

# ENSURING COHERENCE IN FUNDAMENTAL LABOR RIGHTS CASE LAW: CHALLENGES AND OPPORTUNITIES

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*Leiden, The Netherlands | 22 April 2016*







## Social Justice Expertise Center

The Social Justice Expertise Center (SJEC) is an independent practice-oriented research and capacity-building institute established to identify and address deficiencies in the governance and protection of fundamental rights at the workplace. The Center undertakes various activities including multi-stakeholder dialogues on contemporary labor rights challenges, and the development of policy-relevant documents for different interest groups on specific themes. It conducts research and provides capacity building tools to help companies, civil society organizations and public institutions enhance the rights of workers at the company, sectoral and national level.

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## Acknowledgment

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The Social Justice Expertise Center (SJEC) is grateful to Leiden Law School, the Department of Social Law, and The Hague Institute for Global Justice for providing the resources that made the organization of the conference possible. SJEC further wishes to thank the conference speakers for their invaluable substantive contributions to the conference discussions and to this booklet. Much appreciation also goes to all the participants who made their way to Leiden for the conference from both within Europe and outside the continent to contribute to this important discussion. Without your active participation the discussions would not have generated such rich and insightful ideas, as all those present acknowledge.



The operational arrangements of the conference were developed by a dedicated conference organizing committee made up of Ms. Manuella Appiah, Ms. Charlotte de Jong, Dr. Beryl ter Haar, Ms. Stefania Marassi, Mr. Willem-Jan Moolenaar and Mr. Marco van der Ree. SJEC is particularly grateful to Ms. Marassi for her incredible and effective coordinating skills in spearheading the preparation of the conference.

In the view of the Center, this global conference serves as a laboratory for future efforts on enhancing coherence in fundamental rights case law. It hopes to repeat this exercise in the not too distant future.

Analyses of fundamental labor rights case law can be found in the Centers *International Labor Rights Case Law*, a triannual publication on seminal fundamental labor rights decisions. Information about the journal can be found on [www.brill.com/ilarc](http://www.brill.com/ilarc).

# Proliferation of Fundamental Labor Rights Enforcement Mechanisms: Contemporary Discourse and Institutional Challenges - The Contribution of the European Court of Human Rights

*Judge Dean Spielmann, Judge, Court of Justice of the European Union (General Court);  
Former President, European Court of Human Rights \**

Ladies and Gentlemen,

It is a great pleasure for me to be in Leiden and to participate in the Global Conference for international and transnational labor law judges and other adjudicators. I have never been a labor law judge myself, but as former president of the European Court of Human Rights, I am deeply honored to have been invited to give the keynote speech today. This is even more so as the European Court of Human Rights has delivered a series of landmark cases particularly relevant to labor law.



The judgments of the European Court of Human Rights have, of course, a very high level of legal significance for Europe. It is through its landmark rulings that the Court has helped shape a distinctive and dynamic culture of human rights for this continent. The Strasbourg case law, which is now an extensive, highly developed corpus juris, has brought about – and I quote here from the Preamble to the Convention – “a common understanding and observance of ... human rights” among the States parties to the Convention.

It is not just the action of the Court that has brought this about. The Convention system has experienced, in the space of the past twenty-five years, both a broadening and a deepening, brought about by the primary actors themselves, the States parties. The broadening refers to the doubling of the number of States parties to the Convention between 1990 and 2006. At the time of the great democratic transition in Europe, the European Convention on Human Rights served as the lodestar for many nascent democratic systems. That broadening is not yet complete, of course. The historic accession to the Convention by the European Union is still awaited. The circle has not yet closed. The deepening came about through incorporation or transposition of the Convention into national law.

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\* The author is indebted to James Brannan for comments on an earlier draft of this contribution.

This was achieved in various ways. For monist legal systems, the formal step of incorporation was not relevant. But the question of the exact status of the Convention in such legal systems was highly relevant. It has been analyzed and answered in countries such as Germany and Italy, where constitutional courts have, over the past ten years, spelled out the significance of the Convention for their respective legal orders. And so the Convention system, though in both origin and essence a creation of international law, nevertheless straddles the traditional divide between international and municipal. It is this particular character that gives the case law laid down at Strasbourg the potency to shape and inform a genuine culture of protecting human rights by law, common to all the States.<sup>1</sup>

The Convention does not include provisions specifically related to labor law. However, the European Court of Human Rights has interpreted and applied the traditional civil and political rights by adopting a dynamic approach. In the *Airey* case,<sup>2</sup> the Court held as follows:

26. (...) The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (...) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (...). Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.<sup>3</sup>

The right to work is recognized by Article 23(1) of the Universal Declaration of Human Rights. It is also affirmed in the provisions of many other international human rights treaties: Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 11(1)(a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 1 of the European Social Charter (ESC); Article 15 of the EU Charter of Fundamental Rights (the EU Charter); Article 15 of the African Charter on Human and People's Rights (the African Charter); and Article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the San Salvador Protocol). The Preambles of a number of International Labour Organization (ILO) conventions, including in particular the Employment Policy

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<sup>1</sup> D. Spielmann, “*The contribution of the Court to a culture of human rights in Europe*,” speech delivered at the Centre for Public Law, Cambridge, 12 November 2015, unpublished.

<sup>2</sup> *Airey v. Ireland*, 9 October 1979, Series A, no. 32.

<sup>3</sup> See the recent article by C. O’Cinneide, “The Social Dimension of ECHR Rights – Escaping the Dead Hand of Orthodoxy,” in *Essays in Honour of Dean Spielmann* (Oisterwijk: Wolf Legal Publishers, 2015), 445–55.

Convention of 1964, also state explicitly that their provisions are intended to give effect to the right to work. Other pertinent stipulations include Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Article 32 of the Convention on the Rights of the Child (CRC); Articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers Convention) and Article 27 of the International Convention on the rights of Persons with Disabilities.<sup>4</sup>

Many of these legal instruments contain enforcement mechanisms. Some mechanisms are judicial in nature, others are of a quasi-judicial nature. The purpose of this conference is to identify threats to, and challenges for, a coherent application of fundamental labor rights. As the organizers have emphasized, the interactive approach will provide an opportunity for dialogue and the sharing of best practice associated with the presence of diverging enforcement systems.

Turning to my field of expertise, I have already mentioned that socio-economic rights have traditionally been excluded from human rights treaties. The EU Charter is, in this respect, a welcome development. As one author has put it,

In purporting to promote the “common values” of EU citizens, the Charter brings together a wide range of modern economic and social rights with more established civil and political rights in a single text, thereby underlining their “relevance and importance” and rendering them more visible to EU citizens. Thus, the fundamental rights in the Charter have been drawn from the EC Treaty, Community legislation and the jurisprudence of the ECJ and the ECtHR, as well as a variety of international and national sources, including UN human rights

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<sup>4</sup> C. O’Cinneide, “The Right to Work in International Human Rights Law,” in *The Right to Work. Legal and Philosophical Perspectives*, ed. V. Mantouvalou (Oxford: Hart Publishing: 2015), 99. But enforcement at the domestic level is uncertain. For example, in a judgment of 13 March 2009, the French *Conseil d’Etat* decided that the right to work was not precise enough to be enforced, and needed to be made more concrete by legislative acts or international conventions. However, in a judgment of April 2012, the *Conseil d’Etat* decided that a measure excluding some categories of migrants from the right to housing was illegal because it violated Convention 97 of the ILO concerning migrant workers, which requires equal treatment in matters of accommodation (Article 6). In recent years, the French *Cour de cassation* has used, and sometimes combined, ILO conventions, the European Convention on Human Rights, the European Social Charter or the Charter of Fundamental Rights. In a judgment of 1 July 2008, the *Chambre sociale*, applying ILO Convention 158 directly, set aside a French statute establishing a “*contrat nouvelles embauches*,” allowing dismissal at will during the first two years of employment. See S. Robin-Olivier, “The French Approach to the Right to Work: The Potential of a Constitutional Right in Ordinary Courts,” in *The Right to Work*, 204, 205.

instruments, the Council of Europe and the European Community's Charter of the Fundamental Social Rights of Workers 1989.<sup>5</sup>

Moreover, three kinds of EU-based or EU-coordinated right-to-work interventions can be usefully subjected to comparative analysis at the EU level:

- National employment policy or workfare regimes, as coordinated by the European Employment Strategy;
- EU-based controls on discrimination in the sphere of employment and occupation; and
- EU freedom of movement of workers as implemented in the Member States.<sup>6</sup>

By noting the absence of the watertight division between civil and socioeconomic rights, the European Court of Human Rights has examined many cases linked directly or indirectly to labor law. As we shall see, the Court's contribution has shaped a genuine culture of protecting human rights in the fields of collective and individual work relations. The Court takes into account, as an interpretative guide, many other human rights treaties containing, in contrast to the Convention, provisions related to the right to work. The European Social Charter and revised Social Charter have a prominent role in its case law, as is demonstrated in a document concerning the use of Council of Europe treaties, published by the research division of the Court.<sup>7</sup> Moreover, as Colm O'Cinneide, the vice president of the European Committee of Social Rights, has recalled,

The European Court of Human Rights has a long tradition of regarding the interpretation given by the European Committee of Social Rights (ECSR) as being highly authoritative. For example, in the judgment of *RMT v UK* (no. 31045/10), delivered on 8 April 2014, the European Court of Human Rights commented that the "interpretative value" of the ECSR's jurisprudence was "generally accepted by states and the Committee of Ministers [of the Council of Europe]."<sup>8</sup>

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<sup>5</sup> E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford: Hart Publishing, 2007), 91.

<sup>6</sup> M. Freedland and N. Kountouris, "The Right to (Decent) Work in a European Comparative Perspective," in *The Right to Work*, 128.

<sup>7</sup> European Court of Human Rights, Research Division, *The use of Council of Europe treaties in the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2011): 15–20, 35–36.

<sup>8</sup> C. O'Cinneide, "The Right to Work...", 102. The Court held in *National Union of Rail, Maritime and Transport Workers ("RMT") v. the United Kingdom*, no. 31045/10, 8 April 2014, as follows:

94. The Government did not regard the ECSR's assessment as an authoritative source of law, since, despite the independence and expertise of its members, the ECSR did not possess judicial or quasi-judicial status. Its role was to report to the Committee of Ministers. The Court observes that the ECSR's competence is stipulated in the Protocol Amending the European Social Charter (also known as the "Turin Protocol", Council of Europe Treaty Series No. 142), namely to 'assess from a legal standpoint the compliance of national law and practice with the

The Court, while interpreting and applying the Convention, looks for common ground among norms. In *Demir and Baykara*, the Court observed that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.<sup>9</sup>

It held as follows:

84. (...) The Court regards this as an argument in support of the existence of a consensus among Contracting States to promote economic and social rights. It is not precluded from taking this general wish of Contracting States into consideration when interpreting the provisions of the Convention.

85. The Court, in defining the meaning of terms and notions in the text of the Convention, 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. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.

In my presentation concerning labor law issues under the European Convention, I focus on two main topics: individual labor relations and the impact of work-related rights; and collective labor relations and, in particular, trade union rights.

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obligations arising from the Charter'. It is true that this Protocol has not entered into force as several States party to the Charter, including the United Kingdom, have not ratified it. Yet the interpretative value of the ECSR appears to be generally accepted by States and by the Committee of Ministers. It is certainly accepted by the Court, which has repeatedly had regard to the ECSR's interpretation of the Charter and its assessment of State compliance with its various provisions (e.g., *Demir and Baykara*; also *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, § 39, ECHR 2006-II, a trade union case in which the Court described the ECSR as a "particularly qualified" body in this domain).

<sup>9</sup> *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR 2008; § 78.

## I. Individual Labor Relations and the Impact of Work-Related Rights

Individual labor relations cover issues related to access to work and dismissal, but also issues related to freedom of expression in the employment context as well as social security issues, such as occupational health, pensions, and employment benefits. Reconciliation of professional and family life, respect for private life in the employment context as well as safety at work are also topics that have been examined by the European Court. Recent developments concern austerity measures and reduction in remuneration, benefits, bonuses, and retirement pensions of public servants. On all these issues, the European Court of Human Rights has handed down judgments and decisions.<sup>10</sup> In my presentation, I would like to give just a few examples concerning access to work, dismissal, and problems related to freedom of expression in the workplace.

### Access to work

Access to work may be covered by various provisions of the Convention. I would like to give three examples.

In *Thlimmenos v. Greece*,<sup>11</sup> the executive board of the Greek chartered accountants body refused to appoint the applicant as a chartered accountant – even though he had passed the relevant qualifying exam – on the grounds that he had been convicted of insubordination for refusing to wear the military uniform at a time of general mobilization (he was a Jehovah's Witness). The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 9 (freedom of thought, conscience and religion) of the Convention. States had a legitimate interest in excluding some offenders from the profession of a chartered accountant. However, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform could not imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the grounds that he was an unfit person was not, therefore, justified. The applicant had served a prison sentence for his refusal to wear the military uniform. Imposing a further sanction on him was disproportionate. It followed that his exclusion from the profession of chartered accountants did not pursue a legitimate aim. No objective and reasonable justification existed for not treating the applicant differently from other persons convicted of a "serious crime." The State, to ensure respect for Article 14 taken in conjunction with Article 9, should have introduced appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.

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<sup>10</sup> An overview of the case law can be found on the website of the European Court of Human Rights. Factsheet – Work-related rights.

<sup>11</sup> *Thlimmenos v. Greece* [GC], no. 34369/97, 6 April 2000, ECHR 2000-IV.

In *Alexandridis v. Greece*, the applicant was admitted to legal practice at the Athens Court of First Instance and took the requisite oath of office.<sup>12</sup> He complained that when taking the oath he had been obliged, in order to be allowed to make a solemn declaration, to reveal that he was not an Orthodox Christian, only one standard form on which to swear a religious oath was provided. The Court held that there had been a violation of Article 9 of the Convention. It found that that obligation had interfered with the applicant's freedom not to have to manifest his religious beliefs.

*Lombardi Vallauri v. Italy* concerned a refusal to grant the applicant a teaching post in a denominational university because of his alleged heterodox views.<sup>13</sup> The applicant complained that this decision, that had been taken without any explanation or genuine adversarial debate, had breached his right to freedom of expression. He further complained of the domestic courts' failure to rule on the lack of reasons for the Faculty Board's decision, thereby restricting his ability to appeal against that decision and to instigate an adversarial debate. In addition, he alleged that the Faculty Board had confined itself to taking note of the Congregation's decision, which had also been taken without any adversarial debate. The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention. It considered that the University's interest in dispensing teaching based on Catholic doctrine could not extend to impairing the very substance of the procedural guarantees afforded to the applicant by Article 10. Accordingly, in the particular circumstances of the case, the interference with the applicant's freedom of expression had not been "necessary in a democratic society." For the same reasons, the Court held that the applicant had not been afforded effective access to a court, and found a violation of Article 6 § 1 (right to a fair hearing) of the Convention.

## Dismissal

Dismissal can occur for different reasons. Problems may arise as to freedom of thought, conscience, and religion, because of the alleged problematic past of the employee.<sup>14</sup> It may also raise delicate issues regarding diplomatic immunity.<sup>15</sup> Dismissal may also occur on account of membership of a political party,<sup>16</sup> of sexual orientation,<sup>17</sup> or on grounds of gender<sup>18</sup> or health.<sup>19</sup>

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<sup>12</sup> *Alexandridis v. Greece*, no. 19516/06, 21 February 2008.

<sup>13</sup> *Lombardi Vallauri v. Italy*, no. 39128/05, 20 October 2009.

<sup>14</sup> *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 27 July 2004, ECHR 2004-VIII; *Sidabras and Others v. Lithuania*, nos. 50421/00 and 56218/08, 23 June 2015.

<sup>15</sup> *Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010, ECHR 2010; *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011; *Wallishauser v. Austria*, no. 156/04, 17 July 2012.

<sup>16</sup> *Redfearn v. the United Kingdom*, no. 47335/06, 6 December 2012.

<sup>17</sup> *Lustig-Prean and Beckett v. United Kingdom*, nos. 31417/96 and 32377/06, 27 September 1999; *Perkins and R. v. the United Kingdom*, nos. 43208/98 and 44875/98, 22 October 2002 and *Beck, Copp and Bazeley v. the United Kingdom*, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002.

<sup>18</sup> *Emel Boyraz v. Turkey*, no.61960/08, 2 December 2014.

The examples I have chosen in connection with dismissal relate to freedom of thought, conscience, and religion.<sup>20</sup>

*Obst v. Germany*<sup>21</sup> and *Schüth v. Germany* concerned the applicants' dismissal from a church for engaging in an extramarital relationship.<sup>22</sup> In the first case, the applicant had grown up in the Mormon faith and married in 1980 in accordance with Mormon rites. After holding various positions in the Mormon Church, he was appointed to the post of director for Europe in the public relations department in 1986. In December 1993 he confided to his pastor that he had been having an affair with another woman. The pastor advised him to tell his superior, which he did. His superior dismissed him without notice a few days later for adultery. In the second case, the applicant had been the organist and choirmaster in a Catholic parish from the mid-1980s to 1994, when he separated from his wife. Since 1995 he had been living with his new partner. In July 1997, after his children told people in their kindergarten that their father was going to have another child, the dean of the parish discussed the matter with the applicant. A few days later the parish gave the applicant notice that he was being dismissed for adultery from April 1998. Relying on Article 8 (right to respect for private and family life) of the Convention, both applicants complained of the refusal of the domestic courts to overturn their dismissal.

In these cases, the Court for the first time addressed the dismissal of church employees on grounds of conduct in their private lives. In the first case, it held that there had been no violation of Article 8 of the Convention. Having regard to the wider margin of appreciation of the State in the present case and in particular that the labor courts had to strike a balance between several private interests, it considered that Article 8 did not require the State to afford the applicant a higher degree of protection. In the second case, it held that there had been a violation of Article 8. The labor courts had not sufficiently explained the reasons why, according to the conclusions of the Labor Court of Appeal; the interests of the parish far outweighed those of the applicant, and they had failed to weigh the rights of the applicant against those of the Church employer in a manner compatible with the Convention. Consequently, the State had not afforded the applicant the necessary protection.

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<sup>19</sup> *I.B. v. Greece*, no. 552/10, 3 October 2013, ECHR 2013-V.

<sup>20</sup> See V. Mantouvalou, "Ideological Organisations and Dismissal for Private Activities," in *Essays in Honour of Dean Spielmann* (Oisterwijk: Wolf Legal Publishers, 2015): 375–81; A. Nußberger, "Job and private life – nothing but one and the same? Recent developments in the jurisprudence of the European Court of Human Rights on Article 8 ECHR," in *Essays in Honour of Dean Spielmann*: 437–43.

<sup>21</sup> *Obst v. Germany*, no. 425/03, 23 September 2010.

<sup>22</sup> *Schüth v. Germany*, no. 1620/03, 23 September 2010, ECHR 2010.

In *Eweida and Others v. the United Kingdom*, all four applicants were practicing Christians.<sup>23</sup> Ms. Eweida, a British Airways employee, and Ms. Chaplin, a geriatrics nurse, complained that their employers had placed restrictions on them, preventing them from visibly wearing Christian crosses around their necks while at work. Ms. Ladele, a registrar of births, marriages and deaths, and Mr. McFarlane, a counselor with a confidential sex therapy and relationship counseling service, complained about their dismissal for refusing to carry out certain duties which they believed would condone homosexuality.

The Court held that there had been a violation of Article 9 (freedom of religion) in respect of Ms. Eweida; no violation of Article 9, taken alone or in conjunction with Article 14 (prohibition of discrimination), in regard to Ms. Chaplin and Mr. McFarlane; and no violation of Article 14 taken in conjunction with Article 9 in regard to Ms. Ladele.

The Court did not consider that the lack of express provisions in UK law to regulate the wearing of religious clothing and symbols in the workplace in itself meant that the right to religious freedom was breached, because the issues could be and were considered by the domestic courts in the context of discrimination claims brought by the applicants.

In Ms. Eweida's case, the Court held that on one side of the scales was the applicant's desire to manifest her religious belief. On the other side was the employer's wish to project a certain corporate image. Although this aim was undoubtedly legitimate, the domestic courts had accorded it too much weight.

In regard to Ms. Chaplin, the importance for her to be allowed to bear witness to her Christian faith by wearing her cross visibly at work carried significant weight. However, the reason for the request to remove the cross, namely the protection of health and safety on a hospital ward, was inherently more important than that which applied in regard to Ms. Eweida, and the hospital managers were well placed to make decisions about clinical safety.

In the cases of Ms. Ladele and Mr. McFarlane, it could not be said that national courts had failed to strike a fair balance when they upheld the employers' decisions to bring disciplinary proceedings. In each case the employer was pursuing a policy of nondiscrimination against service-users, and the right not to be discriminated against on grounds of sexual orientation was also protected under the Convention.

*Fernández Martínez v. Spain* concerned the nonrenewal of the contract of a married priest and father of five, who taught Catholic religion and ethics, just after he had been granted dispensation

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<sup>23</sup> *Eweida and Others v. the United Kingdom*, no. 48420/10, 15 January 2013, ECHR 2013 (extracts).

from celibacy and following an event at which he had publicly displayed his active commitment to a movement opposing Church doctrine.<sup>24</sup> The applicant alleged in particular that the nonrenewal of his contract because of his personal and family situation had infringed on his right to respect for his private and family life.

The Court held that there had been no violation of Article 8 of the Convention finding that, having regard to the margin of appreciation afforded to the State, the interference with the applicant's right to respect for his private life had not been disproportionate. In the Court's view, it was in particular not unreasonable for the Church to expect particular loyalty of religious education teachers, given that they could be regarded as its representatives. In the instant case, the Court found that the Spanish courts had sufficiently taken into account all the relevant factors and had weighed the competing interests in a detailed and comprehensive manner within the limits imposed by the respect due to the autonomy of the Catholic Church. In light of the review by the domestic courts, the principle of the Church's autonomy did not seem to have been invoked improperly: it could not be said that the Bishop's decision had been insufficiently reasoned or arbitrary, or that it had been taken with an aim incompatible with the exercise of the Catholic Church's autonomy, as recognized and protected under the European Convention.

### Freedom of expression in the workplace

The protection of Article 10 (freedom of expression) of the Convention extends to the workplace in general and to public servants in particular.<sup>25</sup> At the same time, civil servants owe to their employer a duty of loyalty, reserve, and discretion.<sup>26</sup>

A leading judgment on this is *Guja v. Moldova*.<sup>27</sup> The applicant, who was at the time the head of the Press Department of the Moldovan Prosecutor General's Office, complained about his dismissal for divulging two documents that disclosed interference by a high-ranking politician in pending criminal proceedings. The Court held that there had been a violation of Article 10, finding as follows:

Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff – and having weighed up the

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<sup>24</sup> *Fernández Martínez v. Spain* [GC], no. 56030/07, 12 June 2014.

<sup>25</sup> *Vogt v. Germany*, 26 September 1995, Series A no. 323; *Ahmed and Others v. the United Kingdom*, 2 September 1998, Reports of Judgments and Decisions 1998-VI; *Wille v. Liechtenstein* [GC], no. 28396/95, 28 October 1999, ECHR 1999-VII; *Fuentes Bobo v. Spain*, no. 39293/98, 27 February 2000.

<sup>26</sup> *De Diego Nafría v. Spain*, no. 46833/99, 14 March 2002.

<sup>27</sup> *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, ECHR 2008.

other different interests involved in the present case – the Court comes to the conclusion that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not 'necessary in a democratic society'.<sup>28</sup>

*Heinisch v. Germany* concerned the dismissal of a geriatrics nurse after having brought a criminal complaint against her employer alleging deficiencies in the care provided.<sup>29</sup> The applicant complained that her dismissal, and the courts' refusal to order her reinstatement, had violated Article 10. The Court held that there had been a violation of Article 10, finding that the applicant's dismissal without notice had been disproportionate and the domestic courts had failed to strike a fair balance between the need to protect the employer's reputation and the need to protect the applicant's right to freedom of expression.

In *Palomo Sánchez and Others v. Spain*, the applicants argued that their dismissal following an offensive and humiliating publication initiated by them – featuring a cartoon on the cover showing employees of the company giving sexual favors to the director of human resources – had infringed their right to freedom of expression, and that the real reason for their dismissal had been their trade union activity, thus also breaching their right to freedom of assembly and association.<sup>30</sup> The Court held that there had been no violation of Article 10. It found that the applicants' dismissal had not been a manifestly disproportionate or excessive sanction requiring the State to afford redress by annulling it or replacing it with a more lenient measure.

## II. Collective labor relations and trade union rights

The scope of trade union rights under the Convention has been determined in connection with Article 11 safeguards. The guarantee of freedom of assembly and association under that Article comprises the right to form a trade union and to join the union of one's choosing. As the Court held in its early *National Union of Belgian Police* case, Article 11 also contains the right to be heard and "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."<sup>31</sup> Traditionally, the rules governing the exercise of the right to organize fall within the State's margin of appreciation. According to the Court's case law, Article 11 guarantees the right neither for trade

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<sup>28</sup> *Ibid.*, § 97.

<sup>29</sup> *Heinisch v. Germany*, no. 28274/08, 21 July 2011, ECHR 2011 (extracts).

<sup>30</sup> *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06, and 28964/06, 12 September 2011, ECHR 2011.

<sup>31</sup> *National Union of Belgian Police v. Belgium*, 27 October 1975, Series A, no. 19, § 39.

unions to be consulted<sup>32</sup> nor to retroactive benefits resulting from a collective agreement.<sup>33</sup> Article 11 does not guarantee the right to strike as such,<sup>34</sup> even though relevant case law has been developed in recent years.<sup>35</sup> Neither does it guarantee the right for trade union members not to have their posts transferred.<sup>36</sup>

So what does Article 11 cover in connection with collective labor relations?

### Right to join or not to join a trade union

In addition to cases on the positive right to join a union (see, for example, the cases mentioned in connection with union rights in the public sector), the European Court has developed case law on the negative right to freedom of assembly and association.

In *Young, James and Webster v. the United Kingdom*, the applicants' complaint concerned the "closed shop" agreement between British Rail and three railway workers' unions.<sup>37</sup> A closed shop exists in an undertaking or workplace where, as a result of an agreement or arrangement between one or more trade unions and one or more employers or employers' associations, employees of a certain class are in practice required to be or become members of a specified union.

The Court found a violation of Article 11 on the ground that closed shop agreements had to protect individuals' freedom of thought.<sup>38</sup>

The *Sigurður A. Sigurjónsson v. Iceland* case concerned the obligation imposed on the applicant, a taxi driver, to join the Frami Automobile Association or lose his license.<sup>39</sup> The Court found a violation of Article 11 and held that "Article 11 [encompasses] a negative right of association."<sup>40</sup> The Court

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<sup>32</sup> *Ibid.*, § 38.

<sup>33</sup> *Schmidt and Dahlström v. Sweden*, 6 February 1976, Series A, no. 21; *Dilek and Others v. Turkey*, no. 74611/01, 26876/02 and 27628/02, 17 July 2007.

<sup>34</sup> *Schmidt and Dahlström*.

<sup>35</sup> See a number of cases in which restrictions on industrial action were found to have given rise to violations of Article 11 (see, for example, *Karaçay v. Turkey*, no. 6615/03, 27 March 2007; *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, 17 July 2007; *Urcan and Others v. Turkey*, nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 July 2008; *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009. Compare with the "RMT" case concerning secondary strike action.

<sup>36</sup> *Akat v. Turkey*, no. 45050/98, 20 September 2005.

<sup>37</sup> *Young, James and Webster*, 13 August 1981, Series A, no. 21.

<sup>38</sup> See also *Sibson v. the United Kingdom*, 20 April 1993, Series A, no. 258-A.

<sup>39</sup> *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, Series A, no. 264.

<sup>40</sup> *Ibid.*, 35.

relied on the European Charter of Social Rights as evidence that “every employer and every worker shall have the freedom to join or not to join professional organisations or trade unions without any personal or occupational damage being thereby suffered by them.”<sup>41</sup>

In the *Sørensen and Rasmussen v. Denmark* case, the applicants complained of the existence of pre-entry closed-shop agreements in Denmark.<sup>42</sup>

In its judgment, the Court decided that Article 11 had been violated. That the applicants had been compelled to join a particular trade union struck at the very substance of the right to freedom of association guaranteed by Article 11. The Court held that Denmark had not protected the negative right to freedom of association, in other words, the right not to join a trade union. It noted that “there is little support in the Contracting States for the maintenance of closed-shop agreements” and that several European instruments “clearly indicate that their use in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms.”<sup>43</sup>

### Trade union registration

The case of *Sindicatul “Păstorul cel Bun” v. Romania* concerned the refusal by the Romanian State of an application for registration of a trade union formed by priests of the Romanian Orthodox Church.

In the Grand Chamber judgment of 9 July 2013, the Court found no violation of Article 11 of the Convention.<sup>44</sup> It had held in its Chamber judgment that the Dolj County Court had not taken adequate account of all the relevant arguments and had justified its refusal to register the union on purely religious grounds based on the provisions of the Church’s Statute. Nonetheless, the Grand Chamber took the view that the County Court’s decision had simply applied the principle of the autonomy of religious communities. The court’s refusal to register the union for failure to comply with the requirement of obtaining the archbishop’s permission was a direct consequence of the right of the religious community concerned to make its own organizational arrangements and to operate in accordance with the provisions of its own Statute.

The Court held that in refusing to register the applicant union, the State had simply declined to become involved in the organization and operation of the Romanian Orthodox Church, thereby observing its duty of denominational neutrality under Article 9 of the Convention.

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<sup>41</sup> Ibid.

<sup>42</sup> *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, ECHR 2006-I.

<sup>43</sup> Ibid., § 75.

<sup>44</sup> *Sindicatul “Păstorul cel Bun” v. Romania* [GC], no. 2330/90, 9 July 2013, ECHR 2013.

## Trade unions' right to draw up their own rules and choose their members

Trade unions have the right to draw up their own rules and to administer their own affairs and, in particular, to expel one of its members if certain conditions are fulfilled.

In a 2012 case against Turkey, the authorities initiated a procedure, upheld by the domestic courts, for the dissolution of Eđitim-Sen, the Education and Science Workers' Union, because they did not approve of a language-related provision in its constitution.<sup>45</sup> The Court found that the proceedings brought against the applicant union, which had the result of obliging it to amend its constitution, could not reasonably be regarded as meeting a "pressing social need" and that consequently there had been a violation of Article 11.

The case of *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom* concerned the inability of a trade union to expel one of its members who belonged to a political party that advocated views inimical to its own (the person concerned was an activist in the BNP, a far-right, lawful party formerly known as the National Front).<sup>46</sup>

A violation of Article 11 was found, in the absence of any identifiable hardship suffered by the individual concerned or any abusive and unreasonable conduct by the applicant trade union. The Court noted that trade unions were not bodies solely devoted to politically neutral aspects of the well-being of their members, but were often ideological, with strongly held views on social and political issues. Furthermore, the trade union did not have any public role such that it could be required to take on members to fulfil any wider purposes. In its judgment, the Court relied on the European Social Charter as evidence that "unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union."<sup>47</sup>

## Trade union rights in the public sector

The "State as employer" must respect trade union freedom and guarantee its effective exercise.<sup>48</sup> Only "convincing and compelling reasons" could justify restrictions on trade union rights in the public sector.<sup>49</sup>

<sup>45</sup> *Eđitim ve Bilim Emekçileri Sendikası v. Turkey*, no. 20641/05, ECHR 2012.

<sup>46</sup> *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, 27 February 2007.

<sup>47</sup> *Ibid.*, §§ 22–24, 39.

<sup>48</sup> *Tüm Haber Sen and Cinar v. Turkey*, no. 28602/95, 21 February 2006, ECHR 2006-II. The Court held as follows: "Furthermore, although Turkey was one of only two States (the other being Greece) that had not yet accepted Article 5 of the European Social Charter, the Committee of Independent Experts had construed that provision – which afforded all workers the right to form trade unions – as applying to civil servants as well. The Court can only subscribe to this interpretation by a particularly well-qualified committee. It also notes that

In the Grand Chamber case of *Demir and Baykara v. Turkey*, the Court held that “members of the administration of the State” could not be excluded from the scope of Article 11.<sup>50</sup> At most, the national authorities were entitled to impose “lawful restrictions” on them, in accordance with Article 11 § 2.<sup>51</sup> In that case the Court found two violations of Article 11 for interference with the right of the applicants, as municipal civil servants, to form trade unions and also for the annulment of a collective agreement (an aspect of the right of association to which I return shortly).<sup>52</sup>

The Court also found a violation of Article 11 in the recent cases of *Adefdromil v. France* and *Matelly v. France* concerning membership of an association for military personnel.<sup>53</sup> The relevant provisions of the French Defence Code contained an outright ban on such personnel joining any trade-union. In the Court’s view, although the freedom of association of military personnel could be subject to

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Article 5 of the European Social Charter sets out conditions for the possibility of forming trade union organizations for members of the police and the armed forces. *A contrario*, this Article must be considered as applying without restriction to other categories of state employees.” (§§ 12, 24 and 39)

<sup>49</sup> *Dilek and Others v. Turkey*, no. 31845/96, 17 July 2007.

<sup>50</sup> *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR 2008.

<sup>51</sup> *Ibid.*, § 107.

<sup>52</sup> In the Court’s view, it had not been shown that the absolute prohibition on forming trade unions imposed on civil servants by Turkish law, as it applied at the relevant time, met a pressing social need. At that time, the right of civil servants to form and join trade unions was already recognized by instruments of international law, both universal and regional. Their right of association was also generally recognized in all member States of the Council of Europe. ILO Convention No. 87, the fundamental text securing, internationally, the right of public officials to form trade unions, was already, by virtue of the Turkish Constitution, directly applicable in domestic law, and the State had confirmed by its subsequent practice (amending of Constitution and judicial decisions) its willingness to recognize the right to organize of civil servants. Turkey had also, in 2000, signed the two United Nations instruments recognizing this right. (§§ 120–25).

See also *Enerji Yapi-Yol Sen v. Turkey*, no. 68959/01, 1 April 2009, concerning disciplinary measures taken against public-sector workers who had participated in a one-day national strike for the recognition of their right to a collective agreement (violation of Article 11) and *Kaya and Seyhan v. Turkey*, no. 30946/04, 15 September 2009, concerning teachers disciplined for taking part in a national strike action organized by their trade union (violation of Article 11). Compare with the judgments of the ECJ in *Viking Line v. ITF* (C-438/05, 11 December 2007) and *Laval v. Svenska Byggnadsarbetareförbundet* (C-341/05, 18 December 2007). See the analysis by K.D. Ewing: “The ECJ, although accepting that the right to strike was a fundamental principle of EU law, it imposed a number of qualifications on the exercise of the right (Viking). A week later, the same court held in the parallel Laval case that a trade union could not take collective action against a Latvian building firm in order to compel to observe Swedish collective agreements for workers it had posted to Sweden from Latvia. In the two cases, freedom to provide services (EC Treaty, Article 49) took priority over the right to strike.” See “Economic Rights,” in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld and A. Sajó (Oxford: Oxford University Press, 2012), 1052.

<sup>53</sup> *Adefdromil v. France*, no. 32191/09, 2 October 2014, and *Matelly v. France*, no. 10609/10, 2 October 2014.

legitimate restrictions, a blanket ban on joining a trade union encroached on the very essence of that freedom and was, as such, prohibited by the Convention.

### **Right to bargain collectively**

The Court emphasized the role and importance of collective agreements in the 1996 case of *Gustafsson v. Sweden*, brought by a restaurant owner complaining of trade union action against him because he had refused to sign such an agreement in the catering sector.<sup>54</sup> No violation of Article 11 was found: the restriction sustained by the applicant had not interfered significantly with the exercise of his own right to freedom of association. In this case, the Court pointed to a number of international instruments as evidence of “the legitimate character of collective bargaining,” having concluded that Article 11 did not provide for a right not to enter into a collective agreement.<sup>55</sup>

The leading case law on the right to bargain collectively is now to be found in the just mentioned judgment, *Demir and Baykara v. Turkey*,<sup>56</sup> where a collective agreement between a union of civil servants and a municipal authority had been annulled. The Court decided that Article 11 had been violated on account of the retrospective annulment of that agreement. The applicants had the right, inherent in their trade-union freedom, to bargain collectively.

In the Court’s view, the list of elements of the right of association was not finite, but instead “subject to evolution depending on particular developments in labour relations.”<sup>57</sup> Having regard to “developments in labour law, both international and national, and to the practice of Contracting States in such matters,”<sup>58</sup> the Court held that

the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’ set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.<sup>59</sup>

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<sup>54</sup> *Gustafsson v. Sweden*, 25 April 1996, Reports of Judgments and Decisions 1996-II.

<sup>55</sup> *Ibid.*, §§ 52–53.

<sup>56</sup> *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR 2008.

<sup>57</sup> *Ibid.*, § 146.

<sup>58</sup> *Ibid.*, §§ 147–54.

<sup>59</sup> *Ibid.*, § 154.

### III. Conclusion

As Colm O’Cinneide puts it, “[the] relationship between the right to work and other human rights is .... uncertain.”<sup>60</sup> But I fully share his view that

the interdependent nature of both sets of rights also undermines the orthodox assumption that courts should only focus on protecting civil and political rights: in general, individuals will only be able to enjoy the benefit of their civil and political rights if their social rights are protected to a certain minimum level, and vice versa – which suggests that legal mechanisms for protecting human rights should be able to engage with both sets of rights, or at least not be unduly constrained in their scope of application to the civil and political side of the coin.<sup>61</sup>

Admittedly, as the Court held in the “RMT” case, “its jurisdiction is limited to the Convention. It has no competence to assess the respondent State’s compliance with the relevant standards of the ILO or the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action.”<sup>62</sup> Nevertheless, the European Court of Human Rights has made a considerable contribution by putting traditional civil rights in perspective and interpreting some of them as work-related rights. It has achieved this goal by examining closely, while interpreting the Convention, different international instruments and the case law of other judicial and quasi-judicial bodies.<sup>63</sup> By entering into a jurisprudential dialogue with various bodies, taking into account the divergent approaches, the Court remains coherent in the interest of legal certainty. The Convention has thus, over the years, become a robust instrument, particularly relevant to the monitoring of individual and collective labor relations.

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<sup>60</sup> O’Cinneide, “The Right to Work,” 101.

<sup>61</sup> O’Cinneide, “The Social Dimension of ECHR Rights,” 449, 450.

<sup>62</sup> *National Union of Rail, Maritime and Transport Workers* (“RMT”), § 106.

<sup>63</sup> In the “RMT” case (ibid.), the Court added an important caveat to its conclusion of not finding a violation of Article 11 as to secondary strike action: “Nor should the conclusion [of not finding a violation of Article 11 in relation to secondary action] reached in this case be understood as calling into question the analysis effected on the basis of those standards and their purposes by the ILO Committee of Experts and by the ECSR.”

# The Right to Strike: A Need to Align Different Interpretations?

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## I. Increasing importance of coherent interpretation in fundamental rights case law

Currently, concern is growing regarding divergent interpretations of comparable or overlapping guarantees in the social rights field.<sup>1</sup> This is due to potential risks for social rights resulting from multilevel guarantees. Even if such a possibility might be considered exaggerated at first glance, a closer look might reveal that, indeed, a multiplication of guarantees could create escape routes for states opting for a levelling down of cost bearing social standards in times of economic crisis.<sup>2</sup> This paper discusses whether it is deemed fruitful to align different interpretations of fundamental social rights in general, and of the right to strike specifically, and in which perspective might more coherent standard be achieved.



### Multiple fundamental rights guarantees

Social rights can be included in national constitutions, in regional (here, European) human rights treaties such as the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), or in global conventions such as ILO or other UN Conventions.<sup>3</sup> Even when the content of social rights guaranteed in such treaties is comparable or overlapping, the specific wording of identical topics may still vary, especially so in the case of a right to strike as this could be either explicitly guaranteed

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<sup>1</sup> Vgl. Social Justice Expertise Center/University of Leiden, *Global Conference for International Labor Law Judges: Ensuring Coherence in Fundamental Labor Rights Case law*, 22 April 2016.

<sup>2</sup> M. Schlachter, "Soziale Rechte auf supranationaler Ebene: Wirksame Schutzinstrumente?," *Festschrift Lörcher* (Baden-Baden, 2013), 203.

<sup>3</sup> International Covenant on Economic, Social and Cultural Rights, (Article 8 § 1 d); European Social Charter and Revised European Social Charter (Article 6 § 4). International Covenant on Civil and Political Rights (Article 22); ILO Convention No. 87 (Article 3); European Convention on Human Rights (Article 11).

or merely implied.<sup>4</sup> The very example of the right to strike may also point toward a reason why such differences coexist. They might continue to exist because of underlying differences in the political, economic, or social contexts that such guarantees are conceived for. If so, different settings of social standards might reflect differences in societies, furthering the development of a multilevel protection combining targeted specific guarantees with more overarching general standards.<sup>5</sup> Both aspects of these differences need to be taken into consideration.

### Developing rights by interpretation

Social rights at international level are regularly worded in a rather abstract, generalized way. To make such rights operational in practice, they need to develop into concrete entitlements and obligations. Such a development will implicitly or explicitly be assigned to courts or supervisory bodies responsible for controlling their implementation in national legal systems. The more abstract provisions are phrased, the more influential the art of interpretation becomes. Interpretative methods are influenced at international level by Article 31 of the Vienna Convention on the Law of Treaties, but the relative weight of methodological aspects develops in a specific way: the wording of a provision is less effective in determining the boundaries of an acceptable interpretation once provisions coexist in different languages, all of which have equally binding effect without providing an identical meaning. Interpreting provisions in a systematic manner cannot develop much guidance in a field of international treaties that usually represent stand-alone conventions not mutually interrelated. The most relevant interpretative aspect in international social rights will then derive from the norm's respective purpose. The underlying social concern had been powerful enough to trigger setting up an international treaty, and ratifying states thereby expressed their will to subscribe to the solution provided. An interpretation furthering the most effective way to implement such a solution will then become the most convincing option. A comparative method of interpretation may be most useful in meeting this goal. Standards already applied in other international contexts provide at least a meaningful source of inspiration for understanding a specific guarantee.

Orienting an interpretation toward other international instruments might be a legitimate choice, which is especially convincing where legal instruments have been created regarding other existing international solutions. As an example, the EU Charter of Fundamental Rights (CFREU) might be invoked, the explanatory report of which contains references to international sources (such as ILO-Conventions or the European Social Charter) that this Charter reflects on.<sup>6</sup> Aligning different

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<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, (Article 8 § 1 d); European Social Charter and Revised European Social Charter (Article 6 § 4).

<sup>5</sup> EGMR, Appl. No. 44958, *Anderson v. UK*, Rn. 31; Appl. No. 42246, *Johnson v. UK*, Rn. 1.

<sup>6</sup> T. Kingreen, in C. Callies/M. Ruffert (Hrsg.), EUV/AEUV (2011) Article 53 GRC, Rn. 5; K. Lenaerts, EuR 2015, 3, 24.

interpretations of social rights might prove to be specifically beneficial to a complicated multilevel system of guarantees as that in place at the European level. A more coherent international approach might here rely on existing interrelations explicitly stated during the period of creating the respective treaties. Regardless, this does not translate into the potential of importing binding precedents from one international instrument to the other, because no system of subordination is in place between independent treaties at international level or between bodies competent to interpret and apply them. However, this lack does not preclude using other instruments as sources of inspiration for developing a more coherent approach.

### The special case of social rights

Whether a more coherent interpretation finds acceptance might be influenced by the specific set-up of relevant supervisory systems which are competent to apply this interpretative method. Some international legal instruments establish a court system competent to deliver enforceable decisions against a fundamental rights violation, whereas others create monitoring bodies competent to state the existence of such violation. Regular courts are composed of career judges, whereas monitoring bodies are usually composed of independent experts, mainly with a background in research rather than law enforcement. Such differences lead to the conclusion that fundamental rights are understood and applied differently even when they include at least partly overlapping guarantees.

The different standards applied are a result of the choice by states to not put social and economic rights on an equal footing with civil rights. Admittedly, judged by the widely used rhetorical phrase of “indivisibility of human rights,” such difference should no longer play a major role<sup>7</sup>; but political reality is not regularly following suit.<sup>8</sup> The character of social rights as norms providing entitlements to individual citizens is far from universally acknowledged.<sup>9</sup> The comparatively poor record of acceptance of international social rights might already indicate a reluctance to provide social rights, as do the weaker methods of securing supervision and implementation. Coherence in interpretation might particularly strengthen existing enforcement mechanisms for fundamental social rights: when courts embrace a method of aligning interpretation of fundamental rights under their specific competency to

<sup>7</sup> J. Kenner, “Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility,” in *Economic and Social Rights under The EU Charter of Fundamental Rights*, ed. T. Hervey and J. Kenner (Oxford: Hart Publishing, 2003), 19–20.

<sup>8</sup> M. Schlachter, “The European Social Charter: Could it contribute to a more social Europe?” *Resocialising Europe in a time of crisis*, ed. N. Countouris and M. Freedland (Cambridge: Cambridge University Press, 2013), 105.

<sup>9</sup> Opinion, Advocate General Cruz Villalon, C-176/12 “AMS”, § 55: “the legal status of social rights in the CFREU as mere ‘principles.’” T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), 32.

approaches developed at international level, the weak status of social rights, compared with civil and political rights, could be partly compensated.

## II. Problems caused by different interpretations

Understanding identical or overlapping fundamental rights in a different manner is likely to create conflicts among citizens and states. Firstly, full protection of social rights can be weakened by invoking a competing interpretation by claiming that only the lower standard remains relevant.<sup>10</sup> Even if from the legal standpoint accepting an additional international guarantee cannot replace obligations already undertaken, at the factual side such understanding may prevail. The notoriously weak mechanisms sanctioning social rights' violations give states ample room for disregarding legally binding obligations. However, a contractual obligation remains valid even though the state later accepts comparable guarantees under an additional instrument interpreted differently.

The legal conflict may again be exemplified by developments at EU level concerning the right to strike. Originally, the CJEU stated the existence of a right to strike already in 2007 without, at this point, any statutory basis in force, instead merely developing it from national constitutions and international sources.<sup>11</sup> Regardless, the relevant decisions created in parallel strict limitations for using such a right that went considerably beyond what was accepted by other international instruments. The member state affected by the *Laval* decision, Sweden, was obliged to implement the understanding provided by the Court by adapting national law accordingly. Swedish unions' right to collective bargaining and collective action was thereby restricted in a manner not compatible with the ILO Convention No. 87 and Article 6 para. 4 ESC.<sup>12</sup>

Conflicting interpretations of the right to strike at different international levels lead to conflicting obligations on the state bound by several provisions in parallel. If the EU is a party to such conflict, however, a solution is provided: the EU obliges member states to introduce statutory provisions to the effect that EU law (or national law implementing it) should prevail over other obligations. Accordingly, the EFTA court in the Norwegian dock workers case held (by reflecting on Protocol No. 35 to the EEA-Agreement) that Norway was not allowed to rely on its obligations under the ILO-Convention No. 137

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights, (Article 8 § 1 d); European Social Charter and Revised European Social Charter (Article 6 § 4).

<sup>11</sup> CJEU, C-438/05 *Viking Line*, §§ 43–44; C-341/05 *Laval*, §§ 90–91.

<sup>12</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, CEACR, Report III Part 1A, International Labour Conference, 99th session 2010: 208–209. European Committee of Social Rights, Collective Complaint No. 85/2012, *LO and TCO v. Sweden*.

if the resulting legal entitlement contradicts EU competition law.<sup>13</sup> This approach differs from the one international instruments regularly take, Article 53 ECHR, stating the ongoing competence of contracting parties to retain or introduce levels of protection to human rights going beyond the Conventions' guarantees.<sup>14</sup>

The CFREU, meanwhile, intends to eradicate tensions with international instruments by providing "horizontal clauses" in Article 52 para. 3 / Article 53 CFREU excluding any interpretation of the Fundamental Rights Charter, to the effect of limiting the protection for fundamental rights guaranteed by the ECHR or other international instruments to which all member states are parties. The mere existence of such clauses demonstrate that Member States expected possibly divergent interpretations of comparable fundamental rights and meant to preclude lowering existing standards due to this possible conflict.<sup>15</sup> Although lowered standards would provide a solution commonly applied in international law for avoiding tensions among international obligations, the CJEU's understanding of the supremacy of Union law is not concerned by such a horizontal clause because it does not depend on interpreting the CFREU.<sup>16</sup> For Member States of the EU, neither national constitutions nor obligations undertaken under international treaties therefore remain competent to demand a level of protection for social rights beyond EU standards because they might interfere with fundamental freedoms. Conflicts between potentially competing interpretations definitely should be solved in favor of protecting social rights and honor the obligations States have undertaken. One possible way may be provided by aligning different interpretations at a more coherent level.

That such a method has proven that its capability can be demonstrated again with the example of the right to strike. Initially, the ILO supervisory bodies developed the right to collective bargaining and collective action.<sup>17</sup> Subsequently, they came to serve as a model for interpretation of other international treaties.<sup>18</sup> Especially when establishing a right to strike from legal sources not providing provisions explicitly formulating such right, courts regularly apply the interpretation developed for ILO Conventions. It also became a source of inspiration for the ECtHR when interpreting Article 11

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<sup>13</sup> As of 19 April 2016.

<sup>14</sup> J.-M. Servais, *International Labour Law* (3. Aufl. 2011), 85.

<sup>15</sup> Compare Opinion of Advocate General Y. Bot, C-399/11, *Melloni* No. 134; K. Lenaerts, "Die EU-Grundrechtcharta: Anwendbarkeit und Auslegung," *Europarecht* 1 (2012): 3, 12.

<sup>16</sup> CJEU, 26 February 2013, C-617/10, *Akerberg Fransson*, §§ 29, 36.

<sup>17</sup> B. Gernigo, A. Odero, and H. Guido, "ILO principles concerning the right to strike," *International Labour Review*, 4 (1998): 441.

<sup>18</sup> J.-M. Servais, *International Labour Law*, 3rd ed. (Alphen aan den Rijn: Kluwer Law International, 2011), 85.

ECHR to include a right to bargain collectively<sup>19</sup> and finally a right to strike.<sup>20</sup> The ECtHR had made an effort to elaborate the methodological reasoning: Starting from the provisions of the Vienna Convention on the Law on Treaties<sup>21</sup>, the relevance of converging developments in international law was underlined, indicating a need to align different interpretations of fundamental rights. The Convention was understood as obliging the respondent state, Turkey, to not exclude all public officials from the right to strike, but restrict this to officials exerting public authority. Because Turkey had not undertaken any international obligation towards guaranteeing a right to strike, such a decision was heavily criticized<sup>22</sup> as subjugating the state to an international standard it deliberately has excluded from acknowledgement<sup>23</sup>. Anyhow, the approach used with the comparative interpretation does not imply merely taking over rights and obligations from one international instrument to the other. The ECtHR refrained from subjugating states parties to the Human Rights Convention to ILO-Conventions or ESC-Articles they have abstained ratifying. The Court merely interprets the Convention in light of internationally developed standards for argumentation.<sup>24</sup> Both approaches differ considerably: In the latter case, the court needs to thoroughly compare relevant international instruments, their content as well as their limitations, to the guarantees provided for by the ECHR and justify using the former for developing the latter. Failing this, no comparable result emerges.

Aligning different methods of interpretation is, however, not universally welcomed: the legitimacy of the methodological approach and the competency of the ILO bodies to provide it were questioned by legal scholars and employers' representatives alike. Employers' representatives in the ILO tripartite bodies formally protested the current working methods, denying any competence of the ILO monitoring bodies to deliver authoritative interpretations to ILO Conventions, especially to

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<sup>19</sup> A. Wisskirchen, *Zeitschrift für Arbeitsrecht* 2003: 691, 711; S. Regenbogen, "The International Labour Organization and Freedom of Association: Does Freedom of Association Include a Right to Strike?" *Canadian Labour & Employment Law Journal* 16 (2011): 385; A. Wisskirchen, "Die normsetzende und normüberwachende Tätigkeit der Internationalen Arbeitsorganisation," *Zeitschrift für Arbeitsrecht* 2003: 691; B. Langille, "Imagining Post 'Geneva Consensus' Labor Law for Post 'Washington Consensus' Developments," *Comparative Labor Law & Policy Journal* 31 (2010): 523.

<sup>20</sup> International Labour Conference, 101st Session 2012, Report of the Committee on the Application of Standards, General Report, PR (rev.) Part I/32, No. 134 ff.

<sup>21</sup> 23 May 1969, *United Nations Treaty Series* 1155, p. I-18232.

<sup>22</sup> M. Henssler, "Arbeitskampf in Deutschland – Wie geht es weiter?" *Zeitschrift für Arbeitsrecht* 3 (2010): 397, 402; M. Jacobs and L. Schmidt, "Anforderungen an Einschränkungen des Streikrechts," *Europäische Zeitschrift für Arbeitsrecht* 9 (2016): 82, 86.

<sup>23</sup> A. Seifert, "Recht auf Kollektivverhandlungen und Streikrecht für Beamte," *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 4 (2009): 357, 362; T. Hebler, "Sind Beamtinnen und Beamte Beschäftigte ohne Grundrechte?" *Der Personalrat* December 12 (2012): 492, 494.

<sup>24</sup> Vgl. etwa: EGMR, 2.10.2014, Appl. Nr. 10609, *Matelly v. France*, Rn. 32 f.; A. Nußberger, DRdA 2015, 408, 410.

acknowledge a right to strike.<sup>25</sup> Representatives of employers in particular underlined their view that international courts should refrain from using such “illegitimate” interpretation as a model for developing convergent international standards.<sup>26</sup> If such arguments were to prevail they could have prevented courts and adjudicating bodies from developing more coherent international interpretative standards in social rights cases.<sup>27</sup> The criticism eventually proved unable to achieve this goal: on a practical level, aligning different interpretations remained successful at international level.<sup>28</sup>

### III. Interpreting the right to strike

Before engaging with aspects of the right to strike potentially benefitting from a more coherent interpretation, courts might struggle to interpret legal provisions under their supervision as actually including a right to take collective action. Historically, several fundamental rights instruments, domestic or international, omitted its explicit regulation as they were unable to come up with one politically viable compromise formulation. Typically, such non-regulation is not directed at implicitly denying a right to collective action altogether; rather, where a political compromise was not found, details have been left to the judiciary for development on a case by case- basis. As legal provisions in the social rights field leave ample room for interpretation, approaching a more coherent understanding of fundamental rights at international level became a more influential strategy.

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<sup>25</sup> International Labour Conference, 101st Session 2012, “Report of the Committee on the Application of Standards,” General Report, PR (rev.) Part I/32, No. 134 et sequ.

<sup>26</sup> A. Wisskirchen, “Die normsetzende und normüberwachende Tätigkeit,” 691, 711; S. Regenbogen, “The International Labour Organization and Freedom of Association,” 385; B. Langill, “Imagining Post ‘Geneva Consensus,’” 523.

<sup>27</sup> M. Choko, “The Dialogue between Canada and the ILO Freedom of Association,” *International Journal of Comparative Law* 4 (2012): 397, 407.

<sup>28</sup> K. D. Ewing and J. Hendy, “The Dramatic Implications of Demir and Baykara,” *Canadian Labor & Employment Law Journal* 15 (2009): 161, 176, 180; P. Barnacle, “Convergence Revisited: Canadian and European Judicial Approaches to Freedom of Association and their Implications for a Constitutional Right to Strike,” *Canadian Labour & Employment Law Journal* 16 (2011): 419, 425; M. Schlachter, “Soziale Rechte auf supranationaler Ebene,” 302; K. Lörcher, *AuR* (2015): 126.

domestic or international, omitted its explicit regulation as they were unable to come up with a politically viable compromise. Such non-regulation is not typically directed at implicitly denying a

right to collective action altogether; rather, where a political compromise was not found, details have been left to the judiciary for development on a case by case- basis. As legal provisions in the social rights-field leave ample room for interpretation, approaching a more coherent understanding of fundamental rights at international level became more influential.

Under the European Social Charter, however, a right to strike was explicitly guaranteed.<sup>29</sup> Article 6 (4) ESC states that

With a view to ensuring the effective exercise of the right to bargain collectively, the parties 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.

Given the history of this international instrument, the content of which was very much influenced by already existing guarantees developed on the basis of the emerging practice of the ILO supervisory Committees,<sup>30</sup> parts of the substance and the monitoring process of the Social Charter were created following the model of the ILO.<sup>31</sup> Therefore, interpretations accepted by the ILO CEACR or by the ECtHR are frequently the starting point for deliberations and interpretations developed by the European Committee of Social Rights.

This first step of ensuring coherence—the acknowledgment that there can be partly identical fundamental rights in different provisions,<sup>32</sup> and that it is worthwhile to consider their content for developing case law<sup>33</sup>—has been closely followed by the European Committee of Social Rights from the start. Considering the merits of a specific case law does, as described earlier, not imply a transfer of the results from one legal instrument to another. Existing differences between the texts of legal

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<sup>29</sup> The drafting procedure drew inspiration from Article 27 of the Inter-American Charter of Social Guarantees: “Workers have the right to strike. The law shall regulate the conditions and exercise of that right.” Council of Europe, *Travaux Préparatoires*, provisional ed., vol. II (1955), 42, 56.

<sup>30</sup> Draft text submitted by the CoE’s Social Committee and debated by the Tripartite Conference convened 1958 by the ILO. *Travaux Préparatoires*, provisional ed., vol. I (1958), p. 481/vol. 2, 518.

<sup>31</sup> S. Evju, “The European Social Charter and the International Labour Organization: Interlinks past and present,” *Festschrift Lörcher* (2013), 146 et sequ.

<sup>32</sup> For an example, see ECtHR, 2 October 2014, Appl. No. 48408/12 *Tymoshenko v. Ukraine*, 43, 32-49.

<sup>33</sup> G. de Burca, “After the EU Charter of fundamental Rights: The Court of Justice as a Human Rights Adjudicator?” *Maastricht Journal of European and Comparative Law* 2013: 168.

guarantees, between the constituencies of their signatories, between the political, economic and social policy contexts and the means for monitoring the implementation of obligations undertaken by States,

prohibit the mere carrying over of what has been developed elsewhere. For justifying differentiations, comparative interpretation would have to point out how relevant similarities and differences in the legal and factual situations are, and how they lead to a specific outcome potentially different from the conclusions of other international bodies.

For the right to strike, important implications follow from the relevance of the collective bargaining system in the countries concerned, particularly from the relative strength or weakness of their unions' bargaining power. In case workers' organizations are strong enough to effectively protect their members' interests by collective bargaining and collective action, legal systems guarantee collective actors substantial room for maneuvering, mostly refraining from state interference. If, however, collective bargaining remains weak, the collective labor law system will depend on state guarantees for bargaining rights and securing collective action. A unified common definition of the right to strike and its limitations across national and international fundamental rights instruments is therefore deemed to be not only unrealistic, but perhaps undesirable. As vividly demonstrated by the difficulties for the CJEU to balance the right to strike against the economic freedoms of undertakings<sup>34</sup>, a supra-national system incapable of protecting and consequentially implementing a right to strike should not consider limiting potentially better developed domestic guarantees.

Aligning interpretations might aim at, first, identifying current developments, both in law and in practice, challenging the exercise of a right to strike in modern societies and identifying all available tools for combating them; second, considering which conditions and limitations to a right to strike won acceptance among decision-making bodies internationally, and eventually establishing a common core of considerations for interpretation. Admittedly, such a working method might prove time consuming for the interpretation process, even prone to prolonging the conflict. However, the available data base improves with each additional case, so that the additional time in preparing the international and comparative material will decrease. Additionally, such a burden does not necessarily rest solely with the decision-making body, as lawyers, particularly when affiliated to a professional organization, may be compelled to identify international legal developments beneficial to their case.<sup>35</sup>

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<sup>34</sup> Examples provided in Roger Blanpain and Andrej Swiatkowski, eds., *The Laval and Viking Cases: Freedom of Services and Establishment vs. Industrial Conflict in the European Economic Area* (Alphen aan den Rijn: Kluwer Law International, 2009), pp. 66, 123 ff.

<sup>35</sup> J. Buelens, "The effectiveness of collective action in the light of international standards: the case of Belgium," *Festschrift Lörcher* (2013): 311, 320.

From the perspective of the ECSR's case law, the following topics represent challenges to the exercise of and limitations to a right to strike, which could finally benefit from developing a more aligned method of interpretation:

- An effective exercise of the freedom of association for the purpose of furthering economic and social interest of employees and employers includes the means of collective bargaining and collective action.
- The right to strike as the most prominent tool of collective action is not the only protected method.<sup>36</sup> New forms of collective action may develop according to changing business models.
- The right to strike represents a right of individual workers and in parallel a right of collective organizations. Individuals may exercise this right whether or not they are affiliated to a union.<sup>37</sup> This does not imply a decision as to who may call a strike.<sup>38</sup>
- The right to strike extends beyond the personal scope of an “employee” as one of the parties to a labor contract.
- Certain categories of employees may be limited in exercising their right to strike, such as “senior civil servants” in the military, police, judiciary,<sup>39</sup> without excluding them totally from such a right.<sup>40</sup>
- Collective actions are a tool for solving conflicts of interests, not of rights.<sup>41</sup>

Such a list is not meant to be definitive: other topics might be considered equally fundamental. In any case, it includes typical basic conflicts of exercising a right to strike. Developing a common method in interpreting a right to strike will not easily be achieved. If such an undertaking were to eventually succeed, protection of a fundamental right would benefit as would legal certainty.

## IV. Conclusion

Besides all existing political and economic differences among States, arguing for different treatment of different situations, fundamental rights do need some coherence at international level. As they are

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<sup>36</sup> ECSR, Conclusions X-1, Norway, p. 76; Collective Complaint No. 59/2009, 13 September 2011, *ETUC et al. v Belgium* § 36.

<sup>37</sup> ECSR, Conclusions VIII-1, Denmark, p. 273.

<sup>38</sup> ECSR, Conclusions 2004, Sweden, p. 565; Conclusions XV-1, Finland, p. 203.

<sup>39</sup> ECSR, Conclusions I – Statement of Interpretation on Article 6 § 4, p. 38.

<sup>40</sup> ECSR, Collective Complaint 32/2005, 16 October 2006, *CITUB et al. v. Bulgaria*, § 46; Collective Complaint 83/2012, 2 December 2013, *EuroCOP v. Ireland*, § § 176-178.

<sup>41</sup> ECSR, Conclusions I – Statement of Interpretation on Article 6 § 4, p. 38.



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challenged by ongoing crises, making fundamental social rights more visible and better enforceable might stabilize protective standards. A coherent interpretation of a common core of fundamental rights develops a level playing field of protection, which will be difficult to obtain but is worth trying.

# Divergence in Fundamental Labor Rights Case Law: Banning Religious Symbols in Public Employment

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## I. Introduction

Ensuring coherence in fundamental labor rights case law is an increasingly pressing issue. Indeed, the proliferation of judicial bodies competent to apply fundamental rights standards has turned coherence into a pressing issue in almost all areas of fundamental rights protection. In this respect, labor rights case law is no exception.



On the one hand, it seems obvious that the increasing number and variety of judicial bodies competent to adjudicate fundamental labor rights create new opportunities for enhancing the protection of those rights. At the same time, however, this development may pose threats to fundamental rights protection if it leads to widely diverging fundamental rights standard setting by different bodies.

One area where fundamental rights protection is clearly at stake concerns the fundamental rights of workers in public employment who wish to wear religious symbols such as a turban, a headscarf, or a kippa at work. The human rights protection these workers receive in European countries differs starkly.<sup>1</sup> In France, for instance, publicly employed personnel are not allowed to express their religion by wearing a headscarf or turban on the job, whereas in the UK this is not a problem. From the point of view of the employees concerned, this is highly problematic. In France, their freedom of religion is much more curtailed than in the UK.

So far, the fundamental rights framework of the European Convention on Human Rights (ECHR) has not created more coherence in this area. The European Court of Human Rights (ECtHR) allows the national authorities a very wide margin of appreciation in regulating manifestations of religion in the

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<sup>1</sup> See for a comparative analysis of France, the UK, and the Netherlands, H. van Ooijen, *Religious symbols in public functions: A comparative analysis of Dutch, English and French justifications for limiting the freedom of public officials to display religious symbols* (dissertation, Leiden University, Antwerp: Intersentia, 2012).

public sphere, thus allowing the divergence in human rights protection of French and UK workers to continue.

As I submit, the Court of Justice of the EU (CJEU) could well take a different approach if it is called upon to provide a preliminary ruling on the issue, as is bound to happen at some point. In fact, several preliminary rulings regarding a ban on headscarves in employment are pending, but so far they concern private employment, not public employment.<sup>2</sup> Given the specific characteristics and goals of the EU legal order the balancing of interests that is ultimately at stake in cases like this could lead the CJEU to arrive at a different outcome and to require more coherence in the approaches taken by the member states in the protection of the freedom of religion of publicly employed workers. At the same time, this would then mean the CJEU is getting out of step with the ECHR fundamental rights standards as interpreted by the Strasbourg Court.

In this contribution, I explore these matters further. To start, I provide a brief overview of the diverging regulation of the wearing of religiously inspired dress in public employment in France, the UK, and Germany (section 2). I then address the way in which the ECtHR has dealt with this matter in its case law so far (section 3) and explore the question of what is to be expected of the CJEU, when it is confronted with similar cases (section 4). I round off with some concluding remarks (section 5).

## II. Diverging approaches to religious dress in public employment in European countries

If you are a religious person and publicly employed and wish to express your religion by wearing a religious symbol at work, you are much better off in the UK than in France.

In France you will not be allowed to wear a headscarf, turban, or any other visible, ostentatious religious symbols because this is regarded as incompatible with the French notion of state neutrality, or *laïcité*. The state is not to express any preference for, or association, with a particular religion, belief, or conviction. It must be strictly neutral. As public functionaries represent the state when at work, they must also abide by this requirement in the way they dress or otherwise express themselves.<sup>3</sup>

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<sup>2</sup> See the Belgian case *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* (Case C-157/15) and the one from France *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole Univers SA* (Case C-188/15). Just before finalizing this contribution the Opinion of Advocate General Kokott was delivered regarding the first case.

<sup>3</sup> For an exposition the report by the Commission that advised the French Government on the introduction of a ban on religious symbols in public education, see Commission de réflexion sur l'application du principe de laïcité dans la République, "*Rapport au président de la République et au parlement*,"

Underlying this notion of *laïcité* is the conviction that this approach is the best way to guarantee the freedom of religion or belief of all subjects of the state. Religious diversity and the expression of personal identity are important values that the state should recognize and protect, but they belong to the private sphere and not to the state sphere. In the latter, people must leave their personal religions or convictions behind so as to meet on the basis of an equal and neutral citizenship. Freedom of religion and belief is thus regarded as a precious and fundamental right, yet one that must primarily find its expression in the private sphere.

The way in which this approach to state neutrality has been elaborated is pretty far reaching. First, the prohibition to wear religious or other symbols applies to all workers who are publicly employed, regardless of whether they come face to face with the general public. So it is not just teachers at public schools or public servants who are in direct contact with the public who have to abide with the prohibition on religious symbols, but also, for example, technicians or administrative personnel who are not in such a position. Second, the regulations also cover employees of private employers if the firms concerned provide public services. This significantly increases the number of workers affected. Although the regulations have been challenged, the highest French judicial bodies have upheld them to date.<sup>4</sup>

UK practice regarding the wearing of religious symbols in public employment is almost the polar opposite. Religion and belief are not banned from the state sphere and its visible presence is not considered problematic. Be it civil servants or public school teachers, expressing religion or belief through a headscarf, turban, or other symbols is allowed, though more extreme forms of dress, such as a niqab or other face-covering veils, have been prohibited.<sup>5</sup> Even some police officers, who can be seen as representing the state par excellence, have been provided with turbans and headscarves matching their uniform. In addition, since 2011, a Sikh judge in the High Court sits with a turban.<sup>6</sup> This would be unthinkable in France. In the UK, the neutrality the state has to display toward its subjects is not perceived to require a uniform outward appearance, but is rather sought in the inclusion of diversity.

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11 décembre 2003, <http://www.ladocumentationfrancaise.fr/rapports-publics/044000099-rapport-2003-au-president-de-la-republique-et-au-parlement> (accessed 27 May 2016).

<sup>4</sup> For a succinct overview of the legal state of affairs in this matter, see the guidelines in *Le fait religieux en entreprise, La Collection 'Vivre ensemble, travailler ensemble' no 2*, issued by the French confederation of trade unions CFDT, [https://www.cfdt.fr/upload/docs/application/pdf/2015-12/guide\\_fait\\_religieux\\_en\\_entreprises\\_-\\_bd.pdf](https://www.cfdt.fr/upload/docs/application/pdf/2015-12/guide_fait_religieux_en_entreprises_-_bd.pdf) (accessed 27 May 2016).

<sup>5</sup> Such prohibition is then for different reasons, such as communication being hampered by the wearing of a face covering veil. For an overview, see Van Ooijen, *Religious symbols in public functions*, note 1.

<sup>6</sup> Jerome Taylor, "High Court appoints its first Sikh judge," *The Independent*, 29 July 2011, <http://www.independent.co.uk/news/uk/home-news/high-court-appoints-its-first-sikh-judge-2328658.html>.

Germany is somewhere in between the UK and the French approach. A good illustration of this concerns the position of public school teachers. The question whether teachers are allowed to wear a headscarf in the classroom has been a contested issue for quite some time. In 2003, in *Ludin*, the German Constitutional Court held that a ban on the wearing of a religious symbol such as a headscarf in a public school is not allowed if it does not have an adequate basis in law. This means that individual Länder, or states, are free to either ban or allow it, but they must provide for a proper legal foundation and in doing so should take into account all the relevant interests at stake, including the freedom of religion of the teacher, the neutrality of public education, and the rights of the children and of the parents.

In response to the judgment in *Ludin*, several states designed laws that prohibit the wearing of headscarves and other, especially non-Christian, religious symbols. When one of these was challenged before the Constitutional Court, the Court made clear that it will closely review any prohibitions of this sort. The ban instituted by the German state *Nordrhein-Westfalen* was held to be disproportionately limiting the freedom of religion and thus in breach of the Constitution. Although the protection of the state's duty of neutrality and of the school peace were each considered to be a legitimate aim, the regulation was based on an abstract assessment that the wearing of a headscarf endangers the state's duty of neutrality and the school peace. There was no evidence of a sufficiently specific danger to neutrality and school peace.

This overview shows how workers in Europe are faced with widely diverging limitations to the expression of their religion or belief at the public workplace, and how courts at the national level dealing with these issues have come to very different conclusions in terms of their compatibility with human rights standards. Given the framework of the European Convention on Human Rights on the one hand and of EU law on the other, case law of the ECtHR and the CJEU could be expected to bring about more coherence in this area.

### **III. The European Court of Human Rights and bans on religious dress**

In the landmark judgment of 2005 in *Sahin v. Turkey*, the European Court of Human Rights held that Turkey was free to prohibit the wearing of headscarves and other religious symbols by students (and not just teachers) at state universities to protect the principles of, among others, state neutrality.<sup>7</sup> A decisive element in the judgment of the Court was its consideration that where the regulation of the relationship between state and religion is concerned, the national authorities enjoy a wide margin of

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<sup>7</sup> ECtHR 10 November 2005, *Sahin v. Turkey* (Grand Chamber), Appl. no. 44774/98.

appreciation.<sup>8</sup> Similarly, in 2009 the European Court of Human Rights decided that France could exclude Sikh and Muslim pupils who refused to abide by a ban on the wearing of a turban or headscarf at a public school. Again the Court decided that measures such as those regulating religion in the public sphere fall within the state's margin of appreciation.<sup>9</sup>

Subsequent case law has confirmed this approach. The Grand Chamber judgment of the Court in *Lautsi v. Italy* (2011) is another landmark case.<sup>10</sup> In it, the Court accepted that Italy did not overstep its margin of appreciation by hanging crucifixes in public school classrooms. The message to be taken from these cases seems clear: the Court will not interfere in the issues at stake, which are politically very sensitive and have raised considerable public debate across Europe. The results of this deferential approach are also clear: under the ECHR standards as developed by the Court, the widely divergent practices between European countries described above are allowed. The national authorities are free to decide what or whom to protect and the Court sets no uniform European human rights standards in this area.

This approach has recently been confirmed in a case that specifically challenged the French ban on the wearing of religious symbols by workers in public employment, *Ebrahimian v. France*.<sup>11</sup> The case concerned a social worker employed in a psychiatric public hospital whose contract was not renewed because she refused to remove her headscarf at work. The Court again left a wide margin of appreciation to the national authorities and held that France's general ban on ostentatious religious symbols, such as the wearing of a headscarf, is permissible to protect the rights of others, that is the freedom of religion of the users of the public service. Importantly, and contrary to the standard of review applied by the German Constitutional Court in its 2015 judgement on the legal regulation in *Nordrhein-Westfalen*, the European Court accepted the abstract character of the French justification for the ban and did not require a more rigid and specific assessment of why the wearing of a headscarf by the social worker posed a threat to the freedom of religion of others.<sup>12</sup>

All in all, the case law of the ECtHR shows that, so far, the Court has not been willing to step in to provide more coherence in the approaches taken in European countries toward banning religious symbols in public employment. As a result, the Court gives its blessing in this area to widely diverging

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<sup>8</sup> *Ibid.*, § 109.

<sup>9</sup> Several rulings were handed down on the same date: ECtHR 30 June 2009; on headscarves: *Aktas v. France*, Appl.no. 43563/08; *Bayrak v. France*, appl.no. 14308/08; *Gamaleddyn v. France*, Appl.no. 18527/08; *Ghazal v. France*, Appl.no. 29134/08; on turbans: *Javir Singh v. France*, Appl.no. 25463/08; *Ranjit Singh v France*, Appl.no. 27561/08.

<sup>10</sup> ECtHR 3 November 2009, *Lautsi v. Italy*, appl.no. 30814/06.

<sup>11</sup> ECtHR 26 November 2011, *Ebrahimian v. France* (appl. No. 6446/11), available in French only.

<sup>12</sup> This is in fact part of the critique of the dissenting judges in the case, see *ibid.*

levels of fundamental rights protection for workers across Europe. Furthermore, by granting the national authorities an almost free hand, the Court also paves the way for a lowering of standards regarding the freedom of religion at the workplace in those countries where this freedom so far is less restricted than in France. Given the increasing social and political tensions related to the immigration crisis in general and the existence of hostile attitudes toward Muslims in several European countries in particular, such leveling down seems to be a serious scenario. This is highly problematic, especially for workers who regard the wearing of certain religious symbols as a fundamental aspect of their religious identity or as a prescriptive religious practice. It may seriously affect their job opportunities. Given the principled position taken by the Court regarding the wide margin of appreciation to be left to the national authorities, it is not very likely that this situation will change. This makes it all the more important to see whether the CJEU may perhaps take a different approach given the specific exigencies of the EU legal order and the specific role of EU law.

#### **IV. The EU Court of Justice and bans on religious dress**

As mentioned, preliminary questions on banning headscarves at work are pending for the CJEU. Both cases concern private employers, not public ones or private ones providing public services. Nevertheless, the Courts reasoning regarding bans in private employment may well shed light on the larger issues at stake and in any case it will only be a matter of time before public employment cases will reach the CJEU as well.

If this is to happen, a crucial question is whether the CJEU will follow a similar line as the ECtHR or not: will it be as deferential as the Strasbourg court or much stricter?<sup>13</sup> Stricter review need not lead

the Court to impose a strictly uniform standard on regulating religious dress at the workplace, but as the judgment of the German Constitutional Court shows, it will definitely lead to a far more critical evaluation of overly broad regulations based on abstract assessments of the dangers of the wearing of religious symbols to neutrality or other interests. A broad ban like the French one would probably not survive more rigorous scrutiny.

In this respect, the balancing test that will ultimately have to be conducted under the applicable EU equal treatment directives is quite similar to the review by the ECtHR under the ECHR. Space does not

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<sup>13</sup> Though in a preliminary procedure the Court will formally not decide a case but leave it up to the national judge to apply the principles and criteria it has formulated, in practice the way in which the court formulates its ruling will leave either much or little discretion for application at the national level. See more extensively Christa Tobler, *Indirect Discrimination: A Case Study into the Legal Development of the Concept of Indirect Discrimination under EU Law* (Antwerpen: Intersentia 2005), 243.

allow for this point to be elaborated here, but in both instances the courts have to assess whether the ban concerned pursues a legitimate aim and whether the means chosen are proportionate.<sup>14</sup> Will the Luxemburg Court also accept abstract balancing as the Strasbourg Court did, or will it require a more specific (and thus more strict)—or even individualized—assessment of the threats posed by the wearing of a headscarf or other religious symbol to state neutrality or other legitimate interests that may be at stake? In addition, will in fact the CJEU include other interests in the balancing exercise than have been considered by the ECtHR?

My contention is that several reasons exist why the CJEU should follow a different line from the ECtHR and leave less discretion to the national authorities, given the specific context of EU law and the impact this may have on striking a (different) balance. At the same time, it should be acknowledged that strong reasons exist that may induce the Court to take a deferential stance.

### Reasons for leaving little leeway to the member states

The main reasons for the CJEU to require a stricter review than the ECtHR applies in similar cases regarding the importance of enhancing the uniformity and efficacy of EU law, of guarding the free movement of workers, and of upholding the rather strong protection against discrimination at the workplace provided by the EU equal treatment directives so far.<sup>15</sup>

In regard to the first reason, the different purpose of EU law and the concomitant supervisory role of the CJEU versus the ECtHR are both clear. For the EU, ensuring the uniformity and efficacy of its law is of crucial importance for its functioning. Uniformity and efficacy may be endangered if member states are allowed to come to widely diverging results in regulating the wearing of religious symbols at the workplace when transposing the same EU directives, as is the case if we compare the outcome for the workers concerned in France and the UK. The importance attached by the CJEU to the uniformity and efficacy of EU law is illustrated by the *Melloni* case, in which the CJEU did not allow member

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<sup>14</sup> For a detailed comparison of the standards of review applicable to a ban on religious symbols for public officials under the ECHR and the EU equality directives see S. Speekenbrink, *European non-discrimination law: a comparison of EU law and the ECHR in the field of non-discrimination and freedom of religion in public employment with an emphasis on the Islamic headscarf issue* (dissertation Utrecht University, Antwerpen: Intersentia, 2013).

<sup>15</sup> See for some further exploration M.L.P. Loenen, *Mensenrechten en diversiteit in Europa: gelijke monniken, ongelijke kappen?* (Inaugural address Leiden University 2013; <https://openaccess.leidenuniv.nl/bitstream/handle/1887/22183/Oratie%20Loenen.pdf>), and M.L.P. Loenen and L. Vickers, “More is less? Multiple protection of human rights in Europe and the risks of erosion of human rights standards,” in *Fundamental rights in the EU. A matter for two courts*, ed S. Morano-Foadi & L. Vickers (Oxford: Hart Publishing, 2015): 159-77.

states to apply a higher fundamental rights standard than provided for in the applicable EU rules, as it would be incompatible with those principles.<sup>16</sup>

As regards the second reason, the free movement of workers belongs to the core values and freedoms of the EU and the CJEU has a prominent role in protecting it against being undermined either directly or indirectly. It seems obvious that restrictions regarding the wearing of religious symbols in a broad range of employment affect this freedom. Many Muslims or Sikhs may be inhibited from moving from countries allowing them more freedom to express their religion such as the UK to France where they will be faced with less job opportunities. This may be exacerbated by the fact that the strict adherence to *laïcité* may also pose a serious barrier for their children to attend school, given that French law also prohibits pupils from wearing any ostentatious religious symbols at public schools. To what extent will this impact on the freedom of movement, inducing the CJEU to give France less leeway than it has had so far to severely restrict the wearing of religious symbols in public employment?

The third reason is more closely connected to the European nondiscrimination standards at stake in this case. Antidiscrimination standards have been part of EU law from the start and the grounds covered have been extended over time from discrimination on grounds of sex to other grounds.<sup>17</sup> As far as employment is concerned, EU law includes several directives covering discrimination on grounds of sex,<sup>18</sup> race or ethnic origin,<sup>19</sup> and sexual orientation, handicap, age, and religion or belief.<sup>20</sup>

As mentioned, no case law regarding discrimination on grounds of religion in employment yet exists, so it is difficult to say how strict the CJEU will review this type of discrimination. Interestingly, however, it is not inconceivable for a similar case to be presented as a claim of indirect discrimination on grounds of sex, or on grounds of race or ethnic origin. Indirect discrimination is also covered by EU law. Indirect discrimination on grounds of sex or race discrimination it is at stake when an apparently neutral provision, criterion or practice puts persons of one sex or race/ethnic origin at a particular disadvantage compared with persons of the other sex or another race/ethnic origin, unless that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving

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<sup>16</sup> CJEU 26 February 2013, *Melloni v. Ministerio Fiscal* (Case C -399/11).

<sup>17</sup> For an overview of EU discrimination law see Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law*, 2nd ed. (Oxford: Oxford University Press 2012).

<sup>18</sup> Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L204/ 23 (Recast Directive).

<sup>19</sup> Directive 2000/43/EC of 29 June 2000 on the implementation of equal treatment irrespective of race or ethnic origin in employment and regarding access to and supply of goods and services, OJ L180/22 (Race Directive).

<sup>20</sup> Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L303/16 (Framework directive).

that aim are appropriate and necessary.<sup>21</sup> So the disparate impact of a ban on religious symbols on specific groups of women compared with men, or on specific ethnic groups, may trigger review under those directives.

In the case at hand, it could be argued that in France a ban on wearing religious symbols in public employment will have such a disparate impact on Muslim women because they will be more affected than Muslim men. Similarly, a case could be made that the ban has a disparate impact on specific ethnic minorities given that the groups most affected are people of North African descent. If the Court acknowledged the existence of such a disparate impact, it would have to assess whether an objective justification is indeed present. Generally speaking, the Court requires an exacting scrutiny when indirect discrimination on grounds of sex or race/ethnic origin is concerned.<sup>22</sup> Under such scrutiny, it is doubtful whether a broad ban on religious symbols, as applied in France, which also covers privately employed persons who render public services and persons who have no face-to-face contact with the general public.

### Reasons for leaving much leeway to the member states

This said, several strong reasons may tilt the balance toward the CJEU's not imposing a more uniform standard regarding religious dress codes in public employment across the member states and leaving them much leeway.

To start, a legal argument would tie in with the obligation of the EU laid down in article 4 of the Treaty of European Union to respect the national identities of the member states as manifested, among others, in their constitutional structures.<sup>23</sup> There is little doubt that the very notion of *laïcité* is integral to the French national identity as manifested in its constitutional tradition. However, even if this is accepted, the concrete content and implementation of this principle is not necessarily set in stone, that is, is not subject to change.<sup>24</sup>

Several other reasons of a more political nature stand out. To start with, the Court may wisely want to stay away from politically highly sensitive issues. For France, its particular notion of state neutrality

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<sup>21</sup> Article 2(1)(b) Recast directive, *supra* note 18; Article 2(2)(b) Race Directive, *supra* note 19.

<sup>22</sup> For an overview of the case law, see Ellis and Watson, *EU Anti-Discrimination Law*; E. Howard, *The EU Race Directive: Developing the Protection Against Racial Discrimination within the EU* (London: Routledge, 2010).

<sup>23</sup> Article 4(2) TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

<sup>24</sup> In addition, according to some scholars Article 4(2) TEU is unlikely to provide an autonomous basis for a claim to respect national identity. See Nik de Boer, "Addressing rights divergences under the Charter: Melloni," *Common Market Law Review* 50 (2013): 1097.

and the concrete implementation thereof no doubt constitutes such an issue, but in other countries this topic also raises considerable—often heated—public debate. In addition, like the ECtHR, the CJEU represents a form of supranational power that has increasingly come under attack. The recent Brexit is a clear warning.<sup>25</sup> Such challenges to EU authority and legitimacy may induce the Court not to ruffle the feathers of some of the Member States any more than strictly necessary, especially when it concerns some powerful ones.

The opinion of Advocate General Kokott in one of the preliminary proceedings pending for the CJEU mentioned would clearly appear to support a deferential approach by the CJEU.<sup>26</sup> Even if it is dealing with a ban on religious symbols in private employment and not public employment, the very deferential line she advises the Court to take and the way in which she develops her arguments strongly suggests that she is in favor of giving the Member States a largely free hand. The sensitivity of the matter is explicitly referred to as a reason to do so. As she puts it,

In a case such as this, the proportionality test is a delicate matter in the context of which the Court of Justice, following the practice of the ECtHR in relation to Article 9 ECHR and Article 14 ECHR, should grant the national authorities, in particular the national courts, a measure of discretion which they may exercise in strict accordance with EU rules. In this regard, the Luxembourg Court does not necessarily have to prescribe a solution that is uniform throughout the European Union. Rather, it would be sufficient, in my opinion, for the Court to indicate to the national court all of the material factors that it must take into account in carrying out the proportionality test but otherwise to leave to that court the actual task of striking a balance between the substantive interests involved.<sup>27</sup>

The CJEU should therefore provide the factors that must be taken into account when carrying out the proportionality test, but leave it to the national court to actually strike a balance between the interests involved. A uniform standard across Europe is not required.

Bearing in mind the importance attached to the uniformity and efficacy of EU law in the *Melloni* case mentioned above, it is remarkable the Advocate General does not explain any further why a need for a more uniform standard is lacking. Equally remarkable is the ease with which she discards the possibility of a ban on religious symbols coming in the purview of indirect discrimination on grounds of sex or ethnic origin. Without any further investigation she concludes that “So far as it is possible to

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<sup>25</sup> At the time of writing, the British referendum on this topic had not been held yet.

<sup>26</sup> Opinion of Advocate General Kokott, 31 May 2016, *Samira Achbita en Centrum voor Gelijke Kansen en voor Racismebestrijding v. G4S Secure Solutions NV* (Case C-157/15).

<sup>27</sup> *Ibid.*, § 99.

tell, a company rule such as that, at issue (...) is capable of affecting men just as much as women, and, moreover, does not appear to put employees of a particular color or ethnic background at a particular disadvantage.”<sup>28</sup>

On the other hand, however, she gives much weight to the need for the EU to respect the national identity of the member states. She mentions France as an example of a country where secularism has constitutional status and where a respect for national identity may mean that more far reaching restrictions on the wearing of visible religious symbols would be acceptable.<sup>29</sup> She also mentions the freedom of employers to conduct a business in a free and open market as an important interest.<sup>30</sup> Surprisingly, the importance of the free movement of workers for guaranteeing an open and free market is not referred to as an interest to take into account.

To conclude, as far as Advocate General Kokott is concerned, the reasons elaborated above to support a deferential review are taken on board whereas those that would call for giving less leeway to the national court hardly received any attention to start with.

## V. Concluding remarks

We will have to wait and see what line the CJEU actually takes regarding regulations that ban the wearing of religious symbols in public employment. Whatever the outcome, the issue clearly highlights the complexities and dilemmas involved with the proliferation of judicial bodies dealing with the same type of cases in different legal settings and from different perspectives. Where, ultimately, the outcome of fundamental rights cases, such as those at hand, depend on the balancing of all the interests at stake, different legal regimes and different social, economic and cultural settings may lead to different interests being identified and held in the balance, resulting in widely diverging outcomes. From the point of view of the protection of the fundamental rights of the workers involved, this is highly unsatisfactory. For those for whom religion is a core part of their identity, the question whether they are also allowed to express this identity at work is not trivial. It is difficult to explain why the freedom of workers to do so is protected so much better in one European country than in another, despite the fact that the same fundamental rights standards apply to those countries.

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<sup>28</sup> Ibid., § 121.

<sup>29</sup> Ibid., § 125.

<sup>30</sup> Ibid., § 134.

# Understanding Fundamental Labor Rights: Achieving Social Justice through Interpretation

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## I. Introduction

This paper examines fundamental labor rights and their interpretation. Because the International Labour Organization (ILO) is the main international player, the focus is predominantly on ILO instruments, Conventions, and Recommendations, but some attention is given to some European and UN instruments as well.

The paper is structured as follows. The debates regarding the interpretation of fundamental labor rights can only be well understood against the background of the debate on the differences between on one hand civil and political human rights, and on the other social, cultural, and economic rights. Therefore, we begin with a short summary regarding this divide and its relevance for our topic. The paper includes some general reflection on the interpretation of international treaties generally before discussing the content and interpretation of the eight core ILO Conventions on fundamental labor rights. The challenges of interpreting these instruments in the new environment of legal pluralism within the context of multiple sources and several interpretative bodies using the same instruments are addressed. Finally, some reflections on how to deal with the challenges identified are presented.



## II. Labor Rights as Economic and Social Rights

The experiences of World War II resulted in a global demand for the enhancement of human rights and establishing legal guarantees in order to assure that they are respected. The first visible result of these efforts on the global level was the Universal Declaration on Human Rights adopted in 1948.<sup>1</sup> This declaration covered not only civil and political rights, but also economic, social, and cultural rights.

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<sup>1</sup> The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations and of fundamental human rights to be universally protected.

However, the cold war saw a division both in the UN system as well as in the European Council, where separate instruments were developed for different types of human rights. The rationale behind this was an understanding advocated by western and Anglo American experts, according to which civil and political rights are individual, binding, and directly applicable rights, whereas social and economic rights are programmatic policy principles and not as such directly applicable. This divide was a decisive factor that led to the exclusion of economic and social rights from the European Convention on Human Rights (ECHR) when it was adopted in 1950 and the drafting of a separate European Social Charter in 1961.<sup>2</sup> A similar division was prevalent in the human rights architecture of the UN in the 1960s.<sup>3</sup> The ILO instruments regarding freedom of association, for obvious reasons, never made such a distinction because the whole idea behind them was that not only States but also private employers should respect the right to associate and bargain freely.

The relevance of the historical divide between civil and political rights on the one hand and economic, social, and cultural rights on the other has gradually diminished. On the contrary, the view that all human rights are universal, indivisible, and interdependent and related has gained ground. This was also the starting point for the European Charter on Fundamental Rights of the European Union agreed upon in the form of a Declaration in Nice in 2000 and later entered into force as a binding part in the Treaty of Lisbon, which entered into force on 1 December 2009. Here all types of rights are included and no clear provisions regulate the binding effect of different provisions within the Member States.

The States have obligations not only to respect certain human rights, but also to ensure the enjoyment of these rights to all individuals under their jurisdiction. This calls for specific activities by the State parties to enable individuals to enjoy their rights. These activities can be summarized as an obligation to respect, protect, promote, and fulfil the rights individuals enjoy under a human rights instrument. Because the enjoyment of the human rights might be hindered by private actors, the State Party also has a duty to act with *due diligence* to eliminate the obstacles for implementation of fundamental rights and to prevent violations and to protect individuals. Another undertaking to promote the situation of individuals is affirmative action.

It is, however, important to recall that we are discussing State Part obligations in an era when it has become rather difficult for States to control and regulate big international players.

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<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4/11/1950 (ECHR) and the European Social Charter Turin, 18/10/1961 (ESC).

<sup>3</sup> International Covenant on Civil and Political Rights (1966) which entered into force 23 March 1976 and the International Covenant on Economic, Social and Cultural Rights (1966) which entered into force 3 January 1976.

### III. How to interpret instruments laying down fundamental labor rights?

The fact that we have several sources regulating international labor standards raises the issue of how to interpret international instruments. The Vienna Convention on the Law of Treaties<sup>4</sup> lays down the authoritative guidelines in this regard. Article 31 codifies the general rules of interpretation.<sup>5</sup>

Although the Vienna Convention is not, as such, binding on the ILO because international organizations cannot be contracting parties to this treaty, the Convention is generally regarded as representing binding principles of international law, at least when it comes to the interpretation of treaties. The significant role of some ILO Conventions for national courts can therefore be justified in the light of the clear references in Article 31.3 to “relevant rules of international law” and “any subsequent practice.”<sup>6</sup>

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<sup>4</sup> 3) Concluded at Vienna on 23 May 1969

<sup>5</sup> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

<sup>6</sup> See also Niklas Bruun and Klaus Lörcher, “Social Innovation: The new ECHR jurisprudence and its impact on fundamental social rights in labour law,” *Mélanges à la mémoire de Yota Kravaritou: a trilingual tribute*, ed. Isabelle Schömann (Brussels: European Trade Union Institute, 2011), 353–80.

#### **IV. ILO standards on fundamental labor rights and the role of interpretation in their implementation**

In 1998 the ILO Conference decided to proclaim eight of the existing labor Conventions<sup>7</sup> as Core Labor Standard Conventions. These were divided into four categories: freedom of association and the effective recognition of the right to collective bargaining, elimination of forced or compulsory labor, abolition of child labor, and elimination of discrimination with respect to employment and occupation.

The decision on the core labor standards was taken in the form of an ILO Declaration on Fundamental Principles and Rights at Work. The Declaration commits Member States to respect and promote principles and rights whether or not they have ratified the relevant Conventions. This declaration makes it clear that these rights are universal, and that they apply to all people in all States regardless of the level of economic development. It particularly it mentions groups with special needs, including the unemployed and migrant workers. It recognizes that economic growth alone is not enough to ensure equity, social progress, and eradication of poverty.

The commitment by all member states to abide by the core Conventions is supported by a follow-up procedure. Member States that have not ratified one or more of the core Conventions are asked each year to report on the status of the relevant rights and principles within their borders, noting impediments to ratification and areas where assistance may be required. These reports are reviewed by the Committee of Experts. In turn, their observations are considered by the ILO's Governing Body.

When discussing the interpretation of the ILO core Conventions, it is important to note certain basic facts. Most of these Conventions are rather old. The sole exception is the new legally binding Protocol on Forced Labour, supported by a Recommendation (No. 203), aiming to advance prevention, protection, and compensation measures, and to intensify efforts to eliminate contemporary forms of slavery. The Convention regulating the worst forms of child labor dates to 1998. The older instruments are rather short and many of the interpretations concerning their content have gradually been developed in practice.

The drafting policy when regulating fundamental rights that should be applied globally and universally is, for many good reasons, often driven by the intention to produce concise and declaratory instruments.

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<sup>7</sup> Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Forced Labour Convention, 1930 (No. 29) and Protocol of 2014 to the Forced Labour Convention, 1930 and Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203); Abolition of Forced Labour Convention, 1957 (No. 105).

If human rights instruments contain especially detailed rules, they might not function in diverse contexts, which again might create problems regarding ratifications or implementation. Within the ILO and its tripartite structure, slightly different views have traditionally been held on the preferable drafting approach. Employers have tended to prefer short and general instruments, trade unions often argue for detailed regulation in order to avoid what they see as watering down or downgrading of certain rights in the context of national implementation.

Both approaches can be defended. Short general texts create predictability problems and can lead to legal uncertainty. It is a legitimate requirement that State Parties should know what obligations they undertake when they ratify a Convention. If the text is short and general, we might find out the real content only after the implementation phase when the supervisory bodies have to assess what the implementation requires.

Detailed rules, on the other hand, might not only create problems for Member States with different labor market institutions, but also block the possibility of a dynamic legal evolution of interpretation in accordance with the development of values in society.

Such a dynamic interpretation has clearly been prevailing regarding the ILO Conventions that were adopted in the aftermath of World War II. This is very clear if we look at Conventions 100 and 111 on equal treatment and nondiscrimination. Here the views and even the conceptual framework regarding discrimination have developed considerably since these Conventions were adopted in the 1950s. For instance, the concept of sexual harassment at the workplace is not explicitly mentioned in the text of Convention 111, but recognition is widespread that this is one important form of discrimination covered by the Convention. Regarding the Freedom of Association Conventions 87 and 98, we can find examples of generally accepted interpretations that actually cannot be found in the wording of the Convention. One example is that the right to strike is not mentioned in Convention 87. Another is that the obligation for State parties to promote collective bargaining has been given a rather far-reaching interpretation in the practice of the ILO supervisory bodies.

It is generally accepted that all international treaties must be interpreted. Within the UN Treaty system special Treaty Bodies are given the authority of interpretation. When a Treaty itself gives the power of interpretation to an impartial body, the starting point is that if that body comes up with interpretations that cannot be accepted by the parties to a Treaty, then the Treaty text can be changed.

Some of the changes in the European Treaty of Rome, for example, have been undertaken to measure some of the outcomes of the Court of Justice of the European Union. In other cases, it is usually understood that the “ownership” of the interpretation of a Treaty is with the body created for this

purpose, the organization that has developed the Treaty or a special body to which such powers are given.

One problem within the ILO seems to be that the legal authority to interpret the Conventions has in practice been given to the Committee of Experts (CEACR) and the Committee of Freedom of Association (CFA). In fact, and formally, however, the power lies with the Governing Body of the ILO, which in practice has long agreed that it does not intervene in the activities of the CFA and the CEACR. This long-standing practice was contested by the employers in 2012 regarding the right to strike and though the dispute is now stalled, it cannot be regarded as resolved.

## V. “Ownership” of Conventions – can any form of coherence be sustained in a system of legal pluralism?

The need for social justice and fair competition (avoiding social dumping) has led to an extensive use of ILO standards, and especially of the core labor standards proclaimed in 1998, in numerous situations and by many types of actors.

In this context, it is not possible to discuss all the situations in which ILO standards are used, but a few examples are representative:

1. Free trade agreements (both bilateral and multilateral) might use references to ILO standards to ensure that certain labor standards cannot be deemed as an obstacle to trade.
2. In public procurement contracts (based on obligations in national law or without such obligations) in Europe, ILO standards are used, especially to avoid applications from subcontractors. In the new 2014 EU Directive on public procurement<sup>8</sup> it is explicitly stated that Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions listed in Annex X. In Annex X we find explicit references, among others, to the eight core ILO Conventions.
3. Certificates and standards might include requirements on how a product is produced (for example FAIR TRADE labels).

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<sup>8</sup> See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.

4. Corporate Social Responsibility (CSR) clauses often refer to a commitment or an obligation to respect the ILO core labor standards.
5. Control of subcontractors and supply chains might also include ILO standards outside the context of public procurement.

These are only a few examples of the very different contexts in which we can find references to, and use of, ILO Conventions, Recommendations, standards, and principles.

We find labor standards in both global and regional human rights instruments. Among the global instruments, the UN Human Rights Conventions are critical. From a European perspective, the two important regional instruments in the context of the European Council are the European Convention on Human Rights ECHR and the European Social Charter ESC.

We have seen a development toward a multitude of instruments and decision makers that deal with fundamental labor rights, but in most cases the human rights bodies within the UN and the European Council bodies generally have respected, with some exceptions, ILO standards and practice and have used them as an important starting point for their own interpretations.<sup>9</sup>

In addition, different decision makers in panels or arbitration, as well as national courts, frequently look for the prevailing ILO standard as defined by the CEACR or the CFA.

The increased use of fundamental ILO labor standards by private and semipublic actors, however, might also result in a less coherent practice regarding the interpretation of these instruments. Especially in situations where actors refer to the principles of these instruments, it might be unclear whether this also covers the jurisprudence of CEACR and the CFA.

The systematic questioning of the legitimacy of the CFA and CEACR—which lately has been expressed by the employers group within the ILO, as well as by some representatives for State parties and academics—must be taken seriously. It would not be surprising if some actors outside the ILO in the aftermath of these debates were to begin to openly argue that it is legitimate to apply ILO standards independently, not bound by the prevailing ILO interpretation from supervisory bodies. This again would have a detrimental effect on upholding minimum standards and achieving social justice.

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<sup>9</sup> This has been proclaimed as a fundamental methodological approach by the European Court of Human Rights in the famous case *Demir and Baykara v. Turkey*, ECtHR [Grand Chamber], 12 November 2008, App No 34503/97, ECHR 1345.

There is no doubt that it is difficult to uphold consistency and coherence in the complex regulatory framework of fundamental labor rights in an environment of multiple actors and sources. On the other hand, these difficulties do not justify giving up the ambition to protect the minimum standards as defined by the ILO, but on the contrary raise the challenge of how to remedy the present situation.

## **VI. How can legitimacy be restored in the ILO supervisory system?**

The debate on the interpretation of Convention 87 and the right to strike must also be seen in light of the increased use of core ILO labor standards. The debate has clearly demonstrated the need to restore the legitimacy of the supervisory system of the ILO. A reasonable and predictable way to resolve disputes of interpretation should be in place.

For many reasons, the International Court of Justice envisaged by the ILO Constitution as the last instance for resolving disputes is not well placed to handle disputes regarding the content of international labor standards. During the debate on the right to strike, this option was on the table as a serious alternative, but many doubts were raised. The need for having a special Court especially equipped for disputes within the ILO system is evident.

I therefore see a need to consider the contested issue of establishing an independent ILO tribunal as foreseen in Article 37 (2) of the ILO Constitution.<sup>10</sup> I do not see the possible avenue to the International Court of Justice as foreseen in the ILO Constitution Article 37 (1) as feasible in disputes regarding the content of ILO Conventions. For such disputes, the ILO needs a specialized authoritative instance with material knowledge of social and labor matters. The possibility of taking an issue to such a Court would strengthen the positions of the CFA and the CEACR because their interpretations would be regarded as valid if not contested in an ILO tribunal.

The proposal to use the option under Article 37 (2) has been labeled as unrealistic by some. It is clear that introducing reforms in global organizations like the ILO is difficult. On the other hand, a common global understanding exists on how to organize an independent court; the views held by the tripartite constituencies in the ILO on this issue are not impossible to merge into a consensus solution.

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<sup>10</sup> See also Abdul Koroma and Paul van der Heijden, “The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association,” Submitted to the Governing Body for the 326th Session, 10-24 March 2016.

## VII. Conclusions

The main points of the presentation are as follows:

- It is necessary to interpret fundamental labor standards in a dynamic way to achieve social justice. Interpretation is critical in order to avoid inflexible standards. We have guidance for how interpretation can be handled in the Vienna Convention and evolution through interpretation is an essential part of a functioning system for fundamental labor standards.
- The risk is real that the ILO ownership of ILO instruments is endangered by increased legal plurality in combination with undermined legitimacy of ILO authoritative interpretations.
- One possible solution to this problem is to establish an in-house ILO tribunal under Article 37 (2) of the ILO Constitution. This option should be thoroughly investigated and discussed.

# The ILO and the Interpretation of Fundamental Rights at Work: A Closer Look at Establishing a Tribunal under Article 37(2)

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## I. Introduction

The increasing fragmentation of international labor law—and of international law more generally—is one of the reasons for the increasing questions about the need for the establishment of an interpretative tribunal within the ILO. International labor conventions are generally quite flexible, as well as often quite ambiguous, and some—in particular fundamental conventions—have been cited in various international policy and legal instruments outside the ILO. There is therefore a clear and pressing need for some clarity to be established as to their meaning in practice.



A second reason also militates for the establishment of an interpretative tribunal. Indeed, discussions on interpretations within the ILO and, in particular, the authority to proceed to such interpretation have taken an especially urgent turn since 2012. In June of that year, the Employers' Group put a stop to the usual proceedings at the annual International Labour Conference (ILC) as part of a strategy of escalating their opposition to the interpretation of a right to strike in fundamental Convention No. 87 on Freedom of Association and Protection of the Right to Organise by the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts).<sup>1</sup>

The Employers' Group had been developing their arguments against the interpretations of the Committee of Experts and the content of the right to strike since 1989, when the alliance between workers and employers within the ILO collapsed along with the Berlin Wall, and their arguments raised long-standing issues concerning interpretations in the ILO, the mandate to interpret conventions within the ILO, as well as the question of the legal significance of supervisory bodies'

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<sup>1</sup> See Janice Bellace, "The ILO and the right to strike," *International Labour Review* 153, no. 1 (2014): 29–70.

comments. However, what was unquestionably significant about the June 2012 events is that the Employers increased the stakes of negotiations, without being provoked; paralyzing the work of the ILC and thereby forcing a response to what they perceived as a crisis. At the same time, they unbalanced tripartism within the ILO and cast a shadow on the ILO supervisory bodies by questioning their legitimacy, creating without doubt a real crisis within the ILO.<sup>2</sup>

Within this context, the incentives for establishing a tribunal in charge of interpretations, both for the ILO and its members and for outside reference, are arguably extremely compelling. Indeed, a tribunal would provide an in-house solution to the current questions surrounding the right to strike and to other matters that might surface; there would be no question as to its legitimacy as it is—as we will see—provided for in the constitution of the ILO, and it would deal with matters of interpretation in an official and open way, with clear rules to follow and a clear procedure that could involve all sides to a dispute. It would create legal predictability and clarity to all, inside as well as—possibly—outside the ILO. At the same time, however, the very reasons such a tribunal is so needed now are arguably partly the same as the reasons, in the current context, its establishment is so difficult. This paper examines the constitutional provision concerning the establishment of a tribunal, and in particular, the reasons why it has never been established, as well as the existing legal challenges, before then examining the current political landscape that makes the establishment of such a tribunal extremely challenging.

## II. Article 37 of the Constitution: An unused solution to issues of interpretations

Interpretation of conventions is a long-standing issue within the ILO—it has in fact been a contentious topic of discussion since its inception in 1919. This might come as a surprise considering that Article 37 of the Constitution provides practical solutions to issues of interpretation. According to Article 37(1), since 1919, the ICJ (previously the Permanent Court of International Justice, or PCIJ) is the only body with the explicit competence to interpret the Constitution or ILO conventions.<sup>3</sup> Furthermore,

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<sup>2</sup> These events have been widely discussed by a range of scholars—see, for example, Claire La Hovary, “Showdown at the ILO? A historical perspective on the Employers group’s 2012 challenge to the right to strike,” *Industrial Law Journal* 42, no. 4 (2013): 338–68.

<sup>3</sup> Article 37(1) reads, “Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice”. Article 37(1) is identical to Article 423 of the Treaty of Versailles of 1919, apart for the PCIJ being replaced by the ICJ. This sort of provision is not unusual; other

according to Article 37(2), the Governing Body may, since an amendment was introduced in 1946, set up a Tribunal for the “expeditious determination” of issues of interpretation.<sup>4</sup> Article 37(2) was added to the Constitution for several reasons, and one of them was that even in the early days of the ILO, when there were far fewer conventions and member states, it was considered that there were too many requests for clarifications of conventions and that recourse to the International Court was too complicated and too far removed from the needs of practical situations.<sup>5</sup> Indeed, no advisory opinions have been asked of the world court since 1932. However, a 37(2) tribunal has never been put in place either.

Other means of interpretation have been developed within the ILO over the years, both as a result of and as a reason for not making use of the possibilities offered by Article 37. In particular, both the International Labour Office (the Office) and the Committee of Experts have provided valuable interpretations of conventions from very early on. These interpretations are not deemed binding and it is accepted that only the use of Article 37 can provide authoritative interpretations. However, relying on the Office and on the supervisory bodies to provide interpretations is in line with their functions of providing support to ensure the application of conventions as well as to verify this application. It is, or was, also convenient and responded to the needs of constituents.<sup>6</sup> This mode of interpretation was generally accepted by all constituents to the extent that it could be argued to, in fact, constitute an internal custom of the Organization. However, since the end of the Cold War, the Employers’ Group within the ILO has contended that the Committee of Experts does not have a mandate for interpretation.<sup>7</sup>

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international organizations constitutive treaties have similar ones (as well as, more generally, multilateral treaties and bilateral treaties).

<sup>4</sup> Article 37(2) states, “Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organisation and any observations which they may make thereon shall be brought before the Conference.”

<sup>5</sup> Conley Hall Dillon, *International Labour Conventions: Their Interpretation and Revision* (Chapel Hill: University of North Carolina Press, 1942), 135.

<sup>6</sup> See Claire La Hovary, “The ILO’s supervisory bodies’ ‘soft law jurisprudence’,” in *Research Handbook on Transnational Labour Law*, ed. Adelle Blackett and Anne Trebilcock (Cheltenham, UK: Edward Elgar, 2015), 316–28.

<sup>7</sup> We do not discuss this here. See La Hovary for a defense of the role of the Committee of Experts. For the position of the Employers’ Group, see Alfred Wisskirchen, “Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience,” *International Labour Review* 144 (2005): 235–89.

There are several political, practical, and legal reasons for not resorting to Article 37, however. Concerning legal concerns, Francis Maupain has stated that Article 37 is in fact “fraught with numerous, often complex issues.”<sup>8</sup> We now briefly examine the legal challenges associated with the option of requesting advisory opinions from the ICJ along with the option of establishing a Tribunal, as both have been examined as potential solutions to the 2012 events surrounding the right to strike.

## Legal challenges

The difficulties in asking the ICJ for an advisory opinion, which have been elaborated on by the ILO over the years,<sup>9</sup> relate to uncertainties in the text of Article 37(1) itself—in particular with regard to discrepancies between the French and English versions<sup>10</sup>—as well as to procedural uncertainties. The latter are relevant to all requests for an advisory opinion by the ILO.<sup>11</sup> They involve the worry that the ICJ may not be specialized enough in labor issues, the question of the extent to which Employers and Workers’ Organizations are to be involved in the procedures, and that interpretation of ILO Conventions has to take into account the tripartite nature of the ILO.

These uncertainties are all related to the tripartite specificity of the ILO and, to a certain extent, to the desire to keep problems concerning the ILO within the house. These concerns were reflected in the discussions during the November 2014 Governing Body.

Despite these important issues, there are furthermore “two formidable—and interrelated—obstacles,”<sup>12</sup> again linked to the tripartite structure of the ILO. Indeed, to request the ICJ for an advisory opinion, not only would support need to be gathered from a majority of the tripartite Governing Body but the

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<sup>8</sup> Francis Maupain, “The ILO Regular Supervisory System: A Model in Crisis?” *International Organizations Law Review* 10 (2013): 141–42.

<sup>9</sup> ILO, Article 37(2) of the Constitution and Interpretation of International Labour Conventions, GB.256/SC/2/2, 1993, para. 38.

<sup>10</sup> This poses particular challenges in the ILO where, in contrast with the presumption that the meaning in each authentic text is the same (Article 33(3) of the Vienna Convention on the Law of Treaties), the French and English versions are equally authoritative (see Anne Trebilcock, “International Labour Organization,” in *Conceptual and Contextual Perspectives on the Law of Treaties*, ed. Michael Bowman and Dino Kritsiotis (Cambridge University Press, forthcoming 2016), n45).

<sup>11</sup> Indeed, the Statute of the ICJ and the UN Charter provide that an International Organization may ask for an advisory opinion “on any legal question” (Article 65 of the Statute of the ICJ and Article 96 of the UN Charter; see also Article IX of the Agreement between the United Nations and the International Labour Organization and ILO, 1993, para. 36).

<sup>12</sup> Maupain, “The ILO Regular Supervisory System,” 142n69.

question presented to the Court, approved by the Governing Body, would also need to be drafted in such a way that the answer would be useful to resolve the dispute at hand.<sup>13</sup>

Challenges with regards to Article 37(2) are different. Because there is no guidance as to the form and functions that this tribunal would take (and this extends, arguably, to the ad hoc or permanent nature of the tribunal), challenges relate to the need to draft the rules of the tribunal in a way that answers all the uncertainties that may arise. Several questions would have to be dealt with in relation to a 37(2) tribunal.

These relate, for example, to the scope of the mandate of the tribunal, its composition, the referral of cases, its procedure, access to it, coordination with supervisory bodies, the possibility of appeal, and the follow-up of its decisions.<sup>14</sup> The rules of interpretation would also need to be settled; as is well known, Article 31 of the Vienna Convention on the Law of Treaties allows for different approaches to interpretation—for example, it is said to permit both the interpretation of a term at the time of the conclusion of a treaty and at the time the interpretation is taking place (the latter is favored by human rights treaty bodies for example, as well as the ILO Committee of Experts).<sup>15</sup> Furthermore, deviations from the Vienna Convention are allowed in the ILO—and are in fact implemented by the Office for example—by the use of Article 5 of the Vienna Convention.<sup>16</sup> In this regard, the intention of the constituents needs to be given greater weight due to the tripartite structure of the ILO. Some clarity as to the rules of interpretation to be used by the Tribunal could therefore be introduced in its statute.

Although the legal obstacles are of course complex, they seem manageable from a technical point of view, at least at first glance. However, these rules need to be adopted by the Governing Body and submitted to the ILC for approval. As for Article 37(1), the main issue therefore remains reaching a consensus amongst the tripartite constituents of the ILO. It is thus useful to look at the opinions of the tripartite constituents, both before and after the crisis, to develop a better grasp of the more political obstacles to the potential solutions presented by Article 37.

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<sup>13</sup> Ibid. We do not deal with the important “question of the question” here.

<sup>14</sup> See, for example, ILO, “The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards,” GB.322/INS/5, November 2014, paras. 54–98.

<sup>15</sup> For a short introduction to the Vienna Convention, see Matthias Herdegen, “Interpretation in International Law,” in *The Max-Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, online). For different uses of Article 31, see Joost Pauwelyn and Manfred Elsig, “The Politics of Interpretation: Variations and Explanations across International Tribunals,” in *Interdisciplinary Perspectives on International Law and International Relations*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2012).

<sup>16</sup> See Trebilcock, “International Labour Organization.” Article 5 was in fact introduced with the ILO in mind, on Wilfred Jenks’ insistence.

### III. Opinions of Constituents in Regard to Article 37: The political context

Decisions in the ILO involve all the tripartite constituents and, as is well known, finding a political consensus among the three groups is often quite difficult. To take the decision to go to the ICJ or to set up a tribunal, there must be a consensus or a solid majority within the ILO Governing Body.<sup>17</sup> This is a difficulty that cannot be ignored. Constituents have clearly divergent views regarding the implementation of Article 37. This was the case before the 2012 crisis and is the case now.

#### Pre-2012 events

Despite not being used, Article 37 has frequently been discussed as a potential option by ILO tripartite constituents over the years. In the recent history prior to the 2012 crisis, the possibility of requesting an advisory opinion from the ICJ was raised in 2006 in relation to observance by Myanmar of Convention No. 29 on forced labor. However, in 2007, the Governing Body decided to defer the question on the understanding that the issue would continue to be discussed within the ILO,<sup>18</sup> preferring an in-house solution. Informal discussions regarding a 37(2) tribunal on the other hand took place in March and November 2010, in the context of the issue of strengthening the supervisory system, including through the clarification of the mandate of the Committee of Experts. This led to some relatively extended debates.<sup>19</sup>

The Employers' representative stated at the time that the Employers' Group "wished to make it clear that [they] did not support the creation of a tribunal."<sup>20</sup> They wanted the informal consultations "to be brought to an end" and made it clear that they "would not participate in any further discussions" on this issue. What they favored was more Employers and Workers' involvement—some would use the word *control*—in all matters dealing with interpretation, including in the Committee and in the Office.<sup>21</sup>

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<sup>17</sup> Maupain, "The ILO Regular Supervisory System," 142n68.

<sup>18</sup> ILO, "Conclusions on item GB.298/5: Developments concerning the question of the observance by the Government," GB.298 (2007). See also Justin Fraterman, "Article 37(2) of the ILO Constitution: Can an ILO Interpretative Tribunal End the Hegemony of International Trade Law?" *Georgetown Journal of International Law* 42 (2010/11): 889–90.

<sup>19</sup> The Governing Body asked the Office to start consultations on the interpretation of conventions in November 2009. ILO, "Reports of the Committee on Legal Issues and International Labour Standards," Governing Body, 306<sup>th</sup> Session, November 2009, GB.306/10/2(rev.), para. 44(a).

<sup>20</sup> ILO, "Informal Report of the November 2010 Consultations—Interpretation of International Labour Conventions" (2010), paras. 3, 5, and 17.

<sup>21</sup> *Ibid.*, para. 4.

The Workers' representative did not see a reason to change a system they considered to be solid and credible. They wished to avoid unnecessary costs, to instead strengthen the role of the Committee of Experts, bring greater transparency and openness and less procedural rigidities.<sup>22</sup> However, the Workers called for more discussions to be held.

On the Government side, opinions were more varied, ranging from being strongly against resorting to Article 37(2)—see, for example, the Latin American and Caribbean Group (GRULAC)<sup>23</sup>—to being fully supportive of a tribunal (such as France).<sup>24</sup> All agreed that more consultations were needed, although these never took place.

### Post-2012 events

In 2012, debates surrounding interpretations obviously took on a much more urgent tone because the context of the implementation of an Article 37 solution had changed dramatically. Indeed, when the possibility of establishing a tribunal was discussed in 2010, the supervisory system was still functioning relatively well, despite some overload issues and the opposition from the Employers' Group they had been voicing since 1989. In 2012, this opposition to the interpretations provided by the Committee of Experts was escalated and developed into what many have called a crisis. In this context, that the legal solution of Article 37 would be the best solution became very obvious to some, including the Workers' Group and some Government representatives who felt that referral to the ICJ was not only urgent but necessary.

In November 2014, the Office prepared a detailed document setting out the possible modalities, scope, and costs of action under Article 37.<sup>25</sup> It also prepared a letter that could be sent to the ICJ to launch the proceedings as well as a draft of the statute of the tribunal.<sup>26</sup> The possibility of creating a tribunal

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<sup>22</sup> ILO, "Informal Report of the March 2010 Consultations—Interpretation of International Labour Conventions" (2010), para 4.

<sup>23</sup> They argued, paradoxically, that a tribunal was not needed as it had never been resorted to but at the same time contended that the Committee of Experts should not proceed to providing interpretations of conventions (*ibid.*, para. 16).

<sup>24</sup> The Government representative of France, supported by the Government representative of Switzerland, stated however that it was "essential to create an interpretation jurisdiction" and that there was a need for a coherent system and the distinction between the different procedures needed to be reestablished. The Committee of Experts was saturated by its workload; there was a need for legal certainty as uncertainty and insecurity was damaging the system. The "survival" of the ILO was at stake (*ibid.*, para. 8).

<sup>25</sup> ILO, GB.322/INS/5, November 2014.

<sup>26</sup> *Ibid.*, Appendix II.

was deferred in November 2014, however.<sup>27</sup> The issue of requesting an advisory opinion from the ICJ was officially deferred in March 2015.<sup>28</sup> None of the specific legal details were fully discussed in depth, if at all.

### Why was the ICJ/Tribunal solutions rejected in November 2014?

It has been said that, even in the Office, all eyes were on the ICJ solution rather than on the tribunal solution. There was in fact very little debate on the proposal to create a 37(2) Tribunal during the discussions and it was supported by very few constituents. The Employers' Group, but also IMEC (the industrialized market economy countries), ASPAG (the Asia Pacific Group), the Africa Group, the Nordic countries, and GRULAC, for example, did not support it. The Workers' Group was not against it as such, but clearly favored an ICJ option.<sup>29</sup> Some government representatives were supportive of the idea however (France).

Issues such as cost, the fact that “a tribunal’s decisions could be challenged, which would create a need to resort to the ICJ again,” that “[p]revailing circumstances were not conducive to establishing an in-house tribunal,” the fact that it was premature and that there remained uncertainties (such as the ways of selecting and appointing judges and constituting panels), were all cited as reasons for not establishing a tribunal.<sup>30</sup>

An ICJ solution seemed to be the preferred option to resolve the right to strike crisis, especially because it had been supported in November 2012 by the Employers' Group. The latter did not support it in November 2014 however and the proposal did not gather enough support among government representatives despite huge efforts to that end on the workers' side (obtaining the support of governments is crucial in cases where Workers and Employers disagree). It was said, for example, that it was premature, that it raised a number of questions, and that an in-house solution should be found through social dialogue; in fact, many reaffirmed the need to find a solution through consensus. The

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<sup>27</sup> ILO, GB.322/INS/5(Add.2), para. 1, 6.

<sup>28</sup> ILO, GB.323/INS/5, para. 25, b.

<sup>29</sup> Although not rejecting it, the Workers' vice chairperson said that the “proposal to establish a tribunal . . . could be explored as a potential long-term solution but would only be acceptable subject to certain guarantees. The group could agree to the appointment of a working party to prepare recommendations on that issue” (ILO, “Minutes of the 322nd Session of the Governing Body of the International Labour Office,” GB.322/PV, para. 52).

<sup>30</sup> The Office had provided a detail breakdown of costs and these “would be kept fairly low,” according to the Office’s own conclusions (see ILO, GB.322/INS/5, 2014, paras. 99-101). Government representative of China speaking on behalf of ASAG (ILO, GB.322/PV, 2014, para. 71). Africa Group (ibid., para. 75). IMEC (ibid., para. 79). Again, this issue was addressed by the Office and would have needed to be addressed further by a working party (ILO, GB.323/INS/5, 2014, para. 53).

fact that going to the ICJ was not supported by the United States<sup>31</sup>—which has a notoriously uneasy relationship with the World Court—was also important, particularly considering that it contributes so much to the ILO’s budget.

Dialogue was presented as the ideal mean of resolving disputes and it was even suggested that “resorting to external mechanisms would place the future of tripartite dialogue at risk.”<sup>32</sup> Even the Employers argued that “a referral to the ICJ [for example] would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute.”<sup>33</sup> This is of course ironic considering that informal discussions had been going on for over two years without yielding results and the joint agreement subsequently agreed between Workers and Employers’ Groups in February 2015 cannot be said to be the result of good-faith dialogue on the part of the latter.<sup>34</sup>

## IV. Concluding Remarks

The nonbinding interpretations provided by the ILO supervisory bodies have been essential in establishing the scope and meaning of provisions of conventions in practice and furthering social justice. This is particularly the case for fundamental rights at work and the clarifications provided by the supervisory bodies are particularly useful as these rights have been referred to in many judicial settings and instruments adopted outside the ILO.

However, it is precisely these references to the Committee of Experts in particular—or the increase in the possibility of such references—that has, in part, provoked the 2012 crisis—as the Employers themselves have admitted.<sup>35</sup> And as the Employers have stated, the whole supervisory system is in crisis. Under these circumstances, a status quo ante is therefore not an option in the tripartite context

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<sup>31</sup> Ibid., para 133.

<sup>32</sup> Ibid., para 94.

<sup>33</sup> Ibid., para 58.

<sup>34</sup> On this agreement, see Claire La Hovary, “The 2015 ILC and the right to strike: business as usual?” *International Union Rights Journal* 22, no. 2 (2005): 16–17.

<sup>35</sup> Employers stated in 2012 that “the critical issue was that [the Committee of Expert’s] observations were being viewed by the outside world as a form of soft law labour standards jurisprudence” (ILO, “Report of the Committee on the Application of Standards: General Report,” Record of Proceedings, No. 19(Rev)/Part 1, ILC, 101st Session, 2012, paras. 49 and 82) and expressed concern that interpretations that the Committee is giving to fundamental conventions will not remain limited to dealings within the ILO (ILO, “Report of the Committee on the Application of Standards: Submission, Discussion, and Approval,” Record of Proceedings, No. 27, ILC, 101st Session, 2012, para. 3).

of the ILO and the discussions to reform the supervisory system—which have been ongoing for a long time—have already taken a different turn.

Even if it was not formally reformed, the attack on the Committee of Experts, and on the supervisory bodies, has not been without consequences for the functioning of these bodies. Indeed, in the present global context of retreat from workers protection, and in the ILO context of intense attacks on the—already weak<sup>36</sup>—supervisory system by the Employers, there is a real risk that the supervisory bodies might also retreat, or might not provide interpretations to conventions as they have done up till now. It is precisely this interpretation that is so crucial to keeping fundamental conventions both current and useful.

Since the 2012 events, the Experts and the Office in charge of drafting the documents for the Committee of Experts have practiced some form of self-censorship, and further changes have been imposed on how the Committee of Experts functions.<sup>37</sup> This form of self-censorship is not unique; it has been noted of other bodies and tribunals and is linked to an increase or decrease in perceived legitimacy.<sup>38</sup> As a result, it is possible to argue that the “interpretation space” of the Committee of Experts is shrinking, and this could be quite problematic for the future—as the notion of work is changing, for example, there is a constant need to adapt the conventions to new forms of work.

It is clear that in such a context, the solutions provided by Article 37, in particular 37(2), would provide some longer term stability and certainty to interpretation within the ILO. However, we are very much in a Catch-22 situation in this respect: certainty and stability is not what all the constituents want, including in particular the Employers’ Group, which opposes an Article 37 solution as they have an interest in seeing issues of interpretation remain uncertain, insofar as uncertainty has always been a tool to undermine the strength of a norm.<sup>39</sup>

For the Employers’ Group, it seems that it is not the process of interpretation by the supervisory bodies as such that is the problem, so much as the outcomes of that process. Consequently, the possibility that a conflict similar to the one surrounding the right to strike occurs again is very likely—

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<sup>36</sup> See, for example, Maupain, “The ILO Regular Supervisory System.”

<sup>37</sup> See Claire La Hovary, “A Challenging ménage à trois? Tripartism in the International Labour Organization,” *International Organizations Law Review* 12, no. 1 (2015): 204–36.

<sup>38</sup> Pauwelyn and Elsig, “The Politics of Interpretation,” 467.

<sup>39</sup> Philip Alston, The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law, in *The International Legal System in Quest of Equity and Universality*, Ed. Laurence Boisson de Chazournes and Vera Gowlland-Debbas, (The Hague: M. Nijhoff, 2001), 766-67.

another conflict would have the same objective as the one surrounding the right to strike: to weaken the system and destabilize tripartism and ultimately, the ILO.

This leaves the ILO's future quite uncertain. Despite not answering all the problems that issues of interpretation raise—including the difficult problem of the interpretation of fundamental principles and rights at work and the text of the 1998 Declaration on Fundamental Rights at work more generally—an Article 37(2) solution should be examined more carefully because of the answers it could provide to the vital functions of interpreting conventions. The Workers did not put their whole support behind an Article 37(2) in 2014 as they were favoring an ICJ solution, but in light of the multiple blockages concerning the latter, perhaps they should reconsider the former, especially as some States have already indicated their support for the establishment of a tribunal and lobbying could plausibly be carried out to convince a majority of members of the Governing Body to explore this potential solution. A tribunal could even provide some key benefits for Employers because it is, importantly, an in-house solution that they would be involved in shaping. It is, moreover, clearly difficult to continue attacking or undermining the interpretations provided by the Committee of Experts while at the same time ignoring the solutions provided for in the Constitution. Having said this, there is no doubt that gathering support for an Article 37(2) Tribunal will not be an easy task.

# Consistency, Consensus, or Coherence? Legal Interpretation of Fundamental Labor Rights

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## I. Introduction – “The Coherence Agenda”

Much has been said at this conference about the idea of coherence. My main point in this paper is a general but, I think, important one: that beyond the call for vertical coherence, or consistency between the international and the domestic (the Canadian problem), and horizontal coherence, or consensus between numerous supranational courts and institutions (the European “problem”), what we should really be seeking is what I refer to as deep coherence—which is another way of saying legal coherence. Without legal coherence we will not have, nor should we seek, consistency or consensus in legal results either vertically or horizontally. For this reason, deep coherence is the necessary basis for any sustainable system of fundamental labor rights. You may think this point to be either obvious or wrong, and that either way, I am misapplying it in this context. But I cannot escape the conclusion that, if we are in the business of taking the law seriously, legal coherence is the key to our current discontent, and to a sustainable way forward.



## II. Canadian Events

The Supreme Court of Canada (SCC) has, during the period 2001-2015, engaged in the complete overhaul of its approach to the interpretation of *freedom of association*, as guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms (the Charter).<sup>1</sup> This a general freedom guaranteed to all Canadians, and is not just for workers—the three words guaranteeing the freedom do not specifically mention striking, bargaining, or any other concrete form. In 2007 the Supreme Court held that s. 2(d) provided workers a constitutional “right” to collective bargaining.<sup>2</sup> In 2015 the Court further ruled that

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<sup>1</sup> Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>2</sup> *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia*, [2007] 2 SCR 391 [“BC Health Services”].

s. 2(d) also provided a constitutional “right” to strike.<sup>3</sup> In so doing it extensively relied upon international legal norms, including ILO norms, and said some quite striking things about the relationship between international law and the meaning of the Canadian Charter.<sup>4</sup>

To achieve these recent results, our Court has had to explicitly overrule the entire jurisprudence it had constructed about the meaning of freedom of association in the first twenty years of the Charter’s existence, which began in 1982. Much of this legal action has attracted the attention of European labor law scholars,<sup>5</sup> just as their Canadian counterparts (and the SCC) have been considering the complex, parallel legal events and issues in Europe.<sup>6</sup>

### III. The Role of Legal Interpretation in Ensuring Coherence

It has been widely accepted that judicial interpretation of labor rights laws over much of Canadian history were systematically biased against the interests of labor and in favor of the interests of capital. Currently, outcomes in Canadian courts favor labor. Labor unions and their lawyers, who had for years been critical of, and sought to avoid, judicial processes, are now very busy litigating cases before, and celebrating the legal results provided by, the very judicial figures they sought to avoid. What are we to make of that? On the skeptical view, it is simply a demonstration that the political views of the judiciary have changed. The positive view would be that, finally, we have come to our interpretive

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<sup>3</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245, 2015 SCC 4 [“Saskatchewan Federation of Labour”].

<sup>4</sup> Not all of these judicial musings are, in my view, easy to reconcile with some fundamental truths about the federal architecture of the Canadian Constitution. Nor, in my opinion, is its account of s. 2(d) completely congruent with a coherent legal theory of freedom of association. Nor, again in my opinion, does the court fully deal with some fairly well accepted ideas about the division of labor between courts and legislatures, even in legal systems with an entrenched charters of rights. But these cases certainly are exciting and represent a true and radical break with the prior approach of our Supreme Court. See Brian Langille and Benjamin Oliphant, “From the Frying Pan to the Fire: Fraser and International Law,” *Canadian Labour and Employment Law Journal* 16, no. 2 (2012): 181–234.

<sup>5</sup> For example, K. D. Ewing and John Hendy, “The Dramatic Implications of *Demir* and *Baykara*” *Industrial Law Journal* 39, no. 1 (2010): 2; Virginia Mantouvalou, “Is There a Human Right not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights,” *LSE Law, Society and Economy Working Papers*, August 2007, 4-5.

<sup>6</sup> For example, Patrick Macklem, “The Right to Bargain Collectively in International Law: Workers’ Rights, Human Rights, International Rights?” in *Labour Rights as Human Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2005), 61, 82–84.

senses and are now making legal sense of labor issues. The middle view—which is mine—is that we have not yet fully achieved sound legal interpretation, but that it is possible to do so. Presently, we do have better outcomes, but our courts have not deployed the legal reasoning we need, and have available, to legally underwrite them.

Thus, though I do not share the skeptical view, I do think that showing the skeptics are wrong on these counts requires sound legal interpretative work. And this work is something the Canadian Supreme Court has not always undertaken. As a result, the SCC has, to some extent, undermined its achievements and placed its holdings regarding the rights to strike and collectively bargain on unstable legal ground.

#### IV. Three Related Ideas: Consistency, Consensus, and Coherence

##### Vertical/internal coherence (consistency)

Here I refer to achieving harmonious and consistent results among the various courts, and other adjudicating bodies, within a legal system. We do not have to think about this a great deal in Canada. We have a single, unified, hierarchy of courts with the Supreme Court of Canada at the top. All other decision-making bodies, including administrative or quasi-judicial bodies making decisions on labor rights (labor relations boards, human rights tribunals, and so on), fit into (one way or another), and are part of, this hierarchy. The Charter is the supreme law of Canada and the SCC its supreme interpreter. Its interpretations bind legislators. Unconstitutional laws and laws based on flawed interpretations of the Charter are struck down. Thus, interpretation of the Charter's guarantees applies to all and is interpreted, in the end, by one Court. Internal coherence, that is, consistency, is in this way easy to achieve in Canada. So, too, the Supreme Court of Canada can, in this way, achieve vertical consistency between domestic international norms via interpretation by the Supreme Court of the Charter's guarantees.<sup>7</sup> The specific legal question for us is the relationship between the Court's interpretations of freedom of association in 2(d) of the Charter, and interpretations at the ILO and

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<sup>7</sup> There is one wrinkle—Canada is a federation. Under our constitutional division of powers, *labor* is a matter of provincial or territorial, not federal, competence or jurisdiction. Thus the actual detail of labor law varies from province to province. But all such laws are subject to the Charter's guarantees as interpreted by the Supreme Court. So, though the law may vary from province to province, all such laws must comply with the Charter's basic labor rights guarantees. See Brian Langille, "Who Governs Labour Market Policy in Canada?" in *Employment Policies and Multilevel Governance*, ed. Roger Blanpain, Juan Pablo Landa, and Brian Langille (Dordrecht: Kluwer, 2009).

other locations in international law. Even more specifically, the question is whether freedom of association includes collective bargaining and striking. Here the SCC has set out, in its recent cases, what looks at first blush like a broad, simple, and useful approach to achieving external coherence. Although it has used a variety of formulations in its approach, the most concrete and straightforward expression of its view is that international norms are viewed as nonbinding (that is, a matter for legislative incorporation).

As a result, we will never have legal consistency in this sense, imposed from the judicial top. What we can have is a legal consensus because such norms are an important interpretive tool. The SCC has held that:

The Charter should generally be presumed to provide protection at least as great as that afforded by the similar provisions in the international human rights documents which Canada has ratified.<sup>8</sup>

In deploying this interpretative approach, the SCC has examined and relied on not only the obligations outlined in the documents themselves but also the interpretations of those documents by the relevant international bodies, including the ECtHR, the CFA and the CEACR of the ILO, and others.<sup>9</sup>

But when it comes to the views of the ILO supervisory bodies it does so in a peculiar way.<sup>10</sup> The Court is quite willing to follow the ILO lead at the level of general questions of principle—is there a right to strike? Or, is there a right to collectively bargain?—while ignoring the views of the ILO supervisory bodies on the details and decisions in the very cases before them.<sup>11</sup>

### External/horizontal coherence (consensus)

External/horizontal coherence is the coherence between different courts and institutions at the supranational level. Here, the problem for the Canadian Supreme Court lies in establishing the supranational position and locating its views in relation to that position. But, as we know, and as this meeting makes plain, horizontal consensus has proved elusive in Europe.

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<sup>8</sup> Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987, 1 SCR 313 at para. 59 [Alberta Reference]. See also *BC Health Services*, paras. 69–70; and *Saskatchewan Federation of Labour*, para. 64 onward. In applying this maxim of interpretation, the SCC has in fact looked at a wide variety of international human rights documents, including many that Canada has not and could not ratify.

<sup>9</sup> See below re CEACR and CFA on this score.

<sup>10</sup> Here I rely on the analysis of Judy Fudge, “Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes,” *Current Legal Problems* 68, no. 1 (2015): 267.

<sup>11</sup> *Ibid.* See also Langille and Oliphant, “From the Frying Pan to the Fire.”

But leaving aside the details of a lack of consensus, there is a deeper point to be made: consensus is not a desirable goal, in and of itself. In so far as consensus is taken as a reason or justification for a decision, the line of thinking is that “a lot of other people think this is so, therefore we should.” Whatever merits that approach may have in other walks of life—and I cannot think of very many—it has no merit as a form of legal reasoning. Rather, legal reasoning involves deciding whether other judgements are legally coherent, normatively compelling, and fit with what we know to be other “truths” about the content of our law. Therefore, the question we are always asking is not whether a consensus has been established, but whether the consensus elsewhere is right or wrong, because the mere presence of a consensus on a given result is of no weight if the reasoning is faulty and does damage to a coherent legal position, or if there is no reasoning but instead simply a holding or declaration that has been repeated.<sup>12</sup> But this important analysis is not undertaken very often, if at all, in the Canadian Charter cases on the right to collectively bargain and to strike.

So, again, consensus, whatever its other advantages, is not a legal virtue. Thus we are forced to turn to the real issue—neither legal consistency nor legal consensus but legal coherence.

### Legal/deep coherence

Vertical consistency does not, by itself, make good law. Nor does horizontal consensus alone carry weight.<sup>13</sup> My view is that we will neither have, nor want, legal consistency or consensus without legal coherence. Legal coherence is the primary goal for which we should strive and it is the only way for sustainable legal consistency and consensus. If we miss this point we will be on a constant treadmill of trouble.

The lesson of recent Canadian legal constitutional labor law history is that legal incoherence (the lack of a sound, convincing, legal interpretation and analysis) will be a permanent thorn in the side of any effort to achieve either consistency or consensus because the reasoning underlying the decisions is inherently unstable and will be exploited by adroit lawyers. As I see it, this is the real problem in Canada. We have courts looking at legal results in cases, and these results are treated as data points. We tally the results and tally up the resulting score. But such win-loss records are for sports teams: they are not a form of legal argument.

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<sup>12</sup> As in, for example, the Human Rights Committee’s work. See Patrick Macklem’s discussion of in *The Sovereignty of Human Rights*, where he discusses what seems to be a change of view on the Committee’s part on the right to strike (*The Sovereignty of Human Rights* [Oxford: Oxford University Press, 2016], 86–87). But when one looks at the legal texts, there is no reasoning on offer.

<sup>13</sup> As important as “treating like cases alike” is in law for realization of the goal of formal equality, it is also true that “the law itself must be equal.” See Joseph Tussman and Jacobus tenBroek, “The Equal Protection of the Laws,” *California Law Review* 37, no 3 (1949): 341.

Judy Fudge has put her finger on these problems as part of her very different academic inquiry, which is socio-legal rather than jurisprudential or philosophical.<sup>14</sup> She describes the problem we are addressing as “the circulation of international human rights through different adjudicative sites.”<sup>15</sup> In Europe, the circulation is through what she describes as “a polycentric galaxy composed of a number of distinct sites and systems which exert gravitational force on one another.” In Canada, the celestial system is a simpler one in which the stars can simply align—but the norms are again simply “in circulation.”

The decisions or interpretations coming from elsewhere are like a foreign currency taken at face value with no questions asked. But such currencies cannot be taken at face value and questions do need to be asked. Money from elsewhere needs to be converted and to do that we need an independent assessment of their value. In law, this means making an assessment of the legal reasoning which underwrites the face value of the legal result.

So I think Fudge is sociologically accurate and as a result we have a serious jurisprudential problem.

## V. Treating Cases as Data Points

The problem I am describing is that in much of the circulation of international norms, all we have is the circulation of conclusions about the critical interpretive question. (Such as whether there is a constitutional right—to collectively bargain or to strike.) Here is the most recent Canadian version of this problem. In *Saskatchewan Federation of Labour*, the SCC held that s. 2(d) of the Charter protects striking.<sup>16</sup> In its judgment, the Court relied on several international instruments Canada had ratified that explicitly spell out a right to strike in some fashion, specifically, the International Covenant on Economic Social and Cultural Rights Article 8(1) and the Charter of the OAS Article 45(c).<sup>17</sup> The Court then refers to C87, notes it does not explicitly provide a right to strike, but reports the conclusion of the CFA and CEACR that it does, and then cites a number of authors reporting and repeating that well-known conclusion.<sup>18</sup> It then, in an unprecedented legal move, relies on the ICESCR Article 8(3) and its invocation of C87, which leads the Court again to repeat a summary of conclusions of the CFA regarding the right to strike.<sup>19</sup> It then reports that “[t]hough not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favorably

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<sup>14</sup> Fudge, “Constitutionalizing Labour Rights,” 269.

<sup>15</sup> Ibid.

<sup>16</sup> *Saskatchewan Federation of Labour*.

<sup>17</sup> Ibid., para 65 onwards.

<sup>18</sup> Ibid., para 67.

<sup>19</sup> Ibid., para 68.

cited and widely adopted by courts, tribunals and other adjudicative boards around the world.”<sup>20</sup> It also refers to the ECtHR’s decisions in *Demir and Baykara v. Turkey*<sup>21</sup> and *Enerji Yapi-Sol Sen v. Turquie*<sup>22</sup> and then quotes the latter’s reliance once again on ILO’s supervisory bodies on the right to strike.<sup>23</sup>

Thus, C87 and its interpretation play a direct role in our Canadian cases, and they also have a “resonating” or “reverberating” effect by entering over and over again via the references to other courts—such as the ECtHR—who rely upon the same ILO law. In the Supreme Court of Canada, all of this unexamined legal territory is further reinforced by expert witness testimony merely and accurately repeating the same legal landscape. The Court therefore easily finds that there is a “consensus” in international law that a right to strike exists as a matter of interpretation of the idea of “freedom of association”. But insofar as C87 and the ILO play a role in this finding, it is in large part an unexamined self-referential one. This is, in my view, not a recipe for a sound foundation of a right to strike.

## VI. The Unexamined Life of ILO law in Canada

Here is the problem as I see it: while I agree with the SCC that there is a large (if not complete) consensus internationally regarding the right to strike, consensus alone is not enough to ground legal judgements, and consensus built on an unsound or unexamined foundation will always be at risk (as it should be).

Therefore, there needs to be a close inquiry of the elements of our legal position that must be clarified in order to put a right to strike on the legal foundation it deserves. Let me use the Canadian lens to examine this question – coming at it as a Canadian lawyer might well do.

First, at the center of all of the action is C87—which Canada has ratified. Thus it is certainly caught by the Supreme Court’s interpretive tool of using international treaties as a persuasive influence in interpreting the Charter. Yet the Court has never, in any of the cases in which C87 has been relied upon, set out or examined the text of C87. If they were to do, they would quickly be faced with the question of how to read that text contextually, and in relationship to other documents such as C98

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<sup>20</sup> *Ibid.*, para 69.

<sup>21</sup> [2008] ECHR 1345; (2009) 48 EHRR 54.

<sup>22</sup> ECHR Application No. 68959/01.

<sup>23</sup> *Saskatchewan Federation of Labour*, para. 71. The Court goes on to look at other constitutions and constitutional courts and mentions the European Social Charter (paras. 72–74).

(which Canada has not ratified). Then there is the relatively obvious point about the legislative history that might help us make sense of what looks like a rather anemic text expressing a very thin theory of freedom of association, exactly the theory the SCC had first adopted in 1987 regarding the content of s. 2(d).<sup>24</sup> That legislative history is not, to say the least, helpful to those who see a right to strike in C87. The point is not to argue this case here, but simply to say these are obvious legal questions that have not, at least in Canada, been asked, let alone answered.

Rather than ask these questions, we have instead the SCC's reliance upon the interpretations of the CFA and CEACR. Yet the SCC has never examined the reasoning of these supervisory bodies by which they derive their conclusion (there is a right to strike) from that text (C87). And when one looks for legal reasoning one finds little if anything. Rather, these conclusions are often expressed in summaries prepared by others, often repeating conclusions from the CFA's Digest.

There is also at least some legal murkiness in the relationship between the CFA and the CEACR which should be clarified. The CFA's constitutional existence depends upon the distinction between applying Conventions and promoting "principles" contained in the ILO Constitution.<sup>25</sup> This is a constitutional necessity required to justify its mandate to apply to all states in virtue of membership. It is thus able to write at the level of principle and not limited to the narrow Conventions – a huge advantage. Then again, it is unlike the CEACR and not a body of legal experts.<sup>26</sup> The CFA is therefore faced with the

general idea of freedom of association, but neither equipped nor established to create a general legal theory of the freedom. To the external observer, the ILO therefore looks as if it finds itself on the horns of a legal dilemma. The legal body, the CEACR, is saddled with the particular wording of the Conventions. The nonlegal body, the CFA, is not similarly restricted, but is also not geared to offer a comprehensive jurisprudential account of the matter before it. Thus these two bodies, each saddled with complementary disabilities, appear to have joined forces to compensate for each other's limitations. But it is not at all legally obvious how this act of conjunction occurs.

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<sup>24</sup> See C. J. Dickson's judgment in the Alberta Reference, Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," 341.

<sup>25</sup> In regard to Jenks's legal defense of the CFA, see Brian Langille, "Can We Rely On the ILO?" *Canadian Journal of Labour and Employment Law* 13 (2007): 363.

<sup>26</sup> As we all know, that body exists in the form of the rarely used Fact Finding and Conciliation Commission in Freedom of Association—for whom The CA was to be a preliminary filter to make sure only well founded cases went to the Commission. See Langille, "Can We Rely?" 371-72. We have the result that a committee filtering cases to a fact-finding and conciliation body became, or became to be seen as, an adjudicative body. All in the context of express provisions in the Charter clearly allocating those prior functions elsewhere.

Plausible questions about an interpretation, combined with a lack of clarity about the institutional legitimacy about its source, are not something that, legally, should be swept under the carpet. So why is it that these points do not gain more attention?

## VII. The Reasons for, and Costs of, the Unexamined Life

Why do the legal conclusions, or, as I have called them, data points, unadorned as they are by examined reasons, continue in legal circulation? And what are the costs of doing so?

One explanation of the continued circulation and consensus is that they are an easy way to favorable conclusions, particularly when it comes to Charter jurisprudence. But our continued reliance upon them comes at the expense of a sound normative legal argument that could very feasibly take its place.<sup>27</sup> However, the CEACR is not interpreting the Canadian Charter—it is interpreting C87. It would be, in my view, a “good thing” if the ILO had a broad Convention on freedom of association akin to the ringing endorsement of a basic human freedom in the Canadian Charter and other international human rights instruments. Even better with an express right to strike, but it is not, in my view, legally obvious that it does, at least in C87 and at least not without numerous fully examined legal arguments about both substance and process.<sup>28</sup>

We do not have to resolve these legal issues today. But we do need to be aware of them, because they will not and should not go away. This is because there are real costs in continuing along the current path. Briefly, there is a sound legal way to the conclusions that collective bargaining and striking are necessary components of the freedom of association per the Charter. There are also sound legal ways to get to this legal conclusion in ILO law. And they have not been taken. Until we reevaluate our

approach we continue to run a real risk that we will undermine the content of freedom of association at the ILO. This will have a knock on effect both vertically, as in Canada, and horizontally elsewhere.

A number of important elements need to be kept in mind as we consider the way forward.

First, the ILO is a tripartite institution. It is in the ILO’s constitutional and structural bones that it be so. Over the years this truth has underwritten its moral and legal authority. In the real world of labor rights and working standards, nothing is as important an asset as the agreement of the social partners.

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<sup>27</sup> See Brian Langille, “The Condescending Constitution,” *Canadian Labour and Employment Law Journal*, forthcoming.

<sup>28</sup> Maybe in the 1998 Declaration. But that is a separate legal manner.

Of course you can have labor rights as a matter of constitutional interpretation—as in Canada—where legitimacy does not depend on tripartite legislative agreement. But at the ILO tripartite agreement is necessary to have a Convention<sup>29</sup> and such tripartite endorsement is the ILO’s great legitimating calling card when it works. If it seems reasonably, or even plausibly, clear that there was no tripartite agreement about a right to strike at the beginning of C87’s life, and no agreement now (and for twenty years or more), then a lot depends on what we make of the apparent agreement in the Cold War interim. But “everyone” knows the story about that interim and its politics.<sup>30</sup> Even groups like the ITUC make this point—understanding it to be a point in their favor. But is it? If we all understand that it was the reality of the demands of the Cold War, when combined with that era’s understanding of the (soft law) legal consequences of ILO processes, which made possible and underwrote the temporary tripartite agreement on the right to strike, at least in the CFA during the Cold War period, then what are we to make of the new change of circumstances on both fronts (political and legal)? Isn’t it quite plausible, even necessary, to say the circumstances have changed yet again—and the agreement is therefore in need of revisiting? I do not see the virtues of averting our gaze from the reality of these issues.

Second, there is the integrity of the ILO’s current machinery to take into account – both as a matter of process and substance. The CEACR’s current (2016) statement of the status of its output is:

Its [the CEACR’s] opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee’s work based on its impartiality, experience and expertise.<sup>31</sup>

I think we have to take this statement at face value and recognize that it carries with it the burden it describes. The demands of institutional legitimacy and legal rationality are real. In fact they are, as the CEACR rightly sees, all there is. So any questions on that front need to be faced.

Third, my view is that there is an even deeper set of institutional problems here based upon a set of assumptions which need to be justified rather than just asserted. Without delving deeply into the

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<sup>29</sup> We do have the Constitution and its values. This is the basis of the CFA’s constitutional possibility, reach beyond the Conventions and of the 1998 Declaration. But these are values which can be promoted, not enforced. Enforcement, whatever that means and whoever does it, only comes after ratification of a Convention.

<sup>30</sup> See for example Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford: Hart Publishing, 2013); ITUC Brief 2014; Steve Hughes and Nigel Haworth, *The International Labour Organization (ILO): Coming in From the Cold* (London: Routledge, 2011).

<sup>31</sup> Mandate of the Committee of Experts on the Application of Conventions and Recommendations [Committee of Experts or CEACR].

details, the gist is that there is an unexamined and potentially destabilizing assumption that the CEACR is a compliance entity. This in turn grounds the standard defense of the CEACR's interpretive competence despite the legislative history to the contrary. As Janice Bellace (among many others) puts it, to know whether a member state is in compliance or has applied a Convention, the CEACR logically must first interpret the Convention.<sup>32</sup> This is only sound logic if we start with the unarticulated assumption that the CEACR is in the compliance game. Why is assumption made, given the wording of the reporting obligations? This question is not simply unanswered, but unasked.<sup>33</sup>

Fourth, and relatedly, the current situation has diverted the ILO from the real legal avenues available to it—namely, a convention on the right to strike, or, even more broadly, a fundamental convention about the fundamental freedom of association. Furthermore, implementing a Tribunal would be a way forward and could provide much-needed clarity about the legal basis of the power to make and status of “legal” interpretations at the ILO.

Fifth, the current set of legal and institutional practices has the effect of blocking of a rational approach to contemplating changes to the ILO's structure and progressive nature, as well as the coherence of the ILO Constitution's legal machinery taken as a whole, and as set out on the face of the Constitution. This is something Francis Maupain has written about persuasively and at length.<sup>34</sup>

## VIII. Conclusion: “Certain Facts Must Be Faced”

What is the answer? As Ivan Rand, one of Canada's finest judges, puts it in one of Canada's most important cases about the freedoms of Canadian workers, “There are certain facts which must be faced.”<sup>35</sup> Some of those facts follow.

First, if the ILO had a robust, broad, and explicit Freedom of Association Convention with an express right to strike, and an efficient and explicitly authoritative, constitutionally mandated, adjudicative, interpretative body (such as the Tribunal) offering binding interpretations of that right, and following a robust legal process, the world would be a better place. But there is no such explicit right, nor such a body. The ILO has the legal ability to create both. But it has not. Instead, what we have is legal bickering based upon what I see as legally plausible matters to bicker about (the meaning of C87, the

<sup>32</sup> Bellace, “The ILO and the right to strike.”

<sup>33</sup> See Brian Langille, “Hard Law Makes Bad Cases,” *International Journal of Comparative Labour Law and Industrial Relations*, forthcoming.

<sup>34</sup> Maupain, “Future of the ILO”; also Maupain, “ILO normative action in the second century” in *Blackett and Trebilcock*, 301.

<sup>35</sup> *Smith v. Rhuland* [1953] 2 SCR 95, at p 98.

status of the interpreters, and so on). All of this casts a long shadow, both vertically and horizontally, over a coherent approach to fundamental labor rights.

Second, there is a well-known dynamic in play here and it is an interactive one. That reality is that events in places like Canada feedback by a very direct loop to Geneva, putting the entire ILO legal apparatus in, as the chair of the GB puts it, a “serious institutional crisis.”<sup>36</sup>

Those are the facts that must be faced. What are the options? One can double down on the lawyers, stand on an argument about current law, and threaten litigation at the ICJ. As part of this strategy one can say that the controversy at the ILO is all because of the employers’ discontent with workers’ rights. Or one can face the facts. The ILO **is** a tripartite institution. Bargaining, leading to agreement, among the social partners is both its great limiting reality but also its great source of legitimacy. It is the ILO’s real life calling card in the otherwise rarefied world of international human rights norms and institutions. This is an extraordinary asset which other international human rights sources do not possess. It is not to be underestimated. But neither should we underestimate the risk of this legitimacy being overstretched by various means, including legal interpretation. These are the key facts which must be faced by all of those interested in the future role of the ILO in the advancement of fundamental labor rights. The ILO needs to use its own resources, which are at hand, to solve its own problem. It has now been presented with a real opportunity (necessity?) to do so and to place its law and its legal processes on a coherent legal foundation. If I were a mediator involved in attempting to seize this opportunity, I would say that the ingredients of a possible tripartite deal are not impossible to find.

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<sup>36</sup> At the November 2014 GB Meeting - GB3221PV, at para 47.

# The Interpretation of the Court of Justice of the European Union of Fundamental Labor Rights

*Judge François Biltgen, Judge, Court of Justice of the European Union<sup>1</sup>*

Ladies and Gentlemen,

As it will be impossible to give, in the twenty minutes that I've been allocated, an exhaustive review of the case law of the Court of Justice of the European Union (also referred to as the ECJ) concerning social fundamental rights, I will only address a selected number of topics.

I have to recall that in fact, for a long time, and certainly during the existence of the European Economic Community, it was the Court of Justice which really created fundamental social rights.



At an early stage of the European Economic Community, the only Article of the EEC Treaty providing a directly applicable social right was Article 119, regarding equal pay between men and women. This Article gave birth to three important judgments: *Defrenne I* of 1971, *Defrenne II* of 1976, and *Defrenne III* of 1978.<sup>2</sup> These cases concerned an air hostess of the Belgian air company Sabena who had her employment contract terminated on her fortieth birthday, because the said contract provided that women shall cease to be members of the crew on reaching the age of forty.

In *Defrenne II*, and despite real oppositions revealed during the procedure, the Court enhanced the direct horizontal effect of the principle of equal treatment of men and women, when it stated that the principle that men and women should receive equal pay may be relied on before national courts. These courts have the duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labor agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.<sup>3</sup>

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<sup>1</sup> This contribution reflects the views of the author alone.

<sup>2</sup> Judgment of 5 May 1971, *Defrenne*, 80/70, EU:C:1971:55; judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56; judgment of 15 June 1978, *Defrenne*, 149/77, EU:C:1978:130.

<sup>3</sup> Judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56.

The Court developed its later case law, inter alia, by referring to international agreements and to the constitutional principles of the Member States. In its judgment in *Internationale Handelsgesellschaft* of 1970, the Court said that

the respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.<sup>4</sup>

The Court also inspires itself by referring to other international instruments in order to confirm the existence of fundamental social rights in the European law.

The judgment in *Defrenne III*, stating that fundamental personal human rights form part of the general principles of Community law,<sup>5</sup> recalled that the same concepts are recognized by the European Social Charter of 18 November 1961 and by Convention No 111 of the International Labour Organization of 25 June 1958 concerning discrimination in respect of employment and occupation.<sup>6</sup>

The Court referred to such instruments not only while interpreting the primary law, as in *Blaizot* of 1988, when the Court had to clarify whether university studies should be regarded as vocational training in the light of Article 7 of the EEC Treaty prohibiting unequal treatment on behalf of nationality.<sup>7</sup> It also referred to external legal instruments when it came to interpret secondary law, as in the judgment in *Kiiski* of 2007,<sup>8</sup> when the Court had to give an appreciation of the right to fourteen weeks of maternity leave; or as in the judgment in *Impact* of 2008,<sup>9</sup> when the Court held that Clause 4 of the framework agreement on fixed term work<sup>10</sup> must be interpreted as articulating a principle of community social law which cannot be interpreted restrictively.<sup>11</sup> Another judgment worth mentioning is *Parliament v Council* of 2007<sup>12</sup> concerning a demand of annulment of the family reunion Directive,<sup>13</sup>

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<sup>4</sup> Judgment of 11 December 1970, *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114.

<sup>5</sup> Judgment of 15 June 1978, *Defrenne*, 149/77, EU:C:1978:130.

<sup>6</sup> *Ibid.*, paras. 27 and 28.

<sup>7</sup> Judgment of 2 February 1988, *Blaizot a.O.*, 24/86, EU:C:1988:43, para. 17.

<sup>8</sup> Judgment of 20 September 2007, *Kiiski*, C-116/06, EU:C:2007:536.

<sup>9</sup> Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223.

<sup>10</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP, OJ 1999, L 175, 43.

<sup>11</sup> Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, para. 114.

<sup>12</sup> Judgment of 27 June 2007, *Parliament v. Council*, C-540/03, EU:C:2006:429.

<sup>13</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003, L 251, 12.

where the Court recalled that a formally correct application of EU law does not allow a Member State to violate other international instruments governing social law.<sup>14</sup>

That said, I now want to show how the Court progressively developed some fundamental social rights, first concerning the collective actions and collective bargaining agreements in light of the opposition of fundamental economic liberties versus fundamental social rights, as it appears from the *Viking/Laval* cases through to the recent judgment in *Sähköalojen ammattiliitto* of 2015,<sup>15</sup> which helped inspire the Commission's new proposal for amending the posted workers' directive.<sup>16</sup> In the second part, I will focus on the issue of the direct horizontal effect of directives, in the light of the general principles of European law and the provisions of the Charter, concluding with the very recent judgment in the *Dansk Industri (DI)* case of 2016, also known as *Ajos*.<sup>17</sup>

## I. Fundamental Economic Freedoms v. Fundamental Social Rights

This controversial debate, which is largely about the scope of collective actions trade unions are allowed to use in the light of the EU law, found its origin in the *Viking* and *Laval* cases of 2007,<sup>18</sup> which also referred to international agreements about social law.

The facts behind the judgment in *Viking*, officially known as *International Transport Workers' Federation & Finnish Seamen's Union*,<sup>19</sup> were regarding collective actions, including strikes, that the

Finnish and the International trade unions wanted to take against the reflagging of the then Finnish vessel *Rosella* under Estonian flag. The ship owner was facing strong competition from Estonian vessels on the line served by the *Rosella*. The objective of the reflagging was to benefit from the Estonian collective wages as they were lower than the Finnish collective wages. The legal dispute

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<sup>14</sup> Judgment of 27 June 2007, *Parliament v. Council*, C-540/03, EU:C:2006:429, paras. 105 and 107.

<sup>15</sup> Judgment of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86.

<sup>16</sup> Proposal for a Directive of the European Parliament and of the Council amending the 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, COM(2016) 128 final.

<sup>17</sup> Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278.

<sup>18</sup> For recent studies, see *EU Law in the member States, Viking, Laval and Beyond*, ed. Mark Freedland and Jeremias Prassl (Oxford: Hart Publishing, 2014).

<sup>19</sup> Judgment of 11 December 2007, *International Transport Workers' Federation und Finnish Seamen's Union*, C-438/05, EU:C:2007:772.

concerned the freedom of establishment laid down in Article 43 of the Treaty on the European Community (now Article 49 of the Treaty of the Functioning of the European Union, TFEU).

The Court stated as follows:

1) Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

The Court noted inter alia that the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action from the application of Article 43 EC.<sup>20</sup> Recalling the *Schmidberger* and *Omega* cases, the Court underlined that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by community law, even under a fundamental freedom guaranteed by the treaty, but that such exercise must be reconciled with the requirements relating to rights protected under the treaty and in accordance with the principle of proportionality.<sup>21</sup>

2) Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

3) Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.

That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

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<sup>20</sup> Ibid., para. 41.

<sup>21</sup> Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333; judgment of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614; judgment of 11 December 2007, *International Transport Workers' Federation und Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paras. 45 and 46.

In the eyes of the Court,

since the Community has (...) not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.<sup>22</sup>

The Court held the planned collective action as a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective, which was up to the referring court to ascertain.<sup>23</sup>

The final responsibility left to the national court is one of the two main differences between the judgment in *Viking* and the judgment in *Laval un Partneri Ltd*, published only seven days later,<sup>24</sup> which clearly precluded the trade union from the planned collective actions. The second difference is that the legal dispute concerned not only, as in the *Viking* case, the treaty provisions—for instance Article 49 of the EC Treaty about freedom of services (now Article 56 TFUE)—but also the posted workers' directive, which partially harmonized the EU law.<sup>25</sup> This second difference explains in some measure the first difference between the two judgments.

The *Laval* case concerned a Latvian company sending workers to build a school in Sweden. A Swedish trade union attempted, by a blockade of the building site, to force *Laval* into entering negotiations with it, inter alia, on the rates of pay for the posted workers, and to sign a collective agreement the terms of which laid down, regarding some of the concerned matters, more favorable conditions than those resulting from the relevant legislative provisions. At this time, Sweden did not have a system for declaring collective agreements universally applicable.<sup>26</sup>

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<sup>22</sup> Judgment of 11 December 2007, *International Transport Workers' Federation und Finnish Seamen's Union*, C-438/05, EU:C:2007:772, para. 79.

<sup>23</sup> *Ibid.*, para. 90.

<sup>24</sup> Judgment of 17 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007: 809.

<sup>25</sup> 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, OJ 1997, L 18, 1.

<sup>26</sup> Judgment of 17 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007: 809, para 7.

As mentioned, the Court held that the collective action at issue in the main proceedings could not be justified in the light of the public interest objective brought forward by the trade union.<sup>27</sup>

Even if the *Viking* and *Laval* judgments are criticized still today, two important aspects of these judgments are very often forgotten:

- 1) The ECJ held that the right to take collective actions, including the right to strike, constitutes a fundamental right.
- 2) This fundamental right may be balanced against economic freedoms.

The debate became even more controversial, when in 2008 the Court took two other judgments concerning the posted workers' directive, namely *Rüffert* and *Commission v Luxembourg*.<sup>28</sup> Academia even termed the four judgments the “infamous Laval quartet.”<sup>29</sup>

In the judgment in *Rüffert*, the Court stated that Article 3(8) of the directive is applicable only where no system is in place for declaring collective agreements to be of universal application, which was not the case in the Federal Republic of Germany.<sup>30</sup> But because the provision of the *Land Niedersachsen* did not fix a rate of pay according to one of the procedures laid down in the directive, the Court therefore precluded the *Land Niedersachsen* from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings that, when submitting their tenders, agreed to pay their employees at least the remuneration prescribed by the collective agreement in force at the place where the works were done.

However, in its recent judgment *Stadt Landau an der Pfalz*, also known as *RegioPost*, the Court did not copy the *Rüffert* case law.<sup>31</sup> It did not because the minimum wage imposed by the legislative provision of the *Land Rheinland-Pfalz* applied generally to the award of any public contract in the *Land*, irrespective of the sector concerned. Furthermore, that legislative provision conferred a minimum social protection.<sup>32</sup>

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<sup>27</sup> Ibid., para. 110.

<sup>28</sup> Judgment of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189; judgment of 19 June 2008, *Commission v Luxembourg*, C-319/06, EU:C:2008:350.

<sup>29</sup> Aristeia Koukiadaki, “Greece,” in *Viking, Laval and Beyond: EU Law in the Member States*, ed. Mark Freedland and Jeremias Prassl (Oxford: Hart Publishing, 2014), 180.

<sup>30</sup> Judgment of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189, para. 27.

<sup>31</sup> Judgment of 17 November 2015, *Stadt Landau in der Pfalz*, C-115/14, EU:C:2015:760.

<sup>32</sup> Ibid., paras. 70, 71, 75 and 76.

Before continuing with the case law concerning the posted workers' directive, I would like to make one brief remark about the judgment in *AKT* of 2015.<sup>33</sup> It also concerns the collective bargaining agreements and is the first judgment of the Court related to the directive of temporary agency work.<sup>34</sup> Article 4, paragraph 1 of that Directive states that

Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

By December 2011, Member States were supposed to have reviewed, after consulting the social partners, any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned. They should also have informed the Commission of the EU about this. The Court held that this provision is addressed only to the competent authorities of the Member States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified. Therefore, it does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work not justified on grounds of general interest within the meaning of the provision.<sup>35</sup>

This example shows that the case law of the Court has evolved alongside the changes that EU law underwent, recognizing a broader scope to the collective bargaining agreements, to conciliate the latter with the other principles of EU law because it results also from the former judgments in *Commission v Germany* of 2010, *Hennings and Mai*, and *Prigge* of 2011.<sup>36</sup>

This trend has lastly been confirmed by the judgment in *Sähköalojen ammattiliitto* of 2015,<sup>37</sup> which may be seen as a development of the case law with regard to the definition of minimal wage. In the new proposal for an amended directive on posted workers, the Commission referred to this recent

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<sup>33</sup> Judgment of 17 March 2015, *AKT*, C-533/13, EU:C:2015:173.

<sup>34</sup> Directive 200/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ 2008, L 327, p. 9.

<sup>35</sup> Judgment of 17 March 2015, *AKT*, C-533/13, EU:C:2015:173, para. 32.

<sup>36</sup> Judgment of 15 July 2010, *Commission v Germany*, C-271/08, EU:C:2010:426; judgment of 13 September 2011, *Prigge a.O.*, C-447/09, EU:C:2011:573; Judgment of 8 September 2011, *Hennings et Mai*, C-297/10 et C-298/10, EU:C:2011:560.

<sup>37</sup> Judgment of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86.

judgment in order to propose to replace in Article 3, paragraph 1, the reference to *minimum rates of pay* by a reference to *remuneration*.<sup>38</sup>

To carry out electrical installation work at the construction site for a nuclear power station in the north of Finland, a company concluded, in Poland and under Polish law, employment contracts with 186 workers. The latter were posted to the company's Finnish branch. They were assigned to the construction site and were provided with accommodation some 15 kilometers from the site. Before the referring court, the parties contested inter alia the scope of some provisions of the Finnish collective agreements as applicable for the posted workers.

The Court started to clarify first the guaranteed pay for hourly work or piecework in accordance with the categorization of employees into pay groups. It stated that the rules in force in the host Member State may determine whether the calculation of the minimum wage must be carried out on an hourly or a piecework basis. The minimum wage calculated by reference to the relevant collective agreements cannot be a matter of choice for an employer who posts employees with the sole aim of offering lower labor costs than those offered locally. However, if they are to be enforceable against an employer posting workers, the rules on the categorization of those workers into pay groups which are applied in the host Member State must also be binding and meet the requirements of transparency. This means, in particular, that they must be accessible for, and clear to, a foreign employer. It is for the national court to ascertain whether those conditions are met.<sup>39</sup>

The Court judged in a similar way on the payment of a daily allowance. As it was intended to ensure the social protection of the workers concerned, making up for the disadvantages entailed by the posting as a result of the workers being removed from their usual environment, the Court decided that it must be “regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned.”<sup>40</sup>

The Court decided again in a similar way for the compensation for daily travelling time, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration.<sup>41</sup> The Court also considered as part of the minimum wage the provisions of the agreement relative to the holiday pay.<sup>42</sup> This seems to comfort the Commission's proposal amending

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<sup>38</sup> See Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278.

<sup>39</sup> Judgment of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86, paras. 40, 41, and 44.

<sup>40</sup> *Ibid.*, paras. 46, 48, 49, 50 and 52.

<sup>41</sup> *Ibid.*, para. 57.

<sup>42</sup> *Ibid.*, para. 69.

the Directive to promote the principle “that the same work at the same place should be remunerated in the same way.”

On the other hand, the Court did not consider coverage of the cost of accommodation and meal vouchers as part of the minimum wage.<sup>43</sup>

## II. The Direct Horizontal Effect of the Directives, in the Light of the General Principles of EU Law and the Provisions of the Charter

I have already pointed out that since *Defrenne II* the principle of equality of treatment between men and women, as provided by the treaty, has a direct horizontal effect and applies also between private parties.<sup>44</sup> In its judgments in *Van Binsbergen* and *Walrave* of 1974, the Court held that Article 59 EEC regarding the free movement of services, because it refers to the abolition of any discrimination based on nationality, creates individual rights which national courts must protect.<sup>45</sup> In its judgement in *Angonese* of 2000, the Court repeated the same for Article 48 of the EC Treaty concerning freedom of movement for workers.<sup>46</sup>

But this direct horizontal effect doesn't apply for directives. The well-known judgment in *Francovich* of 1991 said that the persons concerned by a directive cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period.<sup>47</sup> Therefore a Member State is required to make good loss and damage caused to individuals by failure to transpose the directive.

The discussion about the direct horizontal effect was above all raised in cases concerning the working time directive.<sup>48</sup>

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<sup>43</sup> Ibid., paras. 57 and 63.

<sup>44</sup> Judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56.

<sup>45</sup> Judgment of 3 December 1974, *Van Binsbergen*, C-33/74, EU:C:1974:131; judgment of 12 December 1974, *Walrave*, C-36/74, EU:C:1974:140.

<sup>46</sup> Judgment of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296.

<sup>47</sup> Judgment of the Court of 19 November 1991, *Francovich a.O.*, C-6/90 and C-9/90, EU:C:1991:428. In this case, *Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer*, OJ 1980, L 283, 23.

<sup>48</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ 1993, L 307, p. 18.

In its judgment in *BECTU* of 2001, the Court stated that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of community social law.<sup>49</sup>

In its judgment in *Pfeiffer a.O.* of 2004, it decided that the forty-eight-hour upper limit on average weekly working time, including overtime applied, is also to be considered as a rule of community social law of particular importance from which every worker must benefit.<sup>50</sup>

But in this judgment the Court also tackled the issue regarding the lack of direct horizontal effect and its remedies by developing and imposing onto the national courts the duty to give an interpretation of the national law which is in conformity with the community law.<sup>51</sup>

This principle of conform interpretation has been steadily developed and has become consistent case law. It can be summarized as follows.

First, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or has failed to implement the directive correctly.

Second, given that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, such a provision cannot of itself apply in proceedings between private parties.

But, third, because the Member States have an obligation, arising from a directive, to achieve the result envisaged by that directive, this obligation is binding on all the authorities of the Member States including, for matters within their jurisdiction, the national courts. It is therefore the responsibility of the national courts in particular to provide the legal protection that individuals derive from the rules of EU law and to ensure that those rules are fully effective.

Fourth, the duty to give an interpretation of the national regulation consistent with the EU law requires the national court to do whatever lies within its jurisdiction, with regard to the entire body of national law, to ensure that the provision of EU law is fully effective.

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<sup>49</sup> Ibid.; judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, para. 47.

<sup>50</sup> Judgment of 5 October 2004, *Pfeiffer a.O.*, C-397/01 to 403/01, EU:C:2004:584, para. 100.

<sup>51</sup> Ibid., paras. 103, 108, 109, 110, 111, 114, and 118.

Fifth, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and nonretroactivity, and that obligation cannot serve as the basis for an interpretation of national law that would be *contra legem*.<sup>52</sup>

The judgments in *Mangold* of 2005 and in *Küçükdeveci* of 2010, both having been preliminary rulings from Germany, and concerning EU social law and more precisely Directive 2000/78, introduced a new paradigm into the discussion of direct horizontal effect with regards to fundamental social rights, by bringing into play the general principles of EU law.<sup>53</sup>

The question at stake in *Mangold* was whether the directive should be interpreted as precluding a provision of domestic law which authorized, without restriction, the conclusion of fixed-term employment contracts for workers age fifty-two and above.

The period for the implementation of this directive had, at the time of the facts, not yet expired in Germany. The Court stated that “Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation.” The source of the actual principle underlying the prohibition of those forms of discrimination being found in various international instruments and in the constitutional traditions common to the Member States, “the principle of non-discrimination on grounds of age must thus be regarded as a general principle of EU law.”<sup>54</sup> Therefore, it is the responsibility of the national court to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.<sup>55</sup>

The facts in the *Küçükdeveci* case of 2010 took place when the directive had already come into force. The Court enshrined the expression “the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC.” This principle must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provided that periods of employment completed by an employee before reaching the age of twenty-five were not taken into account in calculating the notice period for dismissal.

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<sup>52</sup> Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, para 100.

<sup>53</sup> Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709; judgment of 19 January 2010, *Küçükdeveci*, C-555/07, EU:C:2010:21; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303, p. 16.

<sup>54</sup> *Mangold*, paras. 74 and 75.

<sup>55</sup> *Ibid.*, para. 77.

Another question of the referring court was whether it should decline to apply the national provision, as this provision was not open to interpretation in conformity with EU law. The Court answered that the need to ensure the full effectiveness of the principle of nondiscrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of EU law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision.<sup>56</sup>

After this judgment, the question arose whether this approach of a “general principle of EU law as given expression by a Directive” could also apply to other fundamental social rights.

The judgment in *Dominguez* of 2012 offered the occasion to test this hypothesis in regard to the Working Time Directive.<sup>57</sup> In an exhaustive judicial analysis, Advocate General Trstjenak concluded in her reasoned opinion,<sup>58</sup> that the referring national court could neither rely on Article 31(2) of the Charter nor use a general principle as in the *Küçükdeveci* case, to decline, in a dispute between private parties, to apply national legislation in breach of EU law that is not open to interpretation in conformity with the Directive.<sup>59</sup> In its judgment, the Court did not reflect on these arguments, but simply held that if the national court is unable to apply the principle of conformity, the party injured as a result of domestic law not being in conformity with EU law can nonetheless rely on the *Francovich* principle to obtain, if appropriate, compensation for the loss sustained.<sup>60</sup>

The Court followed a similar approach in the judgment in *Association de médiation sociale* of 2014, which was, as was the *Dominguez* case, a preliminary question referred to the Court by the French *Cour de Cassation*.<sup>61</sup> This case concerned the Directive 2002/14/EC and Article 27 of the Charter of the Fundamental Charter.<sup>62</sup> Referring to the judgment in *Confédération générale du Travail*, the Court said that workers with assisted contracts could not be excluded from the calculation of staff numbers in the undertaking when determining the legal thresholds for setting up bodies representing staff.<sup>63</sup>

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<sup>56</sup> Judgment of 19 January 2010, *Küçükdeveci*, C-555/07, EU:C:2010:21, para 53.

<sup>57</sup> Judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33.

<sup>58</sup> Opinion delivered on 8 September 2011 by Advocate General Trstjenak, *Dominguez*, C-282/10, EU:C:2011:559.

<sup>59</sup> *Ibid.*, paras. 83, 143 and 169.

<sup>60</sup> Judgment of 19 November 1991, *Francovich a.O.*, joined cases C-6/90 and C-9/90, EU:C:1991:428.

<sup>61</sup> Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.

<sup>62</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 2002, L 80, 29.

<sup>63</sup> Judgment of 18 January 2007, *Confédération générale du travail a.O.*, C-385/05, EU:C:2007:37; judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, para. 29.

The referring court also wanted to know whether the defendants in the main proceedings may rely on this provision against the AMS, which was also a private body, because it was faced with a *contra legem* limitation. The Court analyzed the applicability of Article 27 of the Charter and of the *Küçükdeveci* case law. For the Court it was clear that for Article 27 to be fully effective, it still had to be given more specific expression in EU or national law. On this particular point, it has to be stressed that the facts of the case were very different from the ones that led to the *Küçükdeveci* case in so far as the principle of nondiscrimination on grounds of age at issue in the latter, laid down in Article 21(1) of the Charter, is sufficient in itself to confer an individual right to private parties which they may invoke as such.<sup>64</sup> In the *AMS* case, the Court thus did not follow the reasoned opinion of Advocate General Cruz Villalon, who had argued that Article 27 of the Charter, given specific substantive and direct expression in Article 3(1) of Directive 2002/14/EC may be relied on in a dispute between private parties.<sup>65</sup>

Following these two judgments that refused the direct horizontal effects of directives even with regards to the fact that they could be linked to articles of the Charter, the Court was questioned, in a very recent case, *Dansk Industri (DI)*, also known as *Ajos*, by a request for a preliminary ruling from the Højesteret (Supreme Court) of Denmark, regarding the application of the *Mangold/Küçükdeveci* case law.<sup>66</sup>

The facts of the case can be summarized as follows: Mr. Rasmussen had been dismissed from *Ajos* and his employment relationship terminated. He was, in principle, entitled to a severance allowance equal to three months' salary, pursuant to Article 2a(1) of the national law on salaried employees. However, because he had reached sixty years of age on the date of his departure and was entitled to an old-age pension payable by the employer under a scheme he had joined before reaching fifty years of age, Article 2a(3) of the said national law, as interpreted in consistent national case law, barred his entitlement to the severance allowance, even though he remained on the employment market after his departure.<sup>67</sup>

But this interpretation by the national courts had been misruled by the Court's judgment in *Ingeniørforeningen i Danmark* of 2010.<sup>68</sup> This case opposed an employee and a public employer. In a

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<sup>64</sup> *Ibid.*, paras. 45, 47, 48.

<sup>65</sup> Opinion delivered on 18 July 2013 by Advocate General Cruz Villalon, *Association de médiation sociale*, C-176/12, EU:C:2013:491.

<sup>66</sup> Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278

<sup>67</sup> The provision of 2a(3) runs as follows: "No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching 50 years of age." The consistent national case-law however interpreted the word "will receive" as "is entitled to receive."

<sup>68</sup> Judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600.

judgment handed down on 17 January 2014, the Danish Supreme Court held that the legislative provision in question, although it had not been amended following the judgment in *Ingeniørforeningen i Danmark*, could no longer be applied by public-sector employers where the employee demonstrates an intention to temporarily waive his right to an old-age pension in order to continue with his career.

On the contrary, the *DI* case concerned relationships between private parties. In its request for a preliminary ruling, the Højesteret pointed out that in this case, due to the consistent national case law, interpreting the national provision in a manner consistent with EU law would be *contra legem*. The case would also raise “the question of the extent to which an unwritten principle of EU law may preclude a private-sector employer from relying on a provision of national law that is at odds with that principle.”<sup>69</sup>

The Court came substantially to the same findings than Advocate General Bot in his reasoned opinion.<sup>70</sup> It confirmed the solution of the judgment in *Ingeniørforeningen i Danmark* and underlined above all that the principle, now enshrined in Article 21 of the Charter of Fundamental Rights must be regarded as a general principle of EU law, as it was said by the *Mangold/Kücükdeveci* case law.<sup>71</sup>

But the Court also clarified the method of conform interpretation of a directive.

First: Despite the fact that the Court has stated that the principle of interpreting national law in conformity with EU law has its certain limits, this requirement entails also the obligation for national courts to change its established case law.

In applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognized by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU ... The requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive ... Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with

<sup>69</sup> Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016/278, para. 15.

<sup>70</sup> Opinion delivered on 25 November 2015 by Advocate General Bot, *DI*, C-441/14, EU:C:2015:776, paras. 47, 81, 82.

<sup>71</sup> Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, para. 22.

EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.<sup>72</sup>

Second: When this method fails, the national court has to apply the general principle of the EU prohibiting discrimination on grounds of age, as given expression in Directive 2000/78:

If a national court .... does in fact find it impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.<sup>73</sup>

Third: Neither the principle of legal certainty nor the principle of protection of legitimate expectations can alter that obligation.

In fact, the referring court sought to ascertain whether EU law is to be interpreted as permitting a national court seized of a dispute between private persons, where it is established that the relevant national legislation is at odds with the general principle prohibiting discrimination on grounds of age,

to balance that principle against the principles of legal certainty and the protection of legitimate expectations and to conclude that the latter should take precedence over the former.

The Court reaffirmed clearly the supremacy of EU law as it reads and applies it.

Not only would the theory of the referring court have had the effect of limiting the temporal effects of the Court's interpretation:<sup>74</sup> "Moreover, the protection of legitimate expectations cannot, in any event, be relied on for the purpose of denying an individual who has brought proceedings culminating in the Court interpreting EU law as precluding the rule of national law at issue the benefit of that interpretation."<sup>75</sup>

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<sup>72</sup> Ibid., paras. 31, 33, 34.

<sup>73</sup> Ibid., para. 35.

<sup>74</sup> Ibid., para. 39.

<sup>75</sup> Ibid., para. 41.

### III. Closing Remarks

To conclude, I would just like to make three short remarks and one prediction:

- The case law of the ECJ regarding fundamental social rights has been, and still is, continuously developing.
- In the past the Court's case law has very often inspired the EU legislator to become active and adapt its secondary law. This still seems to be the case nowadays as we can see from the judgment in *Sähköalojen ammattiliitto*. It will be interesting to follow the discussions on the new proposal of the Commission amending the posted workers' directive, which is, however, highly controversial.
- Contrary to some expectations raised during the proceedings of the judgment in *DI*, the Court did not deny its *Mangold/Kücükdeveci* case law, but confirmed and précised it.
- As far as the direct horizontal effect of directives is concerned, the Court stated recently in its judgment in *Fenoll* of 2015,<sup>76</sup> which was related to the working-time directive, and which denied it direct horizontal effect, that Article 31,2 of the Charter of the Fundamental Rights was not applicable *ratione temporis*. So one may suppose that the question may be raised again.

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<sup>76</sup> Judgment of 26 June 2015, *Fenoll*, C-316/13, EU:C:2015:200, para. 45.

## Reflections from Conference Participants and Selected Pictures



*“I believe the conference succeeded in providing an avenue for the free exchange of ideas and peer-learning on very important issues. The presentation by Dr. La Hovary about the ILO-ICJ advisory opinion and the proposal for an internal ILO Tribunal to resolve interpretation-disputes including the nine questions to be very enlightening. Any “post” examination of the issue would require a careful knowledge of the judiciary organization of the constituent countries due to the fact that the different national systems need a convergence path. In the field of strike law, Professor Schlachter gave a wonderful speech as she was able to depict the skeleton of future implementation methods, monitoring and sanctioning. When discussing the need for explicit protection against potentially conflicting obligations, it would be interesting to develop studies making a fluent comparison between legal systems at any level. In this regard, I think it would be of interest to examine elemental questions such as the following, already detailed in Spanish Law: strike as a fundamental right, the precise sanction for breaching or limiting that right, it can be exercised by workers and trade unions, it must be notice to employers and authorities, strike committee, the duty of negotiation while strike lasts and tipification of unlawful ways of strike. Of course some of these questions leave little room for interpretation but on the other hand provide a sort of guarantee for all parties”.— M<sup>a</sup> Milagros Calvo Ibarlucea. (Supreme Court Justice, Madrid, Spain)*



*“Ensuring coherence in Fundamental Labor Rights is an important and timely topic for EU external and internal policies. All 28 EU Member States have ratified the 8 ILO core labor standards conventions and the ILO labor inspection convention N°81. The 28 EU Member States have ratified either the European Social Charter or the revised European Social Charter. The EU Charter on Fundamental Rights includes all the fundamental labor rights and explicitly ensures that more favorable protection, enshrined in international conventions ratified by all EU Member States or by the EU, is safeguarded. The EU has launched in March 2016 a consultation on the European Pillar of Social Rights aiming at e.g. strengthening the social dimension of the Euro area while allowing other EU Member States to join in if they want to do so. All EU trade and investment agreements, as well as the EU trade GSP Plus scheme, include binding commitment on the international core labor standards as well as a follow-up system. Ratification and application of the core labor standards conventions is an accession condition for EU candidate countries. The EU takes into account the findings of the ILO supervisory system. The EU cooperates with the ILO for supporting the strengthening of the capacities in some third countries in order to improve effective application. By opting for the ILO conventions the EU contributes to the strengthening of the multilateral systems. The EU has also contributed to unblock the work at the ILO tripartite committee on the application of conventions and has highlighted that freedom of association includes the right to strike. The EU is strengthening its action on improving fundamental labor rights and working conditions in in global supply chains.”— Rudi Delarue ( European Commission, Deputy Head of Unit External Relations, Neighbourhood Policy, Enlargement, IPA)*



*“In contrast to European labor law, we interpret labor law provisions much more narrowly in the United States. Individual employees should have something in addition to collective unions, since people are hired as individuals”. — Ms. T. Brooks (International Employment Policy Specialist) & Mr. E. Brown (Consultant)*

*“With today’s advances in technology, there should be a social network like Facebook for judges and lawyers to consult with each other on labor law”. — Judge Kamel Abou Kaoud (Israel National Labor Court)*



*“It was an absolute pleasure to attend the conference held on April 22 in Leiden. It brought attention to a very important, but not adequately discussed, issue in international labor law – viz., fragmentation - both in theory as well as in practice. The working groups were particularly interesting for encouraging its participants to address labor law issues through human rights enforcement mechanisms, which appear to have a more coherent approach to upholding fundamental rights. It would be very interesting if the conference were to include, in its next edition, international civil service law as a part of the discussion. This is a field of law which is not addressed enough and is highly incoherent in its application, especially vis-a-vis international labor law principles.”— Ms. Renuka Dhinakaran (International civil service law practitioner, Dhinakaran International Law Consultancy, The Hague)*





*“The conference gave a great opportunity to exchange the views on the approach to employees’ rights. It was an extremely interesting experience to become acquainted with the approach of representatives of other international judicatory bodies, to employee entitlements and relations between employees, employers and other entities operating in the labor market. What was also appealing was the form of the conference which allowed each participant to present individual opinion. The outcome of the conducted discussions was a problem in relation between employees’ rights and freedom of economic activity. Each judicatory body follows different priorities which results in different solutions of a particular case, depending on the body analyzing this issue. An attempt to elaborate a certain fundamental set of workers’ protected rights seems to be essential, which will be recognized as inviolable by all international judicatory bodies. I hope that the discussion regarding this topic will be continued in the next conference organized by The Social Justice Expertise Center and the University of Leiden Law School” — Dr. Marcin Wujczyk (Assistant Professor Jagiellonian University Poland / member of the European Committee of Social Rights, Council of Europe)*





*This conference has been interesting and useful for me as a practicing labor law professional.—  
Dr. Viktor Györe (Judiciary Professional from Hungary)*

*I very much enjoyed the working group on the right to strike but thought it was quite European-oriented.—  
Xiang Li (Ph.D. Candidate in Labor Law and Social Security, Leiden University)*







## Conference Program

- 09:00 – 09:30**      **Reception and Registration**
- 09:30 – 10:00**      **Welcome and Introductory Remarks**
- Professor Rick Lawson, Dean, Leiden Law School, University of Leiden  
Professor Paul van der Heijden, Independent Chairperson of the ILO Committee on Freedom of Association; Chair, Social Justice Expertise Center
- 10:00 – 10:45**      **Keynote Address: “The Proliferation of Fundamental Labour Rights Enforcement Mechanisms: Contemporary Discourse and Institutional Challenges - The Contribution of the European Court of Human Rights”**
- Speaker: Judge Dean Spielmann, Judge of the Court of Justice of the European Union (General Court); former President of the European Court of Human Rights  
Discussant: Professor Janice Bellace, Samuel A. Blank Professor of Legal Studies and Business Ethics; Professor of Management, Wharton School, University of Pennsylvania
- 10:45 – 11:00**      **Coffee break**
- 11:00 – 12:30**      **Working Group 1: “The Right to Strike: A need to Align the Different Interpretations?”**
- Chairperson: Professor Monika Schlachter, Vice-President of the European Committee of Social Rights; Professor of Civil Law, Labor and International Law, University of Trier
- 11:00 – 12:30**      **Working Group 2: “Discrimination at the Workplace: Balancing the Divergent Interests at Stake”**
- Chairperson: Professor Titia Loenen, Professor of Human Rights and Diversity, Leiden Law School, University of Leiden
- 12:30 – 13:30**      **Lunch break**
- 13:30 – 14:15**      **Keynote Address: “Understanding Fundamental Labor Rights: Achieving Social Justice through Interpretation”**
- Speaker: Professor Niklas Bruun, Member of the United Nations Committee on the Elimination of Discrimination against Women; Professor of Private Law, University of Helsinki  
Discussant: Dr. Claire La Hovary, Lord Kelvin Adam Smith Fellow, University of Glasgow; Former Legal Officer at the International Labour Organization
- 14:25 – 15:30**      **Working Group 1: “Securing an Effective Application of Fundamental Labor Rights through Legal Interpretation”**
- Chairperson: Professor Brian Langille, Professor of Law, Faculty of Law, University of Toronto



- 14:15 – 15:30**      **Working Group 2: “The Interpretation of Fundamental Labor Rights in Context: an International Human Rights Perspective”**
- Chairperson: Professor Rose-Marie Belle Antoine, former Commissioner of the Inter-American Commission on Human Rights; Professor of Labor Law, Faculty of Law, University of the West Indies
- 15:30 – 15:45**      **Coffee break**
- 15:45 – 16:05**      **Presentation on “The Approach of the Court of Justice of the European Union to the Interpretation of Fundamental Labor Rights”**
- Speaker: Judge François Biltgen, Judge of the Court of Justice of the European Union
- 16:05 – 16:45**      **Connecting the Dots and Conclusions**
- Moderator: Professor Paul van der Heijden, Independent Chairperson of the ILO Committee on Freedom of Association; Chair, Social Justice Expertise Center
- 16:45 – 17:00**      **Vote of Thanks: followed by Reception**
- Professor Rick Lawson, Dean, Leiden Law School, University of Leiden



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