. Article 1 of that Protocol refers to the *accession agreement* which was supposed to include provisions for preserving the specific characteristic of the Union and its law, namely in regard to the Union's possible participation in the control bodies of the ECHR and to the mechanisms for ensuring that the proceedings by states or by individual applications were correctly addressed to the member states and/or the Union as appropriate.

At 17 March 2010, the European Commission issued a proposal for negotiation directives. The Commission proposed that it would represent the EU in the accession negotiations. On 4 June 2010 the EU Justice Ministers gave the Commission such a mandate. The legal service within the Commission was made responsible for the negotiations. The Committee of Ministers of the COE, in turn, gave an *ad hoc* mandate to the Steering Committee for Human Rights (CDDH) to elaborate the legal instrument necessary for the accession together with the EU. The CDDH entrusted the task to a group called CDDH-UE. The group consisted of 14 experts, seven of whom represented EU member states in the COE; the other seven represented non-EU member states.³⁶⁰

From July 2010 until June 2013, when the final *Draft Agreement on the Accession of the European Union to the European Convention on Human Rights* was agreed, a number of meetings were held. In the beginning it was the CDDH-

³⁵⁹ Council of Europe, Explanatory Report, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention* (CETS No. 194); 12 May 2009 Para. 101-102.

³⁶⁰ *Supra note 354*, p. 51-53.

UE working on the document. At a later stage the European Commission was also involved in the process. Importantly, civil society representatives, including human rights NGOs and the European Trade Union Confederation (ETUC), also shared their views.³⁶¹

The European Courts were actively involved in the elaboration process of accession agreement. In January 2011 the presidents of the two Courts issued a Joint Communication. One of the major ideas expressed therein was an establishment of a “prior involvement” procedure, which gives the CJEU an opportunity to carry out internal review before the ECtHR carries external one. This way the principle of subsidiarity will be respected.³⁶² This active involvement of the Courts in the legislative process made the negotiations easier. Probably, it was also due to the fact that the drafters were expecting the CJEU to deliver an opinion on the accession agreement.³⁶³

7.2. The Main Provisions of the Accession Agreement

The draft accession agreement contains 12 articles. Article 1 determines the scope of the accession. The Union is acceding to the ECHR, Protocol and Protocol No. 6. Similar to Article 6 TEU it is stated in this Article that the Convention and the Protocols cannot affect the competences of the EU as it is defined under EU law. Together with Article 4, Article 1 also clarifies that the terms such as “state”,

³⁶¹ Working Documents, *Accession of the European Union to the Convention*, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp

³⁶² *Joint Communication from President Costa and Skouris*, Strasbourg and Luxembourg, 24 January, 2011, Para. 2, available at, http://www.ccbe.eu/fileadmin/user_upload/document/Roundtable_2011_Luxembourg/Joint_communication_from_Presidents_Costa_and_Skouris_EN.pdf

³⁶³ *Supra note 354*, p. 54.

“state parties”, “national law” and so on, mentioned in the ECHR and its Protocols should also be understood as referring to the EU.

Article 2 of the Accession Agreement allows the EU to make reservations to the Convention and its Protocols in the same vein as States are allowed to do it - in accordance with Article 57 of the Convention. However, it is not clear yet whether the EU will refer to such measures after the accession.

Article 5 clarifies that proceedings before the CJEU cannot be understood as international investigations or dispute settlement under Articles 35, Paragraph 2.b and Article 55 of the Convention. In other words, proceedings before the CJEU do not bar applications before the ECtHR.

Article 6 speaks about the election of judges. Similar to other contracting states the EU is entitled to have a judge appointed in accordance with Article 22 of the Convention. A special delegation of the European Parliament will represent the EU in the Parliamentary Assembly of the COE during the election process.

Article 7 provides the possibility for the EU to take part in the meetings of the Committee of Ministers and to vote. The EU shall be consulted within the Committee. Furthermore, precautionary measures are taken in order to make sure that the right to vote of the EU does not prejudice the function of the Committee to effectively supervise the execution of the judgments or friendly settlements and that the EU rule according to which the EU member states are obliged to vote in a coordinated manner in cases concerning one or more EU members does not adversely affect the functioning of the Committee of Ministers.

Article 8 sets rules for the participation of the EU in the expenditure related to the Convention, while Articles 9-12 are of a technical character.

The most important article for the purposes of this thesis, which contains provisions that have a potential to affect the protection of trade union rights in Europe, is Article 3 of the Accession Agreement. It mentions two important novelties: the *co-respondent mechanism* and the *rule of prior involvement*.

Article 3(1) provides amendments to Article 36 ECHR. The title of Article 36 was also to be changed to “Third party intervention and co-respondent” and a new Paragraph 4 was added:

The European Union or Member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

Article 3(2)(3)(4) describes three possible scenarios of EU involvement in the adjudication process of the ECtHR: firstly, when an application is directed against one or more members of the EU; secondly, when an application is directed against the EU itself; and finally when the applicant mentions both the EU and one or more member states in the application. In the first scenario the EU may become a co-respondent if an alleged violation calls into question the compatibility of EU law (primary and secondary; including decisions taken under the EU Treaties (TEU, TFEU), notably where the violation could have been

avoided only by disregarding an obligation under EU law) with the Convention rights (3(2)).

In the second scenario the EU member state may become a co-respondent if an alleged violation calls into question the compatibility of EU primary law and the instruments having the same legal value (notably where the violation could have been avoided only by disregarding an obligation under the EU law) with the Convention rights (3(3)).

In the third scenario, the status of the respondent may be changed to co-respondent if the conditions described in Paragraphs 2 or 3 are met (3(4)).

Article 3(5) further clarifies that in order for a High Contracting Party to become a co-respondent it needs to be invited by the ECtHR. If the contracting party wants to become a co-respondent at its own initiative, it still needs approval from the ECtHR. When deciding on the issue of co-respondent the Court shall seek the views of all the parties to the proceedings and assess if the conditions under Articles 3(2) and 3(3) are met. This will not affect the procedure of the Court according to which it makes a preliminary assessment of the applications with the result that manifestly ill-founded and inadmissible applications are not communicated to the state parties. Only in those cases which are communicated can a party become a co-respondent.³⁶⁴

The Explanatory Report gives reasons for the introduction of the co-respondent mechanisms. One of the main reasons is to accommodate a specific situation that never happened before: a non-state actor with an autonomous legal system

³⁶⁴ Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1 (2013)008rev2, Strasbourg, 10 June 2013, Para 51.

becomes party to the Convention alongside its own members. Acts adopted by the EU institutions should be implemented by its member states, while the provisions of the EU Treaties, on the basis of which the EU institutions operate, are agreed by the member states among themselves. This creates a unique situation in the ECHR system when a legal act is enacted by one contracting party and implemented by another. The co-respondent mechanism cannot be regarded as a procedural privilege for the EU or its member states, because the co-respondent is a party to the case and therefore the judgments of the ECtHR are binding on it under Article 46 of the ECHR. It is a mechanism which helps to avoid gaps in participation. Protocol 8 to the Treaties is important in this regard. Article 1(b) of the Protocol requires the Accession Agreement to put a mechanism in place that ensures that individual applications are correctly addressed to member states and/or the Union.³⁶⁵

According to the Explanatory Report the co-respondent mechanism shall not be an obstacle for the applicant. The admissibility of an application shall be assessed without regard to the participation of the co-respondent in the proceedings. In other words, an application will not be declared inadmissible as a result of the participation of a co-respondent in light of Article 35(1) ECHR on the exhaustion of domestic remedies.³⁶⁶

Important is to note that no contracting party may be forced to become a co-respondent. This reflects the fact that an application is not addressed to the

³⁶⁵ *Ibid.* para. 38, 39, 41.

³⁶⁶ *Ibid.* para. 40.

potential co-respondent and that no party can be compelled to become a party to a case when it was not named in the original application.³⁶⁷

Respondent and co-respondent are normally held jointly responsible. However, in certain cases, on the basis of reasons given by the respondent and co-respondent and the applicant, the ECtHR may hold only the respondent or co-respondent responsible. Apportioning the responsibility on any other basis than this entails the risk that the Court would exceed its competence and assesses the distribution of competences between the EU and its member states. It is also important to mention that the Court only rules on whether there has been a violation of the Convention, and not on the validity of the legal act or provision underlying the act or omission subject of the complaint.³⁶⁸

It is believed, however, that the co-respondent mechanism is expected to be applied in a limited number of cases. Instead, the party intervention rule under Article 36 ECHR is likely to be applied more in the cases where the EU is involved.³⁶⁹

The *prior involvement* rule is triggered in proceedings when the EU is involved in the case as a co-respondent and when the CJEU has not yet ruled on the compatibility of EU law with the Convention rights at issue. In this situation sufficient time shall be afforded for the CJEU to make such an assessment. The condition is that an assessment must be made quickly in order to ensure that the proceedings before the ECtHR are not unduly delayed (Article 3(6)).

³⁶⁷ *Ibid.* para. 53.

³⁶⁸ *Ibid.* para. 62.

³⁶⁹ *Ibid.* para. 46, 50.

In the Explanatory Report it is stated that cases where the EU might be a co-respondent arise from individual applications concerning acts or omissions of EU member states. Before going to the ECtHR the applicant is obliged to exhaust domestic remedies in the national courts of the respondent state. This national court may or in certain cases must refer the question to the CJEU for a preliminary ruling (Article 267 TFEU), but because parties to proceedings before national courts can only suggest (but not require) such a referral, this procedure is not considered a legal remedy obligatory for an individual to exhaust before sending an application to the ECtHR. The national court might not consider it necessary to refer a question to the CJEU for a preliminary ruling, in which case the issue of conformity of an EU act with human rights will directly go to the ECtHR before the CJEU has the opportunity to express an opinion on it. Even though it is believed that such a situation will not occur that often, it was still decided to establish a remedy. For this reason, the Accession Agreement suggests the EU introduce *internal rules* in order to ensure that the CJEU has an opportunity to rule on the validity of a legal provision of EU law that has triggered the participation of an EU as a co-respondent. This assessment should take place before the ECtHR decides on the merits of the application. This procedure is inspired by the principle of subsidiarity and applies only in situations where the EU is a co-respondent. Interestingly, the explanatory report provides a suggestion for the EU that all parties to the case (including the applicant, who will be given a chance to obtain legal aid) will have an opportunity to make observations in the procedure before the CJEU. The CJEU will not assess the act or omission complained about, but only the EU legal basis for it, and its assessment will not bind the ECtHR. After the assessment is issued the parties to

the case should be given enough time to properly assess the consequences of the CJEU ruling. In order to avoid undue delays the explanatory report gives the CJEU a limited period for the assessment. It is emphasized that an accelerated procedure already exists before the CJEU and that the CJEU would have already had been able to rule under that procedure from six to eight months.³⁷⁰

7.2.1 Commentaries on the Accession Agreement

There are several important aspects that the Treaties and the Association Agreement do not shed enough light on and which might possibly have implications for the protection of fundamental rights. One of those important issues is the question when the prior involvement mechanism is triggered. As suggested by the Accession Agreement and the Explanatory Report, once the EU is recognized as a co-respondent to a case, a reference for a preliminary ruling will be made to the CJEU if it had not intervened earlier in this case. At first sight, everything is clear. Nevertheless, a situation may arise in which there was no preliminary reference in regard to the specific case, but the CJEU had already decided on the validity of the specific EU provision at stake in light of fundamental rights in another case. It is also possible that a preliminary reference was made to the CJEU by national courts, but for reasons other than compatibility with human rights.³⁷¹

The issue of deciding whether the Court of Justice already ruled on the matter is one of the problematic ones.³⁷² For instance, in the case of *Kaba II*³⁷³ the first

³⁷⁰ *Ibid.* para. 65-69.

³⁷¹ Aida Torres Perez, *Too Many Voices? The Prior Involvement of the Court of Justice of the European Union in The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014, p. 38.

³⁷² Eleanor Spaventa, *Fundamental Rights in the European Union in European Union Law*, Edited by Catherine Barnard and Steve Peers, Oxford University Press, 2014, p. 251.

question referred to the ECJ was rather straightforward: “how is it possible to make sure that Article 6 ECHR is respected; was it respected in the present proceedings and if not, how this might affect the judgment?”.

Nevertheless, the Court avoided answering the first question. It noted that because the doubts of the national tribunal expressed in relation to the first question were addressed in the second question (here the Court did not mention the ECHR at all, but only Community law and national law) it was unnecessary to reply to the first question.³⁷⁴ It is now debatable whether in cases like this, the ECtHR has to delay the proceedings and allow the ECJ to make an assessment as it is envisaged by the prior involvement rule.³⁷⁵

While prior involvement is triggered only in cases where the EU is a co-respondent, the question is why it is not triggered where the EU is a respondent. For some commentators it seems more logical to have this procedure in all instances in which a question of compatibility of the EU law with the ECHR arises.³⁷⁶ The Agreement and its explanations do not provide clarifications regarding this issue.

Another mystery that accompanies prior involvement is the consequence of this procedure. Two scenarios can be envisaged: 1. The EU law provision is declared by the CJEU as being consistent with fundamental rights and 2. The EU provision is declared by the CJEU null and void for violating fundamental rights. The

³⁷³ Case C-466/00, *Kaba v Secretary of State for the Home Department (No 2)* [2003] ECRI-2219.

³⁷⁴ *Ibid.* para. 37-58.

³⁷⁵ *Supra* note 370, p. 251-252.

³⁷⁶ Giorgio Gaja, *The ‘Co-Respondent Mechanisms’ According to the Draft Agreement for the Accession of the EU to the ECHR in The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014, p. 347.

second scenario is less problematic, if the CJEU finds that the EU provision violates fundamental rights it might declare it null and void. In this case the Strasbourg Court can either grant just satisfaction or, if the standards are higher within the EU, it might rule no violation of the Convention.³⁷⁷

A problem might arise in relation to the first situation. The Strasbourg Court might find the EU legal provision incompatible with the Convention even if the EU provision at stake was declared consistent with the fundamental rights by the CJEU in the prior involvement. This might be a consequence of the CJEU interpretation of the norm which falls below the minimum standards set by Strasbourg; or it could be that the two Courts have a different understanding of how to find a balance between the competing rights.³⁷⁸

7.3 CJEU Opinion on the Accession Agreement

On 4 July 2013 the European Commission requested an Opinion of the CJEU pursuant to Article 218(11) TFEU on the accession of the EU to the ECHR. The question posted to the Court was the following: “Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms ... compatible with the Treaties?”

On 18 December 2014 the CJEU released an Opinion. The conclusion reached by the Court was a surprise for many academics and lawyers interested in the topic: the Association Agreement was ruled to be *not compatible* with Article 6(2) TEU or with Protocol 8 of the Treaties.

³⁷⁷ *Supra* note 360, p. 39.

³⁷⁸ *Ibid.*

The Opinion of the Court is very comprehensive. It contains 258 paragraphs and provides information on the major principles governing the ECHR and EU and also the relationship between the two. The main provisions of the draft accession agreement and the explanatory report are summarized. The submissions of the EU institutions and the member states regarding the accession are also included. The position of the Court itself is contained in 115 paragraphs.

The Court started with the *admissibility issue*. The fact that internal rules were not yet adopted did not bar the Court from declaring the question admissible. According to the Court internal rules constitute internal EU law and therefore they cannot be a subject matter of the Opinion procedure. This procedure only relates to international agreements which the EU is proposing to conclude (Para 149, 151).

The Court emphasized the importance of the specific character of the EU and EU law and stated that it should not be undermined by the accession. The Court reiterated that this specific characteristics arises from the very nature of EU law and unites several aspects. Most importantly, EU law stems from an independent source of law: the Treaties; these Treaties have primacy over national laws; the concept of direct effect allows a whole series of Treaty provisions to be applicable to the member states and its nationals. The Court further clarifies that fundamental rights recognized by the Charter are at the heart of the EU legal structure and that the autonomy the EU law enjoys in relation to national and international laws requires that the interpretation of the Charter rights are ensured within the framework of the structure and objectives of the EU (Para 164-170).

After deciding on the admissibility and recalling the importance of the preservation of the specific characteristics of EU law, the Court gave number of reasons to justify its position. The objection of the Court that is most relevant for this thesis was related to the Charter.

In the view of the Court, Article 53 ECHR and Article 53 of the Charter should be coordinated with each other and a provision to this effect must be included in the Accession Agreement. The Court was not happy with the fact that while the interpretation of the ECHR by the ECtHR is binding on EU institutions (including the CJEU), this is not the case in relation to the Charter – the interpretation of the Charter by the CJEU is not binding on the ECtHR. According to the Court this must be changed. The Court reiterated that Article 53 of the Charter, which defines the level of protection of Charter rights, is interpreted by the Court of Justice “as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter of the primacy, unity and effectiveness of EU law (judgment in Melloni, EU:C:2013:107, paragraph 60)”. Therefore, in the opinion of the Court, because Article 53 of the ECHR gives freedom to member states to introduce higher standards of protection of fundamental rights than those guaranteed by the ECHR, there is a need to *coordinate* Article 53 ECHR with Article 53 of the Charter, as interpreted by the CJEU, “so that the power granted to member states by article 53 of the ECHR is limited – with respect to the rights recognized by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised” (Para 185-190).

In other words, this means that the ECtHR has to ensure that Article 53 of the Convention does not give authorization to member states to introduce higher human rights standards than is established by the EU charter, interpreted by the CJEU. According to the CJEU, this will be a guarantee of the primacy, unity and effectiveness of EU law. It goes without saying that this approach comes into conflict with the very essence of the ECHR, which offers only minimum standards of protection of the rights and welcomes any further improvement from member states.

In my opinion, from a trade union rights point of view, this position of the CJEU is catastrophic. Since 2007 when the Court of Justice restricted the scope of trade union rights in favour of the free movement of companies and services (*Viking* and *Laval*), the situation has not changed in this regard. The reconsidered case law of the ECtHR (*Demir* and *Enerji*) in relation to Article 11 on the freedom of association also did not help to establish balance in this sphere. The CJEU continued in its own style. The only hope was the accession of the EU to the ECHR as a result of which, it was believed, the ECtHR would have been a final Court on human rights issues, while EU law matters were left with the CJEU. However, it seems that after the Charter acquired the same legal value as the Treaties, the CJEU now considers human rights (and most importantly the Charter) as part of EU law, the interpretation of which is within its prerogative only, and it does not wish to accept any external control, including from the ECHR.

The Court also raised the issue of “mutual trust” between the EU member states, which means that while implementing EU law member states are required under EU law to presume that fundamental rights are observed by the other member

states. In the view of the Court, the fact that the ECHR gives member states the power to check on other member states' observance of fundamental rights goes against the principle of mutual trust and undermines the autonomy of the EU. No provision preventing such a development is mentioned in the agreement (Para 191-195).

Protocol 16 ECHR was considered by the Court to be a danger for the effectiveness of the preliminary ruling procedure (Article 267 TFEU) and therefore incompatible with the autonomy of EU law. Namely, a request for an advisory opinion made pursuant to Protocol 16 by a national court of a member state that has acceded to that Protocol could trigger the procedure for prior involvement of the CJEU, thus creating a risk that the preliminary ruling procedure, which is a key stone of the EU judicial system, might be circumvented (Para 196-200).

The Court also noted that the Agreement violates Article 344 TFEU, according to which only the CJEU has jurisdiction over inter-state disputes. In the opinion of the Court, the very fact that the EU or EU member states are able to submit applications to the ECHR under Article 33 entails a liability of objective of Article 344 TFEU being undermined, and goes against the very nature of the EU law (Para 201-214).

The Court also criticized the co-respondent procedure laid down by the agreement and concluded that it does not ensure that the specific characteristics of the EU and EU law are preserved. Three reasons were named in this respect. Firstly, Article 3(5) of the Draft Agreement provides that if the EU or the EU member state requests leave to intervene as a co-respondent, they must present

arguments to prove that the conditions for their participation as a co-respondent are met, and the ECtHR has to assess this reasoning. In the opinion of the CJEU, in carrying out this assessment the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its member states, as well as criteria for attribution for their act or omission. Secondly, Article 3(7) of the Draft Agreement speaks about a joint responsibility of the respondent and co-respondent parties if a violation is found in the case by the ECHR. However, according to the CJEU this does not preclude a member state from being held responsible, together with the EU, for a violation of a provision of the ECHR in respect of which that member state has made a reservation. This goes against the Article 2 of Protocol No 8 EU, according to which the reservations must not be affected. Thirdly, the ECtHR should not be allowed to decide on the apportionment of responsibility between the respondent and co-respondent if a violation is found in the case (Article 3(7) Draft Agreement). In the opinion of the Court the apportionment of responsibility must be resolved according to the EU rules only, and if necessary it must be subject to review by the CJEU, which has the sole responsibility to ensure that any agreement between respondent and co-respondent respects those EU rules. The fact that the ECtHR makes this decision on the basis of the reasons submitted by the respondent and co-respondent does not change anything in this regard (Para 215-235).

The prior involvement mechanism introduced by the Accession Agreement did not survive the CJEU criticism either. Similar to its opinion regarding the co-respondent mechanism, the CJEU ruled that the prior involvement procedure does not enable the specific characteristics of the EU and EU law to be preserved. Two reasons were named in this respect. Firstly, it should be up to the EU institutions

to decide whether the CJEU has already given a ruling on the same question of law. According to the Court, permitting the ECtHR to rule on this issue would amount to conferring on it jurisdiction to interpret the case law of the CJEU, which is not acceptable. The draft agreement does not exclude such a possibility. Secondly, the Agreement does not provide a possibility for the CJEU to interpret the secondary law of the EU (Article 3(6), Draft Agreement). Paragraph 66 of the explanatory report only provides for the ability of the CJEU to rule on the validity of secondary law or on the interpretation of primary law. In the view of the Court, if the CJEU is not allowed to interpret secondary law, the ECtHR might be tempted to do so, which is again violation of the main principle that only the CJEU is allowed to interpret EU law (Para 236-248).

Finally, the Court was not happy with the fact that the ECtHR might have jurisdiction over some Common Foreign Security and Policy (CFSP) matters, when the jurisdiction of the CJEU itself is very limited in this field. The Court reiterated its position that the jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court, outside the institutional and judicial framework of the EU (Para 249-257).

The objections of the CJEU are very serious. Basically, it rejected the entire Draft Agreement by declaring co-respondent and prior involvement mechanisms, which constitute a major part of the Draft Agreement, incompatible with the EU Treaties. The parties now have to think about the renegotiation of a totally new agreement, based on specific requirements of the CJEU. However, the requirements of the CJEU seriously affect not only the EU and its member states but also the ECHR system and its contracting parties. Therefore, there is a need

for all 47 contracting member states to the ECHR to agree on a new agreement concluded according to the terms of the CJEU opinion.

However, it is difficult to see how and why the ECtHR and/or the contracting states to the ECHR would have to agree on the CJEU terms. The most challenging requirement is the one concerning the coordination of Article 53 ECHR with Article 53 of the Charter. According to the CJEU, member states cannot introduce standards higher than the Charter as interpreted by the CJEU (this would apply within the scope of EU law; and where EU law and the CJEU had set a 'ceiling' on rights). If the ECtHR accepts this objection it means that the CJEU will become the standard setting institution (at least in relation to certain issues) in Europe. This in fact leads to the primacy of the CJEU over the ECtHR. It also means that the ECtHR has to change its long-established practice that it provides only for a minimum protection on which the states may build. Changing this approach might have very difficult consequences for those states that might embrace higher standards of protection of a given right than the ECtHR. They might be asked to lower their standards. In that regard, the ECtHR would become dependent on the case law of the CJEU. This perspective is very damaging for trade union rights protection, as the CJEU standards in relation to these rights are considerably lower than those of the ECtHR.

What also concerns me is the question why the CJEU did not mention these (or at least some of these) objections in the negotiation process, as it was also involved at that stage. One of the major reasons for the involvement of the judiciary in the legislative process was to avoid a negative opinion of the Court, which still was not avoided. After all, maybe it was not a wise decision to ask the CJEU if it

would accept the supremacy of the other Court. Nevertheless, the Opinion was released and the negotiating parties cannot disregard it now.

Even though the Opinion was not expectable, I still agree with the CJEU on one thing: it is not clear how the ECtHR can judge the compatibility of an EU act with the ECHR, without actually interpreting that act. If the Strasbourg Court simply relies on the interpretation offered by the CJEU (as a result of the prior involvement procedure), there is a possibility that it (the ECtHR) can never conclude any incompatibility, because most probably, the CJEU will be reluctant to interpret the act as incompatible with the ECHR. This technical issue must be explored on a case-by-case basis, but it is definitely important to take note of it.

A similar concern is expressed by the ICJ judge in his writing, though in a different context. He considers it impossible to exercise external control over compliance by the EU with its obligations under the Convention, if the ECtHR is not allowed to interpret the content of EU law provisions.³⁷⁹

Whether the EU, ECtHR and the member states continue negotiations on the Draft Agreement, and what shape will it take, remains to be seen. Meanwhile, I hope that 18 December, 2014 will not go into history as a step backwards in human rights protection. After all, December is the month of the UDHR.

7.4 Opinions on the Opinion

Commenting on the Opinion of the Court on the accession, Catherine Barnard made a very interesting observation. She thinks that even though the Court recognized the obligation of the EU to accede to the Convention according to first

³⁷⁹ *Supra* note 374, p. 346.

sentence of Article 6(2) TEU, it is apparent from paragraphs 160-162 of the Opinion that the emphasis of the Court is not on this obligation, but on the conditions to which the accession is subject under the Treaties. These are made explicit in the second sentence of Article 6(2) TEU (the condition not to affect Union's competences) and Protocol 8 (the condition not to affect specific characteristics of the Union).

Based on this, Barnard thinks that through the lens of the second sentence of Article 6(2) TEU and Protocol 8, the Treaty provides not an absolute obligation to accede but a conditional one. In support of her position she makes reference to the ECJ discussion document on the accession dated 5 May 2010 when the debates around the topic were very active.³⁸⁰

This is an interesting and important document, because the ECJ officially defines what it means by the “specific characteristic of the EU” and what should be preserved in the case of accession. According to the Court one of the specificities of the Union lies in the fact that, as a general rule, “action by the Union takes effect as against individuals only through the intermediary of national measures of implementation or application”. The role of intermediary is taken by the states. If an individual thinks that his/her fundamental rights are not secured because of the implementation or application of EU law by national authorities, he/she, after exhausting the domestic remedies, may lodge an application against the member

³⁸⁰ Catherine Barnard, *Opinion 2/13 on EU accession to the ECHR: looking for the silver lining*, EU Law Analysis Blog, Expert insight into EU law developments, Monday, 16 February 2015, available at: <http://eulawanalysis.blogspot.co.uk/2015/02/opinion-213-on-eu-accession-to-echr.html>.

state concerned to the ECtHR. This way, an individual can indirectly challenge the acts of the Union.³⁸¹

The opinion of the Court is that in the light of the accession this specific characteristic of the Union must be seen in the context of the principle of subsidiarity, meaning that the national courts or authorities are primarily responsible for the prevention or examination of breaches of the Convention. This principle should also apply to the Union acts. Therefore, it is important to make sure that any external review by the ECtHR is preceded by review by the EU and/or its member states.³⁸²

Another specificity that the Court mentioned in the Discussion Document was its own role in the interpretation and application of the EU Treaties. It reiterated that the CJEU has an exclusive jurisdiction to declare the acts of EU institutions invalid. Even though national courts of member states have the jurisdiction to consider the validity of EU acts, they cannot declare them invalid. This way uniformity is achieved. According to the Court, this prerogative is an integral part of the “powers” of the Union institutions mentioned in the Protocol No. 8 and it must not be affected by the accession. For this not to happen, the Court is of the view that before the ECtHR deciding on the conformity of an EU act with the Convention, the CJEU must have had the opportunity to give a definite ruling on the point.³⁸³

³⁸¹ *Discussion Document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Luxembourg, 5 May, 2010, Para 5.

³⁸² *Ibid.* para. 6, 7.

³⁸³ *Ibid.* para. 8, 9.

The Court also comments on the preliminary ruling procedure as one of the main specificities and positively assesses its functioning over a half a century. However, it notes that not all cases on fundamental rights might reach the CJEU through the preliminary ruling procedure, and individuals cannot set this procedure in motion. Therefore, the Court is of the opinion that the preliminary ruling procedure cannot be regarded as a domestic remedy necessary to exhaust before bringing a case to the ECtHR. Nevertheless, the Court thinks it is important to make sure that when an EU act is challenged it is the Union Court that carries out an internal review before an external review takes place.³⁸⁴

In the end the Court summarizes:

in order to observe the principle of subsidiarity which is inherent in the Convention and at the same time to ensure the proper functioning of the judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention.³⁸⁵

To sum up, the main concerns of the Court in the discussion document were twofold: the possibility of an internal review of the EU act by the CJEU before any external review by the ECtHR, and the preservation of the situation where the CJEU is the only Court with the power to declare the EU acts invalid. Both these concerns were addressed by the relevant articles of the Accession Agreement; the prior involvement mechanism directly corresponds to the first concern of the

³⁸⁴ *Ibid.* para. 10, 11.

³⁸⁵ *Ibid.* para. 12.

CJEU about the internal review. If the EU is co-respondent in the case, the CJEU is given the opportunity to assess the validity of the Union acts before the ECtHR decides on the merits of the application (Para 66, Draft Explanatory Report). As for the second concern on the validity of a Union act, the Draft Explanatory Report explicitly states that the ECtHR only rules on whether there has been a violation of the Convention or not. It does not have the power to declare an act of the EU or any of its member states invalid (Para 62).

So the Court indeed names conditions for the accession. However, firstly, these conditions are not as detailed as in *Opinion 2/13* (not to mention the fact that many of them are not mentioned here at all) and secondly, I believe that they are properly addressed by the Accession Agreement.

Similar issues were raised after several months in the *Joint Communication of the Presidents of the two Courts*. Again, it was stated that in order for the principle of subsidiarity to be respected a procedure should be put in place to ensure that the CJEU carries out an internal review before the ECtHR carries out an external one. Three conditions were mentioned in this respect: firstly, the types of cases which may be brought before the CJEU are clearly defined; secondly, before the ECtHR starts its examination of the case the parties should have the opportunity to properly assess the CJEU position within a time limit prescribed in accordance with the ECHR procedural rules; and lastly, in order to avoid lengthy proceedings the CJEU might be required to give a ruling under an accelerated procedure.³⁸⁶

I believe all these conditions are met in the Draft Accession Agreement. Article 3(6) of the Draft explicitly states the type of cases (cases that raise issues not yet

³⁸⁶ *Supra* note 360.

addressed by the CJEU) for which prior involvement of the CJEU is considered necessary; it states that parties should have enough time to make observations after the CJEU states its position; and it states that the assessment of the CJEU must be quick.

It is possible that in private discussions (that I believe are no less important than the official documents) the judges of the CJEU were more specific about their conditions and maybe also raised the issues mentioned in the Opinion before the ECtHR judges. It is difficult to speculate over this issue. One thing is certain: the CJEU was not very outspoken in public before Opinion 2/13.

7.4.1 The ECtHR on the Opinion

The *ECHR annual report 2014* is so far the only document where European judicial officials, including the ECtHR, commented on Opinion 2/13 on the accession. As Lock correctly noted it is not very often that the Annual Report of the Court receives so much attention.³⁸⁷ But this time it did, because of the comment of the President of the ECtHR Dean Spielmann. This comment deserves to be quoted in full:

The end of the year was also marked by the delivery on 18 December 2014 of the Court of Justice of the European Union's (CJEU) eagerly awaited opinion on the draft agreement on the accession of the European Union to the European Convention on Human Rights. Bearing in mind that negotiations on European Union accession have been under way for

³⁸⁷ Tobias Lock, *Will the Empire Strike Back? Strasbourg's reaction to the CJEU's accession opinion*, Verfassungsblog on Matters Constitutional, 30 January 2015, available at: <http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/>

more than thirty years, that accession is an obligation under the Lisbon Treaty and that all the member States along with the European institutions had already stated that they considered the draft agreement compatible with the Treaties on European Union and the Functioning of the European Union, *the CJEU's unfavourable opinion is a great disappointment*. Let us not forget, however, that the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each Member State. More than ever, therefore, the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation.³⁸⁸

As Lock correctly observed, this comment contains very strong language, unusual for documents of this kind. The President could not hide “great disappointment” caused by Opinion 2/13 and explicitly stated that citizens, deprived of the right to challenge EU institution acts, are “victims” of this Opinion. Lock thought that even though this statement is made only by one judge it might still mean that the ECtHR might change its approach to the *Bosphorus* presumption. A revocation of this presumption was not deemed possible by Lock; after all, the EU enhanced the protection of human rights (EU Charter) since then. What Lock thought might happen is that the ECtHR tightens the conditions for application of the presumption so that more cases will be reviewable by Strasbourg.³⁸⁹

³⁸⁸ *Foreword* by Dean Spielmann, President of the European Court of Human Rights, *Annual Report 2014, provisional version*, Registry of the European Court of Human Rights, Strasbourg, 2015, p.6.

³⁸⁹ *Supra* note 385.

7.5 Future possible developments after Opinion 2/13

The possible future developments after Opinion 2/13 are not clear yet. The officials are not hurrying to make official statements. The obligation of the accession still exists, though, and something needs to be done about it. One possible scenario is to sit around the negotiation table again and amend the accession agreement. This is what Lock recommends to do.³⁹⁰ However, considering the long process of negotiation over the draft AA it will most probably take several years before they reach a new agreement, if they reach one at all. As Steve Peers correctly noted, these amendments might go against the intrinsic nature of the ECHR, which means that the COE member states (those not part of the EU) might not agree at all on such amendments. But even if they agree, does the accession still matter after those amendments?³⁹¹

Another possible scenario is the amendment of the EU Treaties, so that the accession still takes place notwithstanding the Opinion of the CJEU. Leonard F.M. Besselink suggested adding to the EU Treaties an additional Protocol which might read the following way: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating

³⁹⁰ Tobias Lock, *Oops! We did it again – the CJEU’s Opinion on the EU Accession to the ECHR*, Verfassungsblog on Matters Constitutional, Thursday, 18 December 2104, available at: <http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VPpJsaNFBv4>

³⁹¹ Steve Peers, *The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection*, EU Law Analysis Blog, Expert insight into EU law developments, Thursday, 18 December 2014, available at: <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>

to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014”.³⁹²

This way all the problems will be solved. The conditions mentioned in Article 6(2) and Protocol 8 emphasized by the Court and also mentioned by Barnard will automatically lose their relevance. Considering that all the other EU institutions and the EU member states agree on the accession, this should not be a difficult thing to arrange.

From the very beginning, there were different reasons for the idea of accession to become popular. One reason was that the CJEU started to refer to the rights and freedoms mentioned in the Convention on a regular basis. This turned out to be problematic, as the CJEU started to develop its own system of fundamental rights protection. In the absence of a common mechanism of interpretation agreed between the two European Courts, they started to interpret one and the same texts in different contexts and in different ways.³⁹³

Everything got more complicated after the Lisbon Treaty. The Court started to refer more to the EU Charter. The risk of divergent interpretations of the human rights standards in Europe grew. The duplication of the human rights protection systems in Europe created legal uncertainty and runs the risk of weakening overall protection.³⁹⁴

³⁹² Leonard F.M. Besselink, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, *Verfassungsblog on Matters Constitutional*, Tuesday, 23 December 2014, available at: <http://www.verfassungsblog.de/en/acciding-echr-notwithstanding-court-justice-opinion-213/#.VPpLcqNFBv5>

³⁹³ *Supra* note 361, p. 4-5.

³⁹⁴ Jörg Polakiewicz, *EU Law and the ECtHR: will the European Union's accession square the circle? The draft accession agreement of April 5, 2013*; *European Human Rights Law Review*, Issue 6, 2013, P. 595-598.

Furthermore, after the increasing transfer of competences from the member states to the Union, the Union became responsible for the protection of certain rights. However, while the ECHR had (and still has) no *ratione personae* over the Union, it could not hold the EU responsible for these violations. Instead, the member state which implemented the relevant EU law was responsible for any violation of rights caused by the decisions taken by EU institutions. In other words, the actual perpetrator was free without any convictions and the individual whose rights were violated was deprived of these rights.³⁹⁵

Besides, one of the requirements for candidate countries willing to become the EU members is to protect and promote the rights mentioned in the ECHR. According to commentators there is an element of hypocrisy when you ask others to commit themselves to the Convention while you're not a party to it yourself.³⁹⁶

All these reasons are still valid. And I strongly believe that accession of the EU to the ECHR is the only solution to these problems. The fact that the idea of accession did not disappear over the decades, and survived from one Treaty to another, makes me think that accession is unavoidable. Thus it seems justified to explore the effects that a future accession might have on human rights, and specifically, on trade union freedoms.

7.5.1 The two Courts

When it comes to the relationship between the two Courts, there are a few important aspects that deserve our attention. Neither the accession agreement nor the CJEU Opinion talked about these in depth. These issues are broadly discussed among academics and are worth looking at.

³⁹⁵ *Supra* note 352, p. 5.

³⁹⁶ *Ibid.*

One of the most accepted opinions is that after accession takes place there will be no jurisdictional conflict between the two Courts as the ECtHR will execute external scrutiny of the EU in the field of human rights and the CJEU will remain as a Court of last instance for the interpretation of Union law. In other words the CJEU will continue to take final decisions on all the issues regarding EU law, while if the ECtHR finds incompatibilities between the Convention and EU law the relevant EU institutions and/or member states shall be responsible for bringing the relevant regulations or their application in particular cases into line with the Convention's requirements.³⁹⁷ But this explanation does not provide an answer to one major issue: after the Lisbon Treaty entered into force the EU Charter acquired the same legal value as the Treaties, which means that human rights are now officially considered part of EU primary law. It is not clear which Court should have a final say on these matters.

There is also another view in regard with the two Courts. In the opinion of a former CJEU judge, after accession the CJEU becomes subordinated to the ECtHR jurisdiction. In support of this opinion he refers to the CJEU opinion on the EEA where it is stated that the EU can become subject to the jurisdiction of an international court: "where ... an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice".³⁹⁸ However, he emphasizes that in order to avoid

³⁹⁷ *Supra note 392*, p. 602.

³⁹⁸ Opinion 1/91 Draft Agreement between the Community, on the one hand, and the Countries of the European Free Trade Association, on the other, Relating to the Creation of the European Economic Area [1991] ECR I-6079, § 39.

conflict, the existing co-operation and dialogue between the Courts, including through the case law, should be continued and increased after accession.³⁹⁹

In an article published in 1993 Lawson made an observation that most of the ECJ's references to human rights are merely used to support a conclusion that is already reached on other grounds; and that no claims based purely on human rights have been upheld by the ECJ. He mentioned the *Wachauf*⁴⁰⁰ case as an exception, where the Court gave fundamental rights great meaning. However, he also regrettably noted that the Court in that case stated that restrictions can be imposed on fundamental rights in the interests of "common organization of market" and "general interests of the Community" (Para 18).⁴⁰¹

In support of his position that the interpretations of the two Courts might differ from each other Lawson cites the opinion of the Advocate General in the case of *Orkem*.⁴⁰² Here the AG makes a statement that the ECJ "may ... adopt with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights". The AG further notes that, so far, the ECJ is not bound "to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities".⁴⁰³

³⁹⁹ Christiaan Timmermans, *Some Personal Comments on the Accession of the EU to the ECHR* in *The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014, p. 337.

⁴⁰⁰ C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989].

⁴⁰¹ Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg* in Rick Lawson and Matthijs De Bois (Eds.), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Vol 3, Leiden, Martinus Nijhoff, 1994, footnote 11.

⁴⁰² Case 374/87, *Orkem v Commission of the European Communities* [1989].

⁴⁰³ Case 374/87, *Orkem v Commission of the European Communities* [1989], Opinion of Mr Advocate General Darmon, delivered on 18 May 1989, Para 140.

Lawson notes that the aforementioned opinion of the AG was not mentioned by the Court in the judgment and that the ECJ never specified its position vis-à-vis ECtHR case law.⁴⁰⁴ Nevertheless, he still thinks that this statement is important, and pays attention to the fact that the AG speaks about situations when the ECJ interpretation of fundamental rights does not “exactly” coincide with the interpretation of the Convention given by the ECtHR. Here, Lawson notes that the issue of *radical difference* in interpretation is not addressed by the AG.⁴⁰⁵

So two important issues raised by Lawson are that, firstly, the ECJ is mostly concerned with internal market rules and applies fundamental rights only if they are in concert with those rules; in other words, “it has ... a clear tendency to approach cases from a common market point of view”;⁴⁰⁶ and secondly, there is a possibility (at least theoretical) that in the future the ECJ might come up with interpretations of fundamental rights different from those established by the ECtHR in its case law and that as a result “manifest confusion” and/or “direct conflict” between the two Courts might occur.⁴⁰⁷

Even though the views of Lawson are supported by the case law of the both European Courts, it must be kept in mind that the article was written in 1993. Since then the Luxembourg Court has significantly improved the protection of a number of fundamental rights. Trade union freedoms were among those rights protected by the ECJ (*C-112/00 Schmidberger*). However, the situation changed with *Viking* and *Laval* and has remained the same since then.

⁴⁰⁴ *Supra* note 399, p. 229.

⁴⁰⁵ *Ibid.* footnote 31.

⁴⁰⁶ *Ibid.* p. 251.

⁴⁰⁷ *Ibid.* p. 252.

Notwithstanding the antiquity of Lawson's article, the solution that he suggests is still as relevant as ever: accession of the EU to the ECtHR. He thinks that before there is a direct conflict between the Courts it is preferable to create a system of judicial cooperation on human rights issues.⁴⁰⁸ In this regard, accession seems to be the only solution.⁴⁰⁹

Allan Rosas has a slightly different opinion on this matter. In an article published in October 2007 (just two months before *Viking* and *Laval*) he states that EU accession to the ECHR would not change things radically. He thinks that in actual practice the ECJ follows very closely the case law of the ECtHR. The reason for this is to avoid two different strides taken in relation to human rights and fundamental rights, which would potentially create problems for EU member states as they could face conflicting interpretations from Luxembourg and Strasbourg. Here he cites the *Bosphorus* presumption, stating that in case the member states follow the Luxembourg interpretation they may end up in the Strasbourg Court. He further notes that he is not aware of a single case where the ECJ "clearly" disregarded an ECtHR interpretation.⁴¹⁰

Tobias Lock offers a third, more balanced, view on the relationship of the two Courts, with which I totally agree. In his view both Courts in Luxembourg and Strasbourg regularly refer to each other's case law and this helps to create uniform human rights standards in Europe. However, they have no legal duty to do this in the future; either Court can unilaterally end cooperation any moment.

⁴⁰⁸ Ibid. p. 252.

⁴⁰⁹ Ibid. p. 233.

⁴¹⁰ Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, European Journal of Legal Studies (EJLS), Vol. 1, Issue No. 2, 2007, p. 9-10; Footnote 35.

Accession of the EU to the ECHR can prevent such a thing from happening; it will provide a clear legal basis for the relationship of the two Courts.⁴¹¹

One important issue that needs to be addressed and that concerns the relationship of the two European Courts is related to the EU Charter. According to Article 52(3) of the Charter the ECHR establishes the minimum standard that the EU has an obligation to respect. The question is whether the case law of the ECtHR, the only interpreter of the ECHR, also *creates obligations for the EU* and mainly the CJEU.⁴¹²

There is no such explicit mention of the ECtHR case law in Article 52(3). However, ECtHR case law is mentioned in the official Explanations regarding Article 52(3) which states that the meaning and the scope of the Charter rights are determined not only by the Convention and its Protocols “but also by the case law of the European Court of Human Rights” and the CJEU.⁴¹³ Nevertheless, the official Explanations do not create legal obligations for EU institutions; they only have a duty to “duly regard” them (Article 52(7)). This means that the interpreter of the Charter does not have to strictly follow the case law of the ECtHR, and therefore the Explanations do not create a sufficient basis to argue that the ECJ is bound by the case law of the ECtHR.⁴¹⁴

After concluding that the EU Charter text does not include any explicit reference to ECtHR case law, Lock checks on the drafting history of the Charter. The result

⁴¹¹ Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts* in *The Law and Practice of International courts and Tribunals*, Volume 8, Issue 3, Martinus Nijhoff Publishers, 2009, p. 380-381.

⁴¹² *Ibid.* p. 383.

⁴¹³ C 303/17, *Explanations relating to the Charter of Fundamental Rights*, Official Journal of the European Union, 14.12.2007.

⁴¹⁴ *Supra note* 409, p. 384.

is the same: no reference to the case law of the ECtHR. The Convention working on the Charter could not agree on such a reference. Thus, Lock concludes that neither the wording, nor the drafting history of the Charter supports an opinion that there is a strict obligation for the ECJ to refer to ECtHR case law while interpreting the Charter.⁴¹⁵

Paul Gragl agrees that Article 52(7) of the Charter is a clear indication that the ECtHR case law does not create any legal obligations for the CJEU while interpreting the Charter. Nevertheless, Gragl argues that the ECtHR does not create any risks for the autonomy of the EU law, firstly, because Luxembourg accepts the leading role of Strasbourg in the field of human rights and secondly, because accession does not grant the ECtHR any jurisdiction to interpret and apply the Charter provisions as a quasi-court of the last instance. The CJEU must be permitted not only to interpret and apply the Charter but also to derogate from the specific interpretations of the ECtHR, provided that the limitations are according to Article 52(1) in that they “meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.⁴¹⁶

This does not mean, however, that the CJEU may ignore every interpretation offered by the ECtHR. Gragl specifies that the CJEU is bound by ECtHR case law to the extent that it is not allowed to fall below the standards established by the ECtHR.⁴¹⁷

⁴¹⁵ *Ibid.* p. 385.

⁴¹⁶ *Supra note* 352, p. 59-60.

⁴¹⁷ *Ibid.* p. 60.

In conclusion, the EU Charter does not make ECtHR case law obligatory for the ECJ. The situation might be different after accession though. Lock refers to ECJ Opinion 1/91 where it is stated that “where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order”.

According to Lock, because the ECHR constitutes an international agreement with its own court, this dictum of the ECJ seems to be applicable. Under international law only those decisions in which the EU is a party can be binding on it. The same is established by the ECHR (Art 46), according to which decisions of the ECtHR are only binding *inter partes*. It means that if the ECtHR finds a violation of ECHR rights by the EU, the ECJ will be bound by that decision if it has to interpret the same provisions of the ECHR in a subsequent case.⁴¹⁸

However, the CJEU already has experience in adapting its case law to that of the ECtHR. In the case of *Hoechst*, adjudicating on fundamental rights, the ECJ noted that the fundamental right to the inviolability of the home must be recognized in the Community legal order in regard to the private dwellings of

⁴¹⁸ *Supra* note 409, p. 396-397.

natural persons; and that *business premises does not fall in this category*.⁴¹⁹ According to the Court this inference is to be drawn from Article 8 of the ECHR.⁴²⁰

The *Hoechst* case was decided in 1989. At that time, the ECtHR did not consider business premises to be protected under Article 8. However, in 1992 the ECtHR issued a judgment *Niemitz v Germany* where the Court stated that the search of a lawyer's office constituted interference with the applicant's right under Article 8, and since it was not considered necessary in a democratic society there had been a violation of Article 8.^{421,422}

In 2002 the ECJ wrote a judgment on *Roquette Freres*⁴²³ on the same issues. The Court reiterated its statement made in *Hoechst*, that the protection of private activities from arbitrary interference by public authorities constitutes a general principle of Community law that member states are required to respect. The Court was explicit in stating that the scope of that principle in relation to the protection of business premises must be determined in accordance to the case law of the ECtHR subsequent to the judgment in *Hoechst*. The Court specified that according to that case law (*Niemitz v Germany 1992; Colas Est and Others v. France*, No 37971/97, 2002), the protection provided under Article 8 also extends to cover business premises.⁴²⁴

⁴¹⁹ ECJ, *Joined Cases 46/87 and 227/88 Hoechst AG v Commission of the European Communities* [1989].

⁴²⁰ *Ibid.* para. 17, 18.

⁴²¹ *Niemitz v. Germany*, application no. 13710/88, ECtHR, 1992.

⁴²² *Ibid.* § 37.

⁴²³ Case C-94/00, *Roquette Frères SA v Directeur general de la concurrence, de la consommation et de la répression des frauds* and Commission of the European Communities [2002].

⁴²⁴ *Ibid.* § 29.

Examples like this give hope that maybe one day the CJEU will reconsider its case law on trade union freedoms and will put it in line with ECtHR case law.

7.5.2 The *Bosphorus* Presumption

Speaking about the future relationships of the two European Courts it is interesting to mention the *Bosphorus* case.⁴²⁵ This was an ECtHR case decided in 2005, before the Lisbon Treaty. The major issue in this case was to decide whether compliance with the EU regulations could justify an impugned interference by the Irish authorities with the applicant company's property rights protected under the Additional Protocol ECHR (Para 150-151).

In this case the Court recognized a right of sovereign states to transfer powers and competences to international or supranational organizations, and acknowledged the obligations of member states flowing from their membership in those organizations. However, it stated that contracting states are not allowed to completely disregard their Convention responsibilities following a competence transfer, since this is incompatible with the Convention's purpose (Para 154).

So the Strasbourg Court had to find a balance between these two conflicting principles: the sovereignty of a state to transfer competences to international organizations and an obligation under the Convention for the same state to protect human rights. According to the Court: "state action in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at

⁴²⁵ *Bosphorus hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application no. 45036/98, ECHR, 2005.

least *equivalent* to that for which the Convention provides”. At the same time, any such finding of equivalence could not be final and will be affected by any change in fundamental rights protection (Para 155).

The Court continued by explaining that if such “*equivalent protection*” is provided by the international organization and the state implements the legal obligations flowing from such organization, the presumption is that the state has not departed from the Convention’s requirements. However, any such presumption can be rebutted if the circumstances of a particular case show that the protection of Convention rights was manifestly deficient (Para 156).

The formula of “*equivalent protection*” is only applicable where the *state had no discretion at all in implementing a legal act*. In other words, the state would be fully responsible under the Convention for all acts that fall outside its strict legal obligations (Para 157).

While applying these general principles to the facts of the *Bosphorus* case, the Court stated that the EU provides such *equivalent protection* of fundamental rights: the preliminary reference procedure under Article 267 TFEU was considered to fulfil a complementary role to national courts, offered by the EU legal system (Para 164); reference was also made to Article 52(3) of the EU Charter of Fundamental Rights (which was not yet legally binding at the time), which states that the meaning and scope of Charter rights shall be the same as their counterparts in the Convention (Para 80).

Based on this, the Court concluded that Ireland did not infringe the Convention when it had implemented the legal obligations flowing from the EU, because the

EU offers protection of the fundamental rights equivalent to that of the Convention. Therefore, there was no violation of Article 1, Protocol 1 (Para 165).

The judgment can be understood as a sign of respect from the ECtHR towards EU law. By refusing to review the EU legal acts on the basis on which the Irish government acted, the Court avoided a confrontation with the CJEU. Instead, the ECtHR showed that it trusts that Luxembourg can interpret and apply the Convention and ECtHR case law correctly. This approach of the ECtHR left a major question unanswered: which is the supreme human rights court in Europe?⁴²⁶

It is without doubt that the “equivalent protection” formula puts the EU in a privileged situation compared to the member states’ supreme or constitutional courts, even though some of these Courts might have higher standards on human rights than the CJEU does. The following case law, however, shows that the ECtHR is not eager to apply this formula in a strict sense. Even though the Court did not repeal the presumption devised in *Bosphorus*, and did not show an interest in reviewing EU law, it still held member states liable for violations of the Convention in similar situations in its later case law. In the cases of *MSS v Belgium and Greece* and *Michaud v France* the states tried to justify their actions by relying on EU law. In both cases the Court made reference to *Bosphorus*; however, it stated that these two cases are different from *Bosphorus*, because unlike in *Bosphorus*, the requirements of EU law were not so strict in these cases,

⁴²⁶ *Supra* note 352, p. 73-74.

and the states had a margin of discretion to choose the means to reach the goal set by EU law.^{427,428}

Seven judges in *Bosphorus* wrote two concurring opinions where they criticized the general “equivalent protection” formula introduced by the majority judges of the ECtHR. The judges did not question the finding of the majority that the human rights record of the Community had recently significantly improved. However, *they were still of the opinion that before accession actually takes place the protection of human rights under the Community system is not equivalent to that of the ECHR*. The judges cited the majority opinion that the effectiveness of the substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure such observance. According to the concurring judges these mechanisms are not very strong in the Community and are not comparable with the mechanisms offered by the ECHR. Criticism was voiced about two points. The first was the preliminary ruling procedure. The preliminary ruling procedure is not triggered by the applicant, but by the national courts. The interpretation provided by the EU Court is binding on the Court making the referral; the latter still enjoys full discretion in deciding how to apply the interpretations in the particular case. The second concern was related to individuals’ access to the Community Court, which according to the concurring judges was “limited”. As the majority also mentions in Paragraph 122, individual

⁴²⁷ *M.S.S. v. Belgium and Greece*, application no. 30696/09, § 338-340, ECHR, 2011.

⁴²⁸ *Michaud v. France*, application no. 12323/11, § 103, 113, ECHR, 2012.

applications are “one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention”.⁴²⁹

The latter concern was partially addressed by the Lisbon Treaty.⁴³⁰ According to Article 263 TFEU natural and legal persons may “institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”. However, in comparison to this, the ECHR admissibility requirements in relation to individual applications are relatively broad and straightforward. According to Article 34 ECHR any persons, non-governmental organizations or groups of individuals claiming a violation of the Convention rights by one of the contracting parties may send an application.

Judge Ress wrote a separate concurring opinion. The judge expressed the opinion that the presumption does not exclude the possibility of a case-by-case review to check if there has been any violation of the Convention. The judge believed that case-by-case analyses are important, because the presumption of compliance with the Convention does not exist in relation to all Convention rights, because of the mere formal system of protection by the ECJ. He expressed the hope that the EU Charter of Fundamental Rights might enhance and clarify the level of control for the future.⁴³¹

⁴²⁹ Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, in the case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 45036/98, 30 June 2005, Para 3.

⁴³⁰ Paul Graig and Grainne de Burca, *EU Law, Text, Cases and Materials*, Fifth Edition, Oxford University Press, p. 403.

⁴³¹ Concurring Opinion of Judge Ress in the case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 45036/98, 30 June 2005, Para 2.

Judge Ress also commented on the opinion of the majority. He believed that the presumption of compliance can only be rebutted if it is established that the protection of Convention rights is *manifestly deficient*. One such situation might be when there has been an obvious misinterpretation and misapplication by the ECJ of the guarantees of the Convention rights. If the ECJ, when deciding the key question in a case, departs from the interpretation or the application of the Convention that had been already been the subject of well-established ECHR case law, it will be considered manifestly deficient protection. In case the ECtHR establishes different standards from those that were first established by the ECJ, the latter will have an obligation to take the new ECtHR standards into account and follow the well-established case law of the ECtHR. Even if the protection is “comparable” and not “equivalent”, the resulting protection of the Convention right must be the same.⁴³²

If we apply this opinion to the situation of the protection of trade union freedoms, we see that the ECJ openly disregards the well-established case law of the ECtHR on that subject. In the case of *Commission v Germany* the Court did not even mention the ECtHR and its case law, leave alone the application of the standards established by the ECtHR in the cases of *Demir* and *Enerji*. It means that according to the formula offered by the concurring judge the protection of trade union rights by the ECJ was *manifestly deficient*.

It is also notable that the so-called *Bosphorus* formula is not included in the Accession Agreement. The member states of the EU agreed not to request the codification of that formula in the agreement text, despite the fact that there were

⁴³² *Ibid.* para. 3.

some early calls to that effect. A decision was reached to leave this question for the ECtHR to decide.⁴³³ While for some commentators this approach is logical,⁴³⁴ there are others who are not so convinced.

When speaking about the accession the CJEU made reference to the *Bosphorus* judgment in 2010. The Court mentioned the existence of the equivalent protection of human rights in the EU, recognized by the ECtHR, and explained it by the fact that in recent years the CJEU regularly applies the Convention and refers to the case law of the ECtHR.⁴³⁵

While this might be true for other Convention rights it is not that relevant with respect to trade union freedoms. In the cases of *Viking* and *Laval* the ECJ certainly referred to ECtHR cases. In the *Viking* case for instance, the Court made reference to the *National Union of Belgian Police v Belgium, 1975* case, according to which collective negotiations and collective agreements might be *one of the main ways* in which trade unions protect their interests, but not necessarily *the only way* (Para 86). Less than a year after *Viking*, the ECtHR had changed its position with regard to this issue. In the case of *Demir and Bykara* the Court recognized the rights to collective bargaining and collective agreement as rights protected under Article 11 ECHR. This shift in the ECtHR case law did not affect the case law of the ECJ. As already mentioned, the case *Commission v Germany* 2010 did not even mention the European Convention at all (Paragraph 37 only mentions ESC 1961/1996 and the Community Charter of the Fundamental Social Rights 1989), even though the discussion was about

⁴³³ *Supra* note 392, p. 601.

⁴³⁴ *Supra* note 352, p. 74.

⁴³⁵ *Supra* note 379, para. 3.

collective bargaining and collective agreements, which the ECtHR in *Demir* recognized as rights protected under the Convention.

There is a presumption that after the accession there will be no need to apply “equivalent formulas”; but not everybody shares this view. A former CJEU judge raises a challenging question: is it not paradoxical that credit for good behaviour in terms of human rights protection accepted before accession will be abandoned after accession, considering that after *Bosphorus*, the CJEU in fact improved its human rights protection record? In support of his argument he refers to Article 52 (3) of the EU Charter and the increased practice of the CJEU to make reference to ECtHR case law. However, he also mentions the circumstances in which the ECtHR was making a decision in the *Bosphorus* case: the Court did not have jurisdiction to hold the EU, from which the relevant act emanated, liable. After accession that situation will be changed. Nevertheless, his position is that the *Bosphorus* presumption could still survive, possibly in a mitigated form, and that the final say in this regard belongs to the Strasbourg Court.⁴³⁶

Whether the *Bosphorus* presumption still survives after the accession and to what extent, are the valid questions for Lock too. In 2009 he commented that both European Courts show comity towards each other, and that *Bosphorus* is clear proof of that. He argues that after accession there is no need to exercise such comity and therefore no need for the presumption to exist anymore. If it is retained it will deprive the ECtHR of a great deal of cases arising from the EU (the presumption only applies in cases where only the Community acted and where the EU obliges Member State to act). Furthermore, Lock thinks that if the

⁴³⁶ *Supra* note 397, p. 337.

presumption survives it will put the EU in a privileged situation compared to other national courts of member states, and that such an unfair attitude would be hard to justify, especially considering the fact that some of the national courts offer better protection of human rights than the EU institutions.⁴³⁷

After Opinion 2/13 on the accession was released Lock again expressed his opinion on *Bosphorus*. In the wake of a harsh criticism of Opinion 2/13 coming from the ECtHR President in the annual report of the Court,⁴³⁸ Lock thought that it was still unlikely that the Court would revoke the *Bosphorus* presumption, as it was based on an assessment of human rights protection in the EU which had even improved (EU Charter) after that. What Lock considered probable was a tightening of the conditions for the application of the presumption. In this way more cases will be reviewable by the ECtHR.⁴³⁹

7.5.3 The Courts from another Angle

In recent years the activities of the EU in the field of human rights have been growing. The CJEU started to invoke the (now legally binding) Charter more often. As a consequence, the EU rapidly became a standards-setting organization in the field of human rights. At the same time the ECtHR is expanding the scope of Convention rights by relying on the concept of “living instrument”.⁴⁴⁰ This approach was used in relation to various articles, including Article 11, which was discussed in the previous chapter.

⁴³⁷ *Supra* note 409, p. 395-396.

⁴³⁸ *Supra* note 386.

⁴³⁹ *Supra* note 385.

⁴⁴⁰ Kanstantsin Dzehtsiarou and Pavel Repyeuski, *European Consensus and the EU Accession to the ECHR in The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014, p. 313-315.

This situation of overlap between the EU human rights activities and the ECHR might lead to two types of situations: first, that more and more areas of EU activity will be subject to human rights review by the ECHR; and second, that the EU institutions will be able to influence the interpretation of human rights by the ECHR as after accession they will create a new European Consensus (which is a comparative analysis of laws and legal practices of the ECHR contracting states, often relied on by the ECtHR).⁴⁴¹

In other words, the question is: which Court influences the other more? Will it be the ECtHR, which, by using a dynamic interpretation, puts more pressure on EU institutions and most importantly the CJEU, to interpret EU law in compatibility with ECtHR case law? Or will it be the EU, which, after becoming a party to the ECHR, promotes (makes common among member states) its standards to such an extent that the ECtHR will start to consider them common standards of member states and therefore start to use them as a basis for its judgments? It might also be a more constant back-and-forth of both of them influencing each other.

I support the idea that when it comes to choosing between CJEU and ECtHR jurisprudence, one should have a look at the level of development of these standards by the Courts and take notice of those that offer better protection. For instance, in the case of non-discrimination, it might be argued that EU law is more developed and offers better protection than the case law of the ECHR.⁴⁴² Therefore, EU law has to prevail. However, in the situation of the trade union rights the case law of the ECHR is certainly more developed and offers better protection of collective labour rights than the case law of the CJEU. Therefore, it

⁴⁴¹ *Ibid.* p. 311, 315.

⁴⁴² *Ibid.* p. 316.

would be plausible if this case law takes precedence over EU law and particularly CJEU jurisprudence.

7.6 Hope for the freedom of association

The main question which runs through this chapter as a red thread is whether accession can affect the protection of the freedom of association as a trade union right in the EU. The hope is there. It is believed that after accession the internal rules of the EU might be subtly subordinated to human rights. As a result, the EU might change its approach, according to which, when it comes to the competition between the internal market and human rights, the starting point for the CJEU is the protection of market freedoms, while human rights are seen as factors that could justify measures that *prima facie* constitute trade barriers. Although it is not expected that the CJEU will reposition on human rights after the accession, it is believed that “the function of the CJEU as a human rights court would not be simply a welcome surprise, but an expectation”.⁴⁴³

The process of “moral subordination” of economic freedoms to human rights will complete the transformation of the CJEU into a human rights court, a process that started through the jurisprudence of the CJEU and later continued with the entry into force of the EU Charter.⁴⁴⁴ Even though the jurisprudence of the CJEU is not very supportive of trade union freedoms, it is a fact that its human rights jurisprudence has been significantly enriched in the last several decades. If the accession can have an influence on the proportionality test that the CJEU uses when it comes to competition between human rights and economic freedoms, it

⁴⁴³ Aris Georgopoulos, *The EU Accession to the ECHR: An Attempt to Explore Possible Implications in the Area of Public Procurement* in *The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014, p. 288.

⁴⁴⁴ *Ibid.* p. 289.

will fill a gap in terms of human rights protection. This process will hopefully also affect the protection of trade union freedoms when they are in competition with economic freedoms.

7.7 Conclusion

After the accession the subsidiarity principle that applies to ECHR member states will also apply to the EU; the CJEU will not be subordinated to the ECHR, but will be in the same position as the national constitutional courts of the member states. Whether or not we call it subordination, the fact is that the ECtHR has the power to deliver a judgment not in concert with the constitutional courts, and member states are required to do their best to comply with that judgment (whether by amending their legislation; enacting new legislation or overturning the national court judgment).⁴⁴⁵ In short, the Strasbourg Court is not at the same hierarchical level as the national courts, but in fact it has the final say, at least regarding the matter of human rights protection mentioned in the Convention. After the accession this system will be equally applicable to the EU. If the ECtHR finds an incompatibility of the EU law with the ECHR, EU institutions will be obliged to rectify it.

Considering the fact that the judgments of the CJEU are part of EU law, there is a case scenario that we can imagine: an individual lodges a case to the General Court on the issue of trade union rights, namely, the right to strike and the interpretation of the Posting Directive. The General Court will most probably reach the same conclusion as the ECJ reached in the cases of *Laval* and *Viking*. Even if the General Court were to write a different judgment, the case can still go

⁴⁴⁵ Council of Europe, *Accession by the European Union to the European Convention on Human Rights, Answers to frequently asked questions*, 1 June, 2010, p. 6.

to the ECJ and with big probability the Court will not reconsider its own case law. After exhausting domestic remedies the individual takes the case to the ECtHR. Let us assume that the ECtHR does not accept the interpretation of the ECJ about the Posting Directive (as it interpreted the Directive as a ceiling) and states that it is incompatible with the ECHR. This is very likely to happen, considering the recent case law of the ECtHR in which the scope of the freedom of association as a trade union right was extended. What happens next? While the ECtHR is considered a specialized court in human rights the judgments of which are obligatory for the parties (Article 46(1) ECHR), the EU will be required to rectify the situation in terms of trade union rights protection. How can the EU do that? It probably has to reconsider the well-known proportionality test developed in *Viking* and *Laval*. Even if the CJEU agrees on that (the Explanatory Report states that while the EU is a contracting party to the Convention the decisions of the ECHR will be binding on EU institutions, including the CJEU (Para 26)), it is interesting to see how it could do it. The EU fundamental freedoms of movement are still the priority of the CJEU. The same would likely happen if the case were to reach the CJEU through a preliminary procedure, via national courts.

Technical issues are also important: if the ECtHR establishes an incompatibility, does this mean that the case should go back to the CJEU? Or shall the CJEU wait for a future case (with the same content) in order to change its approach?

Here we have another problem: by adjudicating on the rights protected under the Convention, the ECtHR (whether deliberately or not) also affects EU law. In other words, by interpreting the freedom of association as a trade union right the ECtHR also interprets the Posted Workers Directive, which is EU law. This takes us to a very sensitive issue: EU legal autonomy.

The autonomy of the EU was and still is one of the main concerns of the drafters of the accession agreement. It means that only the EU (mostly the CJEU) deals with the interpretation of EU law. According to Article 344 TFEU, in order to retain consistency and coherence the Union Courts are the only ones competent to decide on problems of EU law. This issue was also raised in the CJEU Opinion. The interpretation of the fundamental freedoms of the EU is a clear-cut case – only EU institutions have a jurisdiction to interpret them – but what about human rights? The rights found in the EU Charter are part of EU law, because after the Lisbon Treaty they acquired legal force similar to the EU Treaties. Some of these rights, however, are included in the ECHR. It is not clear how the two Courts will share the jurisdiction over these issues and how they would resolve a conflict that might arise when it comes to the interpretation of these rights.

In his agenda the new President of the European Commission highlights the importance of the accession of the EU to the ECtHR. He entrusts the Commissioner with specific responsibilities to conclude the accession process, which is an obligation under the EU Treaties.⁴⁴⁶ Interesting is how the Commission will decide to act now, after the CJEU opinion.

Chapter VIII – Conclusion

We have seen that freedom of association as a trade union right was strongly opposed by different states over years, but because of its great importance it was mentioned in all three major documents of the International Bill of Human Rights. It is a right that opens the door for the realization of other rights and

⁴⁴⁶ Jean-Claude Juncker, *A New Strategy for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission*, 15 July 2014, Strasbourg, p. 8-9.

therefore is fairly considered not only a civil and political right, but also an economic and social one. The fact that the First Additional Protocol to the ICESCR was adopted and entered into force in May 2013 gives hope that the freedom of association will be better protected in the future.

The importance of freedom of association as a trade union right is fairly well noted on UN level. The fact that a special rapporteur was appointed recently by the UN to work on the issue of freedom of association is a clear example of this. Trade unions play an important role in the development of liberal democracies.⁴⁴⁷ Therefore, it is of utmost importance to ensure effective enforcement of trade union rights at an international level.

The ILO is the organization which has elaborated freedom of association standards from the very beginning of its existence. This is the most authoritative source on labour rights, and therefore both the ICCPR and the ICESCR make direct reference to the ILO Convention on Freedom of Association, suggesting that the scope of the trade union rights mentioned in these documents shall be defined with ILO standards on mind.

Freedom of association is one of the major principles the work of the ILO is based on. The importance of this principle is recognized at every level of ILO activity. The Declaration of Philadelphia 1946, incorporated into the ILO Constitution, first emphasized the importance of freedom of association for sustained progress. Since then all the important documents at the ILO level paid due regard to this principle. ILO Conventions 87 and 98 are the main texts the ILO supervisory organs use to promote freedom of association.

⁴⁴⁷ Stuart White, *Chapter 12, Trade Unionism in Liberal State in Freedom of Association*, edited by Amy Gutmann, Princeton University Press, Princeton, New Jersey, 1998, pp. 339.

As the result of more than a half century of work, the ILO supervisory organs established that the following are the components of the principle of freedom of association: the right to strike; the right to organize freely and conclude collective agreements; the right not to be prejudiced and discriminated for trade union activity.

For the ILO organs freedom of association is a tool that enables workers and employers to be equally represented in the negotiation process and to enjoy equal rights. Mutual respect and the protection of rights is the only guarantee for social justice.

The ILO offers the highest standards of protection of trade union freedoms. At the same time, the ILO takes into consideration the necessary measures that states sometimes have to refer to in order to save the economy in times of crisis. Therefore, it allows states to introduce restrictions on the freedom of association, providing that these restrictions are reasonable, last no more than necessary and are agreed with the workers' and employers' organizations. The ILO also allows certain restrictions in relation to public servants and those working in essential services, but on the condition that public servants are the ones exercising authority in the name of the state and that essential services are interpreted narrowly.

On the regional level trade union rights protection developed much later. Within the framework of the EU, the ECJ was the institution that first started to recognize the freedom of association. *Bosman* was the first case where the Court established freedom of association as a general EU principle. This was in 1995. In 1996, the Court in *Albany* recognized the right to form and join trade unions as

part of the freedom of association. Since then the Court developed the freedom of association. In *Viking* the right to strike was recognized and in finally in 2010 the Court recognized the right to bargain and the right to conclude collective agreements in the case against Germany (*Commission v Germany*).

One might say that the EU Court came very close to the respected standards of the ILO on the freedom of association. It has recognized all the necessary elements of the freedom of association that the ILO organs consider important for trade unions to protect their members.

The problem, however, is not so much with the recognition of the elements of freedom of association, but with the extent to which a given institution allows restrictions on those rights. The ECJ, most importantly, has allowed restrictions on trade union freedoms in order to safeguard fundamental freedoms of movement of the EU. This type of restriction is not known to the ILO organs. The proportionality test that the Court introduced in the *Viking* and *Laval* cases is hard to reconcile with the ILO standards. In *Viking* the ECJ instructed the national court to assess first if the jobs of the workers were “jeopardized or under serious threat” and if the collective action by the trade union was necessary to protect these jobs. After establishing this, the national court has further to ascertain whether the trade union action is “suitable for ensuring the objective pursued and does not go beyond what is necessary to attain that objective”. This makes strike action a last resort for trade unions, which can only be relied on if workers are losing their jobs. This position, is, of course, against the understanding of the right to strike offered by the ILO, which allows strikes as long as they don’t go violent and as long as they pursue economic and social objectives.

The interpretation of the Posted Workers Directive in *Laval* is also problematic. The ECJ offered a very strict reading of the Directive. Basically, it made the Directive a ceiling for the protection of workers' rights. Only if the provider of a foreign service voluntarily signs a collective agreement in the host state (offering better protection to the workers than the Directive), this agreement can be applicable to posted workers. But this is a scenario that is very unlikely to happen if the collective agreement indeed offers better protection for workers than the Directive. No employer will be willing to burden himself with additional responsibilities, especially if they are costly.

The *Rüffert* and *Luxembourg* cases further show that the Court does not give much freedom to the member states when the issue concerns economic freedoms. The Court blocks any initiative of member states that try to enhance protection of posted workers and therefore impose more obligations on the employer, clearly taking the side of the employer. This situation is not really compatible with the ILO, which offers the highest standards of worker protection. The ILO Conventions are equally concerned with the protection of employers and employees. This means that during the negotiations on terms and conditions of work, their rights should be equally protected and respected. Both parties to the negotiation should have an equal say. In the ECJ case, I think the balance is distorted. The ECJ is clearly on the side of employers and this is explained by one main reason: economic integration is needed.

On the other hand, another European Court makes its standards on freedoms of association higher. The Court decided to strengthen the protection of trade union freedoms by giving member states less choice in choosing the means of protection. Since *Demir*, collective bargaining and collective agreement are no

longer mere means for the protection of trade union freedoms that states might choose to guarantee or not. Now they are inherent elements of the freedom of association. This decision was made by relying on the ILO and the ESC. Presumably, ILO organs would approve this shift in ECtHR jurisprudence. The right to organize and the right to conclude collective agreements are cornerstones in the ILO for the protection of workers' rights. The same goes for the ESC, which in this sense has the same set of standards as the ILO. The fact that the ECtHR directly refers to the ILO and ESC standards without discussing them makes me think that the European Court accepts the standards established by these international institutions on the right to bargain and collective agreement, including the scope of the restrictions that these institutions allow in relation to these rights.

The case of CJEU is different. In *Commission v Germany* (a case decided after *Demir and Baykara*, in 2010) the Court restricts the right of parties to collective bargaining, without even mentioning the ECtHR or ILO standards. However, the Court does mention Article 28 of the EU Charter and makes the statement that even though the right to bargain collectively is a recognized right, it is not an absolute right and it needs to be reconciled with the fundamental freedoms of the EU, most importantly, with the principle of proportionality developed by the ECJ in *Viking* and *Laval*. The mention of the EU Charter together with *Viking* and *Laval* is a clear example for me of how the Court tries to adjust the interpretation of the human rights to the unique system of EU law. In this process, ECtHR and ILO standards are only partially respected.

The right to strike creates a different situation. Here, the ECtHR does not fully comply with ILO standards. The Court was reluctant to explicitly recognize the

right to strike as an inherent element of the freedom of association, as it was done with the right to collective bargaining and collective agreement. The *RMT* judgment later slightly changed the situation; the Court recognized secondary strikes, but supported the UK's total ban on it. This, of course, is not in concert with the ILO, which does not lose a chance to criticize the UK for this. The Court seems to share the UK government's economic argument that secondary strikes might harm the economic situation in a country. I think it would have been wiser of the Court to use a case-by-case approach to secondary strikes instead of supporting total ban. The UK could still regulate secondary strikes on its territory and the Court would have made a judgment closer to ILO and ESC standards. With the *RMT* judgment the Court actually got closer to CJEU jurisprudence, most significantly to *Viking*. In both cases, the Courts recognized the right to strike (in *Viking* primary strike, in *RMT* secondary strike) and in both of them the restrictions were justified and ILO standards disregarded.

Getting closer to the CJEU judgment on the right to strike does not really makes the ECtHR jurisprudence attractive for the ILO. The ILO Committee of Experts in the British case of BALPA stated that the doctrine the ECJ elaborated in the *Laval* and *Viking* cases was very likely to have a significant restrictive effect on the exercise of the right to strike, in a manner that is contrary to ILO Convention 87.⁴⁴⁸

One challenge of this research lies in the fact that the institutions setting trade union standards in Europe have different goals and agendas and operate in very different contexts, with very different backgrounds. The ILO is the oldest

⁴⁴⁸ Report of the Committee of Experts on the Application of Conventions and Recommendations, ilolex No. 062010GBR087, 2010.

international organization in the world, established in 1919 and having witnessed the aftermath of WWI and scourges of WWII. It has been concerned with the protection of labour rights in the world since then. Even though the scope of ILO activities is very broad, the organisation still works mainly on social and economic rights. The belief is that only by achieving social justice, one can achieve world peace. The situation is different with the EU. The creation of this Union was also stimulated by the desire to promote peace and prevent countries on the continent to get involved in future conflicts, by establishing supervision of their production of coal and steel. With time, this purpose became less important and the EU became an economic union, the main focus of which always was to create wealth and to guarantee economic prosperity. Only at a later stage, with the jurisprudence of the EU Court, the EU started to be concerned with human rights protection. Nevertheless, economic freedoms are still in a preferable situation when it comes to a conflict between these two. On the other hand, the Council of Europe from the very beginning was created for human rights protection. The ECtHR was always concerned with human rights and only, but unlike the ILO, it was mostly concerned with civil and political rights.

We can see how different these institutions are. It is not a surprise that the standards established by them are also different. The fact that they are not subordinated to each other and run their agendas separately complicates the establishment of acceptable standards of trade union freedoms in the Union. The accession of the EU to the ECtHR is seen as a solution in this situation.

Before going ahead with accession, it has to be noted with respect that it took the EU a long time to establish human rights discourse in its institutions, including and probably most importantly in the ECJ. Human rights gradually became a

concern of the EU. It took some time before the recognition of trade union freedoms actually happened. It can be said that human rights, including the freedom of association, are protected under EU law and ECJ jurisprudence. The problem arises when these human rights are in contradiction with the EU's fundamental freedoms of movement. In these cases the ECJ, though trying to introduce balance between these competing values, in fact abandons the human rights approach and focuses more on the interests of the internal market.

The EU Charter acquiring legally binding force did not change the attitude of the ECJ. In fact, the tendency has revealed that the Court might interpret the Charter not necessarily in conjunction with the international standards of the ILO or those of the ECtHR. The last bastion is the EU's accession to the ECHR. Accession has the potential to shed light on many aspects of human rights by introducing common standards acceptable for everybody in Europe.

However, the process of accession has been seriously hindered by the CJEU Opinion. The Court considered that the autonomy and specific characteristic of the EU and EU law are endangered by accession. Specificity was defined as follows: EU law stems from an independent source of law: the Treaties; these Treaties have primacy over national laws; the concept of direct effect allows a whole series of Treaty provisions to be applicable to member states and their nationals. The Court further clarified that fundamental rights recognized by the Charter are at the heart of the EU legal structure and that the autonomy that EU law enjoys in relation to national and international laws requires that the interpretation of the Charter rights are ensured within the framework of the structure and the objectives of the EU (Para 164-170).

The commentaries of the commentators cited above, that after the accession one Court will not be subordinated to the other, but they will share their field of influence, did not seem to convince the judges in Luxembourg. They also did not take into account the main message of the accession agreement that the ECtHR is not going to interpret any provisions of EU law, but only their conformity with the ECHR standards.

To some extent, I also share the fear of the CJEU that the ECtHR, when judging the compatibility of the EU act with the ECHR, will still need to interpret that act and in this way will intrude in the jurisdiction of the CJEU. Although what surprises me is that this fear was not mentioned during the negotiation process on the Association Agreement, where Luxembourg was actively involved.

One thing is certain, judges in Luxembourg cannot go against the will of the states that put the accession provision in the Treaties and that are seriously determined to implement it in practice. In his agenda the new President of the European Commission highlights the importance of the accession of the EU to the ECtHR. He entrusts the Commissioner with specific responsibilities to conclude the accession process, which is an obligation under the EU Treaty.⁴⁴⁹ Therefore, I still believe that accession is unavoidable.

About the effect of accession on trade union rights not many academics comment. Most probably this is because predicting the developments of the case law of the European Courts is not an easy thing to do; especially now, after Opinion 2/13, when it is not clear yet how the accession process will unfold, and whether there will be a new accession agreement taking into account Opinion 2/13 or whether

⁴⁴⁹ *Supra* note 444, p. 8-9.

there will be an amendment to the Lisbon Treaty, in which case it will not be necessary to consider the comments of the CJEU.

If the accession happens on the conditions of the CJEU, it will have approximately the same influence on trade union freedoms as the EU Charter did. The Luxembourg Court will most probably continue with its proportionality test and will not change its attitude towards trade union freedoms in contradiction with EU fundamental freedoms.

But there is another solution to this. Member states might add to the EU Treaties an additional Protocol that will explicitly state that the accession is still going to happen notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014.⁴⁵⁰

If this will be the case, we can still hope that accession will take place and that the EU institutions will actually be obliged to respect the ECHR standards, as defined by the Court, if they are party to a particular case. This is very much possible. After all, this was the wish of all the parties participating in the negotiating process over the Accession Agreement.

After the accession, the CJEU Court will have to take notice of the ECHR standards on trade union freedoms. While imposing restrictions on trade union freedoms the CJEU Court will have to think twice. If the case reaches the ECtHR and Strasbourg finds that the grounds for the restriction are not acceptable for the ECHR and the international standards of the ILO and ESC, which it often refers to, the Court might find a violation of the Convention and the CJEU will have to

⁴⁵⁰ *Supra* note 390.

reconsider its judgment. This will be a detrimental blow to the EU's reputation in general, which claims to have a very high standard of human rights protection. I believe that the CJEU Court will be inclined to prove that the *Bosphorus* presumption was not just a noble act of the ECtHR, but a well-deserved prize.

In conclusion, I will briefly answer the two main questions of this thesis:

- 1. What is the lower acceptable level of freedom of association in Europe?**
- 2. How can it be changed after the EU accession to the ECtHR?**

Freedom of association as a trade union right is guaranteed in all the major international and European documents. The right to bargain collectively, the right to conclude collective agreements and the right to strike are now recognized by ECtHR and CJEU case law as elements of the freedom of association, which can be used by the trade unions to protect the interests of their members.

The right to bargain collectively, the right to conclude collective agreements and the right to strike are all recognized in Europe, in the relevant legal texts as well as in the case law of the Courts. Differences emerge when it comes to the restrictions on these rights. I believe that, after the accession, the scope of the acceptable restrictions in Strasbourg and in Luxembourg might be synchronized.

Bibliography

Books and Articles

August Reinisch, *Essentials of EU law*, Second Edition, Cambridge University Press, 2012

Amy Gutmann (ed.), *Freedom of Association*, Princeton University Press, Princeton, New Jersey, 1998

Alan Dashwood, *Viking and Laval: Issues of Horizontal Direct Effect* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008

Antoine Jacobs, *Article 11 ECHR: The Right to Bargain Collectively, under Article 11 ECHR* in *The European Convention on Human Rights and the Employment Relations* edited by Filip Dorssemont, Klaus Lorcher and Isabelle Schomann, Hart Publishing, 2013

Andrzej Marian Swiatkowski, *Charter of Social Rights of the Council of Europe*, Kluwer Law International, 2007

Aida Torres Perez, *Too Many Voices? The Prior Involvement of the Court of Justice of the European Union in The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014

Aris Georgopoulos, *The EU Accession to the ECHR: An Attempt to Explore Possible Implications in the Area of Public Procurement* in *The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014

Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, European Journal of Legal Studies (EJLS), Vol. 1, Issue No. 2, 2007

Bernard Gernigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning the Right to Strike*, International Labour Office, Geneva, 2000, (first published in the International Labour Review, Vol. 137 (1998), No. 4)

Catherine Barnard, *EU Employment Law*, Fourth Edition, Oxford University Press, 2012

Catherine Barnard, *Article 28 Right to Collective Bargaining and Action in The EU Charter of Fundamental Rights, A Commentary*, edited by, Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Hart Publishing, 2014

Catherine Barnard, *Viking and Laval: An Introduction* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008

Catherine Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests in The Protection of Fundamental Rights in the EU after Lisbon* edited by Sybe de Vries, Ulf Bernitz and Stephen Weatherill, Hart Publishing, 2013

Christiaan Timmermans, *Some Personal Comments on the Accession of the EU to the ECHR* in *The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014

David Tajzman And Karen Curtis, *Freedom of Association: A user's guide, Standards, principles and procedures of the International Labor Organization*, ILO, Geneva, 2000

Damian Chalmers, Gareth Davis, Giorgio Monti, *European Union Law, Cases and Materials*, Second Edition, Cambridge University Press, 2010

David Anderson and Cian C Murphy, *The Charter of Fundamental Rights in EU Law After Lisbon* edited by Andrea Biondi, Piet EEckhout, Stefanie Ripley, Oxford University Press, 2012

David Harris, John Darcy, *The European Social Charter*, 2nd edition, Transnational Publishers, Inc., 2001

Ed Bates, *The Evolution of the European Convention of Human Rights: From Its Inception to the Creation of the Permanent Court of Human rights*, Oxford University Press, 2010

Eleanor Spaventa, *Fundamental Rights in the European Union in European Union Law*, Edited by Catherine Barnard and Steve Peers, Oxford University Press, 2014

Filip Dorssemont, *Article 12(1) Freedom of Assembly and of Association*, in *The EU Charter of Fundamental Rights, A Commentary*, edited by, Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Hart Publishing, 2014

Filip Dorssemont, *The Right to Form and Join Trade Unions for the protection of His Interests under Article 11 ECHR, An Attempt "to Digest" the Case Law*

(1975-2009) of the European Court of Human Rights, *European Labor Law Journal*, Volume 1 (2010). No. 2

Filip Dorssemont, *How the European Court of Human Rights gave us Enerji to cope with Laval and Viking*, in *Before and After Economic Crisis, What Implications for the "European Social Model"?*, edited by Marie-Ange Moreau, Edward Elgar Publishing Limited, 2011

Filip Dorssemont, *The Right to Take Collective Action under Article 11* in Filip Dorssemont, Klaus Lorcher and Isabelle Schomann (eds.), *The European Convention on Human Rights and the Employment Relations*, Hart Publishing, 2013

Girgio Gaja, *The 'Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR* in *The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014

Hilary Kellerson, *The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future*, *International Labour Review*, Special Issue: Labour Rights, Human Rights, Vol. 137 (1998), No. 2

Harold Dunning, *The Origins of Convention No. 87 on freedom of association and the right to organize*, *International Labour Review*, Special Issue: Labour Rights, Human Rights, Vol. 137 (1998), No. 2

International Labor Office, *Rules of the Game, a brief Introduction to International Labor Standards*, revised edition, 2009

ILO (ed), *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised edition, ILO, Geneva 2006

Jörg Polakiewicz, *EU Law and the ECtHR: will the European Union's accession square the circle? The draft accession agreement of April 5, 2013*; *European Human Rights Law Review*, Issue 6, 2013

Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 *Comp. Lab. L. & Pol'y J.* 35, 2004

K.D. Ewing and John Hendy QC, *The Dramatic Implications of Demir and Baykara*, *Industrial Law Journal*, Vol. 39, No. 1, 2010

Kanstantsin Dzehtsiarou and Pavel Repyeuski, *European Consensus and the EU Accession to the ECHR* in *The EU Accession to the ECHR* edited by Vasiliki Kosta, Nikos Skoutaris, Vassilis P Tzevelekos, Hart Publishing, 2014

Lee Swepston, *Human rights law and freedom of association: Development through ILO supervision*, *International Labour Review*, Special Issue: Labour Rights, Human Rights, Vol. 137 (1998), No. 2

Mathew C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights, A perspective on its Development*, Clarendon Press Oxford, 1995

Marc J. Bossuyt, *The right of association, Discussions, Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952), Article 22, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, 1987

Mike Cuthbert, *European Union Law 2011-2012*, Routledge, 2011

Margot Horspool & Matthew Humphreys, *European Union Law*, 5th Edition, Oxford University Press, 2008

Mia Rönnmar, *Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008

M.A. Baderin and M. Ssenyonjo (Eds.), *International Human Rights Law: Six Decades after the UDHR and Beyond*, Ashgate Publishing Co., 2010

Nigel Foster, *EU Law Directions*, 2nd Edition, Oxford University Press, 2009

Matti Mikkola, *Social Human Rights of Europe*, Legisactio Ltd, 2010

Niklas Bruun, Klaus Lorcher and Isabelle Schoman (ed.) *The Lisbon Treaty and Social Europe*, Hart Publishing, 2012

Örjan Edström, *The Right to Collective Action – in Particular the Right to Strike – as a Fundamental Right in Labour Law, Fundamental Rights and Social Europe*, Edited by Mia Rönnmar, Hart Publishing, 2011

Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing, Oxford and Portland, Oregon, 2013

Paul Craig and Grainne de Burca, *EU Law, Text, Cases, And Material*, Fifth Edition, Oxford University Press, 2011

Rick Lawson, *A Twenty-First-Century Procession of Echternach: The Accession of the EU to the European Convention on Human Rights* in *The European Convention on Human Rights and the Employment Relation* edited by Filip Dorssemont, Klaus LÖcher and Isabelle SchÖmann, Hart Publishing, Oxford and Portland Oregon, 2013

Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg* in *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, edited by Rick Lawson and Matthijs De Bois, Vol 3, Leiden, Martinus Nijhoff, 1994

Steve Peers, *EU Justice and Home Affairs Law*, third edition, Oxford EU Law Library, 2012

Sarah Joseph, Jenny Schultz and Melissa Castan, *Trade Union Rights, 19 Freedom of Assembly and Association – Articles 21 and 22, The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, Second Edition, Oxford University Press, 2004

Sonia Morano-Foadi and Johanna Diekmann (ed.), *European Union Law 2011-2012*, Routledge, 2011

Steve Peers, *The Rebirth of the EU's Charter of Fundamental Rights*, The Cambridge Yearbook of European Legal Studies, Volume 13, 2010-2011, Edited by Catherine Barnard and Okeoghene Odudu, Hart Publishing, 2011

Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market*

Economy” in *The Lisbon Treaty and Social Europe*, edited by Niklas Bruun, Klaus Lorcher and Isabelle Schoman, Hart Publishing, 2012

Soren C. Prebensen, *Inter-State Complaints under Treaty Provisions – The Experience under the European Convention on Human Rights in International Human Rights Monitoring Mechanisms*, *The Raoul Wallenberg Institute, Human Rights Library* edited by Gudmundur Alfredsson, Volume 35, Martinus Nijhoff Publishers, 2009

Simon Deakin, *Regulatory Competition after Laval* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008

Tonia Novitz, *A Human Rights Analyses of the Viking and Laval Judgments* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. Catherine Barnard, Hart Publishing, 2008

The European Court of Human Rights, *Overview 1959-2012 ECHR*, June, 2013

Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts* in *The Law and Practice of International courts and Tribunals*, Volume 8, Issue 3, Martinus Nijhoff Publishers, 2009

Alexis de Tocqueville, *Chapter 12, Political Associations in the United States* in *Democracy in America 1831*

Reports/Resolutions/Opinions/Studies

A/65/40 (Vol. 1) Report of the ninety-seven session (12-30 October 2009), ninety-eighth session (8-26 March 2010), ninety-ninth session (12-30 July 2010), the Human Rights Committee

Council on Human Rights Policy and International Commission of Jurists Workshop, 13-14 February, 2005

Christian Tomuschat, *Introduction, International Covenant on Civil and Political Rights, New York, 6 December 1966, Audiovisual Library of International Law*

CCPR/C/90/D/1296/2004, the Human Rights Committee issued its view on 24 July, 2007

Council of Europe, *Accession by the European Union to the European Convention on Human Rights, Answers to frequently asked questions*, 1 June, 2010

Commission of the European Communities, *Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' Bulletin Supplement 2/79, COM (79) 210 Final*

Council of Europe, Explanatory Report, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention* (CETS No. 194); 12 May 2009

Catherine Barnard, *Opinion 2/13 on EU accession to the ECHR: looking for the silver lining*, EU Law Analysis Blog, Expert insight into EU law developments, Monday, 16 February 2015

Cologne European Council, *Presidency Conclusions*, 3 and 4 June 1999

2007/C 303/02, *Explanations Related to the Charter of Fundamental Rights*, Official Journal of the European Union, 14.12.2007

Draft International Declaration on Human Rights, Report of the Drafting Committee to the Commission on Human Rights E/CN.4/95, Commission on Human Rights, Drafting Committee, Second Session, 21 May 1948

Doc. INF/5/E/R, pp. 13-15 in *Preparatory Work on Article 1 of the European Convention on Human Rights*, 31 March 1977, Cour (77) 9 Bilingue, Council of Europe

Declaration of the Committee of Ministers, Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels, adopted by the Committee of Ministers on 12 May 2004 at its 114th session

DH (56) 16, European Commission of Human Rights, *Preparatory Work on Article 11 of the European Convention on Human Rights*, Information Document prepared by the Secretariat of the Commission, Strasbourg, 16th August, 1956

Draft Outline of International Bill of Rights E/CN.4A/C.1/3, prepared by the Division of Human Rights of the UN Secretariat and presented to the Drafting Committee of Commission on Human Rights, 4 June 1947

Discussion Document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for

the Protection of Human Rights and Fundamental Freedoms, Luxembourg, 5 May, 2010

Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1 (2013)008rev2, Strasbourg, 10 June 2013

ECJ Opinion 2/94, on *Accession by the Community to the EHCR* [1996] ECR I-1759

Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union, 14.12.2007

E/2012/22, E/C. 12/2011/3, Report on the forty-sixth and forty-seventh sessions (2-20 May, 2011, 14 Nov-2 Dec, 2011), the Committee on Economic, Social and Cultural Rights

Foreword by Dean Spielmann, President of the European Court of Human Rights, *Annual Report 2014, provisional version*, Registry of the European Court of Human Rights, Strasbourg, 2015

Freedom of Association in Practice: Lessons Learned, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, ILC, 97th Session, 2008

General Survey of the reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), International Labour Conference, 81st Session, Geneva, 1994

General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report III (Part 1B), International Labour Conference, 101st Session, Geneva, 2012

General Report and Observations concerning particular countries, Report III (Part IA), International Labour Conference, 102nd Session, 2013

Jean-Claude Juncker, *A New Strategy for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission*, 15 July 2014, Strasbourg

Joint Communication from President Costa and Skouris, Strasbourg and Luxembourg, 24 January, 2011

Leonard F.M. Besselink, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, *Verfassungsblog on Matters Constitutional*, Tuesday, 23 December 2014

Lee Swanston, *Adoption of Standards by the International Labor Organization: Lessons and Limitations*, *Standard-Setting: Lessons Learned*, International

Mario Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission Jose Manuel Barroso*, 9 May 2010

Maina Kiai, *Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association*, A/HRC/20/27, 21 May, 2012

Niklas Bruun and Andreas Bucker, *ETUI Policy Brief, European Economic, Employment and Social Policy, #4/12, Critical assessment of the proposed Monti*

II regulation – more carriage and strength needed to remedy the social imbalances by ETUI aisbl, Brussels, April 2012

Opinion 1/91 Draft Agreement between the Community, on the one hand, and the Countries of the European Free Trade Association, on the other, Relating to the Creation of the European Economic Area [1991] ECR I-6079

Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759

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, Explanatory Memorandum, Brussels, 21.3.2012

Pieter van Dijk, (Member, The Netherlands), European Commission for Democracy through Law (Venice Commission), *Comments on the Accession of the European Union/European Community to the European Convention on Human Rights*, CDL(2007)096, Strasbourg, 12 October 2007

Peter Danchin, *Drafting History, Third Session of the Human Rights Commission*, Columbia University

Report of the Committee of Experts on the Application of Conventions and Recommendations, ilolex No. 062010GBR087, 2010

Steve Peers, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, EU Law Analysis Blog, Expert insight into EU law developments, Thursday, 18 December 2014

Tobias Lock, *Will the Empire Strike Back? Strasbourg's reaction to the CJEU's accession opinion*, Verfassungsblog on Matters Constitutional, 30 January 2015

Tobias Lock, *Oops! We did it again – the CJEU's Opinion on the EU Accession to the ECHR*, Verfassungsblog on Matters Constitutional, Thursday, 18 December 2104

The Resolution 15/21 on the Rights to Freedom of Peaceful Assembly and of Association, adopted by the Human Rights Council, 6 October, 2010

Working Documents, *Accession of the European Union to the Convention*

Other Resources

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship

Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights

ILO, *ILO Declaration for Fundamental Principles and Rights at Work, Background*

The nature of state parties obligations (Art 2, Par 1), 12/14/1990, CESCR
General Comment 3

The ILO Resolution of 1952 concerning the independence of the trade union movement

The Universal Declaration of Human Rights, a Historical Record of the Drafting Process

UN, Chapter IV, Human Rights, 3.a. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008

ECJ/CJEU Cases and Opinions

Case 26-62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963]

Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969]

Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970]

Case 4/73 *J. Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities* [1974]

Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003]

Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002]

C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and*

Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995]

C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]; Opinion of AG Jacobs

C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006]

Case C-271/08 *European Commission v Federal Republic of Germany* [2010]

Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007]

Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007], Opinion of AG Maduro

Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004]

Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]

Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets, avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007]

Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets, avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007], Opinion of AG Mengozzi

Joined Cases C-350/06 and C-520/06 *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs* [2009]

C-346/06 *Rechtsanwalt Dr. Dirk Ruffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008]

Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] Opinion of AG Trstenjak

Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008]

C-515/08 *dos Santos Palhota and Others*, [2010]; Opinion of the Advocate General Villon

Case F-121/10 *Michael Heath v European Central Bank (ECB)*, Civil Service Tribunal, 29 September 2011

C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995]

C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]; Opinion of AG Jacobs

C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006]

Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007]

Case C-271/08 *European Commission v Federal Republic of Germany* [2010]

Case C-466/00, *Kaba v Secretary of State for the Home Department (No 2)* [2003]

C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989]

Case 374/87, *Orkem v Commission of the European Communities* [1989]

Case 374/87, *Orkem v Commission of the European Communities* [1989],
Opinion of Mr Advocate General Darmon, delivered on 18 May 1989

Joined Cases 46/87 and 227/88 Hoechst AG v Commission of the European Communities [1989]

Case C-94/00, *Roquette Frères SA v Directeur general de la concurrence, de la consommation et de la répression des frauds* and Commission of the European Communities [2002]

ECtHR Cases and Opinions

Associated Society of Locomotive Engineers & Firemen (ASLEF) v. The United Kingdom, application no. 11002/05, ECHR, 2007

Bosphorus hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, application no. 45036/98, ECHR, 2005

Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, in the case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 45036/98, 30 June 2005

Concurring Opinion of Judge Ress in the case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 45036/98, 30 June 2005

Demir and Baykara v. Turkey, application no. 34503/97, Grand Chamber, ECHR, 2008

Enerji Yapi-Yol Sen v. Turkey, application no. 68959/01, ECHR, 2009

M.S.S. v. Belgium and Greece, application no. 30696/09, ECHR, 2011

Michaud v. France, application no. 12323/11, ECHR, 2012

Niemietz v. Germany, application no. 13710/88, ECtHR, 1992

National union of Belgian Police v. Belgium, application no. 4464/70, ECHR, 1975

Schmidt and Dahlstrom v. Sweden, application no. 5589/72, ECHR, 1976

Sigurdur A. Sigurjonsson v. Iceland, application no. 16130/90, ECHR 1993

Swedish Engine Drivers' Union v. Sweden, application no. 5614/72, ECHR, 1976

Sindicatul "PĂSTORUL CEL BUN" v. Romania, application no. 2330/09, ECHR, 2013

Schmidt and Dahlström v. Sweden, application no. 5589/72, ECHR, 1976

The National Union of Rail, Maritime and Transport Workers v. The United Kingdom, application no. 31045/10, ECHR, 2014

Unison v. The United Kingdom, application no. 53574/99, ECHR, 2002

Wilson, National Union of Journalists and Others v. The United Kingdom, applications nos. 30668/96, 30671/96, 30678/96, ECHR, 2002

Young, James and Webster v. the United Kingdom, Application no. 7601/76, 7806/77, ECHR, 1980

Other Cases

Aleksander Belyatsky et al. v. Belarus, Communication No.1296/2004, UN Doc. CCPR/C/90/D/1296/2004, 7 August 2007

2BvE 2/08 *Gauweiler v Treaty of Lisbon* [2009], Federal Constitutional Court of Germany

Metrobus Ltd v Unite the Union [2009], EWCA Civ 829, 31 July 2009

Manfred Brunner and Others v The European Union Treaty [1994] 1 C.M.L.R. 57, Federal Constitutional Court of Germany

J. B. et al. v. Canada (118/1982), ICCPR, A/41/40, 18 July 1986

Individual Opinion by Mrs. Higgins and Messrs. Lallah, Mavrommatis, Opsahl and Wako concerning the admissibility of communication No. 118/1982, J.B. et al. v. Canada

Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, 03/07/2013 European Committee of Social Rights - 85/2012

Internet Resources

www.europa.eu

www.laborlawnetwork.eu

www.hudoc.echr.coe

www.un.org

www.coe.int

www.ilo.org

www.itfglobal.org

www.etuc.org