

**THE COURT OF JUSTICE OF THE EUROPEAN UNION'S DECLARATION OF THE PRINCIPLE OF SUPREMACY OF EU LAW IS FINE IN PRINCIPLE BUT MEANINGLESS IN PRACTICE'. DISCUSS.**

**LAW ASSIGNMENT**

Article I-6 of the constitutional treaty<sup>1</sup> establishes the provision of supremacy (or primacy): "the Constitution and law of the Union's institutions shall have precedence above Member State legislation in carrying out its powers." Until recently, the Community treaties have not included such a provision. But does that make a change? Indeed, from a very early stage the ECJ reasoned that the basic treaties essentially presupposed the supremacy of EU law (Costa 1964). Supremacy, as frequently confirmed by the Court, is one of the fundamental foundations of European Union law.

However, it is still possible to carry out national constitutional controls on the EU Law by implementing the supremacy clause. It provides enough interpretive room to enable disagreement to continue, even if the constitutional Treaty is accepted as an acceptable benchmark for the adjudication of such disputes by national courts. First, the article stipulates that "the Constitution and the legislation established by the Union's institutions in the exercise of their powers [emphasis added] must be supreme." It is only to the degree that the Union has acted within its competence that secondary EU law is of priority. The provision of supremacy does not alone specify who should resolve the issue whether EU law is *supra vires* or not. Although the ECJ and many national courts have disputed this matter, the new provision does not resolve it.

Secondly, the article stipulates that 'Member State legislation' must be *primate* by EU law. The national constitution is, naturally, technically part of the legislation of a Member State. Yet since the most profound debate was never about the supremacy of EU law over national law but rather its primacy over national constitutions, the phrase does not expressly declare that EU law goes beyond member states' constitutions.

In this regard, the U.S. Constitution's supremacy clause (art. VI, cl. 2) is very obvious: "This Constitution and the laws of the United States which are to be established in its implementation, and all Treaty or which are to be concluded under the authority of the United

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<sup>1</sup> Originally, this was art. I-10 of the draft constitutional treaty

States, shall be subject to the supreme law of that country, and any matter of constitution or law of any State, notwithstanding [emphasis added], shall therefore be bound by the Judges of every State."

In the European framework, there is clearly greater uncertainty as to whether any item of EU legislation should be complied with in the national constitution. Article I-5.1 of the Constitutional Treaty further enhances the uncertainty. That clause does not just reaffirm the Union's support for domestic identities (Article 6, para. 3, TEU), but stipulates that the Member States' basic constitutional frameworks are an important element of the national identity to be respected. In the event that the new article I- 5 does not respect national constitutional identities, it would be plausible to interpret that it allows domestic judges to set aside secondary EU legislation, which is an EU issue. Since in such instances the final authorisation to set aside EU law would itself be based on EU legislation, there is no legal violation of the principle of priority.<sup>2</sup>

Finally, the official statement on the provision of supremacy of the Member States included to the Constitutional Treaty does not address the issue. It states that Article I-6 reflects the current jurisprudence of the Court of Justice and the Court of First Instance." It is widely known that, even in contradiction with national constitutional legislation, the ECJ has consistently maintained that EU law takes priority. However, this statement does not resolve the problems involved. The real question has always been whether the ECJ can interpret the primacy claim within a monistic or pluralist framework from the viewpoint of the state courts.

According to a conventional perspective, the supremacy of EU law could only be established successfully if, via a method that could represent a European demo, a European people acting as a constituent power, could the constitutional Treaty be approved and ratified. Legal authority, it is claimed, derives either from or derives from a constitutional power act.<sup>3</sup>

The EU itself was a state in the first instance, whereas it was an international organisation in the second (or at best an entity sui generis). As a state, the EU is the ultimate legal entity and its constitution is the highest legislation of the country. In contrast, it would deriving its power

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<sup>2</sup> Notable examples of member states explicitly constitutionalizing the ECJ's jurisprudence include the recognition of fundamental rights as general principles of EU law and the grant of a competence to legislate in the area of environmental law.

<sup>3</sup> Final Acts, A, Declarations concerning provisions of the Constitution, I.

from the Member States as an international organisation, and only as decided by national constitutional legislation, would EU law be implemented domestically. Despite the lineage of this perspective, we do not feel that it is a useful conceptual framework for the reflection in general or constitutional disputes inside the EU, in particular. The EU is not an entity which can be defined, expounded or evaluated correctly or can be led by future developments.

The constitutional treaty can hardly be regarded as an act of a constituent European power. Firstly, the entire text reaffirms and reinforces the unique character of the EU rather than transcending it. In addition to the showy inclination towards constitutionalism indicated in the title of the text (a Constitutional Treaty), Article I-1 refers also to the desire of European people and states. It recognises a people of Europe nowhere, but simply the people of Europe. The Treaty also highlights the role of national parliaments in providing practical significance to the concept of representing democracy in the Union (art. I-46.2). Moreover, it is not obvious if, at the present, European people can act as a people to be the subject of the constituent power. Doubt arises with respect to the presence, through a sufficient thick collective identity, of a European public sphere, a needed framework of civil society or an adequate feeling of solidarity. It is no surprise that in line with their individual constitutional obligations, the constitutional treaty provides that the States must ratify it " (art. IV-447).

It confirms the EU's relationship to the national constitutions rather than severs them. The Treaty requires neither European referendum or special ratification conventions (as, for example, art. VII of the U.S. Constitution did). Some of its members proposed to call for a European referendum on ratification at the Constitutional Convention. A twofold majority was proposed as legally required to achieve ratification (see CONV 658/03) (majority of citizens and majority of countries). But it was rejected in the end. The States are thus free to determine how the Treaty is ratified. They must not use a different method to ratify regular international accords than they normally do. However, a significant number of countries are dedicated to actively involving the people.<sup>4</sup>

The extent to which individuals are going to engage in the political ratification process is an open issue. Their lack of interest in the work of the Convention makes them suspicious, but they may become more and more involved as the discussions on ratification progress. In order

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<sup>4</sup> See Case C-11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle*, [1970] ECR 1125.

for a particularly European constituent of power to arise, however, it is essential for discussions in the various states to be brought together to lead to a really European discussion. Although certain connections will be created, there will probably not be so much interrelation that a European power component can reasonably be ascribed to the ultimate decision ratifying the Treaty.<sup>5</sup>

However, the particular characteristics of the ratification process may enhance EU legislation, but the approval of the Constitutional Treaty cannot be regarded as act of a constituent European power. Firstly, ratification of the Treaty may involve amending the national constitution in certain countries. Given the manner in which the Treaty changes the domestic scope and balance of powers, a national constitution might be regarded of as a provision covering the ratification of a treaty. In particular the primacy clause of Article I-6 of the Treaty could be considered to call into question the traditional understanding that the supreme law of the nation is a national Constitution, which would require adopting an amendment to the national constitution which explicitly accepts the primacy of European Union law. Secondly, the ratification decision may easily in certain nations be seen as an act of the nation's own constituent power. In this context it is of importance because Member States have a tendency to have people participate directly in the ratification process, whether via binding referendums or by consultative polls, which are politically binding.<sup>6</sup>

The second issue concerns the protection against breaches by EU institutions of basic citizens' rights. This is an ancient issue, which was first expressed in the absence of any judicial protection under the ECJ's basic rights. However, during the 1980s, the European Court established a level that basically equalled that provided by national courts in accordance with their separate constitutions for the protection of fundamental laws against EU legislation. On addition, the inclusion of the Charter of Fundamental Rights is expected to have a beneficial effect in the degree of protection. The Constitutional Treaty confirms that jurisprudence in

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<sup>5</sup> The fact that the constitutional treaty (in art. I-60) explicitly establishes, for the first time, that a member state can freely withdraw from the EU, can have the collateral effect of strengthening the case for the primacy of EU law. One could argue that, to the extent that member states can exit the Union, they should be loyal to its rules and principles while they remain within it, including the principle that EU law has primacy over national law.

<sup>6</sup> Yet we profess some sympathy with those who cling to this conceptual framework. The remarkable tenacity of such a framework cannot be explained exclusively in terms of conceptual fetishism or intellectual inertia. In part, it results from the absence of a comparatively elegant and simple alternative framework.

Article I-9.3. The rights are now more apparent, they are presumably claimed more often, and the ECJ cannot be oblivious to the pull of gravity.<sup>7</sup>

The protections against EU actions are unlikely to fall short of the European Court of Human Rights guarantees. Furthermore, if the Union ratifies the European Human Rights Convention, another institution will offer an extra institutional protective layer that is particularly tasked with protecting rights. Experiences with the European Court of Human Rights show that, when an outside institution may indirectly monitor its judgments, national courts are more willing to internalise the need to protect basic rights. Both national judicial and political branches consider it preferable to safeguard "domestic" rights in order to avoid international humiliation. The same will probably happen if the EU signs the European Convention on Human Rights.<sup>8</sup>

It will be urged to respect the rights of the ECJ and the other EU institutions, so that it is not found guilty by the other human rights Court. We all believe we can no longer say that structural inadequacies in protection of rights are present in the framework of EU law after ratification of the Constitutional Treaty. This does not, of course, imply that there will be consensus on the meaning of such rights in all instances. The ECJ's specific interpretation is sometimes quite disagreeable in the national courts. However, in particular circumstances, such differences on the significance of such abstract guarantees as equality, freedom of speech or free practise are unavoidable. The overall degree of protection provided by the ECJ is not lower than that offered by national courts. And, since it contradicts national constitutional law, they do not support national courts' reassertion of EU legislation.<sup>9</sup>

A third issue concerns what is often referred to as the European Union's democratic deficit. The argument is occasionally expressed as a communitarian one on identity, but is couched in procedural terms in the majority of instances. Both of them are linked. In significant ways, legislation at EU level seems democratically inadequate. The issue is generally believed that the inadequacy of the directly represented institutions is at the heart of the European

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<sup>7</sup> As of March 17, 2005, at least nine member states have committed themselves to do so: the Czech Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

<sup>8</sup> In Spain, for example, the Consejo de Estado (a body that advises the government) had published a report (dated October 21, 2004) suggesting that the primacy clause of article I-6 might collide with the principle according to which the Spanish Constitution is the supreme norm of the legal system that is applied in Spain.

<sup>9</sup> The European Parliament has passed a resolution (October 14, 2004) calling on the European Council to devise a coordinated approach to the timeframes for of national ratification procedures and suggesting that May 5–8, 2005 might be a suitable period for referenda on the constitution, or for parliamentary ratification, in the member states.

legislative process and can take responsibility for choices.<sup>10</sup> There are no methods of participation to guarantee that people in the Union may vote out of government those accountable for a legislative programme. Rather, the legislative outcome seems to be the intricate interplay between the Commission, the Council and Parliament, the Commission and the Council making key political decisions.<sup>11</sup> In European decision-making the consociationalism aspect is still prominent. The European Parliament is naturally an entity that is directly representational and whose permission has to be made effective by most EU laws. However, given the monopoly still exercised by the Commission, the institutional significance of the Parliament remains restricted, given the policy centrality of the Council when determining matters by supermajority.<sup>12</sup>

In cases in which a national community decides to enshrine a specific rule according to the procedure laid down in its constitution, the consequences of which are clear in a given case (that is, a constitutional provision does not permit a reasonable interpretative division as it relates to a specific case), then that decision shall be respected by National Courts. The national constitution should be implemented and EU legislation should be set aside if required.<sup>13</sup>

The need to be explicit in our proposal significantly lowers the danger of the uniform application of EU legislation - an essential value - by the constitutional provisions. For example, abstract rights declared under their respective constitutions or abstract rules that are important for determining the degree to which Member States have been given (or are allowed to transfer) competencies to the EU should not be challenged by domestic courts by EU law.<sup>14</sup> Such a criteria would impact all types of EU law and would seriously jeopardise the consistent implementation of EU law. Rather, limits on the implementation of EU law are far less effective in restricting the extent of the national constitutional override to particular

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<sup>10</sup> See Solange I, *supra* note 7; Solange II, *supra* note 8.

<sup>11</sup> Case C-376/98, *Federal Republic of Germany v. Parliament (Tobacco Directive)*, [2000] ECR I-8419.

<sup>12</sup> For these purposes, it is helpful for member states to have a constitutional court (or at least a specific constitutional chamber within the highest national court).

<sup>13</sup> For a general assessment, see Juliane Kokott & Alexandra Rueth, *The European Convention and Its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 *COMMON MKT. L. REV.* 1315 (2003).

<sup>14</sup> See generally MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION* (Univ. of Georgia Press 1988).

regulations.<sup>15</sup> It is not required to engage in a detailed philosophical debate on the indeterminacy of the language in order to protect and implement the specificity criterion.<sup>16</sup>

**Q2. 'EU Member States must defer to the Court of Justice of the European Union on questions of fundamental rights, over and above their own national courts'. Discuss.**

### Introduction-

In fact, the new century has marked a new constitutional period for the European Union, notwithstanding the failure of the ambitious draught of the European Constitutional Treaty and the arduous road towards the approval of the Lisbon Treaty. In the first decade of the 21st century there are several significant constitutional amendments, most of them relate to basic rights. Fundamental rights have been an honour on the European agenda since the adoption of the Charter — in its establishment<sup>17</sup> Prove of the Fundamental Rights Agency of the European Union in Vienna. In addition, the Charter gave the motor of the European Court of Justice new constitutional fuel. The Court of Justice appears encouraged to function as the constitutional federal tribunal by the availability of a documented inventory of basic rights. In reality, the European Court, a phase focusing on the preservation of basic rights, has started another period of judicial activism. The Europe of judges and rights is thriving while the European Union is not at the most advantageous time in political cohesiveness. As was predicted,<sup>18</sup> The Basic Law Community is growing rapidly.

In a sense, this is a departure: the weakness of the political process and the activism of a judicial branch have defined many previous periods in the history of European integration. After all, political failures are very frequent and provide opportunity for judicial intervention. It is thus no surprise that the European Court of Justice is once again at the heart of the

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<sup>15</sup> See Jürgen Habermas, Does Europe need a Constitution? Response to Dieter Grimm, 1 EUR. L.J. 303 (1995).

<sup>16</sup> Another institutional solution that was suggested, but ultimately rejected, was the establishment of a separate court focusing explicitly on jurisdictional issues. Such a court could have been staffed by judges from national courts and judges from the ECJ.

<sup>17</sup> The European Union Agency for Fundamental Rights was established by Council Regulation (EC) No 186/2007 of 15 February 2007. On this point see A. von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship', Jean Monnet Working Paper, n. 13/07, in <http://www.jeanmonnetprogram.org/papers/07/071301.pdf> visited 23 January 2009

<sup>18</sup> A. von Bogdandy, 'The European Union as a Human Right Organization?' in 37 *Common Market Law Review*, 2000, p. 1308. Soon after the solemn proclamation of the Charter of Rights by the European Union in Nice on 7th December 2000, Armin von Bogdandy sensed the first symptoms of an evolution destined to change the features of the European integration, from an *economic* community towards a *Grundrechtsgemeinschaft*, a community of fundamental rights. As the Author had predicted, the Charter of Fundamental Rights actually marked a new era in the European integration, displaying all its seductive power. Later the Author changed his thesis, as can be read in the paper above mentioned in note 1.

constitutional arena, given the closure of the legislative path to the complete European Constitution.

A more intensive work in areas relating to basic rights is characterised by the current wave of judicial constitutional activism. In this sector, the Member States have both similar backgrounds and distinct traditions at a time: social rights, family law, state and religion – to name a few examples – are areas with varied laws in the 27 Member States. In view of this, the Court holds numerous advantages and also some dangers in the European Charter of Fundamental Rights.

***Signs of constitutional activism in the case-law of the European Court of Justice on fundamental rights.***

Although the Charter adopted in 2000 is not the first form of protection of fundamental rights in the European Union, but instead it is part of a process established during the 1960s which has been consolidated over time, the quality and quantity of interventions by the Court of Justice in respect of fundamental rights are certainly a turning-point. Some were afraid that the Charter would stifle the European Court of Justice's inventiveness, but it appears the reverse has happened.

This theory is corroborated by a vast record of human rights judgments. Below are some of the best examples.

**A. Case of Tanja Kreil**

The Tanja Kreil judgement of 2000 may be regarded the beginning of the new dynasty of constitutional cases.<sup>19</sup> Sentence delivered in the middle of the constitutional enthusiasm which in those years pervading the European Union, before to the adoption of the Charter. It is necessary not to recapitulate such a famous case in detail, as many have discussed, but to recollect that, all in all, the Court of Justice presented a constitutional conflict between a provision of the German Constitution, Article 12 of the Basic Law that banned women from carrying out military roles that implied the use of weapons and a fundamental principle of Community legislation. The Court of Justice, without questioning the 'bush,' states that the principle of Community non-discrimination 'imposes the application of domestic provisions, for example those of German law, which impose general exclusion on women of arms-related

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<sup>19</sup> ECJ 11 January 2000, Case C-285/98, *Tanja Kreil*.

military positions and permit their access to medical and military musical services only.' The Court ends by asking for a constitutional review on the side of Germany, without expressly emphasising the constitutional status of the relevant German standards, pointing to an irredeemable contradiction between Community legislation and national constitutional law. While up until then the Court had avoided the outbreak of conflict between national Constitutions and the ideals of the Community,<sup>20</sup> There is no reluctance in the Kreil case to force Germans to conform via revision of their Constitution to the European ideals. This is exactly why Tanja Kreil may be seen as a precursor to the European Court of Human Rights' new line of judgement.

### **B. Cases of Omega and Schmidberg**

In certain judgments on conflicts between basic economic freedom and human rights, significant indications of innovation may be viewed from a different perspective.

Critics of the Court have voiced scepticism that the guarantees of basic rights of the Community are genuine. Repeatedly, the Court of Justice has taken use of human rights language, with a view not so much to protecting certain fundamental principles in themselves as to strengthening economic integration.<sup>21</sup>

Indeed, collective protection of basic rights has historically been heavily dependent on the overall aims of European economic integration, and therefore, primarily, the common market. Until recently, there has been considerable respect by the Court of Justice to the economic freedoms of the single market each time a balance between these and other basic rights has been required. Indeed, the Court of Justice has never seen basic or fundamental freedoms as absolute values and has thus always taken care to maintain a balance between economic and fundamental freedom grounds. But economic liberties have often gotten the upper hand in this delicate equilibrium.

So that's why the 2003 Schmidberger case<sup>22</sup> Many academics and critics were warmly received. The Court of Justice, called by a demonstration in the presence of an environmental

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<sup>20</sup> Suffice to recall the well known decisions of the ECJ concerning the Irish Constitution: ECJ 28 November 1989, Case C-379/87, *Groener*, on the protection of the Gaelic language and ECJ 4 October 1991, Case C-159/90, *Grogan*, on the right to life and abortion.

<sup>21</sup> J. Coppel – A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', in 29 *Common Market Law Review* (1992), p. 669.

<sup>22</sup> ECJ 12 June 2003, Case C-112/00, *Schmidberger*. On this issue M. Avbelj, 'European Court of Justice and the Question of Value Choices', <http://www.jeanmonnetprogram.org/papers/04/040601.pdf> visited 25 January 2009.

association that blocked the Brenner motorway for 30 hours, in that decision to resolve a controversy between the basic freedom of market – in that case free movement of goods – and certain fundamental rights – freedom of assembly and freedom of speech. The Omega decision in 2004 was even more surprising in many ways<sup>23</sup>.

The Court was also in this case confronted by a conflict between the economic freedom of the Treaty, the freedom to move services and to a lesser extent the freedom to move goods, and the protection of fundamental rights, as set out in that particular case, in the context of a commercial entertainment service offering games to simulate murders with the use of toy I.

The issue might have been settled on another basis, but the Court wished to utilise the basic rights discourse by claiming that dignity is not only one of the essential values of the German Constitution but also part of Europe's ideals. The Court wanted to emphasise the European Union's commitment to respect for human dignity intentionally. It is impossible not to recognise, when you read the judgement of Omega, the subtle impact of the Charter of Fundamental Rights, which begins with the assertion that the preservation of human dignity is an inviolable right. The Court of Justice's efforts were not overlooked. In Omega, as in Schmidberger, basic liberties were over and justified by significant limitations on economic liberty. c. K.B., Richards and Tadao Maruko cases.

An important feature of this case law is that the basic rights of the Community affect the system of British civil status, which clearly does not fall within the competence of the Union. A question on the principle of non-discrimination against sex in the survivor's pension and the definition of retirement age was asked by the Court, but the decision ends up dealing with a matter which the Member States certainly did not intend to pass on to the Community institutions, namely transsexuals' legal status, and civil rules.

Indeed, the concept of incorporation is extended to include K.B. and Richards, the European Court of Justice. This well-known theory should not be insisted upon here.<sup>24</sup> Suffice to remember that up until now the sphere of application of basic rights, aside from being applied to the actions of the Community institutions, was also extended to the acts of the member

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<sup>23</sup> ECJ 14 October 2004, Case C-36/02, *Omega*.

<sup>24</sup> The first and fundamental essay about the incorporation is J.H.H. Weiler, 'The European Court at a Crossroads: Community Human Rights and Member States Action', in F. Capotorti and others (eds), *Du droit international au droit de l'integration. Liber amicorum Pierre Pescatore*, (Baden-Baden, Nomos, 1987) p. 821 and on the recent evolutions of the incorporation principle see B. De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed.), *The EU and Human Rights*, (Oxford, Oxford University Press, 1999) p. 873.

states that cross the realm of European law, and this occurs in two major hypotheses: when the States' actions constitute an application of community law - the Wachauf line<sup>25</sup> And when the State conduct constitutes an exception to one of the internal market's basic freedoms - the ERT line.<sup>26</sup>

Now, clearly, the K.B. and the Richards instances are not covered by any of them. Censored UK laws neither establish guidelines for the enforcement or enforcement of Community actions nor are they an exception to basic economic liberties. As the Court clearly says, UK legislation on the registration of personal data does not directly endanger a statute protected by Community legislation, which is the right to a pension of the survivor but has an effect discriminatory on one of its criteria.

It is too early to tell if a fresh "spin-off" of the incorporation theory was announced. It is nevertheless evident that European basic rights tend to break into national legal systems well beyond the boundaries of inclusion in situations involving the concept of non-discrimination.

The fate of national cultural traditions is, as far as the legal system is concerned, committed first of all to the constitutional courts, expressing the voice of the national constitutions. They are the authorised interpreters of the national Constitutions and are alive.<sup>27</sup> In the case of a voice which lacks the cultural heritage of Europe in its entirety, the European Court of Justice builds its work on voices and traditions that make themselves heard. The Court may only identify the "shared constitutional traditions" and the common nucleus of European basic rights if the constitutional courts are free to interpret and express proudly their unique constitutional traditions. In its interpretation and application of the provisions of the Charter of Fundamental Rights of the European Union, on the other hand, the Court must show utmost respect for all national constitutional traditions.

### **Q3. The Court of Justice of the European Union's case law on the free movement of services poses a threat to the fundamental right to strike'. Discuss**

Protecting basic rights inside the European Union is becoming more and more important with the entrance into effect of the Treaty of Lisbon. Article 6 TEU not only provides a binding legal character for the Charter of Fundamental Rights of the EU, previously declared at the 2000 Nice Summit but also says that the 'European Union is to subscribe to the Convention on

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<sup>25</sup> ECJ 13 July 1989, Case 5/88, *Wachauf*

<sup>26</sup> ECJ 18 June 1991, Case 260/89, *Elliniki Radiophonia Tielorassi ERT*.

<sup>27</sup> V. Onida and B. Randazzo (eds), *Viva vox constitutionis*, annual series since 2002 (Milano, Giuffrè).

Fundamental Rights and Freedoms' (hereafter the ECHR). Of course, we applaud this reinforcement of the protection of European basic rights. However, it also presents legal coherence problems. The EU's and the Council of Europe's legal regimes are different in nature so that basic rights may be protected within these systems. This currently holds true before the admission of the European Union to the ECHR, since at now the Union must protect basic rights guaranteed by the ECHR as a general principle under EU law, which are the consequence of constitutional traditions common to the Member States.<sup>28</sup> Indeed, the case law of the European Court of Justice (ECJ) has been used in the past to provide abundant instances of the (also) application of the European Convention's basic rights. This contribution will concentrate on the coherence elements of, notably, the rights to strike, which are sometimes referred to as the right to collective activities, because there are more kinds of measures to protect workers' social and economic interests than only regular stops to work. Social rights, including the right to collection actions, are particularly important for a number of reasons when discussing the forthcoming admission of the EU to the ECHR. The first point is the application of social basic rights or a test case for the forthcoming difficulties of the adjudication of EU action in this area by the European Court of Human Rights (ECtHR).

The ECtHR delivered its benchmark rulings in *Demir and Baykara* and *Enerji Yapı-Yol Sen* almost at the same time that the ECJ delivered its rulings in *Viking* and *Laval* stating that exercising the fundamental right to collective action had to meet the rationale test of economic freedom for the creation and provision of services. In these rulings he provided full protection under Article 11 ECHR (freedom of association, including the right to form and join trade unions) for the right to collective bargaining and collective bargaining, with extensive reference to the ILO standards and to the European Social Charter (ESC), as defined by his respective international supervisory committees. The rulings were ground breaking decisions, given that, up to then, the ECtHR held for some time that collective bargaining rights and the right to strike were not "essential means" for the Member State to maintain a trade unions' right to represent their members' interests in accordance with Article 11.

### **Implications of the balance struck**

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<sup>28</sup> Art. 6(3) TEU.

At the heart of Laval's judgement, strike action is not so balanced at the basic freedom to offer services but is evaluated as a (unlawful) technical element according to the Directive on posted workers.<sup>29</sup> Although the objective of this Directive is not to reconcile the application of the fundamental right of collective action and fundamental economic freedoms, the EU's lack of competence in the field may still be regarded in accordance with Article 153(5) TFEU as a 'legislative equality' between the free provision of services and the goal of social policy for the protection of workers. However, as the ECJ interprets, the weight seems to move towards their internal market objectives. This was to be emphasised in the subsequent instance of Ruffert where a so-called social clause guaranteeing compliance with the relevant collective labour agreement was excluded in the tendering requirements of the local government since the collective agreement was not generally applicable.<sup>30</sup> In spite of the fact, in Article 3(7), that the Posted Workers Directive obliges a Member State to ensure that a nucleus of minimum conditions of employment shall be applied to posted workers and the States, this does not prevent the application of the more favourable conditions on employment to employees.

According to the Court, paragraph 7 of Article 3 only dealt with the scenario when an enterprise signs a collective agreement 'of its own will' in the host country which provides more favourable conditions.<sup>31</sup> This indicates that the trade unions have the flexibility not only to enter into a threat of industrial action in the event of foreign contractors but to enter into collective negotiations on working conditions beyond the core of Article 3(2) of the Directive.<sup>32</sup> This would certainly not be justified since the collective agreement sought would be entered into on a case-by-case basis. In this connection it seems that the Court considers collective negotiations to be separated from collective action.<sup>33</sup>

But the concept of voluntary collective bargaining would simply not function without the 'equality of arms' for both sides of business. Collective action, according to the ILO's views, is the corollary to collective bargaining and is thus essential to the freedom of association and collective bargaining rights. In particular, the ECJ concluded in Viking that the inexorably

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<sup>29</sup> Cf. A. Van Hoek & M. Houwerzijl, 'Loonconcurrentie als motor van de interne markt? Deel I', 2008 *Nederlands tijdschrift voor Europees recht*, no. 7/8, pp. 190-205.

<sup>30</sup> Case C-346/06, [2008] ECR I-01989. See, i.a., A. Van Hoek & M. Houwerzijl, 'Loonconcurrentie als motor van de interne markt? Deel II', 2008 *Nederlands tijdschrift voor Europees recht*, no. 12, pp. 337-346;

<sup>31</sup> See *Laval*, supra note 2, Para. 81.

<sup>32</sup> Cf. Davies 2008, supra note 3, p. 129.

<sup>33</sup> *Ibid.*

connected collective bargaining and collective action, however, used this reasoning to bring collective action within the reach of Article 49 TFEU (supra, Section 2.1).

This gave horizontal effect to the laws relating to free movement of establishments and services. However, private unions must be appointed addressees of provisions of public interest legislation ensuring freedom of movement at a cost.<sup>34</sup> On the one hand, unions are seen to be semi-public organisations, which are considered capable of 'managing the supply of services collectively';<sup>35</sup> On the other hand they are unable, in respect of public policy reasons, to use the exemptions set forth in the Treaty or in the Posting Workers Directive.

### **The protection of the right to strike**

In adopting its human rights tools, the Council of Europe distinguishes strongly between civil and political rights in the European Convention (1950) and the social and economic rights set out in the European Social Charter (1961)<sup>36</sup> With the 'light' system of monitoring commissions and, subsequently, a collective voluntary complaint proceeding (1995). The social rights of, in particular, collective bargaining, have never fully fitted in with the broad difference between "freiheiten," which are not of a "programmatische" character, like the "traditional" human rights, but need only the abstention of the government. Nevertheless, it was established in 1970 and reaffirmed recently in 2002 pursuant to the ECtHR's longstanding case law,<sup>37</sup> Collective negotiations and strike action were not rights protected by the Convention as such. Article 11 ECHR (i.e. the right to form and join trade associations) was held by the Court in order to safeguard freedom to safeguard workers' occupational concerns through syndical action, but there was a margin for appreciation for the choice of wages to be used by the State for 'should be heard' of the trade union. 41 'There are others, whereas one of these methods, is the conclusion of collective agreements (or initiation of strike action).<sup>38</sup> Demirand Baykara, followed by Enerji Yapi-Yol Sen, was to alter this perspective in his opposing direction.<sup>39</sup>

However, the right to take group action in the field of protection of workers may be a (unwritten) justification under the ECJ, but a sufficient reason for collective action in a

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<sup>34</sup> Cf. Davies 2008, supra note 3, p. 130.

<sup>35</sup> See *Laval*, supra note 2, Para. 98. Compare also *Viking*, supra note 2, Para. 33.

<sup>36</sup> The ESC was revised in 1996, but the revised charter has not been ratified by all EU Member States.

<sup>37</sup> *UNISON v the United Kingdom*, [2002] Appl. No. 53574/99, ECHR 2002-I.

<sup>38</sup> *National Union of Belgian Police v Belgium*, [1975] Series A, No. 1, Para. 38; *Swedish Engine Drivers' Union v Sweden*, [1976] Series A, No. 20, Para. 40; *Schmidt and Dahlström v Sweden*, [1976] Series A, No. 21, Para. 36.

<sup>39</sup> *Ibid.*

particular instance has to be assured by the national court (*supra*, Section 2.1). As already shown, the use of basic social law as such is not enough to justify, although strike action may, depending on the circumstances, nevertheless fit the EU system of restrictions on freedom of movement. But if the exercise of economic freedom may also comply with the restriction system in the ECHR, from a different point of view, it is questionable. There are no "urgent social necessities" for the reasons stated in Article 12, Paragraph 2. It also counters the position of the employer which only has to retract in order to prevent collective bargaining in the interests of the workers, especially when the fundamental right to strike is concerned. It is also the negative economic consequences for the employer that the 'first power' of the collective action weapon is perceived to be. As a result the odds appear also distant of the need, under Article 11(2), to "defend the rights and freedoms of others," to safeguard the interests of the employer's establishments or to offer services.

In accordance with the established ECSR stance on Article 31 ESC interpretation,<sup>40</sup> The employer engaged in the industrial dispute cannot be considered a third party, which is similar to Article 11(2) ECHR. After all, the employer can safeguard his interests via the settlement of the issue with the trade union, unlike other parties. According to the ILO legislation, which until now offered a clear guiding principle for the ECtHR on the interpretation of syndical rights, there is still less space for manoeuvre to incorporate economic liberties in a system of legal limits. Under the terms 'essential services,' in the literal meaning of this word, the interrupted service may threaten the life, personal security or health of the whole or portion of the population, as defined by the ILO convention No. 87 and the Committee on Freedom of Association.<sup>41</sup> Reflecting on the effects of ECJ jurisdiction on the effective exercise of the strike right in the British case BALPA (*supra*, section 2.3). Two major causes for legal incoherence in this area may be extracted from the inequalities described in the earlier section. The first thing to do is to start from various directions using the methodology used to balance the interests of employees and employers in the EU single market. The ECtHR is based on the potential breach of the fundamental right to strike, as a general axis, while the ECJ is based on the possible breach of basic economic freedom. Secondly, and perhaps more importantly, within the system of human rights, especially that which embraces standards of international labour

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<sup>40</sup> Article G in the revised European Social Charter (1996).

<sup>41</sup> I.a. 1996 *Digest*, Para. 544; and 326th Report, Case No. 2135, Para. 267; 307th Report, Case No. 1898, Para. 323; 309th Report, Case No. 1865, Para. 145; 321st Report, Case No. 2066, Para. 336; 336th Report, Case No. 2383, Para. 767.

law with common ground in contemporary societies, economic freedoms of establishment or the provision of services or products should ultimately only be conceived as commercial interests which, as such, do nothing to outweigh the fundamental rights of the trade unions.

Even though this Court does not remove the economic liberties of the Union from the list of legal restrictions in accordance with Article 11(2) ECHR, the issue of inequalities in respect of protection of human rights still exists. In case of an "internal" strike, individual Member States cannot permit economic considerations to triumph over the rights of basic trade unions whereas the EU may do so in the event of a cross-border strike.

