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THE FUNDAMENTALISATION OF SOCIAL RIGHTS

EUI Social and Labour Law Working Group



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*The Fundamentalisation of Social Rights*  
*Second Annual Open Workshop of the EUI Social and Labour Law Working Group*

**EUI SOCIAL AND LABOUR LAW WORKING GROUP**

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## **Abstract**

The place and legal value of social rights in the EU Charter is only one episode (albeit a long drawn out episode, lasting since 2000) in the ongoing struggle about the ‘fundamentalisation’ of social rights, which is the subject of the contributions to this collective Working Paper. In the European Union itself, another arena of this struggle was opened up more recently by the judgments of the European Court of Justice in the cases *Laval*, *Viking* and *Rüffert*, which are amply discussed in several contributions of the Working Paper. Issues relating to the recognition of a fundamental legal status to social rights also occur in other contexts than that of the European Union, namely in the development and monitoring of international human rights norms, and also in the national legal context .

This Working Paper contains the combined output of current doctoral research at the EUI in these two fields: of international and European human rights law, and of comparative and European labour law. The contributions which the reader will find in the following pages take stock of the current debate on the fundamental status of social rights, and raise a number of interesting perspectives on how to carry that debate forward.

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## **Keywords**

Fundamental/human rights, Social rights, Right to information and consultation, Medical rights, Right to food, European citizenship, Constitutional Courts, Consumer’s rights, Agency of Fundamental Rights, Industrial rights

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## Introduction

### Fundamental, Yes – But What Does It Mean?

Professor Bruno de Witte (EUI)

When the European Union was given its own Charter of Fundamental Rights and Freedoms, in December 2000, one of the major characteristics of that document, noted by all commentators and praised by most of them, was that it transcended the dichotomy between social and economic rights on the one hand, and civil and political rights on the other. In this respect, the Charter represented the endorsement of two core ideas that had slowly matured over the years in national constitutional law and in international human rights law, namely: (a) the idea that all rights require some measure of positive action from the side of the state, so that it is no longer justified to operate a sharp distinction between rights implying a negative duty of abstention and rights implying a positive duty to act; and (b) the idea that rights that are not self-executing (to use the international law term) or are not ‘subjective rights’ (to use a term familiar to continental constitutional lawyers) can nevertheless have important legal and political effects.

However, we know that this major event was followed by a long period of hesitation and controversy. The EU Charter itself has not yet become a binding instrument as long as the Lisbon Treaty has not entered into force. Moreover, the revision of the Charter on the occasion of its incorporation in the Constitutional Treaty (and later the Lisbon Treaty) led to a distinction between ‘rights’ and ‘principles’, which aimed at limiting the judicial enforceability of the latter category. This move was intended by those who promoted it (mainly the UK government) to restrict the impact of some of the social rights contained in the Charter. However, the Charter does not label its provisions as being either rights or principles and the rights/principles distinction is therefore bound to become a major source of confusion and controversy once the Charter text becomes formally binding. This very regrettable lack of precision contrasts with some national constitutions (such as those of Ireland and Spain) that similarly exclude judicial review of some fundamental social rights provisions, but at least clearly indicate which specific provisions are excluded. It would certainly be too simple to consider that entire chapters of the Charter (say, the chapter on ‘solidarity’) contain only marginally justiciable principles rather than fully justiciable rights. It is necessary, rather, to proceed on a case-by-case basis, and good arguments can be made for ranging most of the Charter’s fundamental social rights in the ‘rights’ category rather than the ‘principles’ category.

The place and legal value of social rights in the EU Charter is only one episode (albeit a long drawn out episode, lasting since 2000) in the ongoing struggle about the ‘fundamentalisation’ of social rights, which is the subject of the contributions to this collective Working Paper. In the European Union itself, another arena of this struggle was opened up more recently by the judgments of the European Court of Justice in the cases *Laval*, *Viking* and *Rüffert*, which are amply discussed in several contributions of the Working Paper. Issues relating to the recognition of a fundamental legal status to social rights also occur in other contexts than that of the European Union, namely in the development and monitoring of international human rights norms, and also in the national legal context

All the substantive chapters in this collective Working Paper, with the exception of that of Professor Roman from the University of Tours (whose contribution is gratefully acknowledged), are written by PhD researchers of the European University Institute. Their papers are testimony of the attention given to questions of social rights protection at the EUI. In fact, this is a domain of ongoing interest of the EUI which lays at the confluence of two fields which have been central to the intellectual agenda of its Law department for many years now: the protection of human rights at the transnational level, and the development of international and European labour law. The first line of research is exemplified by

such collective endeavours as the volume *EU Law and Human Rights*, edited by Philip Alston in 1999, and the volume on *Social Rights in Europe*, edited by Gráinne de Búrca and Bruno de Witte in 2005.

This Working Paper contains the combined output of current doctoral research at the EUI in these two fields: of international and European human rights law, and of comparative and European labour law. The contributions which the reader will find in the following pages take stock of the current debate on the fundamental status of social rights, and raise a number of interesting perspectives on how to carry that debate forward.

## The Trends of Fundamentalisation

Professor Laurence Burgorgue-Larsen (Université Paris I - La Sorbonne, France)

On matters dealing with economic and social rights, the observations which arise are frequently more or less the same and this is so whatever the legal system referred to (be it national, from the European Community or international).

The first observation relates to the overarching presence of political power. Economic and social rights have always had to deal with politics; indeed they were born of the confrontational power struggle in politics. They are the result, no more, no less, of political conflict.

The “social question” that marked the schism between workers and employers in 19<sup>th</sup> century Europe, soon evolved into the opposition and confrontation of social classes. Indeed, was it not as a result of the great social dilemma of the 19<sup>th</sup> century, which we know was raised to the rank of ideology by Marxist dogma, that social rights and the principle of the “social State” took form? “Social constitutionalism”, a movement promoting the incorporation of programmatic provisions of an economic and social nature within constitutional texts, left its mark at that time on several constitutional texts.<sup>1</sup> The Weimar Constitution of 1919 is systematically put forward as a model of inclusion of social provisions that was ahead of its time. Sometimes the Greek Constitution of 1927 or the democratic Spanish Constitution of 1931 are both also referred to in that light. Anna Maciejczyk rightly refers to the Mexican Constitution of 31 January 1917 drawn up at Querétaro, which was the first 20<sup>th</sup> century constitution that upheld all at once a special guarantee of equality together with two specific provisions (a “dialectic pair”) which recognised the rights of workers and allowed limitations concerning private property.

More generally, the post-war emergence if not explosion onto the scene of economic and social rights is the consequence, among others of course, of the terrible experience of the Second World War. The denigration of human life by the totalitarian Nazi regime led to nothing less than the negation of the human being.

In short, economic and social rights were born of the socio-political clashes of the 19<sup>th</sup> century and developed, in the wake of the horrors of 20<sup>th</sup> century totalitarianism, to the point of appearing necessary for profound moral reasons.

It is surely this congenital link with political power struggles and political visions of what a “just and fair” society should be – i.e. one that takes on the challenge of “social justice” – by going primarily beyond the dogma of formal equality so as to achieve material equality between individuals, that gives economic and social rights their special nature.

All the articles that follow clearly show that the “fundamentalisation” of economic and social rights is based, on the one hand, on a (sometimes converging) movement of “constitutionalisation” (see Anna Maciejczyk and Claire Marzo) and, on the other hand, the “conventional” ratification of economic and social rights (through integration in the treaties, see Claire Marzo and Iris Benöhr). Economic and social rights are at the heart of a potential political vision of a given society at a given moment. Simply put, the idea of a society based on market values and profit versus a society based on social welfare, were matters discussed in the run up to the rejection of the Treaty establishing a Constitution for Europe. The unfounded fear that Europe would sweep away the social “*acquis*” in France was one of the reasons for the No vote, despite the existence of the Charter of Fundamental Rights and its chapter

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<sup>1</sup> C. M. HERRERA, « Sur le statut des droits sociaux. La constitutionnalisation du social », RUDH, 2004, Vol.16, n. 1-4, p.37.

on “Solidarity”. The European Union Agency for Fundamental Rights, which has actively begun its work, will no doubt be in the future a source of information on compliance with fundamental rights in Europe (namely social rights) that will enable citizens to have a better understanding of the social dimension of their rights. If this Agency manages to effectively co-ordinate the different national laws of its Member States, as Nikolett Hös suggests, then Europe will appear far more as a factor of progress, which should have positive repercussions on the feeling of belonging to the Union. Economic and social rights are intimately and permanently linked to the idea of political choices that define the destiny of societies and which may have important consequences in the way they impact on national budgets. Thus, one is able to gauge the acute tension that underpins such choices.

This brings us to the second observation: the eternal and never-ending question of the nature of economic and social rights. This conundrum pervades whether explicitly or implicitly the four contributions of this chapter on the trends of fundamentalisation. Is it a question of rights or merely principles? We know that this distinction arose in the context of drafting the Charter of Fundamental Rights of the European Union and that it was made by Guy Braibant, who sought to use this formula in order to reconcile the different traditions of the Member States.

More generally, analyses show that whatever the “constitutional” or “conventional” format adopted, it is impossible to prevent the most difficult questions from being asked in relation to the nature of economic and social rights. It is undoubtedly the existentialist question that is pervasive to all legal systems. Are we dealing with political principles, programmatic norms, “political action plans”, constitutional objectives (a familiar expression in French law) or are we dealing with “rights”, one might even be tempted to say “genuine” rights? Do these economic and social rights have direct effect, in other words, can they be invoked by individuals before a judge? In short, we come back to the everlasting and inextricable question of the legal enforceability of these rights, which provides a constant source of academic discussion. Rigorous analysis and scientific objectiveness require us to answer: “It depends”...Indeed, it depends on a significant number of precise factors within each legal system. It is not possible to state categorically and in the abstract, that such rights are not enforceable, nor that they are just political action plans. Iris Benöhr rightly mentions that a high level of consumer protection has been established as a principle by the Charter of Fundamental Rights of the EU. However, an exercise of comparative constitutional law might show that certain national legal orders give even greater importance to the scope of consumer protection...Turning to comparative law is at this stage an existentialist means of demonstrating the infinite layers of subtleties contained in Europe’s legal systems whose Byzantine nature can be disconcerting.

Last observation, but not least, which the contributions of Anna Maciejczyk and Claire Marzo expressly highlight, is the importance of the figure of the judge. Whether or not there is constitutionalisation or conventional ratification of social matters, the judge (be he constitutional and/or European) is the centrepiece of the structure to construe these texts of reference and reveal or not their social implications. It is the judge who will be best placed to reveal or on the contrary diminish, scope or circumscribe the social dimension of a text. The role of the judge raises a myriad of questions. It is not possible to mention them all here. Suffice it to ask one question among others: who are the holders of social rights? Individuals of course; citizens of course... But what about foreigners? This is an explosive question from an economic and social perspective. What is the state of progressiveness of certain international texts when faced with constitutions, legislation and case-law that are sometimes less “generous”? Bearing in mind that one of the major issues that developed societies will continue to face, is that of the economic and social consequences of migratory flows and the presence of “migrant workers” both regular and irregular on their soil, that issue deserves some attention.

These general comments show the interest of reading with care the articles of Anna Maciejczyk, Iris Benöhr, Claire Marzo and Nikolett Hös, each of which raises from a different and original perspective some very important questions facing the EU.

# **Constitutional Courts as Actors of Fundamentalisation of Social Rights**

Anna Maciejczyk Jaron (EUI)

## **Abstract**

Asserting rights to social protection in the framework of fundamental rights is, perhaps, one of the most debatable issues among modern constitutional scholarship. Discussions on justiciability and enforcement of social fundamental rights have been continuously led not only on the national level in the context of national constitutions, but primarily on the international scene in the scope of international or regional treaties (International Covenant on Economic, Social and Cultural Rights, European Charter of Social Rights), and most recently on the EU level (Charter of Fundamental Rights). Essentially, opinions vary on whether social rights should be attributed a more concrete nature of individual rights, or should they be left in the form of state's prerogative to shape policies.

Notwithstanding the pro and con arguments on justiciability and enforcement of social rights-developed further in this article- the level on which rights are defined is not meaningless to further discussion. Analysing the nature of rights, and notably of social constitutional rights, is consequential therefore to the understanding, application and interpretation of these rights by relevant courts. It is not clear, however, how the problem of asserting rights to social protection understood as fundamental rights, relates to the existing institutions of a welfare state and the patterns of actions or inactions by particular political actors- political parties, political leaders, ordinary courts, constitutional courts, state control organs, ombudsmen, etc. Therefore, in the last part of this article a short account of a theory of constitutional dialogue is presented. In general, dialogue theory assumes an intermediate approach to the judicial enforcement of constitutional rights. It means that in defining rights in relatively broad terms, courts are able to adopt strong remedies. However, in a dialogue model, a context-specific situation that unveils a positive dimension to social rights requires that court favours weaker approach by either taking a position that adopts weak rights or weak remedies, depending on the circumstances of the particular country and case.

## **Introduction**

Asserting rights to social protection in the framework of fundamental rights is, perhaps, one of the most debatable issues among modern constitutional scholarship. Discussions on justiciability and enforcement of social fundamental rights have been continuously led not only on the national level in the context of national constitutions, but primarily on the international scene in the scope of international or regional treaties (International Covenant on Economic, Social and Cultural Rights, European Charter of Social Rights), and most recently on the EU level (Charter of Fundamental Rights). Essentially, opinions vary on whether social rights should be attributed a more concrete nature of individual rights, or should they be left in the form of state's prerogative to shape policies.

There is a good reason to take a moment of reflection on what we consider social fundamental rights at one hand, and on the other hand what, if ever, is there special in inscribing these rights in constitutions. This article tries to capture an answer to these questions by examining, first, the nature of social constitutional rights, and second, the means by which they acquire features of fundamental rights. In doing so, the article argues that a mere fact of constitutionalization of social rights is not sufficient to their establishment as fundamental rights. A set of enforcement mechanisms are essential for these rights acquire a well grounded status within the constitutional provisions. Constitutional review stands naturally in the foreground of available enforcement mechanisms. However, due to the political implications, the constitutional review, especially in the sphere of social policies, remains under fire of criticism. One aim of this article, therefore, is to provide a more exact account of constitutional

dialogue which, in author's view, is needed in order to focus on the potential of the constitutional judiciary to enhance the characteristic of a constitutional democracy, essentially by balancing political processes. The starting point for a discussion is an attempt to define what fundamental social rights are, to be able to go on next with a deliberation on the nature of social constitutional rights, the question of their constitutional justiciability and enforcement ; finally, to reflect on conditions that make these rights fundamental.

Notwithstanding the pro and con arguments on justiciability and enforcement of social rights- developed further in this article- the level on which rights are defined is not meaningless to further discussion. Analysing the nature of rights, and notably of social constitutional rights, is consequential therefore to the understanding, application and interpretation of these rights by relevant courts. It is not clear, however, how the problem of asserting rights to social protection understood as fundamental rights, relates to the existing institutions of a welfare state and the patterns of actions or inactions by particular political actors- political parties, political leaders, ordinary courts, constitutional courts, state control organs, ombudsmen, etc. Therefore, in the last part of this article a short account of a theory of constitutional dialogue is presented. In general, dialogue theory assumes an intermediate approach to the judicial enforcement of constitutional rights. It means that in defining rights in relatively broad terms, courts are able to adopt strong remedies. However, in a dialogue model, a context-specific situation that unveils a positive dimension to social rights requires that court favours weaker approach by either taking a position that adopts weak rights or weak remedies, depending on the circumstances of the particular country and case.<sup>1</sup>

## 1. The Nature of Social Fundamental Rights

The most basic attempt to define fundamental rights is by claiming that these are the rights whose protection is considered essential by a given society. This formulation supposes therefore that fundamental rights are core of rights; they play a pivotal role in a society or a social system by constituting a basic pillar within it and an objective which orientates institutions and policies. Fundamental rights, therefore, should be regarded in the context of the existence of a society, assuming that they are concretely implemented through the fabric of an organised social system; any change in the fundamental rights model would result in a change of the societal model.<sup>2</sup>

The recognition of social rights, understood as an injunction to take care for those in need and those who cannot look after themselves, originates from major religious traditions, philosophical and political theories. The idea has consequently led to constitutional precedents, such as the Mexican Constitution of 1917, then the Soviet Constitutions in the Soviet Union and its satellite countries, and also the 1919 Constitution of the Weimar Republic (which introduced the *Wohlfahrtsstaat* concept).<sup>3</sup>

However the phenomena of constitutionalization of social rights is the case in some modern national constitutions, it is worth noting that in general, a discussion over the nature of social rights is focused on the explanation of the content of social rights drawn from international treaties provisions. This is to say, that for the decades the academic attention has been mostly directed to provisions of the ICESCR.<sup>4</sup> Furthermore, a juxtaposition of social and economic right with civil and political rights,

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<sup>1</sup> DIXON, R. (2007) Creating dialogue about socioeconomic rights: Strong-form versus weak form judicial review revisited. *International Journal of Constitutional Law*, 5, 391-418., p.393.

<sup>2</sup> PALOMBELLA, G. (2006) From human rights to fundamental rights. EUI Working Paper LAW No. 2006/34..

<sup>3</sup> STEINER, H. J. & ALSTON, P. (2000) *International Human Rights in Context. Law, Politics, Morals*, Oxford, Oxford University Press. at 242-245.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200A (XXI), 1 UN GAOR Supp. No. 16, UN Doc. A/6316 (1966), entered into force 3 Jan. 1976 [hereinafter ICESCR]. Note that for the purposes of this study the part of the Covenant concerning cultural rights will be omitted, assuming therefore that whenever a reference to the Covenant is being made, the author has social and economic rights in mind.

which in turn are revealed in the ICCPR,<sup>5</sup> has been used to explain social rights. Such an approach reflects a classical tension that for decades has been used to describe the interrelation between *social and economic* and *civil and political* rights. It is widely claimed that a dichotomy between social and economic and civil and political rights stems from their categorisation in these two distinct textual formulations.<sup>6</sup> Moreover, the legal scholarship has usually been concerned with civil and political rights, assigning them priority to social and economic rights and confronting them with the civil and political rights on a positive-negative basis.<sup>7</sup> No wonder, that for years, social rights have been reduced to a secondary category of rights. This, in consequence, led to a fair lacuna in discussions over legal protection of social rights, in particular social constitutional rights.

A difficulty in dealing with legal categorisation of human rights has shifted to the national level. Here, a clash between both categories of rights is well reflected in constitutional debates, be it either over amendments to the already existing constitutions or in the cases where new constitutional bills were drafted. An ongoing debate on definitions, materialization and methods of realization of social rights shows the growing importance of these rights and the awareness of constitutional scholars of a need to a more effective inclusion of social rights in the constitutions.<sup>8</sup>

### **1.1. The Constitutionalization of Social Rights**

In what follows, a close look should be given to two elements of social constitutional rights. From a technical point of view every right, especially the one identified in the constitution, has a substantive (material) essence and a procedural (non-material) transmission. Grosso modo, both components express a set of elements and means that ensure realization of rights. The procedural substance of a right relates on one hand to the way it is being legislated and exercised, and on the other hand to a way in which its addressee (an individual) is able to claim it. The substantive essence of a right places an emphasis on its content, thus implying that every right bears a certain value. There is indeed a fallacy in distinguishing the two components one from another and considering them as different and separable. Taking after Alexander, the procedural aspects of rights have a indeed substantive character, albeit of a special kind: they are rights against risks. Therefore, the fulfilment of such premises like the principle of non-retroactivity of law, its internal consistence, or a duty to publish laws, understood as a

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<sup>5</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, G.A. Res. 2200A (XXI), 1 UN GAOR Supp. No. 16, UN Doc. A/6316 (1966), entered into force 23 Mar. 1976 [hereinafter ICCPR].

<sup>6</sup> *Civil and political rights* and *social and economic rights* as the two separate categories of rights are often referred to as respectively first and second generation human rights. This division reflects a historically grounded chronology of the importance assigned to each set of rights. Although interesting, the debate on the reasons of a clear distinction between social and economic and civil and political rights at the UN level (implicitly on the international level), has to be left aside for the sake of the consistency of this paper. Suffice to say, that the categorization of fundamental rights resulted from a certain aspiration towards formalism of human nature, which is reflected in an attempt to develop a shared sense of understanding of given human rights- of their substance and context of their application. An attitude to universal legal formulations of rights and presumptive resulting categories of these rights is indeed characteristic feature for international debates, where the clashes of cultures and political interests meet.

<sup>7</sup> Such an approach is highly contested by number of scholars, who point out to the artificiality of the division between positive-civil and political rights and negative-social and economic rights. Some civil and political rights may require a positive state action; for this argument see: FABRE, C. (1998) Constitutionalising Social Rights. *Journal of Political Philosophy*, 6, 263-284. at 268-270.; while some social and economic rights may demand state non-interference with individual action; for this argument see: SHUE, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton N.J., Princeton University Press. at 39-40, 55-56. In general see: SADURSKI, W. (2002) Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe. Part I: Social and Economic Rights. EUI Working Paper LAW No. 2002/14.

<sup>8</sup> This general argument shall be developed further in the following presentation in respect to the debates on social and economic rights constitutionalization on the example of constitutional debates in the 1990s in Poland. For the specific reference on the debate on the importance of social and economic rights' inclusion into the constitutional framework for the United Kingdom see: EWING, K. D. (1999) Social Rights and Constitutional Law. *Public Law*, 104-123 .

fulfilment of the procedural transmission of a right, constitutes a part of the fulfilment of the very right, which needs to be completed by such premises as a guarantee of justified rights that are respected according to the principles of a democratic State of law.<sup>9</sup> Discussing the substantive values with strong procedural implications, Alexander refers to social entitlements, admitting that the point about procedural components while being derivative of substantive ones remains valid.<sup>10</sup>

Speaking about justiciability of social rights, one often finds the so called “limitation clauses” which subject the decisions on scope and limits of these rights to a legislative discretion. Such constitutional rules that define the state’s tasks in the field of social policies but give the legislator a (relatively) free hand to decide on the future political solutions, serve a recognition of the situation in which this is the legislator, and not the court who is responsible for policy-making. By the same token, it is a restriction to the constitutional court not to politically interfere in the social policies domain. According to the Polish constitutional doctrine the constitutional formulations that relate to state’s duties in this field have the full normative power of constitutional provisions, and hence serve as a basis for constitutional review. Although the limitation stemming from art.81 of the Polish Constitution applies only to the procedural sphere and restricts the range of means to the protection of rights and liberties that belong to an individual, it does not undermine their normative character. Therefore, there are no obstacles against these rights and principles to serving as independent basis of constitutional review once a proper motion is addressed to the Tribunal by an authorised subject.<sup>11</sup>

The substantive-procedural distinction corresponds with the objective of rights convincingly formulated by Titmuss, who claimed that the objective which shaped and influenced social security and social service programmes were: the integration of all citizens into a society, and the stimulation of civil participation within the community.<sup>12</sup> Building on this theory, social constitutional rights:

“(...) facilitate access to benefits which the community has to offer and provide a base of material security below which the individual citizen may not fall [as well as] by extending participation rights from the public to private sphere they thereby ensure not only the social accountability of those who exercise private power, but also the right of individuals to participate in making of decisions which affect them (...)”.<sup>13</sup>

At the same time, the constitutionalization of social rights means pointing towards the effective judicial enforceability. The formal constitutional guarantees must be followed by adequate institutional preconditions, which allow the individual to participate and affect the shape of these rights and policy programmes in a way that these rights become suitably applicable to the individual. As already mentioned earlier, this is the concern of procedural or non-material aspects of rights to regulate the exercise of social power, protect the individual from the overbearing use of the power, and facilitate participation of individuals in decisions taken by the delegated authorities, who bear such power. The guarantees, which ensure the right to take part in forms of procedural or institutionalized interactions, touch upon “social or institutional settings that shape the set of possibilities open to individuals in terms of achieving their goals”.<sup>14</sup>

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<sup>9</sup> Most of Central and Eastern European Constitution use a formula of a democratic State of law, which is close to the definition of the principle of *Rechtsstaat* or *État de droit*.

<sup>10</sup> For a discussion of the relation between substantive and procedural rights see, e.g., ALEXANDER, L. (1998) Are Procedural Rights Derivative Substantive Rights? *Law and Philosophy*, 17, 19-42.

<sup>11</sup> CZESZEJKO-SOCHACKI, Z., GARLICKI, L. & TRZCIŃSKI, J. (1999) *Komentarz do ustawy o Trybunale Konstytucyjnym* Warszawa, Wydawnictwo Sejmowe., at 35.

<sup>12</sup> Titmuss’ deduction is based on a study of the relationship between social security programmes and social service benefits. For more details see: TITMUSS, R. M. (1976) *Commitment to Welfare*, London, Allen & Unwin.

<sup>13</sup> EWING, K. D. (1999) Social Rights and Constitutional Law. *Public Law*, 104-123 at 105.

<sup>14</sup> DEAKIN, S. (2005) Social Rights in a Globalized Economy. IN ALSTON, P. (Ed.) *Labour Rights as Human Rights*. Oxford, Oxford University Press. at 59.



Substantive or material dimension in the case of social rights may otherwise be referred to as claims to resources, through which the individuals are able to convert the commodities into potential or actual functioning. Therefore, the actual content is given to such rights like the right to social security, the right to health and education services, in a way that these rights, are transformed from the notion of “passive protection” into the one of “active security”.<sup>15</sup>

### ***1.2. Are Social Rights and Constitutions Compatible at all?***

Given the diversity of historical legacies and different character of constitutional provisions, the constitutional recognition of social rights varies among the countries to a considerable degree. The question on legitimization of social rights in a constitution is a central point of this study. After all, constitution mirrors the expectations of how a given community wishes to be governed. Constitution stands on the highest position among national legal acts and by the holistic, though general expression of fundamental norms, it reflects moral obligations of those who live in a given society, providing for a framework of implementation of these moral obligations in institutionalized social structures. Finally, it ensures fundamental principles, which both enable and disable the government to use its authority.<sup>16</sup>

The constitution may thus contain both procedural and substantive rules, or it may refer only to general principles of law, which then serve as a basis for constitutional adjudication in the social field. Arguing, however, that the inclusion of social provisions in the constitution would predetermine the allocation of resources or redistribution of wealth, is an over-generalization. Social rights, understood as these which protect the dignity and the well being of individuals, should be constitutionalized, since they indirectly limit the state power, putting an individual and his/her rights in the centre of a political concern.

Even when recognizing that not all moral rights should be turned into legal rights, as their enforcement by the state may be impossible, there are some good reasons in accepting the challenge to introduce legal means by which people could be prevented from violation of their fundamental rights. The constitutional recognition of social rights ensures that these rights are not considered as nominal only and gives a certain guarantee that they can be realized, either in the form of policy programmes, or as individual claims, from which it stems that states are under constitutionally enforceable duties. It has been ascertained also that turning moral rights into legal rights imposes legal duties on individuals what manifests itself in a fact that legal rights impose a legal duty on an individual not to harm the interests in which the rights are embedded - a feature well in relation to social rights.<sup>17</sup>

## **2. What Makes Rights Fundamental?**

It is not easy to answer the question on what makes rights fundamental in few sentences. The difficulty lies, in the opinion of the author, in the multitude of state actors (institutions) that contribute to the understanding of social rights as fundamental rights; that is rights which are undeniable, basic, essential, primary. Such an understanding of fundamental social rights, as shown in the introduction to

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<sup>15</sup> Ibid. at 58-59.

<sup>16</sup> The argument of a constitution understood as precommitment strategies, brought up by Sunstein, arguing that the constitution should work against nation's most threatening tendencies, veils the fundamental basis of this highest legal act in the domestic level, namely its legitimization by the nation which it governs. This however, is not the most important counterargument at this place, as in certain cases “most threatening tendencies” of a nation should be frozen and denied on the constitutional level. These cases, however, relate to the situation when civil and political rights are misaligned with their proper content, as for example infringements of the right to life, or freedom of speech. On the contrary, social and economic rights, especially those falling under the category of subsistence rights, should be enforced by the constitution, taking into account its vague nature.

<sup>17</sup> FABRE, C. (1998) Constitutionalising Social Rights. *Journal of Political Philosophy*, 6, 263-284. at 100.

this article, determine their position in the national legal order, possibly in the highest legal act, which is the constitution. Constitutionalization of social rights, is not in itself sufficient, neither self-explanatory. The inscription in a constitution of any right in fact remains pointless, as long as enforcing mechanisms are not defined nor implemented. Moreover, the enforcing mechanisms, such as system of courts, is not enough either. This part of the article claims that in order to be considered fundamental, the rights need to be given an adequate system of enforcement and promotion. The mechanisms of constitutional control are the most important in the present analysis, but they cannot be considered out of the context. This means that while they are a part of the state institutional “machinery”, they at least need to be seen in the interrelations with the legislature (and the executive, to a lesser extent), but also with other control organs as the Ombudsman, state control institutions, etc. Since, the thematic limitation needs to be adopted to keep focus of the argument, a theory of constitutional dialogue will be presented in the context of relations between the constitutional judiciary and the legislature. First, however, the issue of justiciability and enforcement of social rights (and duties) will be given a more detailed explanation.

### **2.1. *Justiciability and Enforcement of Constitutional Social Rights***

The discussion on legal argument of justiciability of social rights is entrenched in the two opposing approaches to the issue. First, one argues that social rights are inherently non-justiciable, and they cannot be judicially enforced. The juxtaposition of social rights traditionally considered as more vague than the precise civil or political rights, leads to a yet dubious conclusion that regarding the issue of their nature, only the latter may be decided in courts.<sup>18</sup> Moreover, social rights are sometimes believed to be antagonistic, as they are specified in such a way that they may involve violations of other rights (such as the case of a right to private education, which may generate unequal opportunities).

Second, the materialization of social rights into the social policies is named by some an “anti-democratic process”, since the functioning of legal institutions required for this purpose may be contestable.<sup>19</sup> The principal objections to the justiciability of social rights concentrates mainly around the conviction that the protection of social rights lays in the competence of the legislature and executive, while its constitutional protection would lead to an inevitable transfer of power from these two branches of government to the judiciary.<sup>20</sup> Claims are made that implementation of social and economic rights require making political choices, setting priorities, allocating resources and rearranging budgets.<sup>21</sup> These competences belong to the legislative and executive branches of the government. It is believed, consequently, that by adjudicating on social matters courts, in particular constitutional courts, infringe the principle of the separation of powers.

Whereas, on the other hand, the inverse effect is reflected in the danger of politization of the courts, seen as a process of dragging the courts into a political bargaining process.<sup>22</sup> It is also believed that by the constitutional judicial review of social rights judges would be led to assess governmental social policies only on the basis of individual cases, which do not necessarily reflect the overall social

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<sup>18</sup> Although social rights as such are widely recognized, a problem arises with the recognition of their corresponding obligations. This ambiguity results from the fact that social rights are formulated as broad obligations of result rather than specific obligations of conduct. For more see: EIDE, A. (1989) Realization of Social and Economic Rights and the Minimum Threshold Approach. *Hum. Rts. Law Jnl.*, 10, 35-51. at 36-38.

<sup>19</sup> FREEMAN, M. (2002) *Human Rights. An Interdisciplinary Approach*, Cambridge, Malden, Polity Press, Blackwell. at 165.

<sup>20</sup> For more see: SAJÓ, A. (1996) How the Rule of Law Killed Hungarian Welfare Reform. *E. Eur. Const. Rev.*, 31-41.

<sup>21</sup> COOMANS, F. (2006) Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Context. IN COOMANS, F. (Ed.) *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*. Antwerp, Oxford, Intertia.

<sup>22</sup> J.COTTRELL & GHAI, Y. (2004) The Role of Courts in the Protection of Economic, Social and Cultural Rights. IN Y.GHAI & CORTELL, J. (Eds.) *Economic, Social and Cultural Rights in Practice*. London, Interights. at 86.

situation in a given socio-economic environment. The lack of specific expertise among the judges to make complex decisions on social and economic issues, for example in the area of housing or health care, go hand in hand with the argument that in general courts lack the standards against which they could assess the performance of the government in the area of social policies. Furthermore, judges are believed not to be competent enough to deal with social cases, since they lack democratic legitimacy necessary to make decisions as to the allocation of resources. These are the representatives of legislature, and indirectly the representatives of the government, who have been democratically elected and given a mandate to decide on the social policies. Adding to this, adjudication on technical economic or budgetary area poses again a problem of the responsibility limits among the three state power actors: executive, legislature and judiciary.

On the other hand, however, there is no principled objection to justification of social rights, and thus their judicial enforcement. It is acknowledged for instance that once constitutionalized, labour laws contribute to the more efficient protection of individual rights, as well as they encourage institutional guaranties in the form of imposing an obligation on the legislator to specify the constitutionally guaranteed rights.<sup>23</sup> It is no more difficult for a court, in addition, to determine whether an individual has received a fair remuneration than whether he or she has had a fair trial. In fact, civil and political rights have constrained the process of policy-making and resource allocation, so that the courts may no longer be blamed for the tendencies to usurp the policy prerogatives of the legislature and commanding governments on how to draw up the national budget.<sup>24</sup>

Yet, the problem of the lack of judicial legitimacy to deal with social rights is rebutted by the argument that since courts are usually reluctant to voluntarily enter into the political debates, thus infringing the competences of the legislature and the executive in the field of social rights, it proves that their performance is directed into their legitimate function, which is to watch over the performance of governments, bearing in mind the protection of the minority in the situation, where most democratic systems are based on majoritarian rule.<sup>25</sup> At this point the suitability of the distinction made between rights as both claims and needs, and principled goals of the state, proves to be relevant. The fact that these types of rights require different forms of judicial enforcement does not render them *ex definitio* unjusticiable. Moreover, it shall not be forgotten that the reinforcement of the courts legitimacy and perhaps courts' compulsion to adjudicate on social cases comes from the activity and growing importance of the non-judicial bodies, as well as of the non governmental, human rights organizations.<sup>26</sup>

## **2.2. *Justiciability of Constitutional Rights and Constitutional Duties***

The justiciability of both constitutional rights, but even more, of constitutional duties in the field of social rights is widely questioned, mainly, as mentioned before, amounting to the problem of incapacity of constitutional courts to make decisions about the implementation of these rights. In general terms, the justiciability may vary according to four main factors: the characteristics of the case,

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<sup>23</sup> MOREAU, M. A. (2006) Normes sociales, droit du travail et mondialisation. Confrontations et mutations, Paris, Dalloz., at 239-240.

<sup>24</sup> LANGFORD, M. (2005) Judging Social Rights. Human Rights Tribune des droit humains.

<sup>25</sup> LANGFORD, M. (2003) Judicial Enforcement of Economic, Social and Cultural Rights. Right to Food Journal, 2, 4-

<sup>26</sup> A more detailed research on the importance of the non-judicial bodies in promotion and protection of social and economic rights has been presented in MACIEJCZYK, A. (2007) Non-judicial system of socio-economic rights protection in Poland, the Czech Republic and Slovakia. European University Institute (unpublished). Ccopy with the author).

the wording of the provision that is invoked, the attitude of the judge, and general characteristics of the domestic system.<sup>27</sup>

Describing social rights on the statutory level implies that they are regarded as legitimate provisions to the regulation of resources redistribution and they may define choices between competing values. By the same token, they are placed under political not judicial considerations. Further, the statutory dimension gives social rights a less absolute character as opposed to the constitutional formulation. This is because a statute can be more easily changed than the constitution. Consequently, the undeniable and unconditional protection of all the rights is ensured by their constitutional status.<sup>28</sup>

A commonly known distinction between constitutional provisions themselves juxtaposes constitutional social rights and constitutional social duties. This distinction is also referred to as a discernment between the enforceable constitutional claim and constitutional provisions (guiding principles or “programmatic rights”),<sup>29</sup> which set state’s policy goals in the field of social and economic policy. In the latter, a state is expected to create conditions and mechanisms which enable the fulfilment of a given right.

The issue of yet another categorization of social rights, this time on the level of the constitution itself, has been widely discussed and argued among scholars. Some claim, that with respect to the inherent nature of these rights, they have to be considered as equally valued provisions, and any hierarchization among them inevitably leads to negation of the intrinsic value of the social and economic rights as such. Others point out to doubts in enforcing rights considered as entitlements, which provide for paternalistic solutions. Nonetheless, the constitutional practice proves the existence of a clear answer to this question. A number of national constitutions distinguishes between constitutionally enforceable and non-enforceable social rights.<sup>30</sup> Yet, again this fact does not disapprove the constitutional justiciability of these rights. The question to be asked at this point does not concern the constitutional

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<sup>27</sup> COOMANS, F. (2006) Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Context. IN COOMANS, F. (Ed.) *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*. Antwerp, Oxford, Intertia. at 4, and also VILJOEN, F. (2005) National Legislation as a Source of Justiciable Socio-economic Rights. *Social Economic Rights Review*, 6, 6-9. at 6.

<sup>28</sup> Yet the issue of states’ obligations under international human rights law may not be forgotten at this point of the discussion. By the virtue of being a party to the ICESCR a state is required to give it a legal effect in the domestic order. Even if the rights resultant from the Covenant are not incorporated into domestic law, any state party must be considered as to have accepted the rights provided for therein as subjects to effective remedies. Therefore, any downgrading of social and economic rights in domestic policy programmes is clearly incompatible with the ICESCR. From this it follows that whether or not the constitution provides for the protection of social and economic rights, and when confronted with these rights, courts must aim to achieve the interpretations of domestic law which conforms with the recognition of social and economic rights recognised by the Covenant as rights rather than policy goals.

<sup>29</sup> SADURSKI, W. (2002) *Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe. Part I: Social and Economic Rights*. EUI Working Paper LAW No. 2002/14.

<sup>30</sup> The categorization and distinction between constitutional enforceable and non-enforceable social rights in comparative constitutional perspective is complex. The classical example of the constitution which makes social and economic rights equally enforceable as civil and political rights, is the constitution of the Republic of South Africa. Italian and Hungarian constitutions treat social and economic rights on an equal footing as civil and political rights, which implies that they are either identically enforceable or not. Chapters on social and economic goals are enshrined in the constitutions of Spain and Portugal, while directive principles in the reference to these rights are present in the Indian constitution. Germany’s constitution contains a general clause that is used to determine social and welfare policies on a statutory level. Yet, in the French and Swedish constitutions it is only the preamble that mentions social goals of the state, thus rendering these rights into the category of constitutional duties. The categorization of social and economic rights in the Czech and Slovak constitutional orders subjects these rights to the legislative discretion by a separate clause, while the Polish constitution has accepted a double track- the general limiting clause expressed in art.81 of the Polish Constitution of 1997 enumerates rights that are subject to limitations specified by law (ex. minimal wage, prevention of unemployment, protection of family life), while other social rights have their own clauses attached that delegate the duty to determine the scope and form of implementation to legislator (ex. right to education, right to healthcare, right to social security). The latter solution means that such rights are understood as fully enforceable rights.

justiciability, as these rights are justiciable. The question concerns their constitutional enforcement and the judicial mechanism adopted for this purposes. What needs to be recognized is that the different judicial procedures take different effects.

By admitting that once constitutionalized social rights are justiciable, we are faced with the problems of constitutional provisions which have a different bearing on the execution or/and materialization of the right in question. Some of the rights will certainly be considered as right claims, belonging to an individual's inherent entitlement to live in dignity. The others, however, would have to stay in the realm of state's competences and in the reality of state's capacity or intention to shape the welfare policy. It has to be stressed at this point that this approach does not amount to the categorization of social rights by arranging them in any hierarchical lines. It shows and acknowledges a wide constitutional practice that recognizes and enforces constitutional social and economic rights on different levels.

Taking into account the differences between legal protection of rights and political process of formulation and enactment of public social policies, there are two aspects which need to be considered. The first concerns the differences in the functions between the two categories of rights, namely the ones that are judicially enforceable and second those which are considered as programmatic goals, what consequently brings about the questions of the effectiveness of direct provisions of services to be provided for by a state with regard to the nature of a given right. Some of the rights provide for limitations to the power of the state, or have a procedural function which encourages individuals to participate in the life of the society. Yet, there are rights, which once guaranteed, require indeed that the state ensures the entitlements to direct provision of goods and services to right holders. Yet, the issue of the implementation of guiding provisions remains unsolved. The problem is caused by an imposition of the distinction between the protection of, for example, individual's right to health care and the goal of health promotion by state authorities. All things considered, there will always be an overlap between those measures taken to reach a goal in a given social policy area and those which ensure the protection of the rights of individuals or groups of individuals.

The characterization of social constitutional provisions as vague norms does not necessarily question their justiciability. Actually, this argument is very often evoked in a general claim that all constitutional provisions, no matter if civil-political or social, are vague by their nature. Such an attempt questions the justiciability of the constitution as a whole legal act. For the sake of the argument at this point, it is assumed that the legal force of the constitution in itself may not be undermined, if the constitution is to be treated as a legitimate source of the domestic law. Second, as shown in the argumentation above, the distinction between *civil and political* and *social and economic* rights may not be considered as mutually exclusive, contradictory or conflicting. Their recognition as mutually enforceable, intra-related and supplementary rights captures the fragility of human rights' recognition as fundamental rights of individuals.<sup>31</sup> Yet again, constitutionally protected social rights are not all the same, since their judicial enforcement requires adoption of different mechanisms. On the one hand there are mechanisms which allow an individual or groups of individuals to claim his/her/their rights, on the other hand there are mechanisms which ensure the check-and-balances between state powers in terms of proper fulfilment of state's obligations in the field of realization of social rights in respect to the international obligations and domestic obligations towards its citizens.<sup>32</sup> Although, there is no particular reason to claim that social rights should not have a horizontal and vertical effect at the same time, meaning that they could be enforced both against individuals where

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<sup>31</sup> For the distinction between human rights and fundamental rights see: PALOMBELLA, G. (2006) From human rights to fundamental rights. EUI Working Paper LAW No. 2006/34. For the purposes of this paper no distinction between the meanings of the above terms will be made.

<sup>32</sup> As noted above, the aspect of application of social and economic rights to the citizens or non-citizens has only been signalled in this paper and will not be studied in depth.

appropriate and against the state where appropriate, it remains impossible to imagine that a state duty could be enforced by one private party against another.<sup>33</sup>

### 2.3. *The Theory of Constitutional Dialogue*

The difficulty in deciding who decides remains unresolved, largely due to the fact that the constitutions do not specify precisely the ultimate power of any of the constitutional institutions to give it a final interpretation. It is often the case that the constitutional courts are considered to give the final opinions on the constitutional compatibility of legal acts, thus, in a way, judging on the performance of the legislature and/or the executive. Nevertheless, it is still up to the legislator to take up on the courts' decision.

The twofold nature of the judicial role in adjudicating on constitutional cases, proves the complexity of the discussed question. One common belief is that the constitutional judge is regarded as a protector and determiner of rights. In this conviction, judge's role is evaluated in terms of a classical understanding of judicial functions. It presupposes, that a judge has a final say as to the constitutionality, and thus, fairness of the statutory rules and regulations. A second, very different, mode of conceptualizing the role of the judge, and especially of the constitutional judge, is based on a conviction that the judge's role is brought to the function of an arbiter, who decides in cases resulting from ambiguity of a dispersion of governmental powers within the horizontal and vertical dependences of the governance systems.<sup>34</sup>

It is argued endlessly whether judges strive first to make principled decisions, according to constitutional laws or principles,<sup>35</sup> or whether they decide on technicalities, allowing the elected bodies to "correct their mistake". To make matters more complicated, these two functions of the judge often overlap, as one cannot really deny neither the influential constitutional decisions or rulings that are close to law-making, nor one can deny judge's attempts to stay away from the politics and leave a margin of discretion to the legislator, especially in the field of social rights and social policies.

In a broader sense, the question of institutional choice, although unspecified in constitutions, is implicitly left to the judiciary. At the same time, however, while the court asserts its constitutional power to decide who decides, it constantly recognises its ultimate reliance on these branches of state authorities that enforce its decisions and rulings. The difficulty arises with the fact, that simultaneously court needs to protect its independence and autonomy from the executive and legislative actors. Therefore, the question is rather on the political culture, than a particular legal solution. The way, in which court allocates the power to decide- either by granting such a prerogative to itself, or shifting it to the other state actors- enforces courts position and legitimacy to ultimately decide who decides. Moreover, the space determined by the court, in which the power of constitutional politics may be institutionally consolidated,<sup>36</sup> gives only a partial answer to the existing problem. This is why, if a particular constitutional case is to find a decent solution in a given time, the dialogue between the institutions is needed.

The dialogue, however does not depend on a case and should not be assigned to a particular case or a problem. This is to say that the inter-institutional, constitutional dialogue has to be understood as a

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<sup>33</sup> EWING, K. D. (1999) Social Rights and Constitutional Law. *Public Law*, 104-123 at 121.

<sup>34</sup> KLUG, H. (1997) Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review. *South African Journal on Human Rights*, 13, 185-207., p.188.

<sup>35</sup> Another problem demanding a discussion opens here; that is the problem of the vagueness of the constitutional principles, thus allowing constitutional judges to enter into deliberations on law and morals. For the sake of the consistency of the main argument on institutional dialogue, this very interesting and intricate question remains consciously omitted.

<sup>36</sup> KLUG, H. (1997) Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review. *South African Journal on Human Rights*, 13, 185-207.

constant channelling of information between the court and the legislature. The information on existing assumptions, state capacities, policy guidelines accepted by the government, the ability to render feasibility to court's decisions. Considered in this way, constitutional politics should be seen as a careful deliberation of political interests on one hand, and constitutional premises on the other hand. Moreover, such an inter-institutional dialogue should be based on mutual respect; it is not only the court which deliberates on the political interests, but also politicians who should deliberate on constitutional foundations.

## **Conclusions**

Taking into account the significant influence of constitutional courts decisions on national legislation in general, one cannot deny, however, the actual effect courts and judges have on shaping the policy goals. Whether it is a positive or a negative mechanism, remains debatable. It largely depends on the extent and direction to which the court directs the resultant policy. The tension between electoral accountable bodies and the judiciary in the allocation of authority when policies are decided in the rights context remains troublesome, at least to the extent in which such arguments as legitimacy, capacity and expertise are being raised.<sup>37</sup>

The research question, here encompasses a more focused approach of the **constitutional justiciability**. It is therefore concerned with the division of social rights into those directly enforceable in the constitution or those whose judicial enforceability is dependent on the legislative discretion. The question of enforceability, therefore, refers to the constitutional level on which social rights are divided into those constitutionally enforceable and non-enforceable. This standpoint does not have any direct transposition on their justiciability nor on the question on their judicial enforceability on the statutory level. Constitutional enforceability is a way by which certain rights are strengthened and some are assigned to the highest considerations bearing on state's politics that is to the constitutional review. The resultant categorisation of social rights, based on the differences in the judicial enforcement, does not automatically imply any hierarchization of these rights. Moreover, the practice shows the leading role of courts in adjudication on socio-economic matters have a positive effect on realization of social rights derived from the constitution. The principle of reasonability in adjudication on social matters mandates courts in determining whether the state is complying with its obligations of progressive implementation, to evaluate whether measures were adopted to address the problem areas and whether such measures were reasonable, both in their conception and implementation. Hence, the differentiation of claim or entitlement resultant rights and principled state guidelines, serve to recognize the actual *status quo* of social constitutional provisions and underline the diverging means of their judicial enforcement.

Why is then the constitutional review of social rights so controversial? The question of justiciability does not explain everything. Whether the rights are justiciable on the constitutional level or not depends on one's stand and understanding what these rights are, what the constitutions are, and finally what is the role and place of rights in the constitution. The constitutional review causes problems since there is no such a theory which would eliminate potential dangers or weaknesses of the institutional system, that would work perfectly and generate a genuine solutions to the doubts that arise on the level of constitutional adjudication. Whether centralized or decentralized, abstract or concrete, ex-post or a-priori, considered as final or thought to belong to a stage of an inter-institutional dialogue, the theory of constitutional review remains wide and multi-dimensional.

Accordingly, the justiciability of constitutional social rights serves not only as a classically understood justiciability of the substance of these rights; it serves at the same time as a check and balance for the executive whether it has established appropriate laws and institutions that are compatible with

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<sup>37</sup> For an in depth study on this issue in context of CEE countries see: SADURSKI, W. (2001) Postcommunist Constitutional Courts in Search of Political Legitimacy. EUI Working Paper LAW No. 2001/11.

constitutional rights, and if the executive maintains its constitutional duties and obligations towards the citizens. The constitutional courts activity then should be seen as an attempt to ensure the predictability of laws and policies. The same inclusion of social rights in the constitution does not guarantee its respect; only together with appropriate enforcement and promotion mechanisms it conduces to the indivisibility of all human rights and facilitates its enforcement.



# **The ‘Fundamentalization’ of Consumer Rights or the Impact of Fundamental Principles on European Consumer Law**

Iris Benöhr (EUI)

## **Abstract**

This article explores the effect of fundamental rights on consumer law. The first part shows that social justice in consumer law has been neglected in the European Union market integration trend. In the Charter of Fundamental rights, however, a high level of consumer law is mentioned as a social principle. Therefore, it will be analyzed if fundamental social rights have the potential to strengthen consumer protection and what might be possible effects in practice. The article concludes that it is time for a stronger procedural approach to consumer law in the global economy. New forms of basic rights will have to enable consumer participation in policy decisions and market access.

## **Introduction**

During the last 30 years consumer law has undergone a considerable transformation. While market expansion and technological innovations improved economic welfare, it also increased transaction complexity and generated risks for the consumer. This has become evident in product safety scandals, frauds and the spread of over-indebtedness. At the European level two recent trends can be noted in relation to consumer policy. On the one hand the European Union follows an economic focused unification approach; on the other, it has recognized consumer protection as a basic social principle. The consumer law approach of maximum legal harmonization has been criticized by many scholars because it lacks legitimacy and social justice. Furthermore, consumers are not confident in European cross border exchange and do not actively participate in the market. Thus, an essential question is how the European Union can take account of social aspects in consumer protection, increasing individuals’ confidence in policy actions and international transactions.

The Charter of Fundamental Rights has initiated to recognize consumer protection as a social principle, by including this basic value in its ‘solidarity’ chapter. This article figures together with other social rights, such as the protection of the environment, and the access to services of general economic interests. The growing emphasis on social rights may signal a change of values, and it may offer better legal and political protection of the consumer.<sup>1</sup> However, these rights are not litigable rights for the individual, because the Charter provides only a ‘principle’ status to this protection and bears several limitations.<sup>2</sup> This raises the question if the Charter may nevertheless in the future add a social dimension to consumer law.

The first part of the present article sketches the development of consumer law in a global market and demonstrates the inability of the European institutional framework to take account of social aspects in consumer law. Part two analyzes the creation of the Charter. Part three and four assess the scope and limitations of a fundamental consumer protection. Finally part five analyzes the possible practical implication of the Charter and highlights the importance of consumer participation in regulation and markets access.

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<sup>1</sup> T. Wilhelmsson, The ethical pluralism of late modern Europe and codification of European contract law, in: The need for a European contract law, p 143.

<sup>2</sup> G. de Burca, Fundamental rights and Citizenship, in B. de Witte, 10 Reflections on the Constitutional Treaty for Europe, RSCAS 2003, 11 22 ff.

## **1. The Narrow Market Making Scope of Consumer Law**

The European Communities were initially conceived as a means of integrating Member States' economies. According to this approach, markets are made at the trans-national level, while Member States control redistribution and formulate social policy.<sup>3</sup> Enlargement and liberalization have increased the power of companies in social life, limiting the protective role of nation states in consumer welfare. Growing cross-border exchanges in anonymous markets have created a risk of cross border abuses and new health hazards for consumers, due to aggressive advertising, and limited access to information and to justice.<sup>4</sup>

The European Union has reacted to these challenges by strengthening its consumer policy and creating an autonomous consumer protection competence at EU level. A first community action program was adopted in 1975. The Treaty of Maastricht of 1992 integrated the protection of the consumer into its objectives in article 3s and article 129 (a). According to article 129 a, the Community adopts its measures in the frame of the realization of the internal market, engaging in specific actions and supporting national policies promoting the health, security and awareness of the consumer. The Amsterdam Treaty made these political objectives more precise in article 153. It adds that the European Community contributes to the promotion of consumer rights, to their information, education, and helps them to organize to preserve their interests.

Although they endowed the European Union with competence to regulate consumer matters, the Maastricht and Amsterdam Treaties have important limitations. The European Court of Justice introduced a notion of consumer, by interpretation of article 30 ECT, as an instrument to increase market functioning.<sup>5</sup> Harmonization measures of consumer law were normally enacted under the general basis for market integration in article 95 EC. Thus, the existing independent European legal basis of consumer law in article 153 (2) (b) EC of the Amsterdam Treaty has hardly ever been applied to promote socially focused legislative initiatives.

The economic integration focus of the EU was initially not problematic, because there was a clear division of competences between European market law, regulated to a minimal standard, and national regulators, which could adapt a higher social protection of the consumer if necessary. However, the growing impact of EU law through full harmonization and case law has destroyed this balance of competences, and the narrow concept of economic consumer was not sufficient to countervail these tendencies. In particular, it was observed that this narrow definition of consumer may lead to lowers social standard, and undermine cultural diversity.<sup>6</sup> This stimulated a reflection on how to create a broader, socially focused concept of consumer.<sup>7</sup>

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<sup>3</sup> This divide between national private law and European economic integration contributed to the decoupling of social policy; See C. Joerges, What is Left of the European Economic Constitution, EUI WP Law 2004/13, p 5 and 7; for a political science version of this see F.W. Scharpf, The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies*, 40 (2002), 645 ff., at 646; idem, Democratic Policy in Europe, *European Law Journal* 2 (1996), 136-155.

<sup>4</sup> See in general the introduction of C. Rickett/T. Telfer (2003), (eds), *Consumer's access to justice*, International perspective on consumers' access to justice, Cambridge.

<sup>5</sup> C. Schmid, The instrumentalist Conception of the *Acquis Communautaire*, in *Consumer Law and its Implications on a European Contract Law Code*, ERCL 2/2006, p. 225.

<sup>6</sup> According to these critics Europeanization is suppressing diversity as an obstacle to free trade and undermines the distributive capacity of national consumer law; see C. Schmid, p. 216, for similar opinions see S. Weatherill, *European Consumer Law and Policy*, 2006; Howells G. and Wilhelmsson, *EC Consumer Law* (1997); Wilhelmsson, *Social Contract Law and European integration*, 1995; Hugh Collins, *Good Faith in European Contract Law*, 14 *O.J.L.S.* 229 (1994).

<sup>7</sup> For the evolution of a broader consumer notion see Reich, N, *Bürgerrechte in der EU*, Baden-Baden, 1999, p. 276 f.; H. Micklitz, *De la nécessité d'une nouvelle conception pour le development du droit de la consommation dans la Communauté européenne*, *Mélanges en l'honneur de Jean Calais-Auloy*, Paris, 2004, at 725 ff; L. Krämer, *The European Union, Consumption and Consumer Law*, in: *Liber amicorum Bernd Stauder, Droit de la consommation*,

As a result of market failures, the consumer lacks confidence in European markets and restricts his choices to local products.<sup>8</sup> These new trends open the question of how the Commission can strengthen consumer's confidence, and take account of the social aspects of consumer protection. Will the European Charter of Fundamental Rights be sufficient to reinforce and complement the current narrow approach?

## **2. Creation and Aim of the Charter of Fundamental Rights**

The recognition of consumer protection as a fundamental principle came after a long process that is still ongoing with the Lisbon Treaty. The Charter has a crucial role in improving public confidence in the market and in the EU institutions. By including consumer protection as a modern right, the Charter symbolically shows that, besides being valued as economic actor, the consumer should also be acknowledged as a human being.<sup>9</sup>

At its inception, the European Community focused mainly on market integration, trying to improve social policy merely through the free movement of goods and services. Then, since the 70s, pressure has risen on the European Union to act with a stronger focus on welfare and fundamental rights. However, a catalogue of fundamental rights was lacking.<sup>10</sup> Also, due to the pre-eminence of community law, actions of European Community institutions could not be controlled by Member States Courts if they violated national fundamental rights. To close this gap, from 1969 on, the ECJ has considered fundamental rights as general principles of community rights, and set out to actively protect them.<sup>11</sup> By so doing, the ECJ developed in its case law what effectively amount to an unwritten charter of rights for the Community. This jurisprudence was based on article 164 (new article 220), on comparative constitutional law of the Member States, and on the European Declaration of Human Rights and on Community principles. This favourable human rights interpretation found recognition in article 6 (1), (2) of the EU Treaty, which explicitly states that the Union shall respect fundamental rights as general principles of Community law, and has been included in succeeding European Treaties.

However, this court creation of fundamental rights was not a transparent procedure and was in contrast with the principle requiring the Communities to be close to European citizens.<sup>12</sup> Legal scholars such as

(Contd.) \_\_\_\_\_

Konsumentenrecht, Consumer law, L. Thévenoz and N. Reich (ed), Geneva, 2006; Guido Alpa, New Perspectives in the Protection of Consumers: A General Overview and some Criticisms on Financial Services, EBLR 2005, p.720; M. Hesselink, European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice, ERPL 3-2007, p. 330; M. Everson, Legal Construction of the Consumer, in F. Trentmann (ed) The making of the consumer, Oxford, New York 2006, p. 100-101; C. Joerges and M. Everson, Consumer Citizenship in Postnational Constellations? EUI WP Law, 2006/47, Florence, p. 3 ff.

<sup>8</sup> Recent European market studies see Eurobarometer 2006 Special Report 252 – Summary Consumer protection in the Internal Market. Survey Fieldwork, February – March 2006, European Commission, p 22.

<sup>9</sup> M. Hesselink, (2006), Are we Human beings or mere consumers? in European Voice, Vol 12 Number 38.

<sup>10</sup> In the 70s critical voices arose against the purely economic nature of the European Community claiming a change of the relation between economic and social policies of the European Community to assure social progress and consumer safety; Gilles Sintès, (1996), La Politique Sociale de l'Union Européenne, The Social Policy of the European Union, Brussels, Presses Interuniversitaires européennes, pp. 40-43; C. Joerges, (2004), 'What is Left of the European economic Constitution? – A Melancholic Polemic' (EUI Working Papers, Law No 2004/13), p. 34.

<sup>11</sup> K. Lenaerts and P. Foubert, (2001), Social Rights in the Case-Law of the European Court of Justice. The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law, Legal Issues of Economic Integration, p. 283.

<sup>12</sup> G. de Burca, (2001), The Drafting of the European Union Charter of Fundamental Rights, 26 European Law Review, 126, at 126-28; G. de Burca, (1995), The Language of Rights and European Integration, in: J. Shaw & G. More, New Legal Dynamics of European Union (Oxford, Clarendon Press) 29-54 and 39-43.

Simitis and Lyon-Caen<sup>13</sup> criticized that the corpus of European social rights had “no guiding principle and lacked any reference framework”, and considered this a grave shortcoming. Indeed, a catalogue of human rights may enhance self-determination and may improve participation of individuals in the European policies; hence, it may increase public confidence.<sup>14</sup> Moreover, fundamental rights can only fulfil their functions if they are recognizable for the individuals –and this a unique Charter would ensure. The expert group on fundamental rights also recommended that fundamental rights must be applicable to the individual by justiciable rights and regulative measures that promote enforcement.

The European Parliament (EP) strongly promoted fundamental rights by the Declaration of Fundamental Rights and Freedoms of 12 April 1989, as part of a 'Constitution' for the Communities.<sup>15</sup> This declaration contained a comprehensive list of fundamental rights that included social rights as well as classical fundamental rights. Article 24 integrated several Community policies, such as protection of the environment, of consumers and of health. Although this document was not adopted in the Treaty of Maastricht and Amsterdam as intended by the EP, it was important because it was an expression of the popular will of European citizens.

The attention of the protection of human rights was reanimated ten years later at the European Council of Cologne<sup>16</sup> in June 1999, when the Member States decided to create a Charter of Fundamental Rights of the European Union.<sup>17</sup> At this meeting it has been shown indispensable for the individual to find his or her fundamental rights not only in the constitution of their original countries but equally directly in a catalogue of primary law of the EU. The Charter has been eventually signed the 7 December 2000 during the Council of Nice.<sup>18</sup> Although formally only soft law, it is increasingly cited as an argument in legal reasoning.<sup>19</sup> The inclusion of consumer rights in the Charter and the Draft Constitution shows the commitment of the European Union to human values and not only economic market integration.<sup>20</sup> Consumer protection is part of social rights at the highest level of law, which might give more importance to consumer rights in the future.

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<sup>13</sup> S. Simitis/ A. Lyon-Caen, (1996), *Community Labour Law: A critical Introduction to its History*, in: p. Davies et al (Hrsg.), *European Community Labour Law: Principles and perspectives*, 1 (13).

<sup>14</sup> see Butt, M., Kuebert, J. Schultz, C.A., (1999), *Fundamental Social Rights in Europe*, Working Paper, European Parliament, DG for Research, Social Affairs Series, p. 6; G. Bronzini, (2005), *The European Social Model and the Constitutional Treaty of the European Union*, in C. Joerges, Bo Straht and P. Wagner (eds), *The Economy as a Polity: The Political Constitution of Contemporary Capitalism*, London, p. 192.

<sup>15</sup> In 1977 the EP adopted declaration on Human Rights which was extended in 1989 by a declaration of fundamental rights and freedoms; Bieber, de Gucht, Lenaerts, Weiler (Eds.), (1996), *Au nom des peuples européens – in the name of the peoples of Europe (Nomos)* p. 365 ss; see also the eighth report of the United Kingdom Parliament, House of Lords, *European Union*, (2000), *EU Charter of Fundamental Rights*, <http://www.publications.parliament.uk/pa/ld199900/ldselect/ldcom/67/6703.htm> (consulted 31 August 07)

<sup>16</sup> [http://db.consilium.eu.int/dfdocs/EN/04422 EN.pdf](http://db.consilium.eu.int/dfdocs/EN/04422%20EN.pdf); published in No. 2210, 23 Sept. 2000.

<sup>17</sup> See I. Pernice I., R., Kanitz, (2004), *Fundamental Rights and Multilevel Constitutionalism in Europe*, WHI-Paper 7/2004 Humboldt-Universität zu Berlin, p. 4-9.

<sup>18</sup> *Charter of Fundamental Rights of the European Union*, [2000] OJ C/364/1, proclaimed at Nice on 7 December 2000; more in Jean-Francois Renucci, (2002), *Droit européen des droits de l'homme*, 3ème édition, Paris, p. 450.

<sup>19</sup> K. Lenaerts and P. Foubert, (2001), *Social Rights in the Case-Law of the European Court of Justice. The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law*, 269; B.-C Funk, (2002), *Die sozialen Rechte der Grundrechtscharta vor dem Hintergrund des EG-Rechtsbestandes und im Vergleich zur Europäischen Sozialcharta*, in A. Duschaneck, S. Griller, *Grundrechte für Europa*, vol.3, Vienna 39.

<sup>20</sup> J. Weiler, (2000), *Does the European Union Truly Need a Charter of Rights?* 6 *European Law Journal*, 95; G. Alpa, (2005), *New Perspectives in the Protection of Consumers*, EBLR 725.

### **3. Consumer Law as a Social Value in the Charter and the Draft Constitution**

The Charter contains significant socio-economic rights as well as many new-generation rights, some of which are unknown to national constitutions. Such an innovative provision is article 38 on consumer protection in the solidarity chapter 4 of the Charter. Previously consumer law was regulated in primary and secondary Community law as well as Member States legislation. The first proposal concerning the inclusion of consumer protection in the Charter stated that for health, safety and consumer interest, the EU policy will assure a high level of protection.<sup>21</sup> In the following Draft Charter (CONVENT 41) of 3 July 2000, proposals were made from complete elimination of consumer law to the proposal of a subjective rights status for consumer protection. Other Charter proposals foresaw the inclusion of a precautionary principle and a separate section of consumer education. The final Draft of the Charter mentioned consumer protection as a policy goal, instead of an enumeration of consumer rights.

Article 38 of the Charter is kept very short and states that “Union policies shall ensure a high level of consumer protection.”<sup>22</sup> This article has been based on article 153 of the EC Treaty, which equally seeks to protect a high standard of consumer protection, but is more detailed. Article 153 EC Treaty contains a whole title XIV, with concise indications as to the way the Community can realize this protection. This article mentions in par. 1 a list of specific rights, such as health, safety, economic interests, information, education and organization of consumers. Article 153 (2) contains also a clause which states that consumer protection has to be respected in all other EU legislation and implementation policies. Article 153 provides the EU with competence to intervene in consumer matters.<sup>23</sup> Numerous directives have been created in relation to article 95 and 153 ECT, to support and supplement consumer protection, such as the Product Liability Directive, the Doorstep Selling Directive and the Consumer Credit Directive.<sup>24</sup> Finally, article 153 (5) EC Treaty mentions that Member States are free to adopt more stringent protective measures than the EU, as long as they are compatible with the EC Treaty.

Other provisions of the Charter are also relevant for consumer protection, such as article 1 on human dignity, article 3 of the Charter on the right to integrity of the person and article 95 on health protection. These provisions can be used to reinforce consumer health protection, particularly in the case of product safety and with the growth of biotechnology goods. Article 8 on the protection of personal data is crucial for consumer privacy protection with the increasing use of the internet and digitalization of the world.<sup>25</sup> For instance, in the recent *Promusicae versus Telefonica* case<sup>26</sup> the ECJ took a favourable position to protect consumer privacy, referring to the Charter of Fundamental Right to strengthen its decision.

The Charter has been included in the European Draft Constitution in 2004, so that article II-98 of the Draft Constitution contains the commitment of the Union to a high level of consumer policy. Besides this provision already contained within the Charter, there are also a number of other rules in the Draft

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<sup>21</sup> see more in E. Riedel, (2006), in Meyer (eds) *Charta der Grundrechte der Europäischen Union*, 2. ed, Baden-Baden, Art. 38 Fn. 4.

<sup>22</sup> The Charter's drafter included, “ensure” a high level of protection against some liberal Member States wishes, explaining that this was a compromise as consumer protection would only be given principle status and not a subjective right. CONVENT 47, REV 1 from 21 Sept. 2000; Bernsdorf/Broowsky, *Protocols*, p. 343.

<sup>23</sup> See HW. Micklitz/N. Reich/S. Weatherill, (2005), *EU Treaty Revision & Consumer Protection*, *Journal of Consumer Policy*, 27: 367-399, 4.

<sup>24</sup> E. Riedel, (2006), in: Meyer (eds) *Charta der Grundrechte der Europäischen Union*, Art. 38 (Art. II-98 Draft Constitution) Fn. 1., 2. ed, Baden-Baden, Art. 38 (Art. II-98 Draft Constitution) Fn. 1.

<sup>25</sup> See more on Consumers' Digital Right <http://www.edri.org/edrigram/number4.1/consumerrights> (1. 2. 2009).

<sup>26</sup> See case Case C-275/06, *Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU (Telefonica)*, 2008 CELEX no 62006J0275 (Jan. 29, 2008).

Constitution that might apply to consumers. The aim to secure a high level of consumer protection appears in article III-172 (3) in connection with the competence to harmonize national laws, which is similar to the existing article 95 (3) EC Treaty. Article III-235 plays the role currently performed at article 153 EC Treaty.<sup>27</sup>

The European Draft Constitutional Treaty has eventually been rejected. There is however a new reference to the Charter at article 6 of the following Treaty of Lisbon (also known as the Reform Treaty).<sup>28</sup> In this reference “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”<sup>29</sup> This means that if the Treaty of Lisbon enters into force the Charter will become a legally binding document. The Lisbon Treaty adds only minor changes in consumer law, but it proposes an addition in health law at article 152. At point 127 d (iii) the Treaty foresees, for instance, “measures setting high standards of quality and safety for medicinal products and devices for medical use.” This provision is also crucial to improve consumer safety.

The inclusion of consumer protection in the Charter and the Draft Constitution shows the commitment of the European Union to human values and not only economic market integration.<sup>30</sup> Consumer protection has been given more importance as a fundamental social value to compensate for the loss of control over the growing market integration.<sup>31</sup> Still, its value in a specifically legal context is limited by the abstract principle wording in the Charter.<sup>32</sup>

#### **4. Limitations of the Charter**

The application of fundamental rights is restricted by the so called horizontal clauses that are general provisions regarding the interpretation of the Charter. Article 51 and 52 of the Charter contains three important rules. First, the Charter does not grant any new power to the European Union. Second, it applies only to Member States when they implement Community law. Third, the Charter provides only principles of consumer protection not rights.

First, article 51 (2) of the Charter makes clear that it does not attribute any new competences to the European Union: “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.” Thus, an obligation for the Union to promote principles laid down in the Charter may arise only within the limits of the Union competences conferred upon it by the Member States.<sup>33</sup> For the fundamental rights experts article 51 (2) of the Charter is too restrictive. Fundamental rights are general principles of community rights which are

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<sup>27</sup> Art. III-161, 162, 167, 227 and 228 repeat the references to the consumer currently found in provisions concerning competition law, state aids, and article III-423 makes a reference to the consumer in remote regions, more in S. Weatherill, *Consumer Law and Policy*, p. 31-33.

<sup>28</sup> The Lisbon Treaty was signed on 13 December 2007 in Lisbon and contains a modified part of the rejected European Constitution. The ratification by the Member States should be finished by the end of 2008.

<sup>29</sup> Lisbon Treaty text at: <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf> (1.2.09).

<sup>30</sup> J. Weiler, (2000), *Does the European Union Truly Need a Charter of Rights?* 6 *European Law Journal*, 95; G. Alpa, (2005), *New Perspectives in the Protection of Consumers*, EBLR 725.

<sup>31</sup> E. Riedel, (2006), in: Meyer (eds) *Charta der Grundrechte der Europaeischen Union*, Art. 38 (Art. II-98 Draft Constitution) Fn. 5, 2. edition.

<sup>32</sup> S. Weatherill, (2005), *EU Consumer Law and Policy*, Cheltenham, UK : Edward Elgar, p. 31.

<sup>33</sup> See a detailed analysis on the question of competence in the Report on the Situation of Fundamental Rights in the European Union in 2004, drafted by the E.U. Network of Independent Experts on Fundamental Rights (CFR), January 2005, p. 15 ff.

assured by the Community jurisprudence.<sup>34</sup> Furthermore, the limited EU competence is in conflict with the requirement for an effective protection of social rights. Nevertheless, the recognition of social rights in the Charter might give Member States an increased possibility to invoke a restriction to the free circulation of goods or services based on dignity, the rights of expression or consumer protection concerns. In particular, the Member States could foresee national legislation to protect social objectives in the Charter, such as consumer rights even if this might pose a barrier to the free circulation of goods or services. Thus, although the Charter did not change the distribution of competences concerning fundamental social rights, it may well influence the exercise of those powers in an indirect way and further national diversity.<sup>35</sup>

Second, article 51 (1) affirms that the provisions of the Charter apply to the Member States only when they are implementing Union law. The EU can solely dispose about the powers where European law applies or if new competences are received by Member States. This means that the Charter is applicable "if the EU or one of the Communities acts or where national bodies take action within the scope of the Treaty."<sup>36</sup> The rest of the law is in the competence of the Member States, unless Member States confer the entire responsibility to the EU. As Member States remain reluctant to confer competences in social matter to the EU; it is doubtful that such a transfer will occur for the Charter.

Finally, at article 51 (1), the Charter states that rights should be respected and principles observed.<sup>37</sup> This creates a distinction between subjective rights and mere principles. The protection of health, access to services of general interests and consumer protection (articles 95, 96 and 98 of the Charter) can be regarded as principles, because they are shaped as programmatic state objectives.<sup>38</sup> For consumer law the Charter is brief and mentions a high level of policy instead of rights.<sup>39</sup> This broad formulation underlines the Charter's drafter intention that consumer law is meant as a legal principle and not a subjective right.<sup>40</sup> The principal status of fundamental consumer protection was also an argument in July 2000 to decide in favour of its inclusion in the solidarity chapter, whose justiciability had been contested by certain Member States.<sup>41</sup>

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<sup>34</sup> Commentary of the Charter of Fundamental Rights of the European Union, prepared by the EU Network of Independent Experts on Fundamental Rights, 20 June 2006, p. 389-392 (21 August 2007): [http://ec.europa.eu/justice\\_home/doc\\_centre/rights/charter/doc\\_rights\\_charter\\_en.htm#network\\_commentary](http://ec.europa.eu/justice_home/doc_centre/rights/charter/doc_rights_charter_en.htm#network_commentary).

<sup>35</sup> See for instance Case 36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] OJEC C 300/3 (ECJ) ; O. De Schutter, (2002), *Les droits et principes sociaux dans la Charte des droits fondamentaux de l'Union européenne*, in: J.-Y. Carlier et O. De Schutter (dir.), *La Charte des droits fondamentaux de l'Union européenne*, Bruxelles, p. 178.

<sup>36</sup> Butt, M., Kuebert, J. Schultz, C.A., (1999), *Fundamental Social Rights in Europe*, Working Paper, European Parliament, DG for Research, Social Affairs Series, pp. 10-11.

<sup>37</sup> In 2002 the British government succeeded in obtaining an additional clause including the explicit distinction between « rights » and « principles ». Réseau UE d'experts indépendants sur les droits fondamentaux (CFR-CDF), (2004), *Rapport sur la situation des droits fondamentaux dans l'Union européenne et ses Etats membres en 2003*, p. 120 ; Olivier De Schutter, (2002), fn 35, p. 147.

<sup>38</sup> B. Hepple, (2001), *The EU Charter of Fundamental Rights*, 30 *Industrial Law Journal* 225-31, 228.

<sup>39</sup> D. Mc Goldrick, (2004), *The Charter and UN Human Rights Treaties*, in: S. Peers / A. Ward (eds.), *The European Union Charter of Fundamental Rights*, Oxford, p. 97.

<sup>40</sup> This restriction of social rights goes against the aim of the European Council of Cologne, which claimed for the adoption of subjective rights instead of principle. However, as certain States were afraid to transfer more powers to the EU and differences of social rights in many countries only minimum principles have been adopted. Jeffrey Kenner, *Economic and Social Rights in the EU Legal Order*, in: N. Philippi, (2002), *Die Charta der Grundrechte der Europäischen Union, Entstehung, Inhalt und Konsequenzen für den Grundrechtsschutz*, in *Europa, Schriften des Europa-Instituts der Universität des Saarlandes*, Band 38, Baden-Baden, p. 14 s.; Meyer / Engels, (2000), *Aufnahme von sozialen Grundrechten in die Europäische Grundrechtscharta?* ZPR, p. 369.

<sup>41</sup> T. Goldsmith, (2001), *A Charter of Rights, Freedoms and Principles*, 38 *CML Rev.* 1201.

This distinction limits the possible impact of certain fundamental social rights. Subjective rights mean that the individual can directly claim this right in front of the Courts,<sup>42</sup> whereas principles apply only in situations where implementation measures have been taken by Community law or Member States.<sup>43</sup> Thus, principles only have limited justiciability. They can protect against the adoption of certain measures by EU institutions or Member States if they would lower the already existing consumer protection level, but cannot serve as a basis of a claim to invoke the adoption of certain measures.<sup>44</sup>

The distinction of rights and principles has raised critiques as the amended Charter postulates a sort of constitutional inferiority of social rights compared to civil and political rights.<sup>45</sup> Nevertheless, experience has shown that although fundamental right principles are vague they can develop into subjective right through favourable court jurisprudence. For consumer law this concretization is particularly possible if consumer protection provisions are used in cumulative manner with other subjective rights.<sup>46</sup> Consequently, although there is no doubt that consumer protection has a principle status in the Charter, this provision can evolve and become more concrete in combination with other subjective rights of the Charter, relevant norms of the EC Treaty or constitutional provisions. Article 38 of the Charter could, for instance, be applied together with the right to privacy or a national constitutional provision on dignity or freedom of association. Court cases in Member States have shown successful claims for consumer protection with a cumulative application of basic rights.<sup>47</sup> It will remain in the hand of the European Court of Justice and the Member States' courts to determine the real implication of this legal principle of consumer protection.<sup>48</sup>

The Charter does not have yet a compulsory legal status for the ECJ. Nevertheless, various Advocate-Generals have confirmed that<sup>49</sup> the Court can apply the Charter to control and concretize a judgment according to article 6 (2) ECT. There are already some signs that the Charter will obtain binding force by case law. For instance, in the *BECTU* case Advocate-General Tizzano of the ECJ stated that the Charter is a 'reliable and definitive confirmation' of the existence of fundamental social rights.<sup>50</sup> In this way the Charter has an important function to make visible and confirm and strengthen applicable rights. Eventually, with an adoption of the Lisbon Treaty the Charter would become compulsory for EU institutions and most Member States.<sup>51</sup> The formal recognition of consumer protection as a fundamental principle in a binding legal document would be an important innovation, because it has

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<sup>42</sup> Droits sociaux fondamentaux en Europe, Série Affaires sociales, SOCI 104 FR - 02/2000, p. 3.

<sup>43</sup> Certain Member States have the same distinction between rights and social principles in their constitution, Olivier De Schutter, (2002), fn 35, pp. 150-152; CFR-CDF, Rapport sur la situation des droits fondamentaux dans l'Union européenne et ses Etats membres en 2003, p. 121.

<sup>44</sup> K. Lenaerts and P. Foubert, (2001), Social Rights in the Case-Law of the European Court of Justice' (2001) 28 Legal Issues of European Integration, 267-96, p. 271.

<sup>45</sup> G. De Burca, Beyond the Charter: (2004), How Enlargement has enlarged the Human Rights Policy for the EU, Fordham International Law Journal, 679-714.

<sup>46</sup> C. Callies, (2003), Die Europäische Grundrechts-Charta, in: Ehlers, D. (ed), Europäische Grundrechte und Grundfreiheiten, Berlin, p. 23; E. Riedel, (2006), in: Meyer (eds) Charta der Grundrechte der Europäischen Union, Art. 38, 2. ed., Baden-Baden, 430.

<sup>47</sup> See the *Italian case* Trib. Milano, 30-3-1994, Foroit, 1994, I, 1572. A cumulative application can also be imagined with basic rights to information or to health to protect the consumer.

<sup>48</sup> E. Riedel, (2006), in Meyer (eds) Charta der Grundrechte der Europäischen Union, Art. 38, Fn. 9-10.

<sup>49</sup> Christian Callies, (2003), fn 46, 28 and 29.

<sup>50</sup> Opinion of Advocate General Tizzano, in Case-173/99 *BECTU v. Secretary of State for Trade and Industry*, 8 February 2001.

<sup>51</sup> The Charter would not become binding for the UK and Poland, because they excluded themselves.



never existed at international level before.<sup>52</sup> However, due to the rejection of the Treaty at the Irish referendum on 12 June 2008 it remains uncertain if it will eventually enter into force in 2009.

## **5. Practical Significance of the Charter**

Consumer protection has been facilitated by the formal adoption of fundamental rights, which have the potential to affect markets in the direction of achieving social goals.<sup>53</sup> The inclusion of socio-economic rights in the Charter may have three main consequences for consumer protection: it may 1) affect consumer law in respect to EC legislative actions, 2) provide fairer contractual relationships and 3) influence the balance of economic and social rights.

First, the Charter could give a new direction to the legislative actions at the European and national level. As fundamental rights must be respected when European law is adopted, applied and implemented, consumer rights, such as the right to health, safety or access to justice, may influence the interpretation of specific legislation, or may lead to the elimination of incompatible legislation.<sup>54</sup> Also, EU institutions are obliged to promote the Charter, and Member States have to respect these rights. When the European Union adopts new consumer legislation, the fundamental rights principle in the Charter demands that a high protection of the consumer has to be respected and not only efficiency and internal coherence. The Charter has for instance been mentioned in the preamble of the Draft Consumer Rights Directive.<sup>55</sup>

The second possible effect of including socio-economic rights in the Charter is that this may provide fairer contractual relationships between private parties. Indeed, a contract can be tested against fundamental rights review of the EC legislation and national laws adopted to implement directives. Such a contractual review might challenge the validity of certain contract terms and strengthen the position of the consumer as the weaker contractual party.<sup>56</sup> For instance, recent national case law shows that constitutional rights jurisprudence improves important information given to consumers before entering a contract which might be to their detriment.<sup>57</sup> In Italy constitutional rights have also been applied to strengthen the position of the weaker party in contract litigation.<sup>58</sup> In this case freedom of association was used to legitimate a decision according to which it was contrary to good faith for the insurer to enforce a life insurance contract, when the owner of the insurance company founded his own political party with the acquisition network of the insurance company. The insured consumer could not be forced to contribute to the founding of a political party, which was against his political

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<sup>52</sup> Even if the Reform Treaty would not be accepted, the existence of a European Constitution has been recognized in a substantive sense, P Craig, (2001), *Constitutions, Constitutionalism and the European Union*, 7 *European Law Journal* 125; J Shaw, (1999), *The emergence of post national constitutionalism in the European Union*, 6 *Journal of European Public Policy* 579; I Pernice, (1999), *Multi-level Constitutionalism and the Treaty of Amsterdam: Constitution-Making Revisited?* 36 *CML Review* 703.

<sup>53</sup> For a thorough analysis of potential relation of fundamental rights with private law see O. Cherednychenko, (2006), *EU Fundamental Rights, EC Freedoms and Private Law*, 14 *European Review of Private Law* 23, 45; idem, (2006), *Fundamental Rights and Contract Law*, *ERCL*, 4/2006, 500; idem, (2007), *Fundamental Rights, Contract Law and the Protection of the Weaker Party, A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, Munich.

<sup>54</sup> H. Collins, (2005) *European Social Policy and Contract Law*, 1 *European Review of Contract Law* 115, 117.

<sup>55</sup> A real consideration of fundamental consumer right is however lacking in the draft consumer right directive [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm#green](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#green)

<sup>56</sup> General clauses such as good faith or good morals may also become a means in the hand of the ECJ for applying European contracts in the light of fundamental rights.

<sup>57</sup> BVerfGE 89, 214, reported in [1994] *Neue Juristische Wochenschrift*, p. 36, more in M. Hesselink, (2003), *The horizontal effect of social rights in European contract law*, *Europa e diritto privato*, Milano, Dott. A. Giurffrè editore, p. 4.

<sup>58</sup> Trib. Milano, 30-3-1994, *Foroit*, 1994, I, 1572.

view. Thus, the jurisprudence in certain Member States demonstrated that basic constitutional principles can increase protection of consumers in contract law.

Finally, the application of the Charter can help to preserve social fundamental rights from erosion, by counterbalancing market freedom and preventing<sup>59</sup> competitive deregulation of Member States.<sup>60</sup> It can help to justify an exception to free movement of goods and competition by Member States for reasons of general interest, such as the protection of consumers' health. Such an influence may lead the national court to restrict EC freedoms by stating, for instance, that a certain contractual agreement with a cross border element is contrary to fair trade, on the basis that it infringes the fundamental rights recognized in the Community.<sup>61</sup> In recent case law the ECJ has recognized that fundamental rights may allow Member States' restriction of EC freedoms. This can result in the prohibition of a commercial activity. For example, in the *Omega case*<sup>62</sup> the German authorities banned the computer game 'laserdrom', as it involved simulated killings. The Court held that the objective of protection of human dignity could justify the restriction of the freedom to provide services. This shows an adaptation to national sensitivity after a school shooting in Germany.

As seen above, the Charter can have a positive influence on consumer law. However, limitations remain important. This is also reflected in the opinions of consumer scholars that vary. Weatherill admits that the Charter has a high potential to improve the human side of consumer law, but regrets that its value in a specifically legal context is limited by its vague wording.<sup>63</sup> Alpa has a more positive view of the Charter, especially for what concerns the strengthening of the consumer position against companies. At any rate, both scholars highlight that the current legal framework presents a major problem for what concerns consumer redress, because of different legislation in Member States and lack of adequate regulation on this issue.<sup>64</sup> Hence, beside substantial rights, the EU should also improve consumer access to justice.

It is therefore advocated in this paper that the EU should focus on procedural instruments. Although the consumer has a considerable set of right there is a shortcoming in enforcing the law effectively.<sup>65</sup>

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<sup>59</sup> Thomas Wilhelmsson, (2005) The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law, in: Jan Smits ed., The Need for a European Contract Law: Empirical and Legal Perspectives, Europa Law Publishing: Groningen, p. 143.

<sup>60</sup> O. De Schutter, (2002), Les droits et principes sociaux dans la Charte des droits fondamentaux de l'Union européenne, in: J.-Y. Carlier et O. De Schutter (dir.), La Charte des droits fondamentaux de l'Union européenne. Sa contribution à la protection des droits de l'homme en Europe, Bruxelles, 168

<sup>61</sup> N. Bernard, (2003), A "New Governance" Approach to Economic, Social and Cultural Rights in the EU', in: T. Hervey and J. Kenner (eds.), Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective, Oxford, Hart Publ., 2003, p. 245-249; Giuseppe Bronzini, The European Social Model and the Constitutional Treaty of the European Union, in C. Joerges, Bo Strath and P. Wagner (eds), The Economy as a Polity: The Political Constitution of Contemporary Capitalism, London 2005, p. 192; De Schutter (2003), La garanzia dei diritti e principi nella Carta dei diritti fondamentali, in Zagrebelsky, G (ed), Diritti e Costituzione nell'Unione europea, Bari, Laterza 192-221.

<sup>62</sup> Case 36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] OJEC C 300/3 (ECJ), see also Case Schmidberger Internationale Transporte und Planzüge v Republik Österreich [2002] OJEC C 184/1 (ECJ); J. Morijn, (2006), Balancing Fundamental Rights and Common Market Freedom in Union law: Schmidberger and Omega in the Light of the European Constitution, European Law Journal, Vol. 12. No. 1, Jan, p. 15.

<sup>63</sup> S. Weatherill, (2005), EU Consumer Law and Policy, p. 31-33.

<sup>64</sup> G. Alpa, (2005), New Perspectives in the Protection of Consumers, EBLR 725; for Callies article 38 of the Charter is not sufficiently detailed to guarantee an efficient fundamental social right protection because it only repeats the existing legislation of the EC Treaty without guaranteeing access to justice of the individual, Christian Callies, (2003), Die Europäische Grundrechts-Charta, in: Ehlers, D. (ed), Europäische Grundrechte und Grundfreiheiten, Berlin, p. 23.

<sup>65</sup> Reich emphasizes the need to enhance enforcement of consumer rights through instruments like public interest litigation, by Norbert Reich, A European Concept of Consumer Rights: some reflections on the thinking Community Consumer Law, in J. Ziegel / Shalom Lerner, New Development in International Commercial and Consumer Law, 1998, Hart Publishing Oxford, p 431; see also Reich/Micklitz, Public interest litigation, Nomos-Nomos, a similar focus on the need to increase consumer access to justice as one essential element for the way forward in Ugo Mattei / Fernanda Nicola, A

This means consumers lack the means, understanding or legal effectiveness to apply the law in their favour and make their voice heard. Consumer could be empowered through improved participation in policy making, access to justice and education.<sup>66</sup> The Aarhus Convention in environmental law could be a useful inspiration for consumer law in this respect. The Convention explicitly recognizes the right of access to information, public participation in decision-making and access to justice in environmental matter.<sup>67</sup> A promising initiative in this direction to empower consumers in the EU can already be seen in the recent adoption of the Green Paper on Consumer Collective Redress.<sup>68</sup>

## **6. Conclusion: A Procedural Approach to Basic Consumer Law**

Consumer protection has been included in the Charter of fundamental rights to reinforce the diminishing role of consumers in the market. Such an innovative recognition has been fiercely debated in terms of merit and utility. Even exponents of the traditional economic approach to consumer law, had to concede that increased risks and lack of confidences have a negative effect on the market itself. On the other hand, the EU indirect-law making approach was shown to lack legitimacy.

This paper argues that protection of consumer law as a fundamental right is justified in the global market, and is actually needed, to add a social dimension to the European private law. However, to become more effective than a symbolic promise, the new consumer protection has to be sustained by procedures that empower the consumer, through access to justice, participation, and education. A debate on new ways to empower consumers is already underway in collective redress; hopefully, this will promote a new concept of active citizen, who actively participates in legislation and enforcement.<sup>69</sup>

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'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda, *Global Jurist, Frontier*, Volume 7, Issue 1, Article 2, p. 48.

<sup>66</sup> Marc Pallemerts, *Proceduralizing environmental rights: The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters in a Human Rights Context*, published in July 2004 by the United Nations Environment Programme for the Geneva Environment Network, 2004, p. 17-19; see also in the same publication Franz Xavier Perrez, *Key questions concerning the human rights and environment debate. An introduction*, p. 6.

<sup>67</sup> Article 1 entitled 'objectives' of the Aarhus Convention, UN website with the text of the Aarhus Convention <http://www.unece.org/env/pp/documents/cep43e.pdf> (18 January 2009); the Aarhus Convention was adopted by the EC in 2005 [Decision 2005/370/EC], <http://ec.europa.eu/environment/aarhus/index.htm> (accessed 18.1.2009).

<sup>68</sup> [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm) (consulted 1. 2. 2009)

<sup>69</sup> Sandra Fredman, *Transformation or Dilution: Fundamental Rights in the EU Social Space*, *European Law Journal*, Vol. 12, No. 1, January 2006, pp. 41-60.



# European Citizenship as a Means to Fundamentalise Social Rights

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## Abstract

European citizenship was added by the Maastricht treaty in 1992. Since this day, the European Court of Justice has used it to protect and to develop social rights, specifically social security rights. Could this evolution be pushed further towards a *fundamentalisation* of social rights? Making this step implies understanding what a fundamental right is and how it is protected. A theoretical definition will be proposed and applied to existing European social rights. In the second part, examples of EU rights in the process of becoming fundamental will be examined in order to assess the substantive role of EU citizenship.

## Introduction

The protection of social fundamental rights in the European Community has been the object of many studies.<sup>1</sup> It is often argued that they do not enjoy good enough protection.<sup>2</sup> This lack of protection has to do with the international distaste for social and economic rights by opposition to first generation civil and political rights.<sup>3</sup> The idea is that they are rights to and not rights from<sup>4</sup> which are more difficult to implement.<sup>5</sup>

The same can be said at the EU level. The aim of this paper is to assess the possibility to develop this protection by using a completely different and quite recent concept: European citizenship. Since its introduction by the Maastricht treaty in 1992, it has evolved from no substance towards the elaboration of a whole caselaw developed by the European Court of Justice and mainly focused on the protection of social rights.<sup>6</sup>

My claim will be that this development has not only allowed the protection of social rights but has opened the way towards a fundamentalisation of rights. In order to do so, I will first examine what is

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<sup>1</sup> BERCUSSON, B., « The Trade Union Movement and the European Union: Judgment Day », *European Law Journal*, 2007, vol. 13, fasc. 3, pp. 279-308.

<sup>2</sup> POIARES MADURO, M., « Striking the Elusive Balance between Economic Freedom and Social Rights in the EU », in ALSTON, P. (dir.), *The EU and Human Rights*. Oxford, Hart Publishing, 1998.

<sup>3</sup> For instance, compare the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Within the Council of Europe, the achievement of the European Court on Human Rights compared to the European Committee of Social Rights.

<sup>4</sup> SUDRE, F., *Droit européen et international des droits de l'homme*, 8, Paris, PUF, 2006.

<sup>5</sup> More theoretically, see the claim of Ph. Alston to consider social rights as human rights, in ALSTON, P., *Labour rights as human rights*, New York, Oxford University Press, 2005.

<sup>6</sup> Many cases are now building this evolution, see 12 may 1998, *Martínez Sala / Freistaat Bayern*, aff. C-85/96, *Rec.* 1998,p.I-2691 and more recently 18 november 2008, *Förster*, aff. C-158/07, not published yet, 22 may 2008, *Nerkowska*, aff. C-499/06, not published yet. Many articles have now acknowledged this evolution, see for instance JACQUESON, C., « Union citizenship and the Court of justice, something new under the sun, towards social citizenship », *European Law Review*, 2002, pp. 260-281, AKANDJI-KOMBÉ, J.-F., « L'émergence de la citoyenneté européenne. De Rome à Maastricht », in LECLERC, S., AKANDJI-KOMBÉ, J.-F. & RENCONTRES EUROPÉENNES DE CAEN, C. (dir.), *La citoyenneté européenne*. Bruxelles, Bruylant, 2007, pp. 9-21, BARNARD, C., « EU citizenship and the principle of solidarity », in DOUGAN, M. & SPAPAVENTA, E. (dir.), *Social welfare and EU law, Essays in European law*. Oxford, Hart, 2005, pp. 165-175, DOUGAN, M., « The Constitutional Dimension to the Case Law on Union Citizenship », *European Law Review*, 2006, vol. 31, pp. 613-641...

the state of art in terms of protection of social fundamental rights in the EU in order to then reflect on the role of EU citizenship.

## **I. State of Art: Are there EU Social Fundamental Rights?**

A first step to decide if some rights are fundamental is to define them.

### **A. Are there Social Fundamental Rights in the EU?**

Social fundamental rights have known a development through the more general protection of fundamental rights. But they still seem to be at a disadvantage compared to civil and political rights on the one hand and economic rights on the other hand.

#### **1. A development of fundamental right protection**

Without repeating things that everybody knows<sup>7</sup>, there is a need to say that the development of fundamental rights has been unexpected and quite important in the European Community. Three phases can be identified.<sup>8</sup> First, the Community was only economic, then the European Court of Justice took action and finally a constitutionalisation took place with the Amsterdam treaty.

First, there was an economic Community. Initially, the EEC treaty was made to create an economic union. The only articles about social rights were the freedom of movement (39 EC) and the equal pay for men and women (article 141 EC).

At a second stage, from 1969, the European Court of Justice intervened. The *internationale*, *Rutili*<sup>9</sup>, *Nold*<sup>10</sup> and *Stauder* cases<sup>11</sup> have shown the growing interest of the Court for the question of fundamental rights. If it is not clear that its interest was excited more by the refusal of some national courts to recognise EC law supremacy than by a genuine interest in the human beings involved<sup>12</sup>, it starts to examine the legality of EC acts in the light of fundamental rights. It recognises person's rights as general principles of law<sup>13</sup> of which it ensures respect.<sup>14</sup> It was followed by a real caselaw on fundamental rights. A substantive constitutionalisation takes place.

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<sup>7</sup> Many articles on this question. For instance, LARRALDE, J.-M., « Convention européenne des droits de l'homme et jurisprudence communautaire », in LECLERC, S., AKANDJI-KOMBÉ, J.-F., REDOR, M.-J., (dir.), *L'Union européenne et les droits fondamentaux*. Bruxelles, Bruylant, 1999, pp. 105-136 ; COHEN-JONATHAN, G., « La problématique de l'adhésion des Communautés européennes à la Convention européenne des droits de l'homme », in TEITGNE, P.-H. (dir.), *Mélanges offerts à Pierre-Henri Teitgen*. Paris, A. Pédone, 1984, pp. 81-108. Voir FLAUSS, J.-F., « La protection des droits de l'Homme dans le cadre de la Communauté européenne », *Les Petites Affiches*, 1997, vol. 91, fasc. Juillet 1997, pp. 4-11. Voir aussi DUBOUT, E., *L'article 13 du traité CE : la clause communautaire de lutte contre les discriminations*, Bruxelles, Bruylant, 2006.

<sup>8</sup> COHEN-JONATHAN, G., « La problématique de l'adhésion des Communautés européennes à la Convention européenne des droits de l'homme », in TEITGNE, P.-H. (dir.), *Mélanges offerts à Pierre-Henri Teitgen*. Paris, A. Pédone, 1984, pp. 81-108.

<sup>9</sup> 28 october 1975, *Rutili / Ministre de l'intérieur*, aff. 36/75, *Rec.* 1975, p. 1219.

<sup>10</sup> 15 july 1960, *Präsident Ruhrkohlen-Verkaufsgesellschaft e.a. / Haute Autorité*, aff. 36/59, *Rec.* 1960, p. 857.

<sup>11</sup> 12 novembre 1969, *Stauder / Stadt Ulm*, aff. 29/69, *Rec.* 1969, p. 419.

<sup>12</sup> 17 decembre 1970, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, aff. 11/70, *Rec.* 1970, p. 1125).

<sup>13</sup> 15 december 1995, *Union royale belge des sociétés de football association e.a. / Bosman e.a.*, aff. C-415/93, *Rec.* 1995, p. I-4921, 23 february 1995, *F / Conseil*, aff. T-535/93, *Rec.* 1995, p. FP-I-A-49,II-163, 13 july 1995, *K / Commission*, aff. T-176/94, *Rec.* 1995, p. FP-I-A-203,II-621.

The European Parliament also took a position in favour of this development in a resolution on human rights on 9 July 1991. It even proposed that the European Union join the European Convention on Human Rights.<sup>15</sup> After the Court's refusal,<sup>16</sup> it tried to have a bigger impact at the Intergovernmental conferences by proposing more resolutions.<sup>17</sup> Its claim was finally heard at the Amsterdam treaty. What many authors have called 'the Amsterdam constitutionalisation' took place. Article 6 paragraph 2 stated that fundamental rights such as understood from the national constitutional traditions and the European convention on human rights were taken into account by the EU. The Amsterdam Treaty offered an opportunity to formalise the caselaw evolution. This evolution has not stopped and the new article 6 FEU of the Lisbon Treaty goes even further.<sup>18</sup> It states that:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Today, the EU competence to join the European convention on human rights is recognised and the Charter of fundamental rights gets a real legal value<sup>19</sup>. This extension could have great implications for social fundamental rights, but there are still gaps. As Professor Craig explains, the two articles of the protocol on the Charter add nothing of substance to existing EU law, since the Charter does not in itself extend the ability of Community or national courts to find that national laws etc are inconsistent with Charter rights, but it creates a substantive limit, which reduces the impact of Title IV of the Charter concerning solidarity rights<sup>20</sup>. The value of the Charter will only have an impact if the Court decides to have an innovative approach to its content. This does not seem likely in the light of the recent *Laval* and *Viking* judgments.

(Contd.) \_\_\_\_\_

<sup>14</sup> 4 february 1959, *Stork & Cie. / Haute Autorité*, aff. 1/58, *Rec.* 1959, p. 43, 15 july 1960, *Präsident Ruhrkohlen-Verkaufsgesellschaft e.a. / Haute Autorité*, aff. 36/59, *Rec.* 1960, p. 857, 1st april 1965, *Sgarlata e.a. / Commission CEE*, aff. 40/64, *Rec.* 1965, p. 279.

<sup>15</sup> JO C240, p. 45 du 16.9.91.

<sup>16</sup> 28 march 1996, *Avis 2/94*, *Adhésion de la Communauté à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales*, aff. 2/94, *Rec.* p. I-1763.

<sup>17</sup> Amongst numerous resolutions, see for instance *Resolution of the European Parliament about a Charter of rights of the citizens of the Union*, JO C 179 du 06/08/1975, p. 28.

<sup>18</sup> There is also a new social clause in the Lisbon treaty, see article 9 FEU.

<sup>19</sup> BERCUSSON, B., « The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level », *Transfer*, 2003, vol. 58, fasc. 3, pp. 563-568 ; GOLDSMITH (LORD), « A Charter of Rights, Freedoms and Principles », *Common Market Law Review*, 2001, vol. 38, pp. 1201-1216.

<sup>20</sup> CRAIG, P., « The Treaty of Lisbon, Process, Architecture and Substance », *European Law Review*, 2008, vol. 33, fasc. 2, pp. 137-166.

## 2. Social fundamental rights often forgotten

Even though these changes seem to imply an important change, up to now fundamental social rights have not known a great protection. As Professor Maduro explained in a famous article about social rights,<sup>21</sup> they are seen only through an economic perspective. Many examples could be taken.<sup>22</sup> We will focus on recent one: the Laval and Viking cases in which fundamental rights only appear as a shield.<sup>23</sup> In this case, Viking, a Finnish shipping company, owns and operates the ferry, *Rosella*, registered under the Finnish flag and with a predominantly Finnish crew covered by a collective agreement negotiated by the Finnish Seamen's Union (FSU). In 2003, Viking decided to re-flag the *Rosella* to Estonia, which would allow the company to replace the predominantly Finnish crew with Estonian seafarers, and to negotiate lower terms and conditions of employment with an Estonian trade union. FSU started an industrial action. The question was asked of the European Court of Justice whether this action was against the freedom to provide of services, a fundamental freedom of the treaty.<sup>24</sup>

The Court answered in a positive and a negative way. Positively, it concluded that the right to strike was a fundamental right which should be recognized.<sup>25</sup> More negatively, although the right to take collective action, including the right to strike, must be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may nonetheless be subject to certain restrictions.<sup>26</sup> The protection of fundamental rights is considered as 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, such as the free movement of goods or the freedom to provide services.<sup>27</sup> This right was only to have a role in the EU order as a shield, as a justification for not applying one of the fundamental freedoms. The reasoning of the Court is still based on its economic background. If observers were happy to see a fundamental right recognised, they also worried that this recognition might lead towards their cancelation. This negative approach leads to a need to find new ways to protect social rights. More than just mentioning it in a Charter, making these rights substantially fundamental could be a renewed way to protect them. One must then wonder what it means to make a right fundamental.

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<sup>21</sup> POIARES MADURO, M., « Striking the Elusive Balance between Economic Freedom and Social Rights in the EU », in ALSTON, P. (dir.), *The EU and Human Rights*. Oxford, Hart Publishing, 1998.

<sup>22</sup> For instance, think of 12 June 2003, *Schmidberger*, aff. C-112/00, *Rec.* 2003, p. I-5659 or 14 October 2004, *Omega*, aff. C-36/02, *Rec.* 2004, p. I-9609 or even 8 April 1976, *Defrenne / SABENA*, aff. 43/75, *Rec.* 1976, p. 455.

<sup>23</sup> See the paper of U. Belavusau in this Working Paper.

<sup>24</sup> BERCUSSON, B., « The Trade Union Movement and the European Union: Judgment Day », *European Law Journal*, 2007, vol. 13, fasc. 3, pp. 279-308.

<sup>25</sup> Point 43 of 11 December 2007, *The International Transport Workers' Federation et The Finnish Seamen's Union*, aff. C-438/05, *Rec.* 2007, p. I-10779: In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised [...] by the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) ; RODIÈRE, P., « Les arrêts Viking et Laval, le droit de grève et le droit de négociation collective », *Revue trimestrielle de droit européen*, 2008, vol. 44, fasc. 1, pp. 47-66.

<sup>26</sup> Point 44 of 11 December 2007, *The International Transport Workers' Federation et The Finnish Seamen's Union*, aff. C-438/05, *Rec.* 2007, p. I-10779.

<sup>27</sup> Point 45 of 11 December 2007, *The International Transport Workers' Federation et The Finnish Seamen's Union*, aff. C-438/05, *Rec.* 2007, p. I-10779.



## **B. Towards a Fundamentalisation**

Wondering if a right can be fundamental implies asking what fundamental means. An attempt at a definition will allow the identification of methods to make a right fundamental.

### **1. What makes a right fundamental?**

A definition is provided by Professeur Scoffoni. He explains that fundamental rights are subjective rights of a superior rank and judicially protected.<sup>28</sup> Asking if there are social fundamental rights in the EU implies looking for the existence of these three elements.

I would therefore be tempted to exclude right away the first possibility which would consist in relying on the name given by the international organisations and EC institutions to these rights. The EC Treaty, in its article 136, mentions fundamental social rights and relies on the 1961 and 1989 Charters.<sup>29</sup> Similarly, the 2000 Charter of fundamental rights might have a bigger impact now that it is going to have a constitutional value with its inclusion in a protocol to the Lisbon treaty. But this approach does not really allow one to assess the effectivity of the right.

One can in turn focus on the three elements identified before, i.e. a superior rank, a subjective right and justiciability.

A superior rank is usually found in the Constitution of a State. France and Germany are perfect examples.<sup>30</sup> In the case of the United Kingdom, the principles are not written but they are seen as superior. Turning to the European Community, this level has to be the one of the treaties. Because of the hierarchy of norms, the treaties have a level which can be compared to that of a constitution. According to Professor Zoller, a constitution is “an act of sovereignty which gives law to a political community and founds its democracy”.<sup>31</sup> If the European treaties are not exactly an act of sovereignty, they have united the will of the different Member states. They give a law in the sense that they organise the functioning of the economic and political community. There are many debates around the question of democracy in Europe,<sup>32</sup> but the notion of constitution has already been used.<sup>33</sup> The treaties, just because they are the primary source of EC law, can be considered as a higher rank. The question is then to know if they contain social rights. It happens that they do. We already mentioned article 141 or 39 EC. One could also think of the social policy which is even more extended with the Lisbon treaty.<sup>34</sup>

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<sup>28</sup> FAVOREU, L., GAÏA, P., GHACONTIAN, R., MELIN-SOUCRAMANIEN, F., PFERSMAN, O., PINI, J., ROUX, A., SCOFFONI, G. & TREMEAU, J., *Droit des libertés fondamentales*, 2, Paris, Précis Dalloz, 2002.

<sup>29</sup> The 1961 European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers.

<sup>30</sup> In France, the 1958 Constitution only contains a minimum of fundamental rights. Social fundamental rights are referred to in the Preamble which takes to the 1946 Constitution which mainly aims at the protection of workers but also economically deprived people. In Germany, fundamental rights are expressly mentioned in the 1949 Constitution, but social fundamental rights can only be drawn from article 6 IV which mentions a right of mothers to protection and from the notion of State of rights. See European Parliament, *Document de travail Droits sociaux fondamentaux en Europe*, , Séries Affaires sociales, SOCI 104 FR, PE 168.629.

<sup>31</sup> « La constitution est non seulement acte de souveraineté en ce qu'elle donne loi à la communauté politique tout entière, mais elle est aussi acte fondateur de la démocratie en ce qu'elle fonde une société politique qui est une société démocratique, c'est-à-dire d'hommes libres, n'obéissant qu'à des lois et non à des hommes ». See Zoller, E. *Droit constitutionnel*, 2<sup>ème</sup> éd. PUF, 1998, p. 33.

<sup>32</sup> See for instance MAU, S., « Democratic demand for a social Europe? Preferences of the European Citizenry », *International Journal of Social Welfare*, 2005, vol. 14, pp. 76-85.

<sup>33</sup> For instance, DOUGAN, M., « The Constitutional Dimension to the Case Law on Union Citizenship », *European Law Review*, 2006, vol. 31, pp. 613-641.

<sup>34</sup> See a new article 5 FEU which amounts to a new social clause.

One could also think of the different Charters. Specifically, the Charter of Fundamental Rights opens the door to a new declaration of the citizens' rights. As it should soon have not only a legal value, but also a higher legal value, one can think that it might allow for a change.<sup>35</sup>

Concerning the creation of an EC subjective right, it asks the question of the legislator's action to protect a subjective right. Two views can be opposed as regards EC law. A negative one would be to say that, considering the creation of an EC subjective right, one still sees space for national action which would prevent a right from being fundamental.<sup>36</sup> The vision of the half full glass would lead one to say that, on the contrary, it can be said that there is a more and more visible extension of EC harmonisation, direct effect and primacy.<sup>37</sup> The Charter of Fundamental rights opens the door to subjective rights. In fact, having made the distinction between rights and principles, the rights are aimed to have a real content and a direct effect on the citizen.<sup>38</sup> One can also consider the existing directives and regulations in the social field. For instance, the directive on working time gives very clear guidance as to the times one is allowed to work.<sup>39</sup> It creates a precise framework which has allowed workers to take actions in order to protect their rights.<sup>40</sup>

Turning to the justiciability of a right, it has to do with the access to court of an individual to protect his own rights. This question of justiciability in the EC context has often been considered as the Achilles heel of the EC protection for two reasons:

1. There is little locus standi for the citizen. Article 230 paragraph 4 only allows for a very little access to EC courts.<sup>41</sup> And many complaints have pointed out that there is no 'fundamental right' action.<sup>42</sup> Some argue that the horizontal effect of the norms and the purely internal situation prevents EC law from being justiciable. One could say that the refusal to apply EC law as long as there has not been any cross-border movement within the Community makes it impossible to rely on. But this argument might not hold if one focuses on the EC law system and not on its boundaries.

2. There is little control of the EC actions by EC courts. Although, there is a developing administrative EC law. Two examples are the extra-contractual responsibility of the EC and the possibility to cancel an infringing EC act. As for the first argument, it can be pointed out that national courts also protect EC law.<sup>43</sup>

## 2. Methods of fundamentalisation

This panorama of the ways to make a right fundamental takes us to different EC methods:

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<sup>35</sup> See upon.

<sup>36</sup> FAVOREU, L., GAÏA, P., GHACONTIAN, R., MELIN-SOUCRAMANIEN, F., PFERSMAN, O., PINI, J., ROUX, A., SCOFFONI, G. & TREMEAU, J., *Droit des libertés fondamentales*, 2, Paris, Précis Dalloz, 2002.

<sup>37</sup> MOREAU, M.-A., « L'utilisation des droits sociaux fondamentaux par les travailleurs dans l'Union européenne », in CHEROT, J.-Y. & VAN REENEN, T. (dir.), *Les droits sociaux fondamentaux à l'âge de la mondialisation*. Aix-Marseille, Presse Universitaire Aix Marseille, 2005, pp. 175-188.

<sup>38</sup> HILSON, C., « Rights and Principles in EU Law: A distinction Without Foundation? », *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, fasc. 2, pp. 193 – 216.

<sup>39</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

<sup>40</sup> 3 october 2000, *Simap*, aff. C-303/98, *Rec.* 2000, p. I-7963.

<sup>41</sup> For more developments on this question, see HILSON, C., « Community Rights and Wrongs: Greenpeace Before the Court of Justice », *Environmental Law Review*, 1999, fasc. 1, pp. 52-58.

<sup>42</sup> This question was raised during the drafting of the European Constitution treaty project, see Texte de l'intervention orale de M. Gil Carlos Rodríguez Iglesias, Président de la Cour de justice, devant le « cercle de discussion » sur la Cour de justice en date du 17 février 2003, Convention européenne, 20 février 2003, CONV 572/03, CERCLE I 6.

<sup>43</sup> The mechanism of preliminary reference of article 234 EC has proved very useful in the developping of EC law.

A first one is Treaty changes: one was made with the Amsterdam treaty with the insertion of article 6 EU. The incorporation of the Charter within the treaty (as it was proposed in the Constitution treaty) or in a protocol (as in the Lisbon treaty) also corresponds to a change. It claims the indivisibility of political and social rights. Even if this link was acknowledged, it happens to become less true as soon as the social rights will have to be implemented by opposition to civil and political rights. In any case, the treaty changes and the adoption of charters should have an impact, at least, on the name of these rights. It might be a first step even if it is not a decisive one. It then needs to be given a content either by the legislator or the judge.

A second one goes through legislative action. This possibility was explained very well by Mister Braibant when he was trying to find a compromise to adopt social rights within the Charter.<sup>44</sup> The distinction between rights and principles allowed the legislator to develop the principles and transform them into rights. Many authors have emphasized the numerous direct effect rights given by legislations made on the ground of article 137 EC (health and safety of workers) or on grounds of article 13 EC with the race directive.<sup>45</sup>

Finally, the ability of the judge to complete the legislator's action is a last possibility. It has been shown very clearly in the early caselaw of the Court when it discovered general principles of EU law which aimed at complementing the existing rights. It can take two forms. First, the judge can use a combination of the affirmation of a right to an allowance from the State and the application of the principle of non-discrimination on grounds of nationality. In this way, the right to housing or the right to work could not be invoked on their own, but with the principle of non-discrimination, for instance, in a case where legislation about housing could create discriminations as to who owns this right.

Second, the judge can continue the legislator's action and identify more concretely the content of some rights or make them more precise. For instance, the European committee of social rights has considered that a "sufficient payment" of article 4 paragraph 1 of the European Social Charter could not go below 68% of the medium national salary.<sup>46</sup> The judge by making a right more precise gives it a real justiciability.

In this framework, the question of the role of EU citizenship is asked.

## **II. A Role for EU Citizenship?**

Citizenship can be understood in three very different ways:<sup>47</sup> A narrow meaning is the political participation to public authority.<sup>48</sup> A broad meaning involves the British definition of citizenship as rights.<sup>49</sup> The EU meaning is in between: it is a closed citizenship in the sense that it is limited to the nationalities of the member states (article 17 EC), but it is also a plural citizenship with an aim of

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<sup>44</sup> HILSON, C., « Rights and Principles in EU Law: A distinction Without Foundation? », *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, fasc. 2, pp. 193 – 216.

<sup>45</sup> Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>46</sup> See *Projet de Charte des droits fondamentaux de l'Union européenne*, Bruxelles, le 6 janvier 2000, CHARTE 4101/00, CONTRIB 1, NOTE DE TRANSMISSION.

<sup>47</sup> BOSNIAK, L., « Citizenship denationalized », *Indiana Journal of Global Legal Studies*, 2000, vol. 7, pp. 447-508.

<sup>48</sup> It is the approach in France, see KOUBI, G., *De la citoyenneté*, Paris, Litec, 1995, WITHOL DE WENDEN, C., *La citoyenneté européenne*, Paris, Presses de Sciences Po, 1997.

<sup>49</sup> See MARSHALL, T. H., *Citizenship and social class*, London, Pluto perspectives, 1992 for whom citizenship is the "status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed". This approach was followed by Beveridge who called citizens the residents in the United Kingdom, see BEVERIDGE, S. W., *Social Insurance and Allied Services*, New York, Toronto, The Macmillan Company of Canada, 1942.

integration which includes social rights as much as political rights (articles 18 and 21 EC). The question is to know if there is room for action at a theoretical level as well as a pragmatic level.

### A. *Room for Action*

One could think that there is no possible link between citizenship and fundamental rights. They do not have the same aim. But, more than these definitions, more than a competence, European citizenship has been given a policy role by the European Court of Justice.

#### 1. Obstacles: theoretical differences

Some professors identify many theoretical obstacles.<sup>50</sup> They are universality, the absence of duties and a territorial limit. Concerning the question of universality, two fundamental rights are supposed to be universal whereas citizenship rights would be limited to some citizens. On the other hand, in the case of European citizenship, this is not true, the examples of the rights to an ombudsman and the right to petition show that they are open to everyone. Even the right to vote has been extended beyond European citizens.<sup>51</sup> When one reads the Charter of fundamental rights, it is quite interesting to notice that the freedom of movement and residence is reserved to Europeans citizens while this exact same right may also “be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State”.<sup>52</sup> This assimilation between the rights of the migrant citizens and the migrant third country nationals tends to blur the borders of European citizenship.

The same conclusion can be drawn concerning the absence of duties. Citizenship is also supposed to include duties when fundamental rights do not. But European citizenship does not include any duty and this is one of its specificities. It is interesting to notice though that the Lisbon treaty does repeat that “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties”.<sup>53</sup> The addition of the term “inter alia” clearly indicates that the rights mentioned in article 20 FEU are not the only rights or duties of the European citizens, but the treaty does not create any duty. This anomaly creates similarities once again between European citizenship and fundamental rights.

Finally, it has been said that fundamental rights, contrarily to citizenship, do not know territorial limits. It is true that citizenship has usually been linked to a state, and in the case of the EU, it exists within the borders of the juxtaposition of the member states borders. On the contrary, it has been suggested that fundamental rights are sometimes linked to natural rights without boundaries.<sup>54</sup> But these two assumptions have known limitations: on the one hand, citizenship has sometimes been seen as a universal concept, a first example is post-national citizenship,<sup>55</sup> social citizenship has also been

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<sup>50</sup> BLUMANN, C., « Citoyenneté européenne et droits fondamentaux en droit de l'Union européenne : entre concurrence et complémentarité », in COHEN-JONATHAN, G. (dir.), *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*. Bruxelles, Bruylant, 2004, pp. 265-281, p. 266.

<sup>51</sup> 12 septembre 2006, *Eman et Sevinger*, aff. C-300/04, *Rec.* 2006, p. I-8055 ; C.J.C.E., Arrêt du 12 septembre 2006, *Espagne / Royaume-Uni*, aff. C-145/04, *Rec.* 2006, p. I-7917.

<sup>52</sup> See paragraph 45 of the Charter of Fundamental Rights.

<sup>53</sup> See article 20 paragraph 2 FEU.

<sup>54</sup> See O'LEARY, S., *European Union citizenship : the options for reform*, London, IPPR, 1996.

<sup>55</sup> SOYSAL, Y. N., *Limits of citizenship, Migrants and Postnational Membership in Europe*, Chicago et Londres, The University of Chicago Press, 1994; SHAW, J., « Citizenship of the Union: Towards Post-National Membership? », in 6, W. P. N., *Jean Monnet Working Papers from Jean Monnet Chair* 1997, New York, New York University School of Law; CHEVALLIER, J., *L'Etat post moderne*, 2, Paris, LGDJ, 2004.

seen as out of the borders of citizenship.<sup>56</sup> On the other hand, fundamental rights do know territorial limits. A perfect example is the European Convention of Human rights which only applies to the countries which ratify it. Europe is then understood in a broad way as Russia is included, but the territorial limit does appear. EU citizenship could therefore be analysed together with fundamental rights. It is what has gradually taken place within the EC.

## 2. EC citizenship as a policy for protecting EC fundamental rights

European citizenship and fundamental rights have known a parallelism in their developments. Because neither the one nor the other were protected, the Parliaments and the other institutions have called for a parallel development. For instance, the Parliament created, in a resolution of August 1975, a charter of rights for citizens of the European Community and measures which can contribute to the formation of a European Community conscience.<sup>57</sup> Two years later, in a Declaration of 5 April 1977, the Assembly, which would become the Parliament, the Council and the Commission take the solemn resolution to respect fundamental rights.<sup>58</sup> A year later, the report about “a Europe of citizens” mentions as well fundamental rights.<sup>59</sup> European citizenship, which starts to be imagined at a supranational level is about the protection of the rights of European citizens.<sup>60</sup> Again in 1989, the Parliament adopts a new Declaration of rights and freedoms.<sup>61</sup> This text recognises early social rights to the European citizen such as access to work, social welfare rights or education rights.<sup>62</sup> These rights are given to the European citizen<sup>63</sup> and are the “*expression of common values of citizens of Europe*”.<sup>64</sup>

In the Maastricht treaty, this trend is followed. The Spanish representatives propose a European citizenship linked to fundamental rights.<sup>65</sup> After the negotiations,<sup>66</sup> two articles about European citizenship and fundamental rights are created. It explains that the status of citizen can only exist within a system of respect of fundamental rights which allows for a complete development for all”.<sup>67</sup> We have seen the different ways of fundamentalisation of rights and it appears that citizenship can help these developments. European citizenship can be the basis for several policies and now one can

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<sup>56</sup> For instance, the French social citizenship as identified in France in 1982, does not have territorial boundaries, see the lois Auroux (*Loi 82-957 relative à la négociation collective et au règlement des conflits collectifs du travail du 15 novembre 1982*, J.O. 14 novembre 1982, p. 3414 ; *Loi 82-689 relative aux libertés des travailleurs dans l'entreprise du 23 juillet 1982*, J.O. 6 août 1982, p. 2518 ; *Loi 82-915 relative au développement des institutions représentatives du personnel du 5 octobre 1982*, J.O. 29 octobre 1982, p. 3255).

<sup>57</sup> *Résolution sur l'Union européenne*, JO n° C 179 du 06/08/1975 p. 0028.

<sup>58</sup> JOCE n° C 103 of 27 april 1977.

<sup>59</sup> *Rapport sur l'Union européenne de M. Léo Tindemans au Conseil européen, partie sur l'Europe des citoyens*, Bull. suppl. 1/76, p. 27, p. 27.

<sup>60</sup> Ibid., pp. 27-28.

<sup>61</sup> *Résolution du 14 février 1989*, JO n° C 77 du 19/03/1984.

<sup>62</sup> See article 12 to 16.

<sup>63</sup> *Résolution portant adoption de la déclaration des droits et libertés fondamentaux*, Journal officiel n° C 120 du 16/05/1989 p. 0051 , p. 51.

<sup>64</sup> Ibid., p. 51.

<sup>65</sup> *Mémorandum du 24 septembre 1990 « Vers une citoyenneté européenne » déposé par le gouvernement espagnol*, Europe Documents, 2 octobre 1990, n° 1653.

<sup>66</sup> *Résolution sur la citoyenneté de l'Union 16/12/1991 Rapporteur R. Bindi.*, Journal officiel n° C 326 du 21/11/1991 p. 205, p. 205.

<sup>67</sup> Traduit par un « full development for all » dans la version anglaise *Résolution sur la citoyenneté de l'Union 16/12/1991 Rapporteur R. Bindi.*, Journal officiel n° C 326 du 21/11/1991 p. 205, p. 205.

identify several in the last report on citizenship of the European Commission.<sup>68</sup> There have already been examples. We will focus on three of them: the diplomatic protection developments, the democratic Europe and name changes. The diplomatic protection developments have been allowed thanks to citizenship. It is the idea that a citizen has a link to Europe and consequently to all the member states that constitute it, that allows for his protection by any EU member state.<sup>69</sup> Concerning the democratic changes, it is again the notion of citizenship, understood this time as political participation, which has led to important developments and changes in the new treaty.<sup>70</sup> Finally and surprisingly enough, European citizenship has had an impact on the attribution of surnames. It has allowed European citizens to have the name of their children given according to Spanish laws when they were born in Belgium.<sup>71</sup> One sees how one concept can lead to the development of rights which have no link with each other. Most importantly, there can be changes in the field of social policy: the 2004/38 directive on the right of the citizen to move and reside freely in the European territory is a good example.<sup>72</sup> Citizenship can be and has also been used by the judge as an instrument to develop some existing rights.

## **B. Existing Starting Points: Caselaw**

Four rights can be taken into account. Some can already be said to be fundamental rights of the citizens (i.e. the right to move and reside freely within the European Union and the principle of non-discrimination on grounds of nationality) whereas others only raise questions (an EU right to education and an EU right to social security).

### **1. Existing EC fundamental rights**

Two rights are now seen as fundamental rights within the European Community: the freedom of movement of citizens and the principle of non-discrimination on grounds of nationality. I contend that this 'fundamentality' is the result of the influence EU citizenship.

#### **a. Freedom of movement of citizens (article 18 EC)**

It is true that the freedom of movement has existed since the creation of the EC. But one must recall that it used to be a freedom limited to workers. It is only with The Maastricht Treaty that article 18 EC has become the first right of citizens. This right has been interpreted in a very broad way. For instance, in the *Trojani* case, it appears that a man who is not a worker, who does not earn or have any money is allowed to stay in a member state which is not his and to receive allowances from this country<sup>73</sup>. It is true that there are limits and the Court does not make clear when a man could be expelled from a country when he does not have enough to sustain himself. In any case, his right to move is made clear thanks to citizenship which becomes a status.

Thanks to European citizenship, the condition of economic activity has been removed for enjoyment of the freedom to move and reside in another country. This is a big change as before the freedom to move was a conditional right. Today, since it is given to all citizens in article 18 EC, it becomes a

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<sup>68</sup> Fourth report of the European Commission on Union citizenship (*1st may 2001-30 april 2004*), , Brussels, 26.10.2004, COM (2004)695 final, SEC (2004)1280..

<sup>69</sup> See article 20 paragraph 2c FEU.

<sup>70</sup> A right to initiative, see a new title on 'the democratic principles of the EU'.

<sup>71</sup> See 2 october 2003, *Garcia Avello*, aff. C-148/02, *Rec.* 2003, p. I-11613 and more recently 14 october 2008, *Grunkin et Paul* aff. C-353/06, *to be published*.

<sup>72</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>73</sup> 7 september 2004, *Trojani*, aff. C-456/02, *Rec.* 2004,p.I-7573.

subjective right. Directive 2004/38 confirms these changes. It is a justiciable right as all EC and national Courts are in charge of verifying its uniform application through the member states.

There are still limitations and conditions as one knows that the condition to cross a border to have EC law applied has not disappeared and EC law keeps having an effect only on people who move from one country to another.<sup>74</sup> But one can now speak of a subjective justiciable right of a superior rank.

The same conclusion can be drawn concerning the principle of non discrimination on grounds of nationality.

*b. The non-discrimination principle: article 12 EC*

Concerning the principle of non-discrimination on grounds of nationality, the same comment can be made as regards its existence before the one of European citizenship.

It had become an autonomous right even before European citizenship was introduced: as we can see in the *Gravier* case, in the field of education, article 12 EC could be used without any other right to give a student the right to study abroad.<sup>75</sup>

But, it is only thanks to citizenship that it becomes a fundamental right. In the *Grzelczyk* case, the Court judged that « Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for ».

These two rights are fundamental as they are in the treaty, they are subjective rights judicially protected. Can this be said of other EC rights?

*1. Towards the fundamentalisation of other rights?*

*a. A right to social security*

It is difficult today to speak of a subjective right to social security especially since the EC and Member states' competences are shared in this area. EC law only aims to coordinate the national social security systems of the member states (article 42 EC). But a new method based on article 18 and 12, and inspired by European citizenship, has led to the creation of rights especially in the field of non-contributory allowances.

Two cases illustrate this tendency well.

In the *Martinez Sala* case,<sup>76</sup> a Spanish mother asks for education allowances previously only given to migrant workers (regulation 1612/68 and 1408/71) and get them on grounds of article 12 and 17 EC. Social advantages seem to have been opened up from applying only to workers to being available to all European citizens. Similarly the *Collins* case and the *Förster* case deal with giving national allowances to non economic migrant European citizens.<sup>77</sup> They indicate a change in the case law because it authorises Member States to limit the exercise of rights based on Article 17 EC.<sup>78</sup> It was considered that the “*entitlement to a jobseeker's allowance can be conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations*”

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<sup>74</sup> 11 July 2002, *D'Hoop*, aff. C-224/98, *Rec.* 2002, p. I-6191.

<sup>75</sup> 13 February 1985, *Gravier / Ville de Liège*, aff. 293/83, *Rec.* 1985, p. 593.

<sup>76</sup> 12 May 1998, *Martínez Sala / Freistaat Bayern*, aff. C-85/96, *Rec.* 1998, p. I-2691.

<sup>77</sup> 23 March 2004, *Collins*, aff. C-138/02, *Rec.* 2004, p. I-2703; 18 November 2008, *Förster*, aff. C-158/07.

<sup>78</sup> Meulman, J., De Waele, H., *Funding the life of Brian: jobseekers, welfare shopping and the frontiers of European citizenship*, *Legal Issues of Economic Integration*, 2004, 31(4), 275-288.

*that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions*".<sup>79</sup> It appears that, even if this right is very limited, a citizen gets a social right simply because of his citizenship.

There are nonetheless two important limits: First, a limit of the application of the principle of non discrimination which implies that the right will only be given if a similar right can be given to a national in the concerned state. Another limit is that of residence: the caselaw of the Court which is now founded on the principle of non discrimination must find new limits: one is the old condition to have crossed a border, the other is the need to show a 'link' with the country to get the rights.

*b. A right to education*

The right to education raises the same question as the EC competence is not very strong in the field of education. Article 149 EC only mentions an EC "action". But, here again, European citizenship applied in coordination with article 12 and 18 EC has led to the recognition of new subjective rights such as a right to get education allowances<sup>80</sup> or a right of European citizens to access education in Europe.

Concerning a right to get education allowances, the *Grzelczyk* case is a good example. In this case, the Court judged that a student can receive a minimum allowance even if he does not fulfil the conditions laid down by directive 93/96<sup>81</sup> of having enough resources and sickness insurance. The idea of a "certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary"<sup>82</sup> is a good enough reason to give a new right to a migrant citizen.

Concerning the right to access the education system of another member state, the *Commission v. Austria* case<sup>83</sup> imposed an obligation on Austria to open its universities to nationals from other member states. The court decided that the examined system was discriminatory because non nationals were treated in a different way from nationals as they had to prove that they had obtained more diplomas than the nationals. This decision is very far reaching as it might completely transform the right to access to universities of European citizens.<sup>84</sup>

## Conclusions

This little tour around fundamental rights and their protection within the EU has allowed us to identify a development. If they are not very well protected yet, one can hope that the Charter of fundamental rights as well as the caselaw is going to initiate a change. One of the tools to fundamentalise the rights is EU Citizenship. Because it has gone beyond a simple political meaning, because it is a sui generis concept, because it is beyond a simple right, one can expect that it is used as a policy to develop social rights by the judge and the legislator. Article 18 and 12 already give good examples as the freedom of movement of citizens and the non-discrimination principle on grounds of nationality are already

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<sup>79</sup> 23 march 2004, *Collins*, aff. C-138/02, *Rec.* 2004,p. I-2703, point 73.

<sup>80</sup> See the paragraph before and 20 september 2001, *Grzelczyk*, aff. C-184/99, *Rec.* 2001,p. I-6193.

<sup>81</sup> Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students *Official Journal L 317* , 18/12/1993 P. 0059 – 0060.

<sup>82</sup> 20 septembre 2001, *Grzelczyk*, aff. C-184/99, *Rec.* 2001,p. I-6193, point 44.

<sup>83</sup> 7 july 2005, *Commission / Austria*, aff. C-147/03, *Rec.* 2005,p. I-5969.

<sup>84</sup> RIEDER, C., « Case C-147/03 Commission v. Austria, Case Comment », *Common Market Law Review*, 2006, vol. 43, fasc. 6, pp. 1711-1726.



considered by EU human rights lawyers as fundamental rights.<sup>85</sup> One could think of the development of a social citizenship by the ‘fundamentalisation’ of other areas such as education and social security. The recent caselaw on European citizenship could indicate a new method of judgments of the European Court of Justice going in this direction.

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<sup>85</sup> RENUCCI, J.-F., *Traité de droit européen des droits de l'homme*, Paris, LGDJ, 2007 ; FALLON, M., *Les droits fondamentaux liés à la citoyenneté de l'Union européenne. Son apport à la protection des droits de l'Homme en Europe*, Bruxelles, Bruylant, 2002 ; FALLON, M., *Droit matériel général de l'Union européenne*, Louvain La Neuve, Bruylant Academia, 2002.



# **Making (Social) Rights Fundamental: The Contribution of the EU Agency for Fundamental Rights?**

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## **Abstract**

According to the conventional understanding social rights are essentially programmatic in nature and they are positive rights, therefore they rely on different enforcement mechanisms than civil and political rights. Discussions on the place of social and labour rights in the general system of human rights protection focus mostly on their justiciability before the courts and they are trying to find a new normative rationale for this. While having in mind the emerging new institutional and governance framework of EC employment law this paper will explore the question on the protection of social and labour rights as fundamental rights from a different angle. The main question will be what could be the contribution of the recently established administrative agency of the EU for the protection social and labour rights in Europe. The activities of the Agency will be analyzed mainly from two perspectives. First it will be argued that its activities could be important for generating convergence on the different national and international sources of law protecting social rights in Europe. Second, the article will also place the agency's activities in a new emerging architecture of EC discrimination law and explore the question how the activities of the agency can complement the traditional rights based enforcement model. Here the focus will be on the role of the Agency to institutionalize coordination between the different actors active in the field.

## **Keywords**

Fundamental Rights Agency, social rights, labour rights, EC discrimination law, protection of fundamental rights, Fundamental Rights Platform, standard of protection, human rights policy

## **1. Introduction**

Are social and labour rights fundamental rights? What is the place of social rights in the general system of human rights protection? These are important questions nowadays when the systems such as our welfare state regimes and our employment models that used to provide a safety net from unfair inequalities, in some European democracies are undergoing 'great transformations'. When we are talking about the European Community we have mainly in mind a regional economic integration project with an ever evolving and distinctive social dimension and employment model. But does this imply that rights being civil, political, economic or social in nature that are at the core of these national models and that are recognized as fundamental rights in the national legal orders of the 27 Member States, necessarily have to take also the same legal value and the same level of protection at Community level? Crucially moreover, what should be the appropriate standard and level of protection granted to each right in a multi-level polity such as the European Community, being also an actor in

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<sup>1</sup> PhD researcher at the European University Institute (EUI); This paper is based on two presentations that were given by the author at two conferences at the EUI in June 2008. The subject of the workshops was the "Fundamentalization" of Social rights and the Future of European Union policies in Theory and Practice. I am grateful for the participants of these workshops for their comments, especially to *Claire Marzo* for her efforts in the organization of the workshop on social rights and to *Anicée Van Engeland* on the invitation to the workshop on the future of European Union policies and to Professor *Marie-Ange Moreau* and *Ming-Sung Kuo* for their thoughtful comments on an earlier version of this paper.

the global sphere. The question is not only who will decide about the appropriate level of protection, but also what source of information and standards will be used for that and who will be the main actors being able to influence this process.

This paper will deal with the question to what extent the recently established EU Agency for Fundamental Rights (hereinafter as FRA or Agency) could become an important actor in facilitating the identification of the optimal level of protection of fundamental rights in Europe, by carrying out research and collecting data on the protection of fundamental rights from a variety of national and international actors. It will be argued that its activities could be important for facilitating coordination between the different actors being active in the field of human rights protection. It will be argued, however, that this potential role of the Agency has been undermined by the fact that the final regulation laying down the legal frame for the activities of the Agency<sup>2</sup> fails to identify the appropriate standard of protection that the FRA should use when it is exercising its fairly limited competences.

Using the example of Community discrimination law the final part of the paper intends to give an overview on how the activities of the Agency can complement the activities of other institutions and actors in a substantive area of Community law. Discrimination law is a good example also for a further reason. It is one of those areas of Community law where the emergence of a broader human rights policy has gained some reality. Article 13 EC, that was introduced in the Amsterdam Treaty not only prohibits anti-discrimination, but also empowers the Community institutions 'to take appropriate action to combat discrimination' based on a variety of different grounds. It has been argued that Article 13 is 'the most significant source of EC competence in the field of human rights'.<sup>3</sup>

## 2. Why Do We Need a Fundamental Rights Agency?

### 2.1. A Multi-Level System of Fundamental Rights Protection in Europe

It seems that the Treaty of Lisbon<sup>4</sup>, if it comes into force, would create a complex *three level structure* of human rights protection in the EU. The *first* level is the European Convention of Human Rights (ECHR) and the relevant case law of the Strasbourg Court on the Convention. In this respect the Reform Treaty stipulates that the EU shall accede to the Convention<sup>5</sup>. The case law of the Court of Justice will provide the *second* level of protection that opened up the possibility for the protection of fundamental rights by general principles of EC law. As it is widely known, the Court draws inspiration for the recognition of fundamental rights within the Community legal order, not only from international agreements, among which special significance is given to the European Convention on Human Rights but also from the common constitutional traditions of the Member States. The basic elements of this methodology were reaffirmed also in Article 6(2) of the Treaty on European Union. The *third* level of protection constitutes the EU Charter of Fundamental Rights (EUCFR). The reach of the Charter both at Community and at national level is expected to be enhanced by a provision of the Lisbon Treaty that would give the same legal value as the Treaties to the Charter, i.e. it would arguably gain the status of primary law. However, it is important to bear in mind that the Charter itself is a unique source of fundamental rights. It refers back to the national laws and practices of the Member States at several occasions, it also makes clear that the ECHR and the jurisdiction of the

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<sup>2</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ L, 22.2.2007 53/1-14

<sup>3</sup> P Craig and G De Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, Oxford 2007), p. 408-412

<sup>4</sup> The Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C [2008] 115/1

<sup>5</sup> See in particular Art. 6(2) TEU and the related Protocol No. 8 and Declaration No.2 on Art. 6(2) of the Treaty on European Union

Strasbourg Court will be taken into account only as 'minimum standards' on the interpretation of the Charter's rights, freedoms and principles.<sup>6</sup> Thus the Community can go beyond this minimum level of protection and provide more extensive protection if it is necessary. Having regard to the evolution of the economic integration project and the growing importance of welfare policies in the Community going beyond the level of protection provided by the Convention is an important question as such. In light of the two controversial judgments of the ECJ in the Viking<sup>7</sup> and Laval<sup>8</sup> cases, one can conclude that identifying those occasions when it would be indeed desirable to go beyond the level of protection as warranted in the case law of the European Court of Human Rights (ECtHR) is not a question that can be answered with absolute certainty in advance.<sup>9</sup>

Due to this complex structure of fundamental rights protection and diversity concerning the level of protection that is afforded to the different rights and fundamental values in the EU27, it might be appropriate to talk about a multi-level system (*Mehrebenensystem*) of fundamental rights protection both in procedural and substantive terms in the EU.<sup>10</sup> Some form of coordination is desirable, that could be one of the major contributions of the Agency. Especially, because as we will see it later the Agency is not concerned with subjective rights protection, but with the *objective standard* of fundamental rights in the EU.<sup>11</sup> There could be other ways also for identifying the appropriate standard of protection in the EU, such as using for example conflict of laws methodology for these purposes.<sup>12</sup> The importance of an institutionalized form of coordination between the legal sources has been pointed out also by *De Búrca* and *De Schutter* who advocated using the Open Method of Coordination (OMC) for the implementation of the EU Charter of Fundamental Rights and the EU human rights policy.<sup>13</sup>

## **2.2. Striking a Fair Balance between Fundamental Rights and Fundamental Freedoms: An Appropriate Mechanism for Identifying the Optimal Level of Protection?**

It is established case law that the ECJ has no jurisdiction to examine the compatibility of national rules with fundamental rights if those rules do not fall within the scope of Community law.<sup>14</sup> Since the law of the internal market can be considered as one of the core elements of the European integration

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<sup>6</sup> See Article 52 (3) of the Charter, see further on the relationship between the Charter and the ECHR P Craig, *EU Administrative Law* (Oxford University Press, Oxford 2006), p. 523-532

<sup>7</sup> *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779

<sup>8</sup> *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR-I 11767

<sup>9</sup> For a human rights analysis of the Viking and Laval judgments see T Novitz and P Syrpis, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' 33 *European Law Review* 411, T Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' in C Barnard (ed) *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007/2008, p. 543-561

<sup>10</sup> JF Lindner, 'Grundrechtsschutz in Europa - System Einer Kollisionsdogmatik' (2) *Europarecht* 160

<sup>11</sup> JM Schlichting and JD Pietsch, 'Die Europäische Grundrechteagentur - Aufgaben - Organisation - Unionskompetenz' (19) *Europäische Zeitschrift für Wirtschaftsrecht* 587, p. 587.

<sup>12</sup> VVD Eeckhout, 'Promoting Human Rights within the Union: The Role of European Private International Law' (14) *European Law Journal* 105; Lindner

<sup>13</sup> G De Búrca, 'Beyond the Charter: How Enlargement has Changed the Human Rights Policy of the EU' in O De Schutter and S Deakin (eds) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant, Bruxelles 2005) OaD De Schutter, Simon (ed), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant Brussels 2005) see also O De Schutter, 'The Implementation of Fundamental Rights through the Open-Method of Coordination' in O De Schutter and S Deakin (eds) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies The Future of Social Europe?* (Bruylant, Bruxelles 2005)

<sup>14</sup> For an overview on the system of human rights protection in the EC legal order see Craig and De Búrca, *EU Law, Text, Cases and Materials*, p. 379-427

project, finding an argument for a breach with one of the fundamental freedoms can be one of the easiest ways to establish a link with Community law. The ECJ applies sometimes a fairly generous and wide test in order to identify when a national measure constitutes a restriction on one of the fundamental freedoms. The claimant does not necessarily have a high level of standard of proof. It is not always necessary to show that the national measure discriminates against for instance foreign-service providers under Article 49 EC. It is enough if the national measure places a double burden on the foreign services-provider or it makes the provision of services more difficult or less attractive and the national measure or private action will trigger the application of Article 49 EC for instance.<sup>15</sup>

As the Court ruled in the recent *Viking* and *Laval* cases the fundamental nature of a right does not as such render Community law inapplicable if the exercise of that right hinders the transnational provision of services or the free movement of companies in the European Union.<sup>16</sup> Therefore the internal market litigation can be used to expand the fundamental rights jurisdiction of the ECJ. In its most recent case law the Court accepted, however, that Member States can invoke the protection of fundamental rights in order to widen the scope of possible justifications and to defend their national legal orders from the negative constraints imposed by the Community freedoms.<sup>17</sup> As AG Jacobs argued in the *Schmidberger* case, even though restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives, such as public health or consumer protection, many of the grounds currently recognized by the Court could also be formulated as being based on fundamental rights considerations.<sup>18</sup> On the other hand, since the protection of fundamental rights can vary to a great extent among the Member States the fact that a right is recognized in a national legal order as fundamental does not automatically lead the Court to the conclusion that it has the same legal status in the Community legal order as well. The automatic recognition of a fundamental right as protected in the national legal orders could undermine the effective enforcement of the fundamental freedoms and it could jeopardize the effective functioning of the internal market.

Therefore the Court always has to analyse as a second step, whether a particular right forms part of the system of fundamental rights protection in the Community as well. The application of this *two stage approach* was described by AG Jacobs in the *Schmidberger* case.<sup>19</sup> He argued that the protection of fundamental rights can be accepted as a legitimate objective in the public interest capable of justifying a restriction on one of the fundamental freedoms, if that right is recognized not only in the national legal order but also in the Community legal order as a fundamental right. As he put it, the “Community can not prohibit Member States from pursuing objectives which the Community itself is bound to pursue”. Therefore, he suggested analysing whether the rights – freedom of assembly and freedom of speech – recognized in the Austrian legal order as fundamental rights, formed part of the protection of fundamental rights in the Community legal order as well. For the AG the Charter was one of the sources to be taken into account as a written catalogue of fundamental rights in this

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<sup>15</sup> On the applicable test concerning the different freedoms see further C Barnard, *The Substantive Law of the EU* (Oxford University Press Oxford 2007)

<sup>16</sup> *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779, para. 47 and *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR-I 11767, para. 95

<sup>17</sup> See in particular *C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659 and *C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609

<sup>18</sup> *C-112/00 Opinion of Advocate General Jacobs, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-05659, para. 89

<sup>19</sup> *C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659

regard.<sup>20</sup> Since the Court's case law draws inspiration under such an assessment also from the common constitutional traditions of the Member States this second step in principle respects the diversity of fundamental rights protection in the Member States.<sup>21</sup> Having regard to the differences between the degree of protection of a specific human right in the different Member States the AG noted, however, that "it cannot be automatically ruled out that a Member State which invokes the necessity to protect a right recognized by national law as fundamental pursues an objective which as a matter of Community law must be regarded as *illegitimate [emphasis added]*".<sup>22</sup>

This two stage approach requires the Court to analyse a *variety* of national and international sources on the protection of fundamental rights and to identify an optimum standard of protection for that right in issue. As *Craig* and *De Búrca* argued even if the Court accepts the argument of a party that a given right should be recognized as part of Community law, the way how the Court determines the legal scope of that right and the permissible restrictions upon it in the context of the case at hand may well differ from the way it would be applied in a national context.<sup>23</sup> In fact, the Court's 'evaluative approach' – as it was described by *Tridimas* – for the recognition of new general principles of EC law does not include a comprehensive comparative analysis to identify a common denominator, but rather the Court 'makes a synthesis seeking the most appropriate solution on the circumstances of the case'.<sup>24</sup> On the other hand, when Member States are invoking the protection of fundamental rights in order to widen their margin of appreciation interfering with the functioning of the internal market, the Court also has to strike a fair balance between the effective protection of fundamental rights and the effective enforcement of the fundamental freedoms in the Community. Identifying the optimum level of protection in a European Union with 27 Member States can be a difficult task for the Court. The way how the Court applies the proportionality principle is essential in these cases in order to optimize the protection of fundamental rights and the Community freedoms.<sup>25</sup> As the Court ruled in *Schmidberger*, in these cases it has to reconcile the requirements and the respected scope of protection of fundamental rights in the Community with those arising from Community freedoms.<sup>26</sup>

Even though in principle the Court interprets the Treaty based derogations strictly, it still accepts certain 'value diversity' in the Member States. Having regard to the mainly decentralized system of fundamental rights protection in the Community,<sup>27</sup> the Member States do enjoy a wide margin of discretion concerning the effective protection of fundamental rights in their democratic societies. The *Omega* case<sup>28</sup> was a good illustration for the implications of this value diversity in Europe. The question arose whether the justification of a restriction on free movement of services should reflect a legal conception of those values that is common to all Member States or whether a shared and confirmed conception on the requirements of a fundamental value in one particular Member State can also be accepted as an objective justification. In Paragraph 37 the Court ruled that under the review of proportionality "it is not indispensable for the restrictive measure issued by the authorities of a

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<sup>20</sup> C-112/00 *Opinion of Advocate General Jacobs, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-05659, para. 100-102.

<sup>21</sup> J Schwarze, 'Der Schutz der Grundrechte durch den EuGH'(43) *Neue Juristische Wochenschrift* 3459, p. 3461.

<sup>22</sup> C-112/00 *Opinion of Advocate General Jacobs, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-05659, para. 98.

<sup>23</sup> *Craig and De Búrca, EU Law, Text, Cases and Materials*, p. 389

<sup>24</sup> T Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford, 2006, p. 20-23

<sup>25</sup> See further on this point N Hös, *The Principle of Proportionality in the Viking and Laval Judgments: an Appropriate Standard of Judicial Review?* *EUI Working Paper* 2009 (forthcoming)

<sup>26</sup> C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659, para.77

<sup>27</sup> Also Schwarze, p. 3461.

<sup>28</sup> C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609, para. 38.

Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”. Moreover, referring back to earlier case law the Court pointed out that the “need for, and proportionality of the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another Member State”. Consequently, if a national measure corresponds to the shared and confirmed conception on the requirements of a fundamental value in one particular Member State that can be accepted as a proportionate restriction of the fundamental freedoms especially of that right has a special constitutional status in that Member State. *Omega* is a good illustration for the fact that the Court in certain situations is sensitive to national interests and “recognizes the possibility – or even perhaps the merit – of value diversity”.<sup>29</sup>

*Omega* was an interesting case also from another perspective. Human dignity found recognition in both international law and in the constitutional systems of the Member States. However, this concept was expressed in a variety of different ways. In the majority of the national legal systems human dignity appeared as a general article of faith or – often in the case law – as a fundamental, evaluation or constitutional principle, the German constitution being an exception where human dignity is recognized as a separate fundamental right. As the Advocate General observed human dignity has not found express (written) mention in valid primary legislation in the Community. Only a few legal instruments of secondary Community law and the subsequent case law on those legal instruments contain reference to human dignity. However, the Court of Justice has also recognized human dignity as a principle of legal interpretation. Therefore, AG eventually concluded that in this case human dignity forms part also of primary legislation as a general legal principle.<sup>30</sup> The Court followed his approach and declared that respect for human dignity as a general principle of law is part of the Community legal order as well.<sup>31</sup> Respect for value diversity is a positive feature of this case law. However, *Schmidberger*, *Omega* as well as the *Viking* and *Laval* cases also indicate that the decentralized implementation of fundamental rights in the EU can lead to a kind of regime competition. Without some form of coordination court led market integration can arguably be used to challenge the protection of fundamental rights or national legislation based on the protection of fundamental rights.<sup>32</sup>

The *Schmidberger* and *Omega* cases are examples also for the defensive use of fundamental rights in the EU, i.e. to defend the national legal orders from the reach of the four freedoms. In contrast with this, there are hardly any effective mechanisms for a more offensive, proactive use of fundamental rights in the EU legal order, for example by guiding the exercise of Community competences.<sup>33</sup> The Commission has developed for instance its own *internal mechanisms* to analyze to what extent its legislative proposals are in compliance with fundamental rights, especially with the Charter.<sup>34</sup> This legislative scrutiny takes mainly two forms. The respected DG of the Commission includes an analysis of the future consequences of the legislative proposal on fundamental rights in impact assessments.

<sup>29</sup> FG Jacobs, *The sovereignty of law : the European way* (Hamlyn lectures, Cambridge University Press, Cambridge 2007), p. 108., see also Schwarze, p.3461

<sup>30</sup> C-36/02 *Opinion of Advocate General Stix-Hackl, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609, para. 81-93.

<sup>31</sup> C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609, para. 34

<sup>32</sup> De Schutter, 'The Implementation of Fundamental Rights through the Open-Method of Coordination'; O De Schutter, 'Fundamental Rights and the Transformation of Governance in the European Union' in C Barnard (ed) *The Cambridge Yearbook of European Legal Studies* (Hart Publishing, Oxford and Portland, Oregon 2006-7)

<sup>33</sup> N Bernard, 'New Governance' Approach to Economic, Social and Cultural Rights' in TK Hervey and J Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights - A Legal Perspective* (Hart Publishing, Oxford - Portland Oregon 2003)

<sup>34</sup> See COM 2005(172) final, see further H Toner, 'Impact Assessments and Fundamental Rights Protection in EU Law'31 (6) *European Law Review* 316



Secondly, by giving a more detailed explanation on the compliance with the Charter and other fundamental rights documents in the explanatory memorandum of those legislative proposals or draft instruments that have a specific link with fundamental rights. The use of impact assessments concerning fundamental rights is rather disappointing, because of the lack of expertise in the Directorate Generals, problems with the participation of civil society in the public consultations as well as due to the lack of guarantees that their opinion will be taken into account.<sup>35</sup> The House of Lords report on the proposal of the Commission for the establishment of the Fundamental Rights Agency saw a valuable role for this body in the future for example in providing *external monitoring* of Commission's proposals. This should have meant in practice an assessment of those draft legislative proposals which raise obvious human rights concerns. They should be submitted to the Agency for an expert opinion. The Report also suggested that the EU institutions should be obliged to provide the Agency with information as to whether they consider that their actions are compatible with the protection of fundamental rights.<sup>36</sup> As we will see below the role of the Agency in scrutinizing the draft legislative proposals of the Community Institutions is restricted by the fact that it cannot prepare conclusions and opinions which concern the legality of the proposals of the Commission or the positions taken by the institutions in the course of legislative procedures on its own initiative.<sup>37</sup>

### **2.3. The Emerging Internal Human Rights Policy of the EU**

The establishment of the Agency can be placed into the emergence of a broader human rights policy in the EU since the late 1990s.<sup>38</sup> The objective of this policy is that fundamental rights should not only place external limits on the exercise of Community competences or on the action of Member States when they are acting within the sphere of Community law. In the first place, the Community institutions should have the right and the positive obligation to act and protect fundamental rights in Europe. Article 13 EC that requires some of the Community Institutions to 'take appropriate action to combat discrimination based on sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation', can be understood as an expression of this desire. The directives adopted on the basis of this Treaty article have already given rise to a "hybrid model" of regulation<sup>39</sup> in the field of race discrimination using different governance mechanisms to implement the same objective.

From a historical perspective, around the same time when the Convention started its work and deliberations on the written catalogue of rights and principles a more ambitious reform proposal was recommended by the "Comité des Sages" to the European decision-makers, i.e. to develop a fully fledged and coherent human rights policy for the EU.<sup>40</sup> At that time there was already growing awareness concerning the fact that what the EU needs in order to enhance the protection of fundamental rights is not yet again a written catalogue of rights in the form of the Charter. As Weiler argued the adoption of the Charter can easily become only a 'subterfuge, an alibi' for not doing what the EU truly needs, i.e. to develop effective procedural guarantees and governance mechanisms for the protection of fundamental rights.<sup>41</sup> Looking at the debates around the status of the Charter ever since it

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<sup>35</sup> O De Schutter, 'Mainstreaming Human Rights in the European Union' in P Alston and O De Schutter (eds) *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency* (Hart Publishing, Oxford and Portland, Oregon 2005), p. 51-65

<sup>36</sup> EUC House of Lords, 29th Session Report of Session 2005-06, *Human Rights Protection in Europe: the Fundamental Rights Agency* (2006), p. 40

<sup>37</sup> See further on this point 4.4.

<sup>38</sup> See on this point further G De Búrca, 'The Case for an EU Human Rights Policy' in P Beaumont, C Lyons and N Walker (eds) *Convergence and Divergence in European Public Law* (Hart Publishing, Oxford and Portland, Oregon 2002)

<sup>39</sup> G De Búrca, 'EU Race Discrimination Law: A Hybrid Model?' in G De Búrca and J Scott (eds) *Law and New Governance in the EU and the US* (Hart Publishing, Oxford and Portland, Oregon 2006)

<sup>40</sup> „Comité des Sages” *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*

<sup>41</sup> JHH Weiler, 'Does the European Union Truly Need a Charter of Rights?' 6 (2) *European Law Journal* 95

was proclaimed in 2000 and the careful ring fencing of the reach of its rights and principles, one might argue that the Professor was right in his predictions. The initiative of the “*Comité des Sages*” was followed by a research project at the European University Institute and the results of this research were presented in a major conference in Vienna under the Austrian Council presidency.<sup>42</sup> The project was mainly concerned with the institutional preconditions of such a human rights policy having regard also to the widening and deepening of the integration process. The authors highlighted several reasons why the EU’s human right approach was inappropriate at the turn of the XX. century. Among these factors was the enlargement of the EU towards Eastern Europe, a gap between the political rhetoric concerning the importance of human rights in the EU and the reality of inadequate mechanisms to make this rhetoric life. The role of the Community courts was claimed to be fairly defensive by placing mainly negative constraints on the Community institutions and the Member States when implementing Community law. They pointed out that one of the main obstacles for such a human rights policy to emerge in the Community is that it lacks the necessary and adequate information that could guide its legislative and policy making activities.<sup>43</sup> It is important to see, however, that their proposal was broader than establishing a human rights monitoring agency in the EU. They suggested in particular establishing a specialized Directorate General on human rights with a specialized commissioner, a specialist human rights unit for the Common Foreign and Security Policy (CFSP), a special Committee responsible for human rights issues in the European Parliament and also to improve access to justice to the ECJ.

The general proposals on the development of a human rights policy were based on the assumption that the principle of indivisibility of human rights is a keystone of EU policy, therefore economic, social and cultural rights should be accorded as much importance as civil and political rights. Their recommendations on the protection of social and economic rights concerned both the internal and external fields of Community activities. *Alston* and *Weiler* argued that the policy documents prepared by the Commission in the social field are not enough “rights focused” and despite the non-restrictive references to the European Social Charter (ESC) in the Treaty there were only few references to social rights in the case law of the Court. Therefore, they made specific proposals how this state of affairs could be changed. In particular they suggested that the right to organize should be recognized as a fundamental right in the Community legal order, the Community should accede to the European Social Charter, the references to the interpretations of the European Committee of Independent Experts on the ESC should be more consistent in the case law of the ECJ and at the same time standing rules should be improved to the Court and the Community should encourage the Member States to ratify the ILO Convention No. 111 on discrimination in employment and occupation from 1958.<sup>44</sup> Professor *Sciarra* highlighted the importance of establishing a body similar to the ESC Committee of Independent Experts in the Community in order to generate convergence on the different international sources concerning social rights. In order to guarantee that when the ECJ refers to external sources of law on the protection of social rights their entire range will be preserved, she pointed out the need of institutional co-operation between the ECJ and other bodies active in the field of social rights protection. This new body should also have monitoring powers and the competence to refer infringements on social rights to the Commission, thereby indirectly initiating a Community infringement procedure. Its members should include also representatives from the Council of Europe and the ILO. *Sciarra* advocated that the scope of activities of this new body should be extended to Article 7 EC procedure as an early-warning mechanism to identify when the protection of social rights

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<sup>42</sup> The outcome of the project was the publication of one of the most wide ranging volume of essays on the protection of human rights in the European Union: P Alston, *The EU and Human Rights* (Oxford University Press, Oxford 1999)

<sup>43</sup> P Alston and JHH Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in P Alston (ed) *The EU and Human Rights* (Oxford University Press, Oxford 1999)

<sup>44</sup> *ibid* , p. 31-34

is under a serious threat in the Member States.<sup>45</sup> On the basis of the Commission's original 2005 proposal Professor *Alston* also analysed what could be the contribution of the future agency to the realization of social and economic rights included into the EU Charter of Fundamental Rights.<sup>46</sup> For instance he drew a comparison between the 'statements of interpretation' used by the ESCR Committee and the capacity of the Agency to formulate opinions. He concluded that this task could be important for spelling out issues which should be addressed in any actions by the EU and the Member States designed to give substance to the economic and social rights provisions of the Charter.<sup>47</sup>

### **3. European Agency for Fundamental Rights**

#### **3.1. The Brief History of the Agency<sup>48</sup>**

##### **3.1.1. The political initiative**

In June 1999, on the basis of an interim report, the *Cologne European Council* suggested 'that the question of the advisability of setting up a Union agency for human rights and democracy should be considered'.<sup>49</sup> Few years later at the *Brussels European Council* the Representatives of the Member States agreed to establish a *Human Rights Agency*.<sup>50</sup> The idea was that by extending the mandate of the existing European Monitoring Centre on Racism and Xenophobia (EUMC) - that was established in 1997 with a seat in Vienna<sup>51</sup> - the new administrative agency would replace the former.

##### **3.1.2. The network of independent experts**

In 2002 the *EU Network of Independent Experts on Fundamental Rights* was created. The network consisted of one expert per Member State. It was established by the DG Justice and Home Affairs of the European Commission following a report carried out by the European Parliament on the protection of fundamental rights in the EU. It was a cooperation network between national experts and a European expert group on monitoring the status of fundamental rights protection in the Member States and in the activities of the Community Institutions. The source of fundamental rights for the network was the EU Charter of Fundamental Rights. As opposed to the Agency, the activities of this informal network were not confined to thematic areas. It was monitoring the protection of rights and principles included in the Charter in the Member States. One of the main activities of the Network was to publish annual synthesis reports on the protection of fundamental rights in the EU. The reports were published between 2002-2005 and they were made publicly available on the network's own website<sup>52</sup> and on the

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<sup>45</sup> S Sciarra, 'From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy' in P Alston (ed) *The EU and Human Rights* (Oxford University Press, Oxford 1999) p. 499-501

<sup>46</sup> P Alston, 'The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights' in P Alston and O De Schutter (eds) *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency* (Hart Publishing, Oxford and Portland, Oregon 2005)

<sup>47</sup> Ibid. p. 182

<sup>48</sup> For a general overview on the tasks and role of the Agency see GN Toggenburg, 'The Role of the New Fundamental Rights Agency: Debating the "Sex of Angels" or Improving Europe's Human Rights Performance' 33 (3) *European Law Review* 385 and E Howard, 'The European Agency for Fundamental Rights' (4) *European Human Rights Law Review* 445

<sup>49</sup> *Cologne European Council*, 3-4 June 1999, para.46.

<sup>50</sup> *Brussels Presidency Conclusions*, 12-13 December 2003

<sup>51</sup> Council Regulation 168/2007 [2007] OJ L53/1

<sup>52</sup> <http://crdho.cpd.r.ucl.ac.be/en/>

website of the DG JHA<sup>53</sup>. The basis of these synthesis reports were 25 national reports prepared by one expert at the national level and a report on the activities of the Community Institutions with a focus on their initiatives and on the question how they dealt with fundamental rights issues. The idea of the network was very ambitious, i.e. to develop an experimentalist governance framework for the exchange of information and for identifying good practices in the Member States on the protection of the Charter's rights and principles. Thereby the experts wanted to facilitate mutual learning between the Member States on the protection of fundamental rights. On the basis of these synthesis reports the Network was allowed to formulate recommendations and opinions for further action to the European Commission.<sup>54</sup> It was suggested that there would be a meaningful role to play by the Network also after the establishment of the Agency, especially having in mind that the activities of the Agency do not include genuine monitoring, in the sense of making a normative assessment of laws and practices of the Member States or the Community Institutions.<sup>55</sup>

### 3.1.3. The Commission's proposal

In 2004 the Commission published a *public consultation document* above all on the remit, scope of activities and the tasks of the agency.<sup>56</sup> As the main tasks of the future agency the Commission mentioned the collection and analysis of reliable and comparable data and the drafting of opinions. The Commission was very clear from the very beginning on the question that the Agency should not have any decision-making powers. As regards the remit of the Agency's activities the Commission proposed two options. The *first* alternative was that the Agency's activities should be confined to those areas that are already covered by Community (or Union law) and it would only complement the existing system and mechanisms of fundamental rights protection in the EU. A *second* more ambitious proposal was to give a power to the Agency in relation to Article 7 of the EU Treaty by assisting the Community institutions on identifying when the protection of fundamental rights was under a serious threat in the Member States. This second option would have allowed the Agency to monitor the protection of fundamental rights in the Member States also outside the field of EU law, in areas where the Member States are acting autonomously.<sup>57</sup>

In June 2005 the Commission published a *proposal for a Council regulation* establishing a European Union Agency for Fundamental Rights.<sup>58</sup> According to this proposal the protection of fundamental rights depends on appropriate governance mechanisms to ensure that they are taken fully into account in policy setting and decision making in the Union. The proposed Regulation was designed to replace the former Regulation on the EUMC and to extend the scope of application from racism and xenophobia to cover all areas of fundamental rights referred to in the Charter, without prejudice to those areas which are already covered by the operations of the existing Community agencies. The Commission's document mentioned that there was a broad consensus in considering that the Charter should be the point of reference for the mandate of the Agency.

Following a long gestation period eventually the Council adopted a *Regulation* establishing a European Union Agency for Fundamental Rights on 15 February 2007.<sup>59</sup> It is an information and

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<sup>53</sup> [http://ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm#](http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm#)

<sup>54</sup> <http://cridho.cpd.r.ucl.ac.be/documents/Documentos.Institucionales/CFR-CDFpresentationEN.pdf>

<sup>55</sup> M Scheinin, 'The Relationship between the Agency and the Network of Independent Experts' in P Alston and O De Schutter (eds) *Monitoring Fundamental Rights in the EU, the Contribution of the Fundamental Rights Agency* (Hart Publishing, Oxford and Portland, Oregon 2005)

<sup>56</sup> COM (2004) 693 final The Fundamental Rights Agency, Public Consultation Document

<sup>57</sup> *ibid.*, p. 5-7

<sup>58</sup> COM (2005) 280 final Proposal for a Council Regulation Establishing a European Union Agency for Fundamental Rights

<sup>59</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for fundamental rights OJ L, 22.2.2007 53/1-14

coordination agency based in Vienna. The legal basis for the establishment was Article 308 EC. As the final version of the Regulation makes clear the Agency should act only within the scope of application of Community law and according to Article 2 of the Regulation the Agency shall carry out its task within the competencies of the Community as laid down in the Treaty establishing the European Community. Limiting the scope of activities of the Agency to certain thematic areas that must be in line with the Union's priorities and that represent also the areas where the Community has competence to act was a restraint of the legal basis.<sup>60</sup> According to the opinion of the ECJ on the accession of the EC to the ECHR the Community does not have a general legislative competence in the human rights field under Article 308. The Community can adopt measures and establish institutions for the protection of human rights so long they do not amount to an amendment of the Treaty by going beyond the scope of the Community's defined aims and activities.<sup>61</sup>

## **4. The Normative Grid of the Agency's Tasks and Objectives**

### **4.1. Which Standard of Social Rights Protection?**

We do not find a direct reference to any international instrument on the protection of social rights or to the EU Charter of Fundamental Rights in the present text of Article 6 EU. According to the second paragraph of this Article the Union shall respect fundamental rights, as guaranteed by ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. We find the closest reference to any international sources of law on the protection of social rights in Article 136 EC. This article as amended by the Amsterdam Treaty refers to the 1961 European Social Charter and the 1989 Community Charter of Fundamental Rights as important documents setting out fundamental social rights, that the Community and the Member States have to have in mind when they are carrying out their activities in pursuance of Community objectives in the field of employment. In order to determine whether a certain right forms part of the general principles of Community law the Court takes into account various international instruments which the Member States have signed or cooperated in as well as those instruments developed by the Member States at Community level or in the context of the European Union and the common constitutional traditions of the Member States.<sup>62</sup> As the recent Viking and Laval cases indicated the Court also takes into account the Conventions adopted by the International Labour Organization (ILO). In both cases the ECJ recognized that the right to take industrial action, including the right to strike that was invoked by the trade unions to justify a restriction that their collective action caused on Articles 43 and 49 is part of the general principles of EC law. For the recognition of the right to strike within the Community legal order the Court referred to various international agreements which the Member States have signed or cooperated in, such as the 1961 European Social Charter and the Convention No 87 concerning Freedom of Association and Protection of the Right to Organize of the ILO. The Court also referred to instruments developed by the Member States at Community level or in the context of the European Union, in particular Community Charter of the Fundamental Social Rights of Workers of 1989 and the EU Charter of Fundamental Rights.<sup>63</sup> Interestingly though the Court did not refer to the European Convention of Human Rights and to the common constitutional traditions of the Member States.

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<sup>60</sup> Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759

<sup>61</sup> Craig and De Búrca, *EU Law, Text, Cases and Materials*, p. 406

<sup>62</sup> *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR-I 11767, para-91-92.

<sup>63</sup> *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR-I 11767 para. 90; *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 para. 43-44

There is therefore a multiplicity of legal sources on what the Court can rely for the recognition of social and labour rights in the EU. However, if the same right is expressed in a different form or with a different substance in two or more of these sources of law the question on the optimal level of protection arises. This is an issue that became relevant after the decision of the Court in *Viking*. The Court's decision has been criticized by many authors on the ground that it has very narrowly construed the legitimate objectives of strike action within the Community legal order.<sup>64</sup> It seems now that on the basis of this judgment trade unions can take collective action in transnational situations only for the protection of the existing terms and conditions of employment. Collective action under Article 43 is only legitimate 'if it were established that the jobs or conditions of employment were not under seriously threat'. Moreover, despite the apparent long term benefits of the ITF's 'Flags of Convenience Policy' (FOC) the Court applied a fairly strict proportionality test with regard to coordinated secondary action. As Novitz pointed out, in spite of the reference to the ILO convention No 87, the Court was not ready to draw on ILO jurisprudence that clearly accepts to take industrial action in pursuit of broader economic and social policy objectives.<sup>65</sup> Instead, although the Court did not refer formally to the ECHR to recognize the right to take collective action within the Community legal order it later referred to the case law of the ECtHR to identify the suitable forms of collective action within the Community legal order.<sup>66</sup> It seems therefore that the Court already missed an opportunity to go beyond the 'minimum protection' offered by ECHR.

As the EU Charter of Fundamental Rights is arguably the most important source of EC law for the protection of social and economic rights it is worth having a look at the legal status of this document and exploring the question to what extent is the Charter eventually the main reference point for the Agency's activities.

#### 4.1.1. The legal status of the Charter

According to the case law of the Court of Justice, while the Charter is not yet a legally binding source of Community law it can be taken into account as an instrument for the recognition of general principles of Community law.<sup>67</sup> The Charter was solemnly proclaimed by the European Parliament, the Commission and the Council in 2000.<sup>68</sup> Nevertheless, it became a fairly influential 'soft law' document because both the Advocate Generals of the Court and the community courts, including some national courts referred to the Charter in their case law.<sup>69</sup> The ECJ made its first reference to the Charter as an instrument that represents the constitutional traditions and international legal obligations

<sup>64</sup> N Reich 'Free Movement v Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice – Part-II' (2008) 9 *German Law Journal*, A.C. L. Davies 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', (2008) 37 *Industrial Law Journal*

<sup>65</sup> T Novitz and P Syrpis, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' 33 *European Law Review* 411, T Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' in C Barnard (ed) *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007/2008, p. 543-561

<sup>66</sup> *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 para. 43-44, para. 86

<sup>67</sup> *Case C-540/03 Parliament v Council* [2006] ECR I-05769, para.38.; *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR-I 11767 para. 90; *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 para. 43-44

<sup>68</sup> OJ [2000] C 364/1

<sup>69</sup> See e.g. AG Jacobs' Opinion in *Case C-50/00 Unión de Pequeños Agricultores v. Council of the European Union* [2002] ECR I-6677; AG Geelhoed's Opinion in *Case C-224/98 D'Hoop v. Office National d'Emploi* [2002] ECR I-000) Court of First Instance see e.g. *Case T-177/01 Jégo Quéré et Cie SA v. European Commission* [2002] ECR II-000)

common to the Member States in 2006.<sup>70</sup> In the recent *Viking* and *Laval* judgments the Court seemed to make an “explicit and unreserved reference” to Charter as one of the main sources of social rights in the Community legal order and not only as a secondary source of law.<sup>71</sup>

The legal status of the Charter became again a *hot potato* during the negotiations on the Lisbon Reform Treaty. While the Constitutional Treaty would have integrated the Charter into the text of the Constitution the new Article 6(1) of the Treaty of Lisbon contains only a cross-reference to the Charter. It stipulates that that ‘the Union recognizes the rights, freedoms and principles set out in the Charter (...) which shall have the same legal value as the Treaties’. The text of the Charter was solemnly proclaimed for the second time by the European Parliament, the Commission and the Council on 12 December 2007 and it was published in the Official Journal of the European Union.<sup>72</sup> In the course of negotiations on the Reform Treaty the rather infamous Protocol Nr 7 was adopted clarifying the application of the Charter to the UK and Poland. Although this protocol has been referred to as ‘the opt-out of Poland and the UK’ from the Charter, the House of Lords impact assessment on the Lisbon Treaty clearly stated that “the protocol is not an opt-out from the Charter. The Charter will apply in the UK even if its interpretation may be affected by the terms of the protocol.”<sup>73</sup> The non opt-out nature of the opt-out was confirmed also by other scholars. The majority view seems to be that this protocol is at the most an interpretative guide sending a political message to the Court when it has to interpret provisions of the Charter in cases where these two countries are involved.<sup>74</sup> Having regard to the general system of fundamental rights protection in the EU especially by referring to general principles of EC law it is very questionable how far the protocol can effectively limit the reach of the Charter in these two Member States.

These uncertainties around the legal status of the Charter can shy away the Community courts from making extensively use of this document as a source of fundamental rights in their case law, especially using the Charter as an independent and autonomous source of Community law. Especially, that it is fairly clear from the horizontal provisions of the Charter that some provisions that take the form of principles are not ‘self-executive’, they need to be implemented first by the Community institutions before any court can make direct reference to them. The activities of an administrative Agency designed to provide information and expertise on the protection of fundamental rights to the Community institutions supporting thereby their activities could be one of the main ways how those “provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers”.<sup>75</sup> As we will see below it is eventually questionable to what extent the Charter really “shines as bright as Polaris”<sup>76</sup> for

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<sup>70</sup> *Case C-540/03 Parliament v Council [2006] ECR I-05769* para. 52-58, see also E Drywood, 'Giving with one Hand, Taking with other: Fundamental Rights, Children and the Family Reunification Decision' 32 (3) *European Law Journal* 396

<sup>71</sup> J Malmberg and T Siegman, 'Industrial Actions and the EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' 45 *Common Market Law Review* 1115, p. 1129

<sup>72</sup> OJ C [2007] 303/1-16

<sup>73</sup> House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, HL Paper 62 2007-8, p. 102.

<sup>74</sup> A Dashwood *The Charter of Fundamental Rights and Its Protocol - Drawing the Teeth of the Paper Tiger*, Parliamentary Brief, 10 March 2008. <http://www.thepolitician.org/articles/the-paper-tiger-646.html>. 2008 and P Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' 33 (2) *European Law Review* 137, p. 20 see also Daugan, who also proposes a number of possible interpretations on the protocol M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' 45 *Common Market Law Review* 617, p. 667-671

<sup>75</sup> See Article 52(5) of the Charter

<sup>76</sup> R Lawson, 'The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments' in P Alston and O De Schutter (eds) *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency* (Hart Publishing, Oxford, Portland and Oregon 2005), p. 230

guiding the activities of the Agency. The role of the Charter as a reference document is underlined also by the fact that according to *Article 51* of the Charter its provisions are addressed not only to the institutions but also to “the bodies, offices and agencies of the Union” with due regard to the principle of subsidiarity. Moreover, the addressees of the Charter should not only “respect the rights and observe the principles” of the Charter, but they shall also “promote the application thereof”.

#### 4.1.2. Is the Charter the main reference point for the Agency?

Having regard also to the Constitutional Treaty that would have given legally binding effect to the Charter, in its 2004 public consultation document the Commission considered that although the Charter of Fundamental Rights is not yet a legally binding document it already ‘constitutes an authentic expression of the fundamental rights protected by Community law as a set of general principles’. Therefore it emphasized that it should become an essential reference document in the discussions on the definition of the Agency’s areas of intervention. In 2004 the Commission proposed two options for the use of the Charter for the activities of the Agency. The Agency could have been asked to monitor all the fundamental rights protected by Community law and included in the Charter. As a second option the Agency would have been entrusted only to focus on thematic areas having a special connection with Community policies. The areas of immigration, asylum, non-discrimination, ethical questions, guarantee of criminal proceedings, violence were particularly mentioned. However, the Commission pointed out whatever solution is chosen the choice of activities should not undermine the effective functioning of the Agency.<sup>77</sup>

The 2005 proposal for a Regulation on the establishment of the Fundamental Rights Agency still suggested that the Charter should become the point of reference for the Agency’s mandate. Thus Article 3(2) of the original proposal provided that the Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union and set out in particular in the Charter of Fundamental Rights of the European Union as proclaimed in Nice on 7 December 2000.<sup>78</sup> The preamble of the final Regulation highlights that the Charter of Fundamental Rights, bearing in mind its status and scope, and the accompanying explanations, reflects the rights as they result from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the European Court of Justice and of the European Court of Human Rights.<sup>79</sup> There is no reference to the Charter in Article 3(2) of the founding Regulation. According to this provision in carrying out its tasks the Agency shall refer to fundamental rights as defined in Article 6(2) of the Treaty on European Union (TEU). Nevertheless, the preamble of the final Regulation still mentions that the Agency should refer in its work to fundamental rights not only in the meaning of Article 6(2) EC but also to fundamental rights as reflected in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations.<sup>80</sup>

#### 4.2. Objectives of the Agency

The Commission saw an asset in setting up an administrative Agency for the protection of fundamental rights by becoming a “cross-roads facilitating contact between the different players in the field of fundamental rights, allowing synergies and increased dialogue between all actors

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<sup>77</sup> COM (2004) 693 final The Fundamental Rights Agency, Public Consultation Document , p. 7

<sup>78</sup> COM (2005) 280 final Proposal for a Council Regulation Establishing a European Union Agency for Fundamental Rights

<sup>79</sup> See recital 2 of the preamble to the Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for fundamental rights OJ L, 22.2.2007 53/1-14

<sup>80</sup> See in particular recitals (2) and (9) of the preamble.



concerned”.<sup>81</sup> This has been reflected in the tasks of the Agency to facilitate cooperation between different national, international and European human rights institutions. As the preamble of the final Regulation indicates the objective of setting up an administrative agency for fundamental rights in the European Union is also to generate ‘greater knowledge of, and broader awareness of, fundamental rights issues’ in order to facilitate their full respect and implementation. The Agency is expected to contribute to the attainment of this objective by providing information and data on fundamental rights matters.<sup>82</sup> As the House of Lords Committee on European Union concluded in its report on the Agency, there is a risks that the Agency will become just a ‘post-box’ for collecting and sorting data, duplicating the work of other bodies in the field and it will lead to the proliferation of useless agencies in the Union. Its activities could become conducive to the protection of fundamental rights if its tasks were properly delineated.<sup>83</sup>

On the basis of this rhetoric of the preamble Article 2 of the Regulation set the following objective for the Agency. It is to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respected spheres of competence to fully respect fundamental rights.<sup>84</sup> Thus the activities of the Agency are built on the existing system of fundamental rights protection in the EU. Accordingly, the Agency was not designed to substitute but to complement and support the work of the EU institutions and that of the Member States when they are acting within the sphere of Community law by providing information and its expertise on fundamental rights issues.

#### **4.3. Scope of Activities**

The work of the Agency was finally limited to *thematic areas*. In principle these areas of activity are defined in the so called *Multiannual Framework* for 5 years and they are specified in the *Annual Work Program* for each year. Since the Agency was created by extending the competences of the former European Monitoring Centre on Racism and Xenophobia, its the work must cover especially the phenomena of racism, xenophobia and anti-semitism, the protection of rights of persons with minorities, as well as gender equality.<sup>85</sup> Provided its financial and human rights resources so permit the European Parliament, the Council and the Commission can request the Agency to carry out tasks outside the field of these thematic areas as well. This is limited, nevertheless, to the tasks of the Agency to carry out research studies and to formulate and publish conclusions and opinions at the request of the respected Community Institutions.<sup>86</sup> The framework of the Agency’s activities must be in line with the Union’s priorities, taking due account of the orientations resulting from the European Parliament resolutions and the Council conclusions in the field of fundamental rights.<sup>87</sup>

The Regulation emphasizes that due to the political significance of these thematic areas it is important that the Council itself should adopt the Multi-annual Framework. Therefore the thematic areas are defined in a so called *sui generis* Council decision<sup>88</sup> on the basis of the Commission’s proposal. The

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<sup>81</sup> COM (2004) 693 final The Fundamental Rights Agency, Public Consultation Document , p. 3-4.

<sup>82</sup> See recital 4 of the preamble of the Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for fundamental rights OJ L, 22.2.2007 53/1-14

<sup>83</sup> House of Lords, p. 39

<sup>84</sup> Article 2 of the Regulation.

<sup>85</sup> See Article 5(2) and recital 10 of the Regulation

<sup>86</sup> See Article 5(3) read together with Article 4(1)c and d

<sup>87</sup> Article 5(2)c of the Regulation.

<sup>88</sup> It is a so called decision *sui generis*, i.e. it is binding source of Community law published in the L series of the Official Journal but it formally derives its legal status from Article 5(1) of the Regulation on the FRA.

European Parliament has to be consulted only and the Commission has to consult the Management Board of the Agency when drawing up its proposal. As opposed to the original proposal of the Commission, the European Parliament is not a member of the Management Board that adopts the Annual Work Program. The limited role granted to the Parliament is somewhat disappointing having in mind its role and efforts in the past in raising awareness and taking the initiative on the problems in the field of fundamental rights protection in the EU.

For the period of 2007-2012, *nine* thematic areas were chosen. These include racism, xenophobia and related intolerance; discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination); compensation of victims; the rights of the child, including the protection of children; asylum, immigration and integration of migrants; visa and border control; participation of the EU citizens in the Union's democratic functioning; information society and, in particular, respect for private life and protection of personal data; and access to efficient and independent justice.<sup>89</sup>

The *Annual Work Program* of the Agency is adopted by the Management Board in accordance with the Multi-Annual Framework. The Commission has quite a significant influence on the adoption of the Work Program. The Director submits the draft to the Commission and together with the Scientific Committee it has a right to submit its opinion on the draft proposal of the Director. The Commission's influence is significant by the fact that two Commission representatives are members of the Board itself. In the original proposal the Parliament was granted a seat as well in the Management Board. The work program has to be submitted to the European Parliament, the Council and the Commission. It is not to be submitted to the Member States, however. 2007 was still a transitional period in the activities of the agency so that the main field of research has been carried out on issues related to racism and xenophobia.<sup>90</sup> The framework equality directives were given special attention in the work program. The Annual Work Program for the year 2008 emphasizes that the activities of the agency should be extended beyond racism, xenophobia and intolerance. On the request of the Commission the Agency will continue with the collection of data and information on the rights of the child. As to the framework equality directives the Agency sees its main added value in analyzing multiple discrimination and mainstream racism across other grounds of discrimination. It is apparent from the work program that the focus will be on the Race Equality Directive rather than the Framework Employment Directive covering much wider grounds of discrimination.

#### **4.4. Tasks of the Agency**

In accordance with the objectives of the regulation the main task of Agency is to collect data and raise awareness on fundamental rights issues in the EU. The Agency was granted some more 'interventionist' powers as well, namely to formulate and publish conclusions and opinions, the effective exercise of this power is constrained by several limitations that have been introduced in the final version of the Regulation. On the other hand, the Commission from the very beginning emphasized that the Agency will not have any quasi-judicial powers, dealing with complaints and petitions as compared to several national human rights institutions. In particular, the original proposal of the Regulation pointed out that the Commission's role in supervising the proper application of Community law must be respected.<sup>91</sup> The Commission was 'jealous' about the possible competences of this Agency in monitoring the application of Community law in the Member States. As *Nowak* has

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<sup>89</sup> Article 2 of the Council Decision 2008/203/EC of 28 February 2008 implementing Regulation No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012 OJ L 63/14

<sup>90</sup> <http://fra.europa.eu/fra/material/pub/WP/wp07-en.pdf>

<sup>91</sup> COM (2004) 693 final The Fundamental Rights Agency, Public Consultation Document , p.4.

observed monitoring of the effective enforcement and application of Community law in the Member States and the role of individual complaints procedure in the framework of the system of judicial remedies should have been kept separately by the Commission. Especially, in light of the strict standing rules for individuals before the Community judiciary the establishment of an individual complaints procedure could have contributed to a system of effective remedies for human rights in the Community.<sup>92</sup> The possibility of individual complaints was explicitly ruled out in the final version of the Regulation.<sup>93</sup>

The tasks of the Agency could be divided into three broader categories. Its *first* main field of activity is the collection of comparable information and data on fundamental rights issues. The Agency receives information from a wide range of bodies and institutions active in the field of fundamental rights matters at national, European and international level. These include the Member States, Union institutions as well as bodies, offices and agencies of the Community and the Union, but also research centres, national bodies, non-governmental organizations, third countries and international organizations and in particular the competent bodies of the Council of Europe. In cooperation with the Member States and the European Commission it is also expected to develop methods and standards to improve the comparability, objectivity and reliability of data at European level.<sup>94</sup> On the basis of this data the Agency carries out scientific research<sup>95</sup> and publishes reports<sup>96</sup> on fundamental rights issues. In principle the Agency carries out scientific research where it is appropriate and compatible with its priorities.

The Agency's *second* main task is to organize institutional cooperation with other national, European, international bodies and institutions as well as cooperation with civil society at the European level. This question seems to be a fairly administrative issue at the first sight, but on a detailed assessment it raises a fundamental conceptual question, namely what will be the role of this administrative agency in system of human rights protection in Europe? A possible duplication with the activities of other national, international or European human rights institutions is not desirable and it can completely undermine the role of the Agency in fundamental rights protection.<sup>97</sup>

The final Regulation contains few provisions on the working method of the Agency and cooperation with these diverse human rights institutions. First of all the Agency shall draw on the expertise of a variety of organizations and bodies in each Member State as well as to take into account and make use of information collected by other international organizations, such for instance the Council of Europe.<sup>98</sup> In order to insure cooperation with the Member States each Member State has to nominate a governmental official as a National Liaison Officer, who shall be the main contact point for the Agency in the Member State. Apart from that, the Agency shall cooperate with governmental organizations and public bodies competent in the field of fundamental rights in the Member States, including national human rights institutions.<sup>99</sup>

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<sup>92</sup> M Nowak, 'The Agency and the National Institutions for the Promotion and Protection of Human Rights' in P Alston and O De Schutter (eds) *Monitoring Fundamental Rights in the EU* (Hart Publishing, Oxford and Portland, Oregon 2005), p. 101.

<sup>93</sup> See in particular recital (15) of the preamble of the regulation.

<sup>94</sup> Article 4(1) a, b

<sup>95</sup> Article 4(1)c

<sup>96</sup> According to Article 4(1) e-g the Agency has to publish an annual report on fundamental rights having regard to the areas of activities of the Agency and also highlighting the examples of best practices. It publishes an annual report on its activities and thematic reports on its analysis, research and surveys.

<sup>97</sup> Á Ságvári, 'Az Európai Unió Alapjogi Ügynöksége' 3 Európai Tükör 61, p. 72

<sup>98</sup> Article 6 (1)-(2) of the Regulation

<sup>99</sup> Article 8(1) and (2)b of the Regulation

From the cooperation with international organizations, cooperation with the Council of Europe has to be highlighted. Close cooperation with the Council of Europe was from the very beginning one of the major concerns of the drafters of the Regulation on the EU Fundamental Agency. In fact, the role played by the Council of Europe in the process leading up to the establishment of the Agency might explain why the powers with which the Agency has been entrusted in the final regulation became so modest.<sup>100</sup> In the first place it was necessary to avoid a possible duplication of the work and a conflict with the activities of a body that, as opposed to the European Community, was established specifically for the promotion of human rights. There are several provisions in the regulation that deal with this question. According to Article 9 of the Regulation, cooperation with the Council of Europe means first the participation of a representative of the Council of Europe in the adoption of the Annual Work Program of the Agency. Pursuant to Article 12 (1)b one independent person appointed by the Council of Europe is a member of the Management Board that adopts the Annual Work Program. The Community should also enter into an agreement with the Council of Europe for the purpose of close cooperation. The Regulation sets forth that in this agreement the Council of Europe ‘must’ appoint an independent person to sit in the Management Board and the Executive Board of the Agency.

For cooperation and regular dialogue with the civil society the Agency shall establish a cooperation network, i.e. the Fundamental Rights Platform. The *Fundamental Rights Platform (FRP)* is a cooperation network between different bodies and organizations, including trade unions and employers’ organizations that shall be set up by the Agency.<sup>101</sup> The FRP should be the place for a structured and fruitful dialogue and close cooperation with all the relevant stakeholders.<sup>102</sup> The objective of the platform is to constitute a mechanism for exchange of information and pooling of knowledge.<sup>103</sup> Beyond its function of ensuring dialogue between the Agency and the stakeholders, the Agency can call upon the FRP to make suggestions to the Management Board on the Annual Work Program, to give feedback and to suggest follow-up to the Management Board on the annual report and to communicate outcomes and recommendations of conferences and meetings to the Director and the Scientific Committee.<sup>104</sup> There are no formal provisions on how the members of FRP will be selected. It is open to all interested and qualified stakeholders specified by the Regulation. The original proposal of the Commission suggested that the members of the Forum shall be selected by an open selection mechanism to be determined by the management board. The number of members was maximized at 100. Their term of office shall have been five years, which was suggested to be renewable.<sup>105</sup> Over summer 2008 the Platform was still under construction, it was trying to identify the tasks and tools which should form the basis of cooperation. In June 2008 the FRA organized consultation meetings with selected organizations. Crucially, however, it is not available what were the criteria for selecting the relevant organizations. During the year of 2007 the FRA launched two public consultations in order to receive feedback on the future role of the platform and the mechanisms it should use for cooperation.<sup>106</sup> The first meeting of the platform took place at the beginning of October 2008 in Vienna. The meeting consisted of around 100 experts from civil society organizations involved in the work for fundamental rights. Their discussions focused on suggestions for the FRA’s

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<sup>100</sup> For an overview about the concerns concerning the duplication of the tasks between the EU Fundamental Rights Agency and the Council of Europe Bodies, including the reactions within the Council of Europe to the establishment of the Agency see O De Schutter, *The Two Europes of Human Rights: The Emerging Deviation of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, *The Columbia Journal of European Law*, (2008) Vol. 14 No. 3 p. 509-561

<sup>101</sup> Article 10 of the Regulation.

<sup>102</sup> See recital (19) of the preamble to the Regulation.

<sup>103</sup> Article 10(2)

<sup>104</sup> Article 10(4)a-c.

<sup>105</sup> See Art. 14(2) of the original proposal

<sup>106</sup> For further information see the EUMC’s website: [http://fra.europa.eu/fra/index.php?fuseaction=content.dsp\\_cat\\_content&contentid=46711074a34bf&catid=46710fa5a58cc&lang=EN](http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&contentid=46711074a34bf&catid=46710fa5a58cc&lang=EN) [access date: 13 October 2008]

work program 2009 and on collecting feedback on the Annual Report 2008. In addition, it offered an opportunity to discuss the means of communication between participants of the Platform to ensure an effective cooperation in the future.<sup>107</sup>

The *third* main activity of the Agency is to formulate and publish conclusions and opinions on specific thematic topics either for the Union Institutions or for the Member States when they are implementing Community law.<sup>108</sup> It is important to bear in mind that according to Article 7 EC, the European Court of Justice is one of the Institutions of the Community. According to Article 4d it is only the European Parliament, the Council, and the Commission that can make a formal request to the Agency to formulate a conclusion or publish an opinion. As mentioned earlier the Agency's right to act on its own initiative has been restricted. According to Article 4 (2) the conclusions, opinions and also the reports may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of the legislative procedures only where a request has been made by these institutions. They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty. In principle therefore the Agency can formulate and publish opinions, conclusions or prepare reports on its own initiative. However, if these documents will deal with documents used in a formal legislative procedure, i.e. if it concerns one of the proposals of the Commission or a position of one of the institutions, the Agency can not intervene on its own initiative. It can only interfere with the legislative procedure if one of the institutions requested it to do so. The Agency might be invited by some of the Community Institutions to submit conclusions, opinions or reports without interfering, however, with the legislative and judicial procedures established in the Treaty. Moreover, the legal status of these conclusion or opinions is not entirely clear either.

## **5. Experimentalist Governance Architecture of EC Discrimination Law and the Role of the Agency**

EC Employment law is in general based on a decentralized enforcement model, i.e. the attainment of the Community's social objectives and the enforcement of its labour standards is essentially subject to the effectiveness of the national social models and their employment laws. On the other hand, there has been a shift in this field of area from the use of directives laying down substantive rules to framework directives. The latter are laying down mainly open ended objectives and procedural rules as well as they are increasingly relying on collective self-regulation. This institutional framework has been complemented in certain substantive areas of law such as for instance Community discrimination law with mechanisms that are showing different elements of a so called 'experimentalist' or 'reflexive' governance regime.<sup>109</sup> It is important to see, on the other hand, that to a certain extent the emergence of this anti-discrimination regime was the result a combination of deliberative action and unexpected political circumstances at the turn of the millennium.<sup>110</sup> While many authors highlighted the potential advantages and disadvantages of this new employment governance architecture,<sup>111</sup> lawyers find it more difficult to measure the effectiveness and the real impact of them in the traditional sense of law

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<sup>107</sup> See further [http://fra.europa.eu/fra/index.php?fuseaction=content.dsp\\_cat\\_content&catid=4884868eab0d9&contentid=48848797a9588](http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=4884868eab0d9&contentid=48848797a9588) [access date: 13 October 2008]

<sup>108</sup> Article 4d of the Regulation.

<sup>109</sup> CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' 14 (3) *European Law Journal* 271

<sup>110</sup> G De Búrca *Stumbling into Experimentalism: the EU Anti-discrimination regime*, paper presented at the University of Madison, Wisconsin and at the Schuman Foundation, Brussels, 2007

<sup>111</sup> For a collection of essays on this question see De Schutter (ed), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*

enforcement. This is because they rely mainly on soft-law and fairly open-ended documents, their effectiveness is therefore dependent on voluntary self-compliance as well as they mobilize a wide range of actors, however, very often without clear criteria of democratic representation.

Nevertheless, the working methods of these new governance mechanisms can fit into the broader objective of developing and implementing a human right policy in the field of Community discrimination law. The inclusion of Article 13 into the EC Treaty gave the main impetus and legal basis for such a human rights policy to emerge in EC discrimination law. Article 13 stipulates that “the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, *may take appropriate action to combat discrimination* based on sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation [*emphasis added*]”. In order to contribute to the achievement of this objective, i.e. to combat discrimination on the grounds listed above, the second paragraph of Article 13 allows the Council also to take “incentive measures excluding any harmonization of the laws and regulations of the Member States, to support action taken by the Member States”. The Council has to follow the 251 EC procedure. On this legal basis two framework directives have been adopted in 2000, laying down the principle of equal treatment in the field of employment on a variety of grounds (Directive 2000/78/EC)<sup>112</sup> and between persons irrespective of racial and ethnic origin (Directive 2000/43/EC)<sup>113</sup>.

One of the areas where a “hybrid governance model” has emerged over the years is Community action against racial discrimination. Its characteristic is that the traditional rights based instruments (the framework equality directive) has been complemented with mechanisms and instruments embodying many of the features and premises of the so called ‘new governance’ regime. The increasing use of networks for exchanges of information, experience and best practices between the relevant actors is one of the main features of this new ‘experimentalist’ model.<sup>114</sup> Similarly to its predecessor, namely the European Union Monitoring Centre on Racism and Xenophobia (EUMC)<sup>115</sup> it is likely that the Fundamental Rights Agency can have a role in facilitating institutional cooperation between these different networks. The objective of EUMC was to provide the Community and its Member States with objective, reliable and comparable data at European level on the phenomena of racism and xenophobia, anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence. Similarly to the Fundamental Rights Platform, the EUMC developed an information network, called RAXEN (European Racism and Xenophobia Information Network). *De Burca* identified two further transnational networks in the field of race discrimination, *EQUINET* and *ENAR*. *EQUINET* is a network of equality bodies which the Member States were required to establish, with the financial support of the Commission, under the Racial Equality Directive. It was intended to promote exchanges of experience and good practice between the different equality bodies. *ENAR* is a transnational network of anti-racism NGOs, established in 1998.<sup>116</sup> Despite of some negative experience that shows that there is in fact very little cautious experimentalism taking place in the framework of these transnational networks and that they lack time, adequate formal structures for exchanging of practices, information, genuine learning, there are some positive results as well. The Commission is receptive to the information that it gathers from these different bodies and network organizations. Many members of these networks valued cooperation because of empowerment or because it allowed them to raise awareness on important

<sup>112</sup> Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment and occupation OJ L [2000] 303/16

<sup>113</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L [2000] 180/22

<sup>114</sup> De Búrca, ‘EU Race Discrimination Law: A Hybrid Model?’

<sup>115</sup> Council Regulation (EC) No 1035/97 of 2 June 1997 establishing the European Monitoring Centre on Racism and Xenophobia OJ L [1997] 151/1-7

<sup>116</sup> De Búrca, ‘EU Race Discrimination Law: A Hybrid Model?’

issues in the Member States as well as they highlighted the development of an informal fora where they can share their experiences. Nevertheless, they paid only very limited attention so far to strategic litigation and to bringing cases to the Community courts.<sup>117</sup>

### **5.1. The Role of the Social Partners**

Both framework directives, the directive 2000/43/EC on racial and ethnic origin and the framework equality directive in employment 2000/78/EC encourage the Member States to promote social dialogue procedures in order to foster equal treatment, including in particular through monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.<sup>118</sup> Having regard to the national traditions and to the minimum requirements of the directive, Member States should encourage the use of collective agreements at different levels in order to order to lay down anti-discrimination rules.<sup>119</sup> Both directives set forth furthermore that the Member States shall also encourage dialogue between NGOs in order to promote the principle of equal treatment.<sup>120</sup>

### **5.2. National Equality Bodies**

Moreover, the racial discrimination directive encourages the Member States to designate an independent equality body for the promotion of equal treatment on grounds of racial and ethnic origin. According to the directive these bodies could be designed to provide independent assistance to victims of discrimination on how to pursue their complaints in discrimination cases. They can carry out surveys concerning discrimination, publish reports and make recommendations on any issue relating to such discrimination.<sup>121</sup>

Under the Community action program to combat discrimination<sup>122</sup> a transnational network of national equality bodies (EQUINET) was established.<sup>123</sup> Apart from publishing reports there is some evidence that there is information sharing on anti-discrimination practices in this framework. In practice this means that one member of the network invites other members to comment on how they would deal with a case that is before that body and they seek to identify the best response, and how this could be applied in practice.<sup>124</sup> However, this is a fairly informal way of information sharing, therefore one of the main contributions of the Agency could be in this field to facilitate institutionalized forms of cooperation between the national equality bodies.<sup>125</sup> The Commission's public consultation document also mentioned that the Agency's task in facilitating coordination between these national bodies and international organizations could be very valuable in developing synergies between their activities.<sup>126</sup> According to the final Regulation when carrying out its tasks the Agency should closely cooperate

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<sup>117</sup> De Búrca Stumbling into Experimentalism: the EU Anti-discrimination regime, paper presented at the University of Madison, Wisconsin and at the Schuman Foundation, Brussels, p. 20-26

<sup>118</sup> Article 10 (1) of the Directive 2000/43/EC and Article 13(1) of Directive 2000/78/EC

<sup>119</sup> Article 10(2) of the Directive 2000/43/EC and Article 13(2) of the Directive 2000/78/EC

<sup>120</sup> Article 12 of the Directive 2000/43/EC and Article 14 of the Directive 2000/78/EC

<sup>121</sup> Article 13 of the Directive 2000/43/EC

<sup>122</sup> Council Decision 2000/750/EC establishing a Community Action Programme to Combat Discrimination (2001-6) OJ L 303/23

<sup>123</sup> See the website of the network: <http://www.equineteurope.org>

<sup>124</sup> De Búrca Stumbling into Experimentalism: the EU Anti-discrimination regime, paper presented at the University of Madison, Wisconsin and at the Schuman Foundation, Brussels, p. 23

<sup>125</sup> For the cooperation between national human rights bodies and the Fundamental Rights Agency see further G. de Beco, 'Networks of European National Human Rights Institutions' *European Law Journal*, (2008) Vol. 14, No. 6, p. 860-877

<sup>126</sup> COM (2004) 693 final The Fundamental Rights Agency, Public Consultation Document p. 5-6.

with national bodies competent in the field of fundamental rights. In order to enhance coordination, the Member States have to nominate a National Liaison Officer, who will be the contact point for effective cooperation at national level.<sup>127</sup>

### 5.3. *Monitoring the Implementation of the Framework Directives*

In 2008 the Agency will also engage in the monitoring of the implementation of the framework Racial Equality Directive. It will launch a major data collection project to fully investigate the impact of the Directive and highlight significant 'good practice' in the transposition measures adopted by the Member States. This project will allow the Agency to fulfill its task, according to Article 17 of the Racial Equality Directive, which is to contribute to the European Commission's report to the European Parliament and the Council on the application of the Directive in the Member States.

## 6. Conclusion

In a recent article *Judy Fudge* explores the emergence of a "new discourse of labour and social rights" in the world of work. She explains that the emergence of this new discourse is in connection with several factors related to globalisation. Globalization has weakened the capacity of nation states to effectively regulated employment relations on a territorial basis. Neo-liberalism has challenged the foundations of the welfare state. The capacity of trade unions to regulate employment relations and to monitor their application has been weakened due to the breakdown of the traditional Fordist model of the firm on the basis of which trade unions were used to organize their activities. It has also led to the erosion of the traditional model of employment relations. As a consequences of the weakening of these traditional conceptions in the world of work, "the language and logic of human and social rights is increasingly used in the field of labour law" to maintain its main rationale, i.e. the protection of workers.<sup>128</sup> She also ascertained, however, that especially in the European Union these debates go beyond the question of finding a new normative basis for the justiciability of social rights as fundamental rights, i.e. empowering the individual to claim rights and entitlements before courts. We also have to keep in mind what *Novitz* observed in light of the *Viking* and *Laval* cases, that 'courts may not be the most appropriate *loci* for protecting the interests of workers on human rights grounds'.<sup>129</sup> Therefore the discussions on the advantages and disadvantages of using complementary, 'new' and softer forms of governance mechanisms for the implementation of social and labour rights in Europe remain important for the future.

This paper argued that having in mind the broader institutional and governance framework of employment regulation in the Community and the attempts to develop a human rights policy for the EU 27 it is possible to depict the potential role of the administrative agency for the protection of social and labour rights. The question mark in the title of this paper indicates that even almost five years after the political desire to establish a human rights monitoring agency in the EU was born, there is still a lot of uncertainty about the exact role of the FRA in the system of human rights protection in the EU. We always have to bear in mind of course that the potential role of the Agency is determined by a 'pyramid of legal-political layers', including above all the founding regulation as a quasi-constitutional framework, the Multi-Annual Framework adopted by the Council every five years and finally the institutional practice as exercised by the Agency itself.<sup>130</sup> It remains to be seen whether the

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<sup>127</sup> Art. 8 of the Regulation.

<sup>128</sup> J Fudge, 'The new discourse of labour rights: from social to fundamental rights?' 29 *Comparative Labour Law and Policy Journal* 1, p. 1-3

<sup>129</sup> T Novitz, 'A Human Rights Analysis of the *Viking* and *Laval* Judgments' in C Barnard (ed) *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007/2008, p. 545-46

<sup>130</sup> Toggenburg, p. 387



Agency under the guidance of its recently appointed director, *Morten Kjaerum*, will become a real player in the protection fundamental rights in Europe. It is also possible that it will become only a “post-box” of information and another forum for endless deliberation on what could be done for improving the current state of affairs without, however, moving towards the achievement of this desire.



## A Field of Fundamentalisation: The Industrial Relations

Professor Jonas Malmberg (Uppsala University, Sweden)

### Introduction

After World War II labour law in most Western European countries grew into a discipline of its own. Once it was established, it was able to develop a functioning system of protection for employees in various problematic situations. Labour law had a more or less well-defined territory of its own which was not called into question. Nowadays, this state of affairs has been radically altered. In the shadow of the internal market a territorial struggle is in progress over where labour law ends and economic rules take over. Exposure to competition, privatization of services, control of operating results, regulation of insider dealing and free movement of goods, services and capital are all phenomena which are in, at least, a relationship of tension with the traditional rules of labour law, if not directly clashing with them. In the late 1990s questions on the relationship between competition law and labour law were raised both nationally and at EU level.<sup>1</sup> The endeavour to create guarantees that labour law requirements are, or will be, complied with in public procurement has entailed a prolonged tug-of-war which is still going on. In 2005 the ECJ delivered a judgment concerning the issue whether the general secretary of a trade union was entitled to receive information that a major bank is to undergo a merger, or whether a trade union representative on the board of the bank ought not to disclose a matter of this kind to the union's general secretary, even though it might have a decisive impact on the livelihood and future of thousands of employees.<sup>2</sup> The debate of the Services Directive essentially concerns the same question: should compliance-enforcement and control mechanisms based on labour law be scrapped in favour of the free movement on Services?<sup>3</sup> The list of examples could easily be made longer.

In this territorial struggle between the aspirations of economic law and labour law the notion of fundamental rights has become increasingly stressed. How are the fundamental economic freedoms and the fundamental social rights to be balanced? Which of them are 'most fundamental'?

The articles by Ann Christine Hartzén, Uladzislau Belavusau and Bruno Mestre give three different perspectives on the fundamentalisation of social rights in the field of industrial relations.

*Ann Christine Hartzén* discusses the freedom of association, the right to collective bargaining and the right to industrial action as essential elements of an industrial relations system and stresses the need for recognition of these freedoms as fundamental rights within the EU legal order. Although the ECJ has recognised the right to strike as a fundamental right, the Court has, according to Ann Christine Hartzén, at the same time diminished the contents of this right. This in turn means that the asymmetry of power between management and labour is retained in the sense that the development of the European social dialogue will remain at the discretion of the employers.

*Uladzislau Belavusau* discusses the Laval Case in the context of the recent enlargement. While Ann Christine Hartzén focuses on the asymmetry of power between capital and work, the conflict between new and old Member States is in the spotlight of Uladzislau Belavusau. He is critical about how the Swedish trade unions acted during the Laval conflict. At the same time he stresses the problem inherent in the differences in competence of EU with regard to the market on the one hand and the

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<sup>1</sup> Bruun, N. & Hellsten, J. *Collective Agreement and Competition Law in the EU*. The Report of the COLCOM Project, DJOEF Publishing 2001.

<sup>2</sup> Case C-384/02 *Grøngaard and Bang* [2005] ECR I-9939

<sup>3</sup> See, for instance, Barnard, C. in M. Rönnermar, *EU Industrial Relations v. National Industrial Relations*, Kluwer 2008, pp. 137–168.

social sphere on the other. While the former has undergone a tremendous evolution, the EU level still suffers from a social deficit. The acuteness of the conflict between social rights and fundamental freedoms is brought to a head by the Laval and Viking-cases. These cases represent, according to Uladzislau Belavusau, both a step forward and a step back for the social dimension of EU. They pave the way for the fundamentalisation of social rights as well as teaching the trade unions about 'good behaviour on the dance floor'.

*Bruno Mestre* deals with workers' right to information and consultation as a fundamental right, as recognized for instance in the EU Charter on Fundamental Rights. Bruno Mestre analyses the aim and function of the right to information and consultation in relation to the current debate on the theory and objectives of the firm. When looking at the right to information and consultation in secondary EU law it is, according to Bruno Mestre, clear that these legal instruments are enacted in accordance with a *contractual* and *stakeholder* view of the firm.

# **Fundamentalisation of Industrial Rights in the EU – An Intricate Network of Legal Sources and Interpretations**

Ann Christine Hartzén (EUI)

## **Abstract**

The freedom of association, the right to collective bargaining and the right to industrial action are all essential elements and can even be considered as founding pillars for any autonomous industrial relations system. Put in relation with the processes of creating social policy in the EU, where the social dialogue has a role granted to it from the EC Treaty, the need for recognition of the freedom of association and the rights to collective bargaining and industrial action is evident. This paper aims to discuss and analyse these rights as fundamental rights within the EU legal order since at the EU level these rights can be questioned as to their legal status, recognition and contents. We will consider the network of national, EU and international regulations that govern these rights as well as how such regulations and other issues of importance for these rights have been treated by the ECJ. Through this analysis we will establish solid arguments in favour of considering these rights as fundamental rights in the EU legal order. The contents of these rights will also be analysed in a similar manner with the aim of arriving at a discussion of how the contents of these rights might affect the potential future development and function of the European social dialogue. The most important conclusion points out the efficient manner in which the ECJ has recognised the right to strike as a fundamental right whilst at the same time diminishing the contents of this right. This in turn means that the asymmetry of power between management and labour is retained in the sense that the development of the European social dialogue will remain at the discretion of the employers. In order to come to terms with this asymmetry of power different solutions are available, such as establishing a duty to negotiate as part of the right to collective bargaining or filling the right to strike with a proper and effective contents. If this is not done the only means for pressuring the employers to negotiate binding agreements will remain the shadow of law, which currently shines of absence from the EU legislative scene.

## **Introduction**

The European Court of Justice (ECJ) has recently recognised the right to strike as a fundamental right within the legal order of the European Union (EU) in spite of this right being exempted from the competencies of the EU. This recognition of the right to strike as a fundamental right can be considered positive in relation to future developments of industrial relations at the EU level. However, it is important to remember that the right to strike is not the sole founding pillar for systems of industrial relations and collective bargaining. Instead, it is one of several rights, so called fundamental labour rights,<sup>1</sup> which together constitute the basis for any labour law system or system of industrial

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<sup>1</sup> The terminology can be discussed as the use of “labour” could imply that the rights in question are only accessible to the labour side of the social dialogue, but this is not the true meaning of the right to freedom of association, the right to collective bargaining and the right to industrial action. Instead these rights are primarily given to or demanded by labour, but in order for labour to call upon and make sensible and practical use of these rights they need to establish a relation and interact with management. From this follows that management will have to be given access to these rights as it would be highly unfair to deny one party in such a relation the rights that the other party has. This means that the rights in question can be seen as accessible to both management and labour, with labour as the primary recipient, and that the terminology simply indicates the pragmatic characteristics and historical development of these rights. Another expression often used is that of fundamental trade union rights (see for example Bercusson, Brian, *The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level*, Transfer, 2003), but this wording might lead to the conclusion that the exercise of these rights belongs primarily to the trade unions and is restricted to the individual

relations and collective bargaining.<sup>2</sup> The other rights are the right to freedom of association and the right to collective bargaining.

The importance of fundamental labour rights become apparent when considering the collective bargaining systems in the Member States, which have all developed within their specific national context, characterised by cultural and historical events and factors. This means that each national collective bargaining system is likely to have its own specific characteristics. The role of collective bargaining, labour law and trade unions and the function of these vary to greater or lesser extent between the different national labour law systems. Some basic rights do, however, exist in all of these systems<sup>3</sup> and these are not surprisingly the fundamental labour rights,<sup>4</sup> i.e. the right to freedom of association, the right to collective bargaining and the right to industrial action. As previously mentioned these rights are to some extent excluded from the competences of the EU and this has led to the conclusion that there is a deficit within the EU system regarding the possibilities for a development of an autonomous system of industrial relations at the EU level.<sup>5</sup> It could thus seem as if the trade unions at the EU level are put in a position of collective begging.<sup>6</sup>

Even though the right to strike has now been recognised as a fundamental right by the ECJ it can still be debated whether or not the freedom of association and the right to collective action are recognised as fundamental rights in the EU legal system. It is also debatable whether other forms of exercising the right to collective action enjoy the same status as the right to strike.<sup>7</sup> This debate is of importance for the strategy and actions of the social partners, in particular trade unions, as the outcome of such a debate could have an effect on their bargaining power and the possibilities for them to voice their rights at the European level. What protection are these rights to have in the Community legal order and what sources are available for arguing in favour of a stronger protection than what currently is granted to the fundamental labour rights? This chapter aims to explore the various sources available for determining the status of the fundamental labour rights within the EU legal order. The addition to the recent intense debate<sup>8</sup> will be that of linking the discussion of the fundamental labour rights to the

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worker. As the concept labour includes both labour as individual workers and labour organised in trade unions, the terminology fundamental labour rights is preferred.

<sup>2</sup> The ILO has stated that “*sound industrial relations systems are based on the full recognition of freedom of association and the right to collective bargaining*” see for example Arrigo, Gianni and Casale, Giuseppe, *Glossary of labour law and industrial relations (with special reference to the European Union)*, 2005, p. 14

<sup>3</sup> Further discussion concerning the recognition of the fundamental labour rights in the Member States national systems will be provided in each of the following sections.

<sup>4</sup> This does, however, not mean that the exact form and regulations governing these rights in the Member States are identical, merely that these rights exist in various forms in all Member States.

<sup>5</sup> See Bercusson, Brian, *The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level*, Transfer. 2003, p. 210, who states that “*An EU system of industrial relations is unlikely to deviate from certain basic elements of national systems*” and “*a legal framework for a system of industrial relations at EU level will need to include fundamental trade union rights recognised in the Member States: the rights of association, to collective bargaining and to strike*”.

<sup>6</sup> See for example Rojot, Jacques, *The Right to Bargain Collectively: an International Perspective on its Extent and Relevance*, The International Journal of Comparative Labour Law and Industrial Relations. 2004, p. 520, who states that “*Without bargaining power, there is no collective bargaining*” and further explains the different aspects that contribute to the social partners’ bargaining power and the importance of this power.

<sup>7</sup> It is ironic that the debate will have to take the starting point from whether or not these rights are recognised within the EU legal system. Certainly it would be more interesting to focus on how to best protect and make use of these rights (as pointed out in ILO. *Organizing for Social Justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. 2004, p. 1), but in order to provide for such a discussion it is necessary to first establish the legal position of the rights in question.

<sup>8</sup> The recent debate concerning the status of fundamental labour rights has indeed become more intense. This is an interesting development which can be interpreted as an evidence of European integration moving towards more social aims allowing for fundamental labour rights to find a place on the integration agenda. The fact that labour rights are closely linked with economic and political developments is not exactly new, but nevertheless it is interesting to note that

European social dialogue and its potential future development towards a stronger system generating valuable outcomes for European workers.

In order to understand how the fundamental labour rights can be framed within the EU legal order it is first necessary to fully understand their legal status and the legal base for their recognition as fundamental rights. The starting point of such a discussion can basically take two different angles. The first one would be turning to other international legislation and EU sources, such as the ILO conventions on labour rights,<sup>9</sup> the European Convention on Human Rights (ECHR) and the Nice Charter, considering the content of these legal acts, whether, and if so how, the ECJ have dealt with this legislation and the level of ratification of these legal acts amongst the Member States. The second starting point would instead be turning to the Member States' national legislation concerning these rights, analysing what the core characteristics of these rights are, how this is regulated in the Member States' national systems as well as the case law of the ECJ relating to common principles on fundamental rights. By doing so it could be possible to define common traits and practices among the Member States and thus establishing a common European tradition or common European principles that ought to be considered part of the EU legal system.<sup>10</sup> Each of the fundamental labour rights will be analysed in a separate section and the final two sections will provide a discussion on the constitutionalisation of the fundamental labour rights as well as concluding remarks on the effects for the social dialogue. Before starting off the analysis it is, however, essential to consider the legal status of some of the legal sources that will be used.

## **Legal Status of International and EU Sources**

The exemption of some of the fundamental labour rights from the competences of the EU forces us to turn to other legal sources than the Treaties in order to properly discuss and assess the legal status of these rights. As stated before there are several international conventions and forms of legislation which deal with the fundamental labour rights and in order to use these sources in the discussion it is necessary to first establish their legal status in the Community legal order. The status of the ILO law on the freedom of association and the right to industrial action can undoubtedly be considered as having legal effect within the Community law. This is due to the following facts: first, all the Member States of the EU have ratified the ILO Conventions 87 and 98<sup>11</sup> which are of interest to the discussion and the EU Member States are thus bound by these conventions; and secondly, the ECJ has stated that such international legal acts are to be included among the sources that should be used as guidelines within the framework of EU law.<sup>12</sup>

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these rights are receiving more attention when a link is made to policies promoting European integration. See for example Bercusson, Brian, *Interpreting the EU Charter in the context of the social dimension of European integration*, in Brian Bercusson *European labour law and the EU Charter of Fundamental Rights*. 2002, p. 9.

<sup>9</sup> Most important for this discussion are the ILO Convention number 87 on freedom of association and protection of the right to organise, and the ILO Convention number 98 on the right to organise and collective bargaining, further on mentioned as ILO Conventions 87 and 98.

<sup>10</sup> Article 6(2) EUT states that "*The Union shall respect fundamental rights ... as they result from the constitutional traditions common to the Member States, as general principles of Community law.*" Further reference to common constitutional traditions of the Member States being considered general principles of Community law is to be found in *Case 11-70. Internationale Handelsgesellschaft.*, ECR 1125. paragraph 4 and *Case C-144/04, Mangold*, ECR I-9981., paragraphs 74-75

<sup>11</sup> These two conventions are further among the seven ILO conventions that are declared to be the fundamental conventions, also known as the ILO core conventions, thus establishing principles and rights of such importance as to be binding upon all the ILO member states regardless of whether they have ratified these conventions or not. For a full list of the fundamental conventions see Arrigo, Gianni and Casale, Giuseppe, *Glossary of labour law and industrial relations (with special reference to the European Union)*, 2005, p. 9.

<sup>12</sup> *Case 4-73, Nold.*, ECR 491. paragraph 13.

The EU Charter of Fundamental Rights (Nice Charter) has not been formally incorporated in the EU legal system, instead it was unanimously approved as a political declaration by the European Parliament, Commission, and Council,<sup>13</sup> which has led to a discussion of its legal status. At first glance the lack of incorporation would lead to the conclusion that the Nice Charter has no legal binding effect on either the EU institutions or the Member States. As a political declaration the effects of the Nice Charter on the legal position of the fundamental labour rights will be limited and indirect as the ECJ is more likely to use the general principle of human rights protection in EU law and other international human rights treaties as reference for its decisions.<sup>14</sup> There are, however, several arguments to the contrary, i.e. in favour of the ECJ referring to the Nice Charter, arguments of varying kind and with varying results. Many of these arguments come to the conclusion that the Nice Charter is binding upon the EU institutions since they have all proclaimed their intentions of acting in line with the values of the Nice Charter.<sup>15</sup> Further arguments claim that the Nice Charter consolidates the *acquis communautaire* on the protection of fundamental rights and that it simply reaffirms rights that the EU and the Member State are committed to on the basis of other instruments.<sup>16</sup> In this sense the Nice Charter is to provide a framework of values that will function as guidance for the ECJ and national courts when deciding on issues related to EU law.<sup>17</sup> In addition the ECJ has had its word on the role of the Charter. It has declared that "...the principal aim of the Charter... is... to reaffirm rights" which are legally binding due to their provenance from other sources recognised by EU law.<sup>18</sup> The Nice Charter can in other words be seen merely as a guide for affirming the position of fundamental labour rights in the EU and even though its importance should not be neglected<sup>19</sup> it is currently having a limited and indirect effect.<sup>20</sup> This status of the Nice Charter is of relevance for the further discussion

<sup>13</sup> Bercusson, Brian, *The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level*, Transfer. 2003, p. 213 and OJ 2000 No C-364/1. *Charter of Fundamental Rights of the European Union*.

<sup>14</sup> Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001, p. 157. Worth noting is that the ECJ in fact did not refer to the Nice Charter neither in the case *Case C-341/05 Laval*, ECR? nor in the *Case C-438/05 Viking*, ECR?.

<sup>15</sup> For an opinion in line with this from the EU institutions see COM(2000) 644 final. *Communication from the Commission - On the legal nature of the Charter of Fundamental Rights of the European Union* and for analyses of the legal status of the Nice Charter see for example Hepple, Bob, *The EU Charter of Fundamental Rights*, Industrial Law Journal. 2001, Bercusson, Brian, *Interpreting the EU Charter in the context of the social dimension of European integration*, in Brian Bercusson *European labour law and the EU Charter of Fundamental Rights*. 2002, Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001, Lenaerts, Koen and De Smijter, Eddy, A "Bill of Rights" for the European Union, Common Market Law Review. 2001, Sciarra, Silvana, *Fundamental Labour Rights after the Lisbon Agenda*, 2005.

<sup>16</sup> See for example Menéndez, Augustín José, *The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union*, Ratio Juris. 2003, p. 375, Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001, pp. 157-158 and Bercusson, Brian, *The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level*, Transfer. 2003, p. 213. For a more critical approach on the current situation see Hendrickx, Frank, *Fundamental Social Rights in Pre- and Post-Constitutional Terms*, The International Journal of Comparative Labour Law and Industrial Relations. 2006, pp. 407-433, according to whom "there is no directly binding EU Bill of Rights", p. 412.

<sup>17</sup> See *Case C-173/99, BECTU, AG Opinion*, ECR I-4881., paragraph 27 where Advocate General Tizziano states; "fact remains that it (the Charter) includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments".

<sup>18</sup> *Case C-540/03, European Parliament v Council of the European Union*, ECR I-5769., paragraph 38.

<sup>19</sup> By the ECJ use of the Nice Charter as an interpretative tool this might become mandatory due to it being interpreted as part of the general principles of EU law, see Bercusson, Brian, et al., *Legal prospects and legal effects of the EU Charter*, in Brian Bercusson *European labour law and the EU Charter of Fundamental Rights*. 2002, p. 15.

<sup>20</sup> Worth mentioning is that even though the role of the Nice Charter might change from that of a framework to that of an instrument for judicial review in case it were to be incorporated formally in EU law (Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001, pp. 161-163.) Art 51(2) EUCHR explicitly excludes the possibility of using the Nice Charter for extending the powers and competences of the EU. Thus it will not be possible to use the Nice Charter as a basis for EU



on the fundamental labour rights within the EU system as the Nice Charter is an important source for establishing those rights in EU law.

The European Convention of Human Rights and Fundamental Freedoms (ECHR) is of importance in a similar manner as the ILO Conventions 87 and 98 since it is an international legal document, not adherent to the EU, ratified by all Member States of the EU.<sup>21</sup> It is mentioned in the ECT and EUT and the ECJ has referred to this convention and related case law of the ECtHR.<sup>22</sup> Furthermore the ECHR has served as a source of inspiration for the Nice Charter, as some of its provisions on fundamental labour rights have been taken directly from the ECHR.<sup>23</sup> For these provisions of the Nice Charter it is indicated that their scope and meaning must be similar to the corresponding provisions in the ECHR and cannot go beyond the scope of those provisions.<sup>24</sup> To some extent this confirms the importance of the ECHR in the EU legal system rather than asserting the Nice Charter and the ECJ might be more likely to use the ECHR as a source of influence in cases concerning fundamental labour rights.

In relation to the ECHR the European Social Charter (ESC) is also relevant, not least due to the fact that Article 136 ECT explicitly refers to the ESC, albeit in a rather vague manner that could cause doubts of whether the reference as such is actually creating any binding obligations for the Community to protect the rights established in the ESC.<sup>25</sup> Nevertheless, the ECJ has made reference to the ESC<sup>26</sup> and the ECJ adopted approach to take into account international treaties signed by or on which the Member States have collaborated<sup>27</sup> would further strengthen the status of the ESC and the rights therein as a legal source providing recognition of rights within the EU. Again we have a legal source that might not be strictly binding as regards the rights contained therein, but rather serve as a tool or part of the guidelines when the ECJ is passing judgements over fundamental labour rights. Similar status can be granted to the 1989 Community Charter of the Fundamental Social Rights for Workers (Social Charter), also referred to in Article 136 ECT.<sup>28</sup>

The ECJ has clearly stated that fundamental human rights are enshrined in the general principles of Community law,<sup>29</sup> and that respect for fundamental rights forms an integral part of the general principles of law protected by the ECJ.<sup>30</sup> Furthermore the case law of the ECJ has clearly stated that if a principle is clearly derived from various international instruments and the constitutional traditions

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legislation, which doesn't mean that the contents of a legislative act with a proper legal basis in the treaties couldn't be inspired by the Nice Charter.

<sup>21</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>, last visited 2008-05-31.

<sup>22</sup> To mention only one example we have *Case C-112/00, Schmidberger*, ECR I-5659.

<sup>23</sup> Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001

<sup>24</sup> Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001, p. 155.

<sup>25</sup> See for example Blanpain, Roger, 2008 p. 150.

<sup>26</sup> See for example *Case 149/77 - Judgment of the Court of 15 June 1978. - Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. - Reference for a preliminary ruling: Cour de cassation - Belgium.*, ECR 1365. paragraph 20 and *Case 24/86 - Judgment of the Court of 2 February 1988. - Vincent Blaizot v University of Liège and others. - Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium*, ECR 379. paragraph 20.

<sup>27</sup> This approach was adopted by the ECJ early on and a case often referred to when discussing this issue is *Case 4-73, Nold.*, ECR 491. paragraph 33 being of importance since the ECJ here states that that it is to take into account "the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".

<sup>28</sup> The discussion of the contents of these two sources will however be very limited in the following paragraphs, since their contents overlap with other sources used for the analysis and the Nice Charter further can be considered as to some extent having overshadowed at least the Social Charter.

<sup>29</sup> *Case 29-69. Erich Stauder v City of Ulm - Sozialamt.*, ECR 419. paragraph 7.

<sup>30</sup> *Case 11-70. Internationale Handelsgesellschaft.*, ECR 1125. paragraph 4.

common to the Member States that principle must be regarded as a general principle of Community law.<sup>31</sup> This means that if the fundamental labour rights can be considered recognised in international instruments which the EU Member States have obliged themselves to respect as well as being considered part of the constitutional traditions common to the Member States, then the fundamental labour rights are doubtlessly to be considered as general principles in Community law.

Regardless of the importance attributed to international conventions and EU acts in the form of political declarations on the fundamental labour rights it is, however, important to bear in mind that such conventions and acts cannot be used as basis for EU legislation and their impact will remain limited to that of serving as guidelines when EU law is interpreted.<sup>32</sup> It is therefore in the hands of the ECJ to develop and ensure the protection of rights that are implicitly recognised in the EU legal order. Having considered the legal status of these sources focus will now shift to the fundamental labour rights as recognised therein.

## Freedom of Association

The freedom of association should not only be regarded as an individual civil liberty and fundamental human right,<sup>33</sup> but can also be seen as a basic principle essential for the foundation of an autonomous collective bargaining system<sup>34</sup> and of high importance for a sound economic and democratic development of societies.<sup>35</sup> Nevertheless, Article 137(5) ECT exempts freedom of association from the EU competences. Undoubtedly this raises problems and questions in reference to the European collective bargaining system. Since the freedom of association can be seen as a foundation for any collective bargaining system there is a clear deficit within the European legal system due to the lack of recognition of this right in the treaties. As it is exempted from the competence of the EU, reference to the freedom of association is possible only within the Member State's national legal systems and legal acts adopted by the national governments. However, the European social dialogue performs activities similar to those in national collective bargaining systems, i.e. the social partners negotiate agreements concerning employment relations and conditions, and therefore the fact that a right, which can be seen as part of the foundation of an autonomous collective bargaining system, is excluded from the competence of the EU is worth debating. This section will provide an analysis of the legal status and contents of the right to freedom of association within the Community legal order.

However, does the exemption of the freedom of association from the competence of the EU necessarily mean that the right is not acknowledged in the system? It is one thing to say that the EU does not have the competence to put forward legislation concerning a specific right and it is another to say that the right is not recognised by the system. In other words the right to freedom of association could implicitly<sup>36</sup> be part of the EU law even though the EU doesn't have competence to legally define its scope or meaning. The EU legal principles have to be framed in the context of the legal traditions

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<sup>31</sup> *Case C-144/04, Mangold*, ECR I-9981., paragraphs 74-75.

<sup>32</sup> Betten, Lammy, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, The International Journal of Comparative Labour Law and Industrial Relations. 2001, pp. 160-161.

<sup>33</sup> The fact that the freedom of association is enshrined in all of the most important human rights conventions and instruments (Gravel, Eric, et al., 2001, p. 7.), ought to leave no doubt that indeed it is a *fundamental* human right.

<sup>34</sup> The ILO has gone even further in stressing the importance of the freedom of association as a factor in the achievement of social justice and one of the principal elements in the achievement of lasting peace and sustained progress, see ILO, 1996, p. 1. and Gravel, Eric, et al., 2001, p. 7, where it is also pointed out that the freedom of association constitutes a guarantee for the good functioning of a tri-partite body such as the ILO.

<sup>35</sup> ILO. *Organizing for Social Justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. 2004, p. 1.

<sup>36</sup> For a discussion on explicit and implicit recognition of the freedom of association and how this right has been considered as implicitly recognised in the Constitution of the USA see Leader, Sheldon, 1992, pp. 21-22.

and practices of the Member States and in order to decide whether the freedom of association is recognised in the EU system it is important to consider what other legal sources are of importance for the EU as a whole and the individual Member States.

On the international level the ILO has developed principles concerning the freedom of association. The Preamble of the Constitution of the ILO states that improvement of certain conditions is urgently needed and one such improvement consist of the recognition of the freedom of association,<sup>37</sup> one of the fundamental principles on which the ILO is based.<sup>38</sup> Several conventions of relevance for the freedom of association have also been adopted, most notably the ILO Convention number 87 on freedom of association and protection of the right to organise,<sup>39</sup> which is one of the ILO core conventions. Furthermore the ILO has established two bodies with the freedom of association as their special focus. These are the Fact-Finding and Conciliation Commission on Freedom of Association, created in 1950 by an agreement between the ILO and the Economic and Social Council of the UN,<sup>40</sup> and the Committee on Freedom of Association, established in 1951 as a tripartite body.<sup>41</sup> The aim of establishing a special supervisory body and procedure with this focus was to strengthen the ILO's supervision of the application of international labour standards.<sup>42</sup>

The Fact-Finding and Conciliation Commission has been convened only rarely. The reason for this is that the consent of the member state's government for reference on a complaint is required if the government in question has not ratified the Conventions on freedom of association, and in addition to this the procedure is long and costly due to the need of hearing witnesses and visiting the country in question.<sup>43</sup> The Committee on Freedom of Association on the other hand is as a tri-partite body subject to procedures different from that of the Fact-Finding and Conciliation Commission. Since it was originally set out to be a preliminary and internal stage of the ILO procedures it doesn't require the consent of the member state before examining allegations.<sup>44</sup> It is legally basing its work on the freedom of association as a fundamental principle in the ILO Constitution and the Declaration of Philadelphia. It meets three times a year and carries out a preliminary examination of complaints and recommends the appropriate course of action to the Governing Body.<sup>45</sup> The work of this Committee, as the main examining body concerning freedom of association,<sup>46</sup> is therefore more of interest as it has established a series of principles that can be seen as international law on freedom of association.<sup>47</sup>

To start of the discussion concerning the ILO Convention 87, it is important to know that all 27 Member States of the EU have ratified this Convention.<sup>48</sup> Due to this all Member States of the EU are bound to respect the principles and provisions which result from this Convention, as minimum standards<sup>49</sup> and the foundation of the freedom of association therein can be seen as common to all

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<sup>37</sup> The Constitution of the ILO, Preamble, second paragraph.

<sup>38</sup> Declaration of Philadelphia, adopted on May 10<sup>th</sup> 1944, Clause I, point (b). As a fundamental principle freedom of association is also to be accepted by all the members of the ILO, see ILO, 2006, paragraphs 15-16.

<sup>39</sup> Further on mentioned as Convention 87.

<sup>40</sup> Resolutions of the Economic and Social Council No. 239(IX) of 2 August 1949 and No. 277(X) of 17 February 1950; 110th Session of the Governing Body, Official Minutes, pp. 71-90.

<sup>41</sup> ILO, 1995, pp.121-122.

<sup>42</sup> Gravel, Eric, et al., 2001, p. 2.

<sup>43</sup> ILO, 1996, pp. 1-2.

<sup>44</sup> Gravel, Eric, et al., 2001, p. 10.

<sup>45</sup> ILO, 1995, pp. 122-123 and ILO, 1996, pp. 2-3.

<sup>46</sup> Gravel, Eric, et al., 2001, p. 11.

<sup>47</sup> ILO, 1995, pp. 122-123 and ILO, 1996, pp. 2-3.

<sup>48</sup> <http://www.ilo.org/ilolex/english/index.htm>, visited on February 6<sup>th</sup> 2007.

<sup>49</sup> ILO, 1996, p. 9.

Member States of the EU.<sup>50</sup> In other words, regardless of whether or not the issue is explicitly regulated in EU law, there are minimum standards concerning the protection of the freedom of association applicable within all EU Member States. For the further discussion it is, however, important to analyse exactly what these minimum standards are.

Article 2, Convention 87 gives workers and employers the right to establish, without previous authority from the state, “*organisations of their own choosing*”.<sup>51</sup> In reference to this the Freedom of Association Committee has defined the meaning of the wording “*organisations of their own choosing*” to imply; the establishment of organisations that are independent of political parties and other already existing organisations, as well as the importance of workers and employers having the full freedom, in practice, of choosing which organisation to join or establish. The Committee further stresses the necessity of not having restrictions on the number of trade unions existing within a specific occupational sector, within a work place or within a specific territory and that regardless of the existence of such organisations the workers are entitled to establish another organisation, should they so wish. The Committee has also stated that any requirements which could present practical or financial difficulties for workers to resign from a trade union might cause a restriction of the workers’ possibilities of free exercise of their right to freedom of association.<sup>52</sup> The workers and employers are in other words free to choose with which organisation to associate, they should not be forced to use their freedom of association only by joining a specific already existing organisation and they should also be free to withdraw from any such organisation. Thus, within the limits of the freedom of association lies undoubtedly also the choice to not associate. This means that the right to dissociate is implicitly recognised by Convention 87 and explicitly recognised by the decisions and principles developed by the Freedom of Association Committee.

Article 12 (1) of the Nice Charter explicitly recognises the right to freedom of association, but it contrasts to some extent with other legal sources concerning the freedom of association. Firstly, Article 12 only recognises the positive aspect of the freedom of association and it ignores the negative aspect of the same right, i.e. the freedom to dissociate, which is recognised in many of the Member States national traditions as well as in the principles developed by the ILO Freedom of Association Committee. Secondly, the article is focused on the freedom of association in reference to form and join trade unions and finally it includes the right to participate in activities organised by the protected organisations.<sup>53</sup> The possibilities of conflict between a minimalist approach and a wider interpretation of the right to freedom of association need to be borne in mind. As such it is highly important that Article 12 Nice Charter is interpreted in the light of these other legal sources in order for the EU to fulfil the obligations of protecting rights in accordance with national traditions and international commitments of the EU and its Member States.

Even though the legal status of the Nice Charter can be debated the principles enshrined in the Nice Charter will undoubtedly become integrated in the ECJ case law through the future work of the ECJ in developing general principles based on values common to the Member States. In spite of the fact that the ECJ only rarely has referred to the Nice Charter<sup>54</sup> the case law established so far<sup>55</sup> undoubtedly

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<sup>50</sup> Bercusson, Brian, *Freedom of assembly and of association (Article 12)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, pp. 25-26.

<sup>51</sup> ILO, 1995, p. 14.

<sup>52</sup> ILO, 1996, pp. 59-61 and 60-70, paragraphs 273-274, 276-283 and 319.

<sup>53</sup> Bercusson, Brian, *Freedom of assembly and of association (Article 12)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, p. 27.

<sup>54</sup> *Case C-173/99, BECTU, AG Opinion*, ECR I-4881. and *Case C-540/03, European Parliament v Council of the European Union*, ECR I-5769. whereby the ECJ established the Nice Charter as an instrument reaffirming rights that are already considered as part of the *acquis communautaire*.

<sup>55</sup> See for example *Case C-144/04, Mangold*, ECR I-9981., paragraphs 74-75, where the ECJ clearly expresses the fact that principles common to the traditions of the Member States are to be considered general principles of Community law.

leads to the conclusion that the values enshrined in the Nice Charter are to be considered as reflecting values already enshrined in Community law either through other international instruments or through the constitutional traditions common to the Member States. Thus the freedom of association as recognised in Article 12 (1) of the Nice Charter is definitely to be considered a general principle in Community law.

In spite of the freedom of association being exempted from the competences of the EU there are some cases from the ECJ that have an impact on the right to freedom of association. The first case of interest to the discussion is the *Schmidberger* case which concerns the balance to be struck between the basic economic freedoms and the freedoms of expression and assembly. In this case the ECJ concludes that these rights constitute the fundamental pillars of a democratic society. However, the ECJ continues stating that these are not absolute rights, but must be viewed in relation to their social purpose. It is therefore, in the opinion of the ECJ, possible to restrict these rights in the aim of public interest as long as such restrictions do not impose disproportionate or unacceptable interference with risk of prejudicing the very substance of the fundamental rights of freedom of expression and assembly. In the case at stake, however, the ECJ concludes that the exercise of these fundamental rights have been subject to some limitations in order to protect the public interest. Furthermore the ECJ concludes that the restriction on the free movement of goods caused by this exercise cannot be seen as contrary to Community law due to the importance of protecting an assuring the fundamental rights of assembly and expression.<sup>56</sup> The explicit protection of the right to organise in Article 5 ESC further strengthens the protection of this right. This means that the freedom of assembly and the freedom of expression both have a strong protection in the legal order of the EU and the effects on the freedom of association might be considered obvious. The freedom of association is often referred to as a precondition for the possibility of exercising the freedom of assembly,<sup>57</sup> thus the right to freedom of association will also have to be considered a fundamental right. This is due to the fact that in order for having a proper and well-functioning assembly the people involved will need to be associated with each other. If such association is not given a proper and adequate protection as a fundamental right then the freedom of assembly will face the risk of being prejudiced in a way that might threaten the very substance of this right.

It is interesting to note that in the *Schmidberger case*<sup>58</sup> the ECJ referred directly to the case law of the ECtHR<sup>59</sup> in the discussion concerning the right to freedom of expression and assembly and what limitations on this right that could be justified. Interestingly the ECJ choose a similar wording to that of the ECtHR when stating that certain limitations of fundamental rights, such as those at stake, can be allowed. The ECJ use the wording “*justified by objectives in the public interest*” and further that any restrictions of the exercise of this right should not “*taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed*”.<sup>60</sup> The ECtHR, on the other hand, state, in the *Steel and Others v. UK* case, that any interference must have the form of “*reasonable and appropriate means to be used to ensure that lawful activities can take place peacefully*” and further that such interference must be “*proportionate to the legitimate aim pursued, due regard being had to the importance of the freedom of expression*”.<sup>61</sup> This similarity in standpoint between the ECJ and the ECtHR could indicate that the ECJ in this case has considered it of some importance to articulate the rights established in the ECHR within the EU

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<sup>56</sup> *Case C-112/00, Schmidberger*, ECR I-5659. paragraphs, 73-74 and 79-80.

<sup>57</sup> Leader, Sheldon, 1992, pp 22-23.

<sup>58</sup> *Case C-112/00, Schmidberger*, ECR I-5659.

<sup>59</sup> To be precise paragraph 79 *Case C-112/00, Schmidberger*, ECR I-5659. refer to paragraph 101 in *Steel and Others v. UK*, 28 E.H.R.R. 603

<sup>60</sup> *Case C-112/00, Schmidberger*, ECR I-5659. paragraphs 79-80.

<sup>61</sup> *Steel and Others v. UK*, 28 E.H.R.R. 603

legal order and in doing so seeking to minimise diversities of the protection of fundamental rights between these two legal orders.

As stated both the *Schmidberger case* and the *Steel and Others v. UK* case related to the freedom of expression and freedom of association and thus Article 10 ECHR and not Article 11 ECHR in which the right to freedom of association is enshrined. Considering the standpoint taken of the ECJ in the *Schmidberger case* it is thus relevant to provide a brief discussion of Article 11 ECHR and the related case law in order to see how the right to freedom of association is protected by the ECtHR and whether this would fit with the EU legal order. In short the freedom of association in accordance with Article 11 ECHR means the right for workers to form and join trade unions for the protection of their interests, but a lot of the case law of the ECtHR relates to the negative aspect of the freedom of association, i.e. the freedom of dissociation.<sup>62</sup> One famous case, in relation to this and also of relevance to industrial relations and collective bargaining systems, is the *Gustafsson v. Sweden case*<sup>63</sup> in which the ECtHR concluded that trade unions cannot force an employer to join an employers' association with whom the trade union has signed a collective agreement. This since such a forced membership would be a breach of Article 11 which protects not only the right to associate, but also the right not to associate. The ECtHR concluded further that the demand from the trade union that the employer either sign a substitute collective agreement or join the employers' organisation was not disproportionate in relation to the trade union's interest in promoting and protecting the collective bargaining system. The employer could thus exercise the freedom of association and avoid joining the employers' organisation by signing a substitute collective agreement with the trade union.<sup>64</sup> This case is thus an evidence of the ECtHR wishing to protect both the individual right to choose whether or not to belong to an association and the protection of trade union rights in order to promote and retain systems of collective bargaining.<sup>65</sup>

Before the enlargement in 2004 there was a unanimous consensus amongst all the, at that time 15, Member States of the EU in favour of the freedom of association, including its counter-right freedom of dissociation.<sup>66</sup> This situation has not changed much in spite of the recent enlargements. As a matter of fact all of the new Member States have an explicit recognition of the right to freedom of association in either their constitution, labour code or through the incorporation of the ILO Convention 87 in the national legal system.<sup>67</sup> The only country where the right to freedom of association is implicitly

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<sup>62</sup> For a thorough discussion of Article 11 ECHR and relevant case law see Janis, Mark W., et al., 2008, pp. 317-322.

<sup>63</sup> *Gustafsson v. Sweden*,

<sup>64</sup> *Gustafsson v. Sweden*,

<sup>65</sup> For this conclusion consider also the case *Wilson, National Union of Journalists and others v. the United Kingdom*, IRLR 2002 568, where the ECtHR stated that the state must provide ways for workers to use the union for representation of their interests or take action in support of their interests, because if workers are not granted this capacity the freedom of association would be nothing but an illusion, see Janis, Mark W., et al., 2008, p. 318.

<sup>66</sup> Bercusson, Brian, *Freedom of assembly and of association (Article 12)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, p. 26.

<sup>67</sup> This is either clearly specified or obvious in other means from the following reports; Hajdú, József and Csikós, Szilvia. *The evolving structure of Collective Bargaining in Europe, National Report Hungary*. 2006, Datchev, Teodor, et al. *The evolving structure of Collective Bargaining in Europe, National Report Bulgaria*. 2006, Yannakourou, Matina and Soumeli, Evangelina. *The evolving structure of Collective Bargaining in Europe, National Report Greece and Cyprus*. 2006, Sewerynski, Michal. *The evolving structure of collective bargaining in Europe, National Report Poland*. 2006, Tómes, Igor. *The evolving structure of Collective Bargaining in Europe, National Report Czech Republic*. 2006, Handiak, Peter. *The evolving structure of Collective Bargaining in Europe, National Report Slovak republic*. 2006, Penko Natlacen, Metka. *The evolving structure of Collective Bargaining in Europe, National report Slovenia*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Latvia*. 2006, Xureb, Peter G. *The evolving structure of Collective Bargaining in Europe, National Report Malta*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Estonia*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Lithuania*. 2006, Mesáros, Aerghei. *The evolving structure of Collective Bargaining in Europe, National Report Rumania*. 2006.

recognised is the United Kingdom.<sup>68</sup> There are, however, some examples of limitations on this right, for example the right to freedom of association for employers has a lower level of protection than that for the workers in Latvia<sup>69</sup> and the negative aspect of the right is to some extent limited in Austria.<sup>70</sup> Regardless of these differences there is a clear majority of Member States, 23 out of 27 countries, which have recognised the freedom of association for workers and employers in both its positive and its negative aspect.<sup>71</sup> In other words there is no doubt about the fact that both the right to freedom of association and dissociation are to be considered common traditions for the Member States and thus recognised within the Community legal order.

## **The Right to Collective Bargaining**

For any system of collective bargaining to function, the right to collective bargaining is a definite prerequisite and this right is also recognised in several international and European acts. In order to find out exactly what this right means and what its contents of are, an analysis of these legal sources will be provided, starting with the ILO law. Most important for the ILO law on the right to collective bargaining is the ILO Convention 98, one of the ILO core conventions. Since all the Member States of the EU have ratified this Convention<sup>72</sup> the principles and practice enshrined therein are to be considered as binding upon the same states.

The ILO law on the right to bargain collectively covers both general principles and more specific aspects of collective bargaining, such as which workers and subjects that are to be covered by collective bargaining. One of the main general principles relating to collective bargaining is that of free and voluntary negotiation. This principle establishes the right for workers and employers or their organisations to freely and voluntarily negotiate conditions of employment and also that such voluntary negotiation of collective agreements is a fundamental aspect of the freedom of association.<sup>73</sup> It further establishes the principle of bargaining in good faith in order to provide best opportunities for developing a system of harmonious industrial relations with a high level of confidence between the parties. Within this principle of bargaining in good faith lies, according to the Freedom of Association Committee, the aspects of collective agreements being binding on the parties and a mutual respect for the commitments within such agreements. In line with this lies that the contents of collective agreements cannot be unilaterally changed by the employer and that the failure to implement the agreed conditions in such an agreement is a clear violation of the right to bargain collectively as well

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<sup>68</sup> Davies, Paul and Freedland, Mark. *The evolving structure of Collective Bargaining in Europe 1990-2004, National Report United Kingdom*. 2006.

<sup>69</sup> Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Latvia*. 2006.

<sup>70</sup> Runggaldier, Ulrich. *The evolving structure of Collective Bargaining in Europe, National Report Austria*. 2006.

<sup>71</sup> In addition to the reports mentioned in footnotes numbers 67-70 the following reports have been used for this analyse; Dorsemont, Filip, et al. *The evolving structure of Collective Bargaining in Europe, National Report Belgium*. 2006, Nielsen, Ruth. *The evolving structure of Collective Bargaining in Europe, National Report Denmark*. 2006, Moreau, Marie-Ange and Blas-Lopez, Esther. *The evolving structure of collective bargaining in Europe, National Report Luxembourg*. 2006, Bruun, Niklas. *The evolving structure of Collective Bargaining in Europe, National Report Finland*. 2006, Ojeda Avilés, Antonio. *The evolving structure of Collective Bargaining in Europe, National Report Spain*. 2006, Verhulp, Evert. *The evolving structure of Collective Bargaining in Europe, National Report Netherlands*. 2006, Kerr, Anthony. *The evolving structure of Collective Bargaining in Europe, National Report Ireland*. 2006, Caruso, Bruno and Zappalà, Loredana. *The evolving structure of Collective Bargaining in Europe, National Report Italy*. 2006, Fuchs, Maximilian. *The evolving structure of Collective Bargaining in Europe, National Report Germany*. 2006, Moreau, Marie-Ange. *The evolving structure of Collective Bargaining in Europe, National Report France*. 2006, Gomes, Júlio. *The evolving structure of Collective Bargaining in Europe, National Report Portugal*. 2006, Nyström, Birgitta. *The evolving structure of Collective Bargaining in Europe, National Report Sweden*. 2006.

<sup>72</sup> <http://www.ilo.org/ilolex/english/index.htm>, visited on February 6<sup>th</sup> 2007.

<sup>73</sup> ILO, 2006, paragraphs 881 and 925-926.

as the principle of bargaining in good faith.<sup>74</sup> The right to collective bargaining, in accordance with the practice established by the ILO, does in other words include both the duty for the parties to negotiate in good faith and the duty to obey by the conditions set up in a concluded collective agreement. A less stringent, but still clear, recognition of the right to collective bargaining can be found in Article 6 ESC, where emphasis is also placed on the importance of negotiations to be carried out voluntarily.

Concerning the right to collective bargaining within the Community legislation there are a couple of sources to analyse. Firstly, we will turn to Article 139(1) ECT that states “*Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements*”. In this article lies in other words the recognition of a system of collective bargaining at EU level if the social partners would wish to establish such relations. This would in turn imply an implicit recognition of the right to collective bargaining as the rejection of that right would be completely counter-productive of the idea of developing a collective bargaining system. There would be no logic in recognising a system of bargaining without at the same time recognising the right to bargain as this right is a fundamental constituent for establishing such a system. The right to collective bargaining can in other words be derived from Article 139(1) ECT and is thus implicitly recognised in the Community legal order.

Secondly, the ECJ has developed case law that is of interest for analysing the right to collective bargaining. In searching for arguments that would strengthen the idea of the right to collective bargaining being recognised in the Community legal order the *Albany* case is of interest; as this case assures a certain extent of protection for the social partners’ right to collective bargaining and collective autonomy through the ECJ statement therein that; “*the social policy objectives pursued by such agreements [collective agreements]*<sup>75</sup> *would be seriously undermined if management and labour were subject to Article 85(1) [now Article 81] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.*”<sup>76</sup> This means that collective agreements have a certain extent of immunity to the restrictions in Article 81 ECT and thus it will not be possible to declare a collective agreement void in accordance with this article. Furthermore this clearly indicates that the ECJ wishes to protect the autonomy of the collective bargaining structures in the EU. Even though the case concerns a national collective agreement it is highly probable that this protection would also apply to the social dialogue on the EU level, since this is now to be considered an important part of the European industrial relations systems. This gives hope for the future as such a protection is essential for facilitating a development of the European social dialogue towards a strong and influential industrial relations system.

A case that not often is referred to in discussions on the right to collective bargaining is the *UEAPME* case,<sup>77</sup> even though the case actually concerns the right of UEAPME to participate in negotiations under the procedure established in Articles 138-139 ECT (at that time Articles 3 and 4 ASP). Interestingly there is no reference to the right to collective bargaining as a fundamental right anywhere in the case, instead the right to negotiate discussed in the case was analysed only as a right to negotiate in relation to the procedure established in the ASP. The fact that negotiations under this procedure could fall under the fundamental right to collective bargaining was completely missed by all parties involved, not even the applicant UEAPME uses this right as an argument in favour of its own case. Perhaps this is not surprising as the social dialogue procedure at that time was newly established and focus was mainly on how this procedure should function, not what fundamental rights could be claimed by management and labour on the European level. Considering the specific circumstances of the negotiating procedure in question it is not unlikely that the CFI would have come to the same

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<sup>74</sup> ILO, 2006, paragraphs 934-935 and 939-943.

<sup>75</sup> Remark by the author.

<sup>76</sup> *Case C-67/96, Albany*, ECR I-5751., paragraph 59.

<sup>77</sup> *Case T-135/96, UEAPME*, ECR II-2335..



conclusions, should the right to collective bargaining have been referred to as a fundamental right in the case. After all the case concerns a specific procedure of negotiations, not collective bargaining in general, and in order for that procedure to function a balance was needed between the right for management and labour organisations to participate in the negotiations and the efficiency of those negotiations.

Clearly the right to collective bargaining must be considered as a dual right containing both the positive and the negative sides of exercising this right,<sup>78</sup> i.e. management and labour are entitled to collective bargaining, but at the same time they are also entitled not to bargain. This means that organisations have the right to call for negotiations with other organisations, but this other organisation is also free to choose whether or not to respond to this call. In conflicts of interest between these two sides of the right to collective bargaining there will be a need for striking a balance and weighing both rights in their context.<sup>79</sup> It is with this in mind that the CFI conclusions in the case are likely to have been the same should the right to collective agreements have been referred to in the *UEAPME* case.

Nevertheless, the fact that the right to collective bargaining is two-fold does not justify the lack of discussion of this right in the *UEAPME* case, which is a serious prejudice of this right. Had there been an explicit recognition of the right to collective bargaining in the EU primary legislation, *UEAPME* would most certainly have referred to it in its appeal. This would not only have led to an adequate discussion, but it would also have guaranteed a proper and legally justified protection of the right to collective bargaining in the EU legal order. In the end *UEAPME* assured the right to collective bargaining for their members through the agreement of cooperation with UNICE.<sup>80</sup> This should not lead to the conclusion that the right to collective bargaining isn't recognised nor given any protection in the ECJ case law, instead this merely highlights the need of having the right to collective bargaining properly recognised in Community law in order to assure that similar doubtful situations will not cause future prejudice of the right to bargain collectively.

Recent developments within the ECtHR as concerns the right to freedom of association and the inherent elements of this right, might serve to further strengthen the right to collective bargaining. The case law that provides this drastic and interesting change in position from the ECtHR is found in the *Demir and Baykara v. Turkey* judgement.<sup>81</sup> In this case the ECtHR found that international, regional and national developments concerning the right to bargain collectively required that also the ECtHR changed its case law concerning this right<sup>82</sup> and that the right to bargain collectively indeed shall be considered as “one of the essential elements of the “right to form and join trade unions for the protection of [one's] interests” set forth in Article 11 of the Convention”<sup>83</sup> the ECtHR thus concludes that there is a dynamic link between the right to freedom of association and the right to collective bargaining, whereby a lack of recognition of the right to bargain collectively would prejudice the possibility for individuals to exercise their freedom of association.

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<sup>78</sup> Veneziani, Bruno, *Right of collective bargaining and action (Article 28)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, p. 56.

<sup>79</sup> This indicates a clear and close connection between the right to collective bargaining and the duty to negotiate. Thus, it can be argued that the right to collective bargaining will be difficult to enforce effectively if the duty to negotiate is neglected within the system.

<sup>80</sup> The agreement was signed in December 1998 by George Jacobs, the president of UNICE, and Jan Kamminga, the president of *UEAPME*, see <http://www.eurofound.europa.eu/eiro/1999/03/feature/eu9903159f.html>.

<sup>81</sup> *Demir and Baykara v. Turkey*,

<sup>82</sup> The previous position of the ECtHR was that the right to bargain collectively did not constitute an inherent element of Article 11 ECHR, see *Demir and Baykara v. Turkey*, § 153.

<sup>83</sup> *Demir and Baykara v. Turkey*, § 154.

In its reasoning the ECtHR relies on several legal sources in addition to the ECHR, because the understanding of the ECHR and the definition of terms and notions therein requires that other international sources, the interpretation of these legal texts as well as practise developed in the contracting states reflect their common values. The ECtHR further concludes that the “*consensus emerging from [such] specialised international instruments and from the practise of the contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.*”<sup>84</sup> The choice of the ECtHR to refer to the ESC and the Nice Charter when interpreting the meaning of Article 11 ECHR<sup>85</sup> and concluding that the right to bargain collectively constitutes an essential element of the right to form and join trade unions is interesting from two aspects. Firstly, it allows the ECtHR to change its previous case law and strengthen the protection of fundamental labour rights offered by the ECHR. Secondly, it strengthens the link between different sources of human rights protection as well as the legal status of these sources, both within their specific legal order and other international legal orders. The case might thus cause a need for the ECJ to further strengthen the protection of the right to collective bargaining, not least due the Treaty-based recognition of the rights established in the ECHR and ESN.

Turning to the national regulations governing the right to collective bargaining we will see that the situation is somewhat similar as for the right to freedom of association. The recent enlargements have not changed the fact that there is a clear majority of EU Member States that have recognised this right either in their constitutions, labour codes or through the incorporation of the ILO Convention 98 in the national legal order.<sup>86</sup> In three Member States, Estonia, Lithuania and the United Kingdom, the right to collective bargaining is recognised implicitly.<sup>87</sup> There are, however, several cases where the negative aspect of the right to collective bargaining is limited. In general this limitation is caused by an obligation for either management or labour or both parties to participate in negotiations. Such

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<sup>84</sup> *Demir and Baykara v. Turkey*,

<sup>85</sup> See for example §§ 149-150 in *Demir and Baykara v. Turkey*, .

<sup>86</sup> As for the right to freedom of association the following national reports have been used for this analysis; Bruun, Niklas. *The evolving structure of Collective Bargaining in Europe, National Report Finland*. 2006, Caruso, Bruno and Zappalà, Loredana. *The evolving structure of Collective Bargaining in Europe, National Report Italy*. 2006, Detchev, Teodor, et al. *The evolving structure of Collective Bargaining in Europe, National Report Bulgaria*. 2006, Dorssemont, Filip, et al. *The evolving structure of Collective Bargaining in Europe, National Report Belgium*. 2006, Fuchs, Maximilian. *The evolving structure of Collective Bargaining in Europe, National Report Germany*. 2006, Gomes, Júlio. *The evolving structure of Collective Bargaining in Europe, National Report Portugal*. 2006, Hajdù, József and Csikós, Szilvia. *The evolving structure of Collective Bargaining in Europe, National Report Hungary*. 2006, Handiak, Peter. *The evolving structure of Collective Bargaining in Europe, National Report Slovak republic*. 2006, Kerr, Anthony. *The evolving structure of Collective Bargaining in Europe, National Report Ireland*. 2006, Mesáros, Aerghei. *The evolving structure of Collective Bargaining in Europe, National Report Rumania*. 2006, Moreau, Marie-Ange. *The evolving structure of Collective Bargaining in Europe, National Report France*. 2006, Moreau, Marie-Ange and Blas-Lopez, Esther. *The evolving structure of collective bargaining in Europe, National Report Luxembourg*. 2006, Nielsen, Ruth. *The evolving structure of Collective Bargaining in Europe, National Report Denmark*. 2006, Nyström, Birgitta. *The evolving structure of Collective Bargaining in Europe, National Report Sweden*. 2006, Ojeda Avilés, Antonio. *The evolving structure of Collective Bargaining in Europe, National Report Spain*. 2006, Penko Natlacen, Metka. *The evolving structure of Collective Bargaining in Europe, National report Slovenia*. 2006, Runggaldier, Ulrich. *The evolving structure of Collective Bargaining in Europe, National Report Austria*. 2006, Sewerynski, Michal. *The evolving structure of collective bargaining in Europe, National Report Poland*. 2006, Tómes, Igor. *The evolving structure of Collective Bargaining in Europe, National Report Czech Republic*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Latvia*. 2006, Verhulst, Evert. *The evolving structure of Collective Bargaining in Europe, National Report Netherlands*. 2006, Xureb, Peter G. *The evolving structure of Collective Bargaining in Europe, National Report Malta*. 2006, Yannakourou, Matina and Soumeli, Evangelina. *The evolving structure of Collective Bargaining in Europe, National Report Greece and Cyprus*. 2006.

<sup>87</sup> See Davies, Paul and Freedland, Mark. *The evolving structure of Collective Bargaining in Europe 1990-2004, National Report United Kingdom*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Estonia*. 2006, and Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Lithuania*. 2006.

limitations on the right not to bargain collectively can be found in for example Belgium, France and Sweden.<sup>88</sup> Not surprisingly these are countries where the collective bargaining system can be considered fairly strong and it is thus a clear indication of the close link between an efficient enforcement of the right to collective bargaining and the duty to negotiate in good faith.

## **The Right to Industrial Action**

As for the freedom of association the right to industrial action is often seen as a fundamental labour right as well as a principle facilitating collective bargaining. In terms of theoretical conceptions of rights, the right to strike is closely linked to the right to freedom of association, but can be conceptualised in two different ways. Either it can be considered an instrumental right as it is a means, necessary for making the right to freedom of association and trade union activities effective; or it can be seen as an independent right, a species of the right to freedom of association based on the idea that individuals should not be penalised for doing collectively what they are entitled to do alone.<sup>89</sup> In this second way of conceptualising the right to strike it is seen as an individual right that is exercised collectively.

The instrumental conception does, on the other hand, offer a close link to a basic assumption in theories on industrial relations and collective bargaining, which is that of the imbalance of powers between labour and management and the need to create a system whereby the weaker party, i.e. labour, can be assured some protection in order to not become exploited. The instrumental conception of the right to industrial action includes both the right to strike and the right to impose lock-outs and as such it gives similar rights, in principle, to both employers and employees. This principal recognition of the same rights to both sides of industry is often referred to as the principle of equality of arms, found in most countries where the right to industrial action is based on the instrumental conception. In financial terms the trade unions probably gain more from having this right acknowledged as practical effects caused by the exercise of the right to industrial action are likely to cause financial damage to the employer. This means that the right to industrial action can be seen as a means of levelling out the balance of power between labour and management and thus improving the chances for labour to have their requests heard by the employer.

As for the freedom of association Article 137(5) ECT exempts the right to strike and impose lock-outs, i.e. industrial action, from the competences of the EU. Regardless of this exemption there is however some protection of the right to strike in the Community legislation. An example of this is Article 2, Council Regulation 2679/98, according to which the free movement of goods may not affect the exercise of fundamental rights, including the right to strike, as recognised in the Member States. This means that in spite of Article 137(5) ECT, Community legislation protecting the right to strike does exist. This regulation does, however, only recognise the existence of the right to industrial action in relation to the free movement of goods within each national system of the Member States and not in relation to the European level social dialogue. Once again we are thus faced with the question of whether or not it is possible to derive the recognition of this right within the EU legal system from other legal sources, such as the ILO Conventions or the Member States' national legislation.

Considering the ILO Conventions 87 and 98, the right to industrial action is not mentioned in any of the Articles in those Conventions. However, the Freedom of Association Committee has in its

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<sup>88</sup> See Dorssemont, Filip, et al. *The evolving structure of Collective Bargaining in Europe, National Report Belgium*. 2006, Moreau, Marie-Ange. *The evolving structure of Collective Bargaining in Europe, National Report France*. 2006, and Nyström, Birgitta. *The evolving structure of Collective Bargaining in Europe, National Report Sweden*. 2006.

<sup>89</sup> Leader, Sheldon, 1992, pp. 182-183 specifically on the right to strike and pp. 22-25 for a more general discussion on independent and derivative/instrumental conceptions of a right.

decisions developed principles concerning the right to strike,<sup>90</sup> principles that are to be respected within all the EU Member States due to their membership of the ILO and ratification of the relevant Conventions. The Committee has decided that the right to strike is a fundamental right of workers and their organisations, a legitimate and essential means of promoting and defending workers' and trade unions' economic and social interests and that a prohibition for federations and confederations to call for strike is incompatible with Convention 87.<sup>91</sup> As for the employers' right to impose lock-outs the ILO law seems to exclude this right for the employers. All reference to industrial action that can be found in the digest of the Freedom of Association Committee is made in terms of the right to strike as a means for workers and their organisations to promote and defend their economic and social interests.<sup>92</sup> The closure of an enterprise in the event of a strike is considered to be an infringement of the freedom of work of persons not participating in a strike,<sup>93</sup> but this is not clearly implying that a lock-out would be considered in the same manner. It is thus somewhat unclear what the legality of a lock-out would be according to ILO law.

Another international source worth debating when considering the right to industrial action is the ECHR, as Article 11 therein clearly provides a protection of the freedom of association. However, in relation to the right to industrial action Article 11 ECHR poses more problems than actual solutions. In fact the ECtHR has not been very clear in whether or not the right to strike is protected by the ECHR or not. In the case *Unison v. UK* the ECtHR did state that a prohibition upon a strike could be a breach of Article 11(1) ECHR, but nevertheless it concluded that the restriction of the strike at question was lawful in accordance with Article 11(2) ECHR insofar it was a proportionate measure necessary in a democratic society for the protection of others.<sup>94</sup> The ECtHR has further declined to recognise the right to strike as a fundamental right protected by the ECHR in the case *Schmidt and Dahlström v. Sweden*. In this case the ECtHR held that where the right to strike exists in national law, it may be limited without infringing Article 11 ECHR. It further concluded that the freedom of association includes a right for workers to be granted the capacity to strive, through the medium of unions, for the protection of their interests, but the right to strike is only one means to this end and not the only one.<sup>95</sup>

The ECtHR has thus declined from recognising the right to strike as a fundamental right in spite of recognising its function as an instrumental part of the freedom of association. Since the right to strike most likely is the strongest instrument available for trade unions in their task of promoting the interests of their members, this can be considered questionable. If trade unions are only left with weak and easily waived means in disputes with employers they are unlikely to be able to properly protect the interests of their members. Considering the specific character of the employment relationship, where the employer undoubtedly is the stronger party, it would be irrational to reject the weaker party of the contract the one instrument that provides a credible levy for balancing the distribution of power more evenly between both parties to the contract. In relation to the Community objectives of increasing the standard of living and working within the Community such a narrow interpretation of the freedom of association and the right to strike would hardly be advisable. With this in mind it is not surprising that the ECJ has completely left out the ECHR when discussing the right to strike in the *Laval* and *Viking* cases.<sup>96</sup>

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<sup>90</sup> The Committee has stated that "the right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87", ILO, 2006, paragraph 523.

<sup>91</sup> ILO, 1996, paragraphs 473-475 and 478 and ILO, 2006, paragraphs 520-522 and 525.

<sup>92</sup> See for example ILO, 2006, paragraphs 520-522, 524, 526-527 and 540.

<sup>93</sup> ILO, 2006 paragraph 676.

<sup>94</sup> *UNISON v. UK*,

<sup>95</sup> *Schmidt and Dahlström v. Sweden*,

<sup>96</sup> For a further discussion of these cases see further down in this section. *Case C-341/05 Laval*, ECR I-11767. and *Case C-438/05 Viking*, ECR I-10779.

The ECtHR has, however, recently made a drastic change in position concerning the right to collective bargaining in such a manner that a similar shift of position in relation to the right to industrial action would not seem too far ahead.<sup>97</sup> The ECtHR has in fact recognised that there is an organic link, between the right to freedom of association and the right to bargain collectively.<sup>98</sup> The instrumental conception of the right to collective bargaining has thus been adopted by the ECtHR and the possibility for a similar approach towards the right to industrial action has increased by this since it would not truly make sense for the ECtHR to adopt the instrumental conception of one right and then not do so for another right having many similar characteristics. The ECtHR based its reasoning in this case on the ESN and the Nice Charter in addition to the ECHR and ILO Conventions and since the ECJ has resorted to the case law of the ECtHR on issues where context and legal instruments have had a similar relation it is quite likely that the ECJ will need to consider this development in future cases. Whether such consideration is likely to change the ECJ case law developed in the *Laval* and *Viking cases* is, however, doubtful.

Considering the status of the right to industrial action within the case law of the ECtHR as the time of the ECJ judgements in the *Laval* and *Viking cases* the ESC would have posed a better option to justify the recognition of the right to industrial action as a fundamental right. This is because Article 6(4) ESC includes collective action under the right to collective bargaining. The reason for this inclusion of the right to collective action under the right to collective bargaining is simply that it is considered a means to ensure the effective exercise of the right to collective bargaining. The ESC thus provides us with an instrumental conception of the right to industrial action, but based on the right to collective bargaining rather than the freedom of association. Interestingly reference to the ESC is only made in the *Viking case*<sup>99</sup> and not the *Laval case*, but why it is mentioned in one case and not the other is not very clear.

The right to strike in the Nice Charter, Article 28 provides for “*the right ... in cases of conflicts of interests, to take collective action to defend their interests, including strike action*”. This is a clear recognition of the right to industrial action, but it is not without problems. Apart from the former difficulties discussed concerning the legal status of the Nice Charter, the explicit recognition of the right to industrial action therein is complicated when put in relation to the regulations governing this right in the Member States. The right to strike is in some Member States explicitly recognised in the constitution or in the labour code, for example Sweden, Denmark, Estonia, Rumania, Latvia and Belgium,<sup>100</sup> in some recognised implicitly, Finland,<sup>101</sup> and in some it is considered not a right but merely a freedom, for example the United Kingdom.<sup>102</sup> Further difficulties occur when the employers’ right to impose lock-out is considered as many of the Member States constitutions do not refer to lock-outs, instead this right is often implicitly excluded or referred to as a mere freedom.<sup>103</sup> In fact only

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<sup>97</sup> The change is to be found in the case *Demir and Baykara v. Turkey*, delivered almost a year after the *Laval* and *Viking cases*.

<sup>98</sup> See the previous section on the right to collective bargaining and the case *Demir and Baykara v. Turkey*, .

<sup>99</sup> *Case C-438/05 Viking*, ECR? paragraph 43.

<sup>100</sup> Nyström, Birgitta. *The evolving structure of Collective Bargaining in Europe, National Report Sweden*. 2006, Nielsen, Ruth. *The evolving structure of Collective Bargaining in Europe, National Report Denmark*. 2006, p. x, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Estonia*. 2006, Mesáros, Aerghei. *The evolving structure of Collective Bargaining in Europe, National Report Rumania*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Latvia*. 2006 and Dorssemont, Filip, et al. *The evolving structure of Collective Bargaining in Europe, National Report Belgium*. 2006.

<sup>101</sup> Bruun, Niklas. *The evolving structure of Collective Bargaining in Europe, National Report Finland*. 2006.

<sup>102</sup> See for example Veneziani, Bruno, *Right of collective bargaining and action (Article 28)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, pp. 59 and 61 and Davies, Paul and Freedland, Mark. *The evolving structure of Collective Bargaining in Europe 1990-2004, National Report United Kingdom*. 2006.

<sup>103</sup> Veneziani, Bruno, *Right of collective bargaining and action (Article 28)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, pp. 59 and 61.

Denmark, Finland, Estonia, Ireland and Sweden have regulations that clearly and explicitly include the right to impose lock-outs within the right to industrial action.<sup>104</sup>

In relation to this it is worth noting that the wording of Article 28 provides an instrumental conception of the right to industrial action, i.e. the right to collective action is derived from the right to freedom of association as an essential means for protecting and promoting the interests of those exercising their freedom of association. This instrumental conception of the right to collective action falls well in line with the conception of the right to industrial action in some Member States, e.g. Germany or the Scandinavian countries, whereas other Member States such as France have a significantly different conception of the right to collective action, i.e. as an independent right adhering to the individual, but exercised collectively. The instrumental conception of the right to collective action as shown in the Nice Charter is thus problematic in the sense as to what should be contained within this concept. This since the instrumental conception of this right would lead further to the principle of equality of arms and thus indicate that also the employers' right to impose lock-outs ought to be part of the right to collective action, an issue that can be considered highly controversial in several Member States.

Regardless of these difficulties it is, however, possible to find a strong majority of the Member States having recognised the workers' right to strike, a recognition that they have all committed themselves to through the ratification of the ILO Conventions 87 and 98. Concerning the employers' right to impose lock-outs it is difficult to draw a conclusion as to whether some traditions common to the Member States can be considered to exist even though it has a clear recognition in some national systems. In order to argue in favour for a Community recognition of the right to impose lock-outs recourse would have to be taken to the Nice Charter where the instrumental conception of the right to industrial action would lead to the conclusion that the right to impose lock-out should also be included, especially considering the vague distinction therein between workers' and employers' organisations with reference to the right to industrial action.

The discussion on whether or not the right to collective action is recognised as a fundamental right in Community law might seem irrelevant considering the outcome of the *Laval* and *Viking* cases,<sup>105</sup> in which the ECJ clearly concludes that the right to strike is a fundamental right protected by Community law.<sup>106</sup> In both cases, with reference to the ESC, the ILO Convention 87, the Community Charter of the Fundamental Rights of Workers and the Nice Charter, the ECJ concludes that "*the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right*

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<sup>104</sup> Nielsen, Ruth. *The evolving structure of Collective Bargaining in Europe, National Report Denmark*. 2006, Bruun, Niklas. *The evolving structure of Collective Bargaining in Europe, National Report Finland*. 2006, Tuch, Margarita. *The evolving structure of Collective Bargaining in Europe, National Report Estonia*. 2006, Kerr, Anthony. *The evolving structure of Collective Bargaining in Europe, National Report Ireland*. 2006 and Nyström, Birgitta. *The evolving structure of Collective Bargaining in Europe, National Report Sweden*. 2006.

<sup>105</sup> *Case C-341/05 Laval*, ECR? and *Case C-438/05 Viking*, ECR?

<sup>106</sup> The importance of these cases for Community law, especially the social dimension, is highlighted in the intense debate of these cases both before and after the judgements were delivered. For some of the more interesting contributions see Barnard, Catherine, *Employment Rights, Free Movement Under the EC Treaty and the Services Directive*, 2008, Davies, A.C.L., *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, *Industrial Law Journal*. 2008 and Malmberg, Jonas and Sigeman, Tore, *Industrial actions and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice*, *Common Market Law Review*. 2008. In addition to these contributions international work shops have been arranged providing rich discussions between legal scholars, practicing lawyers, trade unionists, employers' representatives and representatives from national governments. Two worth mentioning here are the seminar 'Industrial action and free movement – Nordic and Baltic perspectives on the judgements from the ECJ in cases C–341/05 *Laval* un Partneri and C–438/05 The International Transport Workers' Federation and The Finnish Seamen's Union' that took place at the University of Helsinki 14 January 2008; and the 'Viking and Laval Round Table' that took place at the faculty of Law at the University of Cambridge 1 February 2008 and organized by the Centre for European Legal Studies.

which form an integral part of the general principles of Community law”.<sup>107</sup> However, in spite of answering the question of whether the right to strike has the status of a fundamental right in the positive, neither of these judgements provides a full answer to the question of the contents of this right. In fact, the judgements actually raise more questions in this regard, especially when the right to industrial action is considered in relation to the European social dialogue and the possibility for the European social partners to exercise this right.

There is thus a need for further discussion of these cases, considering the contents of the right to industrial action and the implications for the European social dialogue. The reason for this being that not only the recognition of the right to strike, but, also the contents with which such a recognition fills the right to strike is of importance for the actors and how the power is distributed between them in their relations. In order for trade unions to be able to exercise the right to strike at the European level, the right must also contain the possibility for them to do so. If the right to industrial action is limited in a manner that prevents it from being exercised in any other manner than at the national level or possibly in cross-border situations, but not in coordination encompassing several member states or the entire EU, then this right will nevertheless not be readily available for the European trade union federations. The question then, will be what value a fundamental right has in the Community legal order, when the right in question is not readily available to be exercised by Community actors whose interests and a capacity to promote those interests depend upon that right?

To start off it is clear that both judgements give an answer to the question of when industrial action is not considered as complying with Community law. The *Laval case*<sup>108</sup> clearly states that industrial action cannot be considered lawful when exercised with the purpose of concluding a collective agreement that is to override an already existing collective agreement solemnly because the existing collective agreement applies terms and conditions determined in accordance with the law and practice of another Member State than the one where the collective action is exercised or intended to be exercised.<sup>109</sup> In other words, collective action cannot be exercised in a manner that contrasts with the Community principles on non-discrimination based on nationality. However, taking industrial action in order to conclude a collective agreement that is to replace another already existing collective agreement may very well be considered in accordance with Community law as long as the main reason is not in contrast with the principles of non-discrimination. It could thus be possible for trade unions to take action in order to push the employer to conclude a collective agreement that will replace another already existing collective agreement with a significantly lower level of protection than that found in the collective agreements concluded by the most representative employers' and workers' organisations at the national level.<sup>110</sup>

The *Laval case* further answers the question on what demands trade unions can make in situations concerning posted workers, strictly limiting the demands of the trade unions in the host country to issues specifically contained in the Posted Workers Directive<sup>111</sup> and thus excluding the possibility for taking collective action in order to push for demands with a wider scope.<sup>112</sup> The possibility for trade

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<sup>107</sup> *Case C-341/05 Laval*, ECR?, paragraph 91 and reference to the international and EU sources is made in paragraph 90 of the same judgement; and *Case C-438/05 Viking*, ECR?, paragraph 44 and reference to the international and EU sources is made in paragraph 43 of the same judgement.

<sup>108</sup> In spite of having implications mainly for trade unions at the national level and in cross border situations, the contents of the right to industrial action as granted in the *Laval case* is still of such importance that it is valuable to include a discussion thereof.

<sup>109</sup> *Case C-341/05 Laval*, ECR I-11767.

<sup>110</sup> This is also the solution suggested for the problematic issue of the Swedish *Lex Britannia* in Ahlberg, Kerstin, et al., *The Vaxholm case from a Swedish and European Perspective*, Transfer. 2006, p. 166.

<sup>111</sup> OJ No L 18/1997. *Directive 96/71/EC of the European Parliament and the of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services*

<sup>112</sup> *Case C-341/05 Laval*, ECR I-11767.

unions to take collective actions in cross-border situations is thus limited, both in terms of using collective action as a means to push the employer to sign a collective agreement and in terms of what demands the trade union in the host state can make on behalf of the posted workers. This means that the possibilities have been limited for trade unions, especially in high cost countries, to combat social dumping and assure the same level of protection to all workers performing work, as nationals or as temporarily posted workers, on the labour market for which the trade union in question is representative. Nevertheless, the impact of this judgement for the European social dialogue can still be considered as fairly limited in that it deals with industrial action at the national level and in cross-border situations, but no answers are provided concerning collective action at the European level.

As for the *Viking case* and the limitations it identifies for the right to industrial action, the issue could be considered more complex, as well as of greater importance for the European social dialogue since the case concerns collective action and trade union strategies with an international character and scope. First of all, the ECJ states that “*the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty ... and that the protection of workers is one of the overriding reasons of public interests recognised by the Court*”.<sup>113</sup> Something worth noting about the position taken by the ECJ in this case is Bercusson’s comment “*the question is not whether fundamental rights justify restrictions on free movement; rather free movement must be interpreted to respect fundamental rights*”<sup>114</sup> with reference to the opinion of the Advocate General in the *Omega case*. Advocate General Stix-Hackl stated that it is “*necessary to examine the extent to which fundamental rights admit of restrictions*” and further

“the fundamental freedom concerned and particularly the circumstances in which exceptions are permissible must then be construed as far possible in such a way as to preclude measures that exceed allowable impingement on the fundamental rights concerned and hence preclude those measures that are not reconcilable with fundamental rights.”<sup>115</sup>

However, also in the *Omega case* the ECJ adopted the approach 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”<sup>116</sup> thus continuing on this line in the *Viking* and *Laval* cases. One reason that makes this approach by the ECJ understandable is the fact that the EU has been built up and developed with a focus on economic interests, rights and policies and therefore the Court finds itself limited to interpreting what restrictions on the economic freedoms that might be allowed; rather than considering when such an economic freedom might justify a limitation of a fundamental (social) right. With the above mentioned comment, in spite of being published before the judgement was delivered, Bercusson succeeded in pointing out that the social deficit within the EU is very well reflected in the reasoning of the ECJ. The question thus remains whether the ECJ will, or is even capable of, compensate for this social deficit.

Nevertheless, the ECJ conclusion that the protection of workers is a legitimate interest which justifies a restriction, by means of collective action, on one of the fundamental freedoms could, at first glance, provide a fairly broad interpretation of when collective action is lawful in terms of Community law. However, the ECJ continues and adopts an interpretation of the right to collective action as also including a requirement of proportionality in analogy with the principal requirement of proportionality for restrictions on the fundamental freedoms. First of all the ECJ requires that the jobs or conditions of

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<sup>113</sup> *Case C-438/05 Viking*, ECR?, paragraph 77.

<sup>114</sup> Bercusson, Brian, *The Trade Union Movement and the European Union: Judgement Day*, European Law Journal. 2007, p. 303.

<sup>115</sup> *Case C-36/02 Omega*, AG Opinion, ECR I-09609. paragraph 53 also quoted in Bercusson, Brian, *The Trade Union Movement and the European Union: Judgement Day*, European Law Journal. 2007, pp. 303-304.

<sup>116</sup> *Case C-36/02 Omega*, ECR I-09609. paragraph 35.



employment need to be jeopardised or under serious threat in order for collective action, such as that at stake in the Viking case, to fall within the objective of protecting the workers.<sup>117</sup> This requirement can be considered as strictly limiting the cases where collective action, such as that at stake in the case, i.e. collective action having a transnational character in that it is coordinated by an international trade union federation, can be used as a means to promote the interests of the workers.

Secondly, if the requirement of jobs or conditions of employment being jeopardised or under serious threat is fulfilled, then the ECJ continues and states that such collective action will have to be “*suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.*”<sup>118</sup> Within this requirement of proportionality lies further the requirement that the organisation exercising the right to industrial action should not “*have other means at its disposal which [are] less restrictive of the freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into ... and whether that [organisation has] exhausted those means before initiating such action.*”<sup>119</sup> Undoubtedly, the proportionality requirement places a strong limitation on the right to industrial action, a limitation that might not even be considered in accordance with the protection granted this right in the Member States. As pointed out by Bercusson, the Courts in the member states have been very cautious in adopting such a principle for the right to strike, not least due to the close link between this right and the process of collective bargaining and the necessity therefore to examine the right to strike in the context of the bargaining process. Applying a test of proportionality when examining the legality of collective action would seriously prejudice the state’s impartiality in economic disputes and therefore this has been avoided in most member states.<sup>120</sup>

The principle of proportionality applied by the ECJ on the right to industrial action is, however, applicable only in situations that fall under the scope of Community law, i.e. collective action with a transnational or cross-border character. The national systems will thus not be affected. This raises the question of whether there are any good reasons for placing stricter limitations on coordinated collective action than action taken by a single national trade union. By examining the policy on FOCs adopted by the ITF the answer would be a clear no. In fact the action taken by the ITF in relation to the coordination of collective action can only be considered as modest as it consists of issuing a circular to the affiliates and leaving at the discretion of the affiliates to decide whether or not collective action is lawful and advisable.<sup>121</sup> Placing stricter limitations on such coordination as promoted by the ITF than on collective action taken by initiative of an individual and sole national trade union would thus seem disproportionate. Further more, if collective action was to be taken on initiative from a European trade union federation, should it necessarily be considered coordinated collective action, subject to the proportionality requirement, or could it not in the strive for European integration be considered as collective action initiated by one trade union, the only difference being that its scope is European and not national?

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<sup>117</sup> Case C-438/05 Viking, ECR?, paragraph 81.

<sup>118</sup> Case C-438/05 Viking, ECR?, paragraph 84.

<sup>119</sup> Case C-438/05 Viking, ECR?, paragraph 87.

<sup>120</sup> Bercusson, Brian, *The Trade Union Movement and the European Union: Judgement Day*, European Law Journal. 2007, p. 304.

<sup>121</sup> For a further discussion and analysis of the ITF policy on FOCs see for example Northrup, Herbert R. and Scrase, Peter B., *The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995*, Transportation Law Journal. 1995, Koch-Baumgarten, Sigrid, *Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping*, International Review of Social History. 1998 or Lillie, Nathan, *Global Collective Bargaining on Flag of Convenience Shipping*, British Journal of Industrial Relations. 2004. The modesty of the ITTF action in the Viking case has also been pointed out in Bercusson, Brian, *The Trade Union Movement and the European Union: Judgement Day*, European Law Journal. 2007, p. 305 and also footnote 158 on that page.

Another issue of relevance to the discussion concerning the principle of proportionality and the right to industrial action is the question of whether such a principle could justify the recognition of the employers' right to impose lock-outs? It would seem that assuring that both sides of industry have access to similar 'arms' in relation to each other and the aim of protecting their interests would also render such actions more proportionate. This solution can be found in Germany where the principle of 'equal arms' has been used to justify the recognition of the right for employers' to impose lock-outs.

## Constitutionalisation of the Fundamental Labour Rights?

The discussion concerning whether or not the fundamental labour rights are, or should be recognised, in the EU legal system, results in an affirmation of their existence. It does however not solve the question as to how these rights are best protected. Factors of importance for this discussion are the possibilities to ensure the protection, effective enforcement and practical exercise of the rights in question. The lack of explicit recognition of these rights in the EU legal system raises doubts and discussion of the legal status of these rights.<sup>122</sup> It is, however, likely to find several arguments in favour of incorporating the fundamental labour rights in the treaties of the EU.

Consider the following idea of what fundamental rights are: "*Fundamental rights constitute a concrete embodiment of the basic principles around which the political community is structured.*"<sup>123</sup> If this is put into relation with the fact that the European social dialogue is an integrated part of the policy making structures of the EU it is clear that the basic principles necessary for a well functioning social dialogue are to be considered fundamental rights. In other words the freedom of association, the right to collective bargaining and the right to industrial action are all to be considered fundamental right in the EU. This is true due to the fact that these rights are the founding pillars of any industrial relations system and such systems are part of the political structures not only in the Member States, but also on the EU level by means of the European social dialogue. In other words the fundamental labour rights are all to be considered fundamental rights within the EU legal system, in spite of two of them being explicitly excluded from the competencies of the EU.

The European social dialogue is given a role as a part of the EU policy-making system, through Articles 138-139 ECT, but the founding principles of the social dialogue are not given the explicit recognition as fundamental rights in that same policy-making system. Thus there is a deficit in the legal system as these fundamental rights are not given the appropriate recognition and the effective protection of these rights could thus be prejudiced.<sup>124</sup> Without a doubt a possible constitutionalisation of the fundamental labour rights poses problems within the EU legal order, not at least due to the fact that the freedom of association and the right to industrial action are both excluded from the EU competences in accordance with Article 137(5) ECT. This means that this article would have to be interpreted very narrowly or be deleted<sup>125</sup> altogether in order to have consistency with a constitutional protection of the fundamental labour rights. In order for the EU system not to intervene too much with

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<sup>122</sup> The fact that discussions are needed in order to answer the question whether or not the fundamental labour rights are recognised in the EU legal system clearly proves the existence of this problem.

<sup>123</sup> Menéndez, Agustín José, *The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union*, Ratio Juris. 2003, p. 382.

<sup>124</sup> In reference to the Nice Charter and some of the adjustments proposed by Working Group II on the Charter Bercusson states that "*If the competences of the EU do not cover all the fundamental rights guaranteed by the Charter, this means that the EU could not protect these rights.*" And further "*If fundamental rights are subordinated to EU competences, they are only protected to the limit of EU competences.*" And he concludes that "*EU competences are needed for the full implementation of EU Charter rights promoting an EU system of industrial relations.*" Bercusson, Brian, *The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level*, Transfer. 2003, pp. 222, 224 and 226.

<sup>125</sup> Bercusson, Brian, *Freedom of assembly and of association (Article 12)*, in Brian Bercusson *European labour law and the EU Charter of Fundamental Rights*. 2002, p. 27.

nationally established practices and principles, in the field of fundamental labour rights and systems of industrial relations, the narrow interpretation of Article 137(5) ECT would probably be most appropriate.

The recognition of the fundamental labour rights does not automatically mean that the EU would gain competence to regulate them in a way that would seriously affect the national systems. Instead these rights could be recognised within the EU legal order in a way that clearly states the recognition of these rights as referring to the European level. A possible wording of such recognition could be; “*the freedom of association and collective bargaining, including the right to industrial action, are recognised as fundamental rights exercised at the Community level*”. This way the recognition of the fundamental labour rights would still function in line with the limited competence of the EU as regulations adopted by the EU institutions would only be possible in reference to the EU level. By including the specific reference of the rights being recognised exercised at the Community level, any interventions from the EU referring to the national levels would be excluded from the framework and the implications on the national legal and industrial relations systems could thus be minimised. Furthermore, such a recognition of the right to collective action would also solve the problematic issue of whether this right is readily available to be exercised by the European social partners. In other words, the fundamental labour rights need to be recognised on the EU level in order to avoid confusion and this could be done in a manner that follows the practice there is, in line with the guidelines to be found in the communications from the Commission concerning the European social dialogue.

Fundamental rights can only be upheld if citizens are aware of their existence and conscious of the ability to enforce them and the effective safeguarding of fundamental rights as a rule presupposes judicial protection. Furthermore the restriction of the EU’s competences as regards fundamental rights contrasts with the paramount relevance of these rights.<sup>126</sup> The implicit existence of fundamental rights within a legal system, but absence of their recognition, in the constitution or legal codes of that system, obviously poses a paradox and the need for formal incorporation of these rights in the EU legal system is evident. As pointed out by Ahlberg, Bruun and Malmberg: “*the system of ‘checks and balances’ in EU law presupposes that the legislator for the future can change the law when interpretations from the courts are regarded as leading to unacceptable results. No such possibility, with the exception of a change in the EU Treaty, exists in this specific case [i.e. for the right to industrial action].*”<sup>127</sup> In other words, relying solemnly on judicial activism and ultimately the decisions of the ECJ for the protection of the right to industrial action can hardly be considered an acceptable level of protection for a right that has the status of a fundamental right. Thus, the need for constitutionalisation of the right to industrial action is evident.

Clearly there is a democratic deficit in a system where principles concerning fundamental rights are developed solemnly by the court and not through the democratic decision making procedures. In order to legitimately establish a protection of fundamental labour rights in the EU these rights need to be incorporated in the treaties.<sup>128</sup> Such incorporation is not only necessary in order to ensure the protection of fundamental labour rights but it is also of utmost importance in order to build up a

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<sup>126</sup> Report of the Expert Group on Fundamental Rights - Affirming fundamental rights in the European Union: Time to act. 1999, p. 13.

<sup>127</sup> Ahlberg, Kerstin, et al., *The Vaxholm case from a Swedish and European Perspective*, Transfer. 2006, p. 163.

<sup>128</sup> Worth mentioning in this context is the idea of the EU as a community promoting sustainable economic development and the importance that social dialogue can have in this strive. As the ILO points out “*Growing evidence and analysis ... point to the importance of an infrastructure of social and economic institutions in and around the world of work that promotes equitable growth and assist in the resolution of conflicts. At the heart of this infrastructure is the recognition that people are different from other factors of production and that freely formed associations of workers and employers are vital to the efficient and equitable functioning of labour markets.*” ILO. *Organizing for Social Justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. 2004, p. 11.

framework that promotes and facilitates collective bargaining at the European level.<sup>129</sup> Furthermore a proper protection of the fundamental labour rights is absolutely essential in order to cope with the challenges that the social dialogue is facing, not least after the recent enlargements as fundamental rights are even more urgently needed in the, so far, less developed industrial relations systems in the new Member States. If the fundamental labour rights were to be properly recognised within the EU legal order they could serve the social partners in their work on further development of the European social dialogue as the fundamental labour rights could be used for challenging obstacles to collective bargaining or problems in assuring respect for collective agreements,<sup>130</sup> thus further the development of a strong and autonomous European social dialogue. Even though it might be likely that the fundamental labour rights, as recognised in the Nice Charter, will be given legal status as part of the general principles of the EU law through the development of ECJ case law, this is not an option offering sufficient protection of these rights. Such a protection would be seriously limited and prejudiced by the slow emergence of the ECJ case law and the dependence on what claims are brought before the court.<sup>131</sup> In order to secure a proper protection of the fundamental labour rights it is therefore essential that they are incorporated in the treaties.

In the development of the European internal market and the further integration of the EU, social policies become more and more apparent as important for further integration. As citizens of the EU move between the Member States the complexity and difficulties in combining or moving between different national social security schemes have increased the awareness of social policy effects on integration. Different measures are taken in order to facilitate the free movement of persons and in this strive some social goals have become considered basic preconditions for the internal market. In this respect Advocate General Geelhoed has stated:<sup>132</sup> *“the realisation of the internal market may mean that a particular public interest ... is dealt with at the level of the European Union.”* Due to the affects that social dialogue can have on work and employment conditions and due to the need to assure good working conditions all over the EU measures have been taken in order to promote the development of systems of industrial relations all over the EU. The basic preconditions for well-functioning such systems are still, however, regulated mainly at the national levels, leading to divergences in rights accredited to labour and management. In order to secure a future development of strong industrial relations and collective bargaining systems all over the EU it is therefore essential to assure the protection of the basic preconditions for such systems, i.e. a constitutionalisation of the fundamental labour rights at EU level is necessary.

Another reason that points out the need for a Treaty based recognition of the fundamental labour rights is the problem of articulation between international conventions and national legal orders. The example of UK clearly shows that in spite of a right having recognition as a fundamental right internationally, e.g. the right to strike, it might not receive this recognition in national courts, thus nor within the national legal order. In such a case considering the fact that the UK has a dualist approach

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<sup>129</sup> Bercusson points out the importance of guaranteeing a proper protection of trade union rights in order to secure the presence of social partner organisations at all levels in the EU, see Bercusson, Brian, *Freedom of assembly and of association (Article 12)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, pp. 27-28. the ILO Freedom of Association Committee has also pointed out the necessity of respect for fundamental rights in order for a sound development of a truly autonomous and independent trade union movement, see ILO, 2006, paragraphs 33 and 36-37. A good example for illustrating the importance of law in promoting social dialogue and industrial relations is the new laws adopted in New Zealand in 2000, which have had very positive effects on the climate of industrial relations. For more detailed description of this see ILO. *Organizing for Social Justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. 2004 p. 57.

<sup>130</sup> Veneziani, Bruno, *Right of collective bargaining and action (Article 28)*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, p. 55.

<sup>131</sup> Bercusson, Brian, et al., *Legal prospects and legal effects of the EU Charter*, in Brian Bercusson European labour law and the EU Charter of Fundamental Rights. 2002, p. 17.

<sup>132</sup> *Case C-491/, American Tobacco, AG Opinion*, ECR I-11453., paragraph 106.

to international law and with the lack of international sanctions, e.g. from the ILO, the only possibility for change will be through national political changes leading to a change of the national regulations governing this right since the courts will only interpret international law in the light of how it has been implemented in the national legal order. A constitutionalisation of the fundamental labour rights within the EU legal order could in other words help in limiting this problem of articulation, however, for this to happen it will also be necessary to put an end to the UK opt-out from the Nice Charter.

## **Effects for the Social Dialogue**

After having examined the fundamental labour rights, their status and contents, it is appropriate to summarise and conclude what implications the current state of these rights, within the Community legal order, has for the European social dialogue. Within the framework of the European social dialogue these rights and other factors affecting the social dialogue, are closely linked with each other, one potentially weighing up for insufficiencies adhering to another. For example the shadow of law<sup>133</sup> has through the past proved an efficient means for pushing the employers to the negotiating table; thus placing less importance on the contents of the right to industrial action and the existence or enforceability of a duty to negotiate in good faith. On the other hand the shadow of law might not be of importance if there is a possibility to enforce the duty to negotiate in good faith, either through judicial procedure or through the use of collective action. Nor would the shadow of law be of importance if the contents of the right to industrial action as recognised for the European social partners were such as to make the right to industrial action readily available as a means for the European trade unions to push the employers to the negotiating table.

However, the situation is not as positive as hoped for. In fact the current absence of the shadow of law coupled with a weak right to strike and limited possibilities for European trade unions to exercise this right, leaves the potential for European negotiations at the discretion of the employers. In addition the lack of enforceability of the duty to negotiate, either by means of Court action or by means of industrial action, further strengthens the position of the employers, almost completely leaving the development of the European social dialogue at the hands of the employers. Depending on the interests of the employers we are thus faced with a potentially strong hinder for the development of the European social dialogue towards a regulatory mechanism. The future function of the European social dialogue will thus take other forms and the developments towards a strong system of collective bargaining are a mere idealistic and naïve dream.

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<sup>133</sup> The concept of the shadow of law is used to describe the situation when the social partners, during the procedure of consultation as prescribed for in Articles 138-139 ECT, take up negotiations in order to better control the outcomes of the EU legislative process. See for example Falkner, Gerda, *The Interprofessional Social Dialogue at European Level*, in Berndt Keller and Hans-Wolfgang Platzer *Industrial Relations and European Integration*. 2003, Keller, Berndt, *Social Dialogues at Sectoral Level*, in Berndt Keller and Hans-Wolfgang Platzer *Industrial Relations and European Integration*. 2003, Ashiagbor, Diamond, *EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy'*, *European Law Journal*. 2001, or Barnard, Catherine, *The Social Partners and the Governance Agenda*, *European Law Journal*. 2002.



# Laval in the Context of the Post-Enlargement EC Law Development

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## Abstract

Recent enlargements of the European Union (2004 and 2007) provoked one of the most startling legal discussions on the juxtaposition of social rights vis-à-vis the internal market, involving vehement debate on the difference in wages between the two parts of Europe, potential influx of workers from Central and Eastern Europe, tremendous odds in the perception of labour rights (social bargaining, right to strike etc), dangers for a Scandinavian social model, the role of solidarity and conditionality in the context of European integration, concepts of European citizenship and the threat of social dumping.

The advocates of social rights in Community Law inevitably face the cornerstone when defining the place of social and employment rights in the hierarchy of European *acquis*. The problem is aggravated since, on the one hand, the Community is restricted in the manoeuvres to exercise harmonizing power in social sphere, and on the other hand, it involves the question of collation between the internal market and social rights. The latter underwent a tremendous evolution within the Community whose initial goals were focused almost exclusively on economic integration. The acuteness of the conflict between social rights and fundamental freedoms is proved by the discussion about the recent decisions of the European Court of Justice (*Laval* and *Viking*).

Therefore, the question to be raised is what degree of *fundamentalizaion* for social rights is indicated in *Laval*?

## A. Introduction

This article does not envisage an overwhelming goal to present a detailed X-ray of the recently much-discussed ECJ decisions in the field of social law, namely *Laval*<sup>1</sup> and *Viking*<sup>2</sup>. One could find several very profound papers whose authors thoroughly explore the various issues at stake, including the trade unions strategies in the frame of the EC Law, the role of the Posted Workers Directive, a horizontal direct effect in the context of the service-providing, the negotiation of wages and the Scandinavian social model.<sup>3</sup> Therefore, the goal of this piece is to put *Laval*<sup>4</sup> into the macroflora of a wider context,

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<sup>1</sup> Case 341/05, *Laval un Partneri Ptd v. v Svenska Byggnadsarbetareförbundet et al.*, 2007 ECR I-5751. The case is often referred to as *Vaxholm* case because the industrial action was undertaken on a building site in Vaxholm, a town not far from Stockholm (see Kerstin Ahlberg, Niklas Bruun, and Jonas Malmberg, *The Vaxholm Case from a Swedish and European Perspective*, 12 TRANSFER 2/06, 155, 155-166 (2006).

<sup>2</sup> Case 438/05, *International Transport Workers' Union Federation et al. v. Vikingline ABP et al.*, 2007 ECR I-000.

<sup>3</sup> See for example, Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ*, 2 GLJ, 125, 125-161 (2008); Bruno Mestre, *The Ruling Laval un Partneri: Clarification and Innovation*, 1 ELR, 2, 2-9 (2008); Brian Bercusson, *The Trade Union Movement and the European Union: Judgement Day*, 13 ELJ, 279, 279-308 (2007); Patrick Chaumette, *Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises*, 2 OBS. SUR CJCE, DR. SOC., 210, 210-220 (2008).

<sup>4</sup> The focus of this paper is on *Laval* due to the fact that in *Viking* the ECJ offered a less articulated feedback on the status of social provisions. In *Viking*, the Luxembourg jury leaves it to the national courts to decide on the outcomes. Besides,

inherent to the effects of the post-enlargement labour conflict and its implications for the fundamentalization of social rights in the Union.

One of the most delicate issues which the eastward enlargement brought into the EU agenda has become the discussion on the modifications in the regulation of labour market in the EU-25 (or EU-27 after 1<sup>st</sup> of January, 2007). The majority of pre-accession commentators (including economists, political scientists, journalists as well as lawyers) focused on the quantitative analysis of the enlargement implications, i.e. on the potential influx of workers from Central and Eastern Europe (referred to below as – EU-10, or CEEC). This approach echoes a particular concern of certain old member states (referred to below as – EU-15) about the protection of national labour markets vis-à-vis the newcomers.

Michael Dougan named three ‘potentially adverse consequences’ for the existing member states in his remarkable ‘pre-accession’ article<sup>5</sup>: “That the enlargement might lead to large-scale benefit migration towards western countries which have established generous welfare systems; that a massive influx of workers from the CEEC would seriously disrupt labor markets in the EU-15; that difference between wages and other compliances costs might lead to social dumping in favor of undertakings from the CEEC”.<sup>6</sup>

Since, on the one hand, initially only three countries from the EU-15 opened their labor markets to the newcomers, and on the other hand, the post-accession reality in those three countries demonstrates that first two fears did not check out<sup>7</sup>, the increasing concern is being raised towards the problem of social dumping<sup>8</sup>. The latter is proved by the discussion around the long-awaited pronouncements of the ECJ in *Laval* and *Viking*, and has acquired a deep resonance both in media<sup>9</sup> and legal literature<sup>10</sup>. The decision in *Laval* is acute precisely due to the popular expectation (realistic or not) that it sheds light on whether social standards could serve as appropriate derogations under internal market, analogous to the derogations developed by the ECJ to safeguard fundamental rights.

(Contd.) \_\_\_\_\_

the issue of the flag of convenience would need a separate thorough analysis in the context of Private International Law, especially with the implications for the taxation system.

<sup>5</sup> Michael Dougan, *A Spectre is Haunting Europe...Free movement of Persons and the Eastern Enlargement*, in EU ENLARGEMENT: A LEGAL APPROACH, 111-142 (Christophe Hillion, ed., 2004)

<sup>6</sup> *Id.*, 112.

<sup>7</sup> Nicola Doyle, Gerard Hughes and Eskie Wadensjo, *Freedom of Movement for Workers from Central and Eastern Europe: Experiences in Ireland and Sweden*, 5 SWEDISH INSTITUTE FOR EUROPEAN POLICY STUDIES (2006).

<sup>8</sup> The notion of ‘social dumping’ will be analyzed with regard to the EC Social Law. It is a theoretical construction which is described neither in EC/EU Treaties, nor sufficiently defined in the case-law. In the enlargement context the term ‘dumping’ is often referred to describe the influx of cheap goods on the EU-15 market. See PAUL BRENTON, *ANTI-DUMPING, DIVERSION AND THE NEXT ENLARGEMENT OF THE EU* (1999). In *Laval* both the Advocate General in his opinion and the Court in its decision address the notion of *social dumping* on several occasions without setting a general definition (For further discussion, see especially para. 103, 113 in the decision; see also numerous references to the “combat of social dumping” in the Opinion of AG Mengozzi: para. 246, 249, 251, 273, 280, 307, 309). The anti-dumping measure is interpreted strictly in the context of the Swedish Law on Workers’ Participation in Decisions (*Medbestämmändelagen*). Further the paper will attempt to find, at least, an adequate description of social dumping in the post-enlargement context.

<sup>9</sup> Michael Herman and Agencies, *ECJ hears landmark labor case*, TIMES ON-LINE (9 January 2007). Available at: <http://business.timesonline.co.uk/tol/business/law/corporate/article1291012.ece> (last accessed on 18 November 2008); Nikki Tait, *A Viking sea battle to rock the EU boat*, THE FINANCIAL TIMES (1 January 2007). Available at: [http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto010120071237549438](http://us.ft.com/ftgateway/superpage.ft?news_id=fto010120071237549438) (last accessed on 18 November 2008).

<sup>10</sup> See further, Gorce Gaëtan, *L’Union européenne face aux risques de dumping social*, 7 ASSEMBLE NATIONALE, 2000; Ronnie Eklund, *The Laval Case. Swedish Labour Court Decision 2005 No. 49*, 35 ILJ 203 (2006).



## **Brief Facts**

A Latvian construction company Laval accused a Swedish trade union of forcing it out of business after the industrial action aimed at enforcing the Latvian company to conclude a collective agreement. This turned to be a real blockage by the Swedish Building Workers' Union supported by the Electricians' Union through a secondary action. Sweden did transpose the Posted Workers Directive however it did not set a national minimum wage, relying instead on collective pay agreements arranged by the country's powerful trade unions. By paying the Latvian workers almost two times less the average wage for similar construction jobs done by the Swedish workers (average-salary-calculation-scheme), the Latvian company was arguably capable of undermining Swedish social standards.

One should bear in mind that for the purposes of this paper, 'economic freedoms' shall not be read in conjunction with 'social freedoms' in a way to establish a legal fiction of 'economic and social rights' traditionally referred to in juridical literature with an accent on the rights of workers.<sup>11</sup> Hereby 'economic freedoms',<sup>12</sup> are used to describe the provisions of the EC internal market covering free movement of workers (Article 39 EC), freedom of establishment (Article 43 EC) and freedom to provide services (Article 49 EC). The terms 'human rights' and 'fundamental rights' are used synonymously.<sup>13</sup>

The first part of this article will address the evolution of the relevant internal market provisions and social law with a separate accent on the effect of previous enlargements. The second part will put *Laval* into the realm of fundamental rights in the Union. The attention will be focused on the pre-enlargement debate and labour safeguards negotiated before the enlargement. The conclusions will try to identify the degree to which *Laval* is an indicator of the fundamentalization of social rights.

## **B. *Laval* in the Context of the Internal Market**

### **I. *Evolution of the Internal Market through a Social Dimension***

Three pivotal EC Treaty provisions concerned, namely Article 39 EC (free movement of workers), Article 43 EC (freedom of establishment) and Article 49 EC (freedom to provide services), are to be discussed in conjunction with each other and within a larger-scale debate on the free movement of persons.<sup>14</sup> Nonetheless, one should bear in mind that the case-law approach towards those particular

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<sup>11</sup> For an example, see TAMARA K. HERVEY AND JEFF KENNER, *ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS: A LEGAL PERSPECTIVE* (2003); MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT*, (1995).

<sup>12</sup> When these rights referred to in the literature as 'fundamental rights' (*les droits fondamentaux*), it is usually done with the aim to distinguish them from the 'fundamental freedoms' (*les libertés fondamentales*). Within this approach the former are meant to be synonymic with human rights. And the latter are those which come under the scope of internal market. See in particular, Alberto Alemanno, *A la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: Quelques réflexions à propos des arrêts « Schmidberger » et « Omega »*, 4 *Revue du droit de l'Union européenne* [RDUE] 709 (2004).

<sup>13</sup> This synonymous approach has become traditional for EC law doctrine; in particular, see Armin Von Bogdany, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 *CML REV.* 1307, 1307-1338 (2000). It should be noted that sometimes the terminology of 'fundamental rights' is used to embrace even a wider scope of rights and freedoms, including civil, cultural, economic, social and political rights (For an example, see John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 12 *ELJ* 15, 15-40 (2006) which is inadmissible in the light of the present paper, since it distinguishes 'fundamental' (human) and 'social' rights in order to answer the question whether the latter has acquired (or might acquire) a similar 'derogation' status which human rights do enjoy now in EC law.

<sup>14</sup> For a more comprehensive analysis see CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (2006); ROBIN C.A. WHITE, *WORKERS, ESTABLISHMENT AND SERVICES IN THE EUROPEAN UNION* (2004).

freedoms is not identical and a profound detachment is required when discussing the scope of Treaty clauses. E.g., Article 39 EC embraces exclusively natural persons whereas Article 43 EC is also applicable to companies.<sup>15</sup> Despite all differences, these provisions are interpreted in a very similar way since the development of EC Law on the case-by-case basis has led to the approximation of conditions of entry, residence and expulsion for all EU nationals.<sup>16</sup> This stance also had implications on the family rights of workers and the standardisation of access to social benefits.<sup>17</sup> Thus, a trendy approach in legal literature is to describe these rights within a wider notion of the right to pursue an occupation in another Member State.<sup>18</sup>

## 1. Genesis and evolution

The genetic core of the pursuit of occupation is embraced by the legal matrix of free movement of persons. Similarly to the domain of free movement of goods, it was the ECJ who has been incubating this specific legal ground for European mobility. Fifty years of European judicial-making involved the controversy on refusal of entry and deportation, theoretical delimitation of direct and indirect discrimination as well as a rigid application of the principle of proportionality.<sup>19</sup> The latter permitted the Court to prevent an abusive interpretation of derogations under public policy by particular member states. Fundamental human rights served as an argument in safeguarding broad scope of the right to move freely within the European Community.<sup>20</sup> This genetic ('free movement of persons') approach finds its extension in a very wide judicial definition of a worker as well as of the rights conferred on workers by EC Law (the rights to depart the home state, the right to enter the host state and the right of residence in the host state). Furthermore, with regard to workers the Court continued to define employment and family rights within the concept of equal treatment though significantly narrowing their scope in comparison with the rights of European citizens to move for the purposes of tourism, study or exercise of medical services.<sup>21</sup>

Another legal paradox in the genesis of the European labour market is that freedom of movement was initially introduced in the Treaty for the specific categories of economically active people. One could hardly expect that ECJ would extend this doctrine so far as to stretch the pre-existing notions<sup>22</sup> towards such categories as students<sup>23</sup> and other non-economic actors<sup>24</sup>. On the other hand, the notion

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<sup>15</sup> For a more detailed distinguishing analysis between workers and services providers in the context of free movement see Marc De Vos, *Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: a Bermuda Triangle for National Labour Standards?* ERA-Forum, N 3/2006, 357, 357-359 (2006).

<sup>16</sup> EUROPEAN UNION LAW: TEXTS AND MATERIALS, 705 (DAMIAN CHALMERS ED. 2006)

<sup>17</sup> Consider Case 85/96, *Martinez Sala*, 1998 ECR I-2691; Case 314/99, *Baumbast*, 2002 ECR I-07091; Case 60/00, *Carpenter*, 2002 ECR I-6279; Case 148/02, *Garcia Avello*, 2003 ECR I-11613; Case 200/02, *Chen*, 2004 ECR I-09925.

<sup>18</sup> Chalmers, *supra* note 16, 697.

<sup>19</sup> Florence Hartmann-Vareilles and María Pilar Nunez Ruiz, « *Le travailleur communautaire: quelques réflexions sur un élément inachevé du marché intérieur* », ERA, 3/2006 326, 326-344 (2006).

<sup>20</sup> Consider Case 168/91, *Konstantinidis*, 1993 ECR I-1191; Joint Cases 493/01 and C-482/01, *Orfanopoulos*, 2004 ECR I-05257; Case 109/01, *Arkich*, 2003 ECR I-09607.

<sup>21</sup> See Pedro Cabral, *La libre circulation des soins médicaux dans l'Union européenne*, Sean Van Raepenbusch, *Libre circulation et sécurité sociale*, and Pablo Dengler, *Libre circulation des personnes et imposition directe*, in LA LIBRE CIRCULATION DES PERSONNES : ÉTATS DES LIEUX ET PERSPECTIVES, CAHIERS DU COLLEGE D'EUROPE N° 5, ACTES D'UN COLLOQUE ORGANISÉ EN 2003 À LIEGE (2007), 203-268.

<sup>22</sup> Francesca Strumia, *Citizenship and free movement: European and American features of a Judicial Formula for Increased Comity*, (2006) CJEL, Vol. 12, 3/2006. 714-715.

<sup>23</sup> Case 209/03, *Bidar*, 2005 ECR I-02119 (para. 83).

<sup>24</sup> Case 200/02, *Chen*, 2004 ECR I-09925.

of economic activity<sup>25</sup> received a very broad interpretation in case practice.<sup>26</sup> Even sport was acknowledged as a subject of community law since sportsmen could exercise economic activities.<sup>27</sup> The Court rejected attempts by the Member States to extend *Keck* formula<sup>28</sup> beyond the limited scope pertinent to the free movement of goods. It is no accident that the free movement of persons has now become a major motor of integration.

Thus, the choice of the Court in *Laval* was either to keep in line with the logic of the maximum safeguard of the economic freedoms or to frame “social rights” into the list of the essential derogations for the internal market. It seems like the ECJ has decided to stay perfectly in line with its systematic refusal to interpret derogations widely.<sup>29</sup> Further we shall see whether this stance could have been informed by the deliberation at the particular post-enlargement context.

## 2. The potential in the light of the EU citizenship

The very project of European citizenship is rather young though the discussion traces back to the early 1970s.<sup>30</sup> The notion of EU citizenship was introduced to *acquis* only in 1992 by the Maastricht Treaty and provoked a hearty debate in the milieu of European lawyers on the differences in the perception of this ambiguous term. The debate went on to analyze whether EU citizenship is supplementary to national one. This debate has asked whether the introduction of ‘citizenship’ towards the basic instruments of the EU as a supranational organization leads to the creation of European *demos* and what effects it may have for national *folks*.<sup>31</sup> The debate has also looked at whether that legal model should be perceived as a market citizenship (focusing on the rights of economic actors), social citizenship (emphasizing the social-welfare elements of citizenship), or a republican citizenship (based on an active citizen participation).<sup>32</sup>

Finding an answer to these open questions is an on-going task for the ECJ. Thus, in a series of student cases<sup>33</sup> the Court introduces the idea that EU citizenship is “destined to be the fundamental status”.<sup>34</sup> In fact, the Court gives the projection into the future without regard for the reality of the moment. This is a remarkable statement since the Court did not word it like “supplemental to fundamental”. The way

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<sup>25</sup> Interestingly enough, in his *Opinion* in *Case C-96/04, Standesamt Stadt Niebull (name of Leonhard-Matthias)* AG F. Jacobs goes even further to admit that one should not look for economic actor any longer.

<sup>26</sup> The Court even found the link between economic activities and the language (*Case 281/98, Angonese*, [2000] ECR I-4139; *Case 378/87, Groener*, 1989 ECR I-3967 etc) or between economic activities and the name (*Konstantinidis*, *supra* note 21, *Garcia Avello*, *supra* note 18, 2003 ECR). Moreover, the prostitution was acknowledged being an economic activity (*Joined Cases 115 and 116/81, Adoui & Cornuaille*, 1982 ECR I-1665).

<sup>27</sup> *Case 415/93, Bosman*, 1995 ECR I-4921.

<sup>28</sup> *Cases 267/91 and 268/91, Keck & Mithouard*, 1993 ECR I-06097.

<sup>29</sup> Para. 98: “[...] The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised in the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law”.

<sup>30</sup> This notion was first introduced in the German legal doctrine in the 1960s. For an analysis of the evolution of the term see Dominik Hanf, *Le développement de la citoyenneté de l’Union européenne*, in *LA LIBRE CIRCULATION DES PERSONNES : ETATS DES LIEUX ET PERSPECTIVES*, CAHIERS DU COLLEGE D’EUROPE N° 5, ACTES D’UN COLLOQUE ORGANISE EN 2003 A LIEGE, (2007), 16-17.

<sup>31</sup> Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, ELJ 219 (1995).

<sup>32</sup> BARNARD, *supra* note 14, 402-403.

<sup>33</sup> *Case 293/83, Gravier*, 1985 ECR I-00593; *Case 184/99, Grzelczyk*, 2001 ECR I-07091; *Case 209/03, Bidar*, 2005 ECR I-02119. Michael Dougan, *The Constitutional Dimension to the Case Law on Union citizenship* 31 E.L. REV. 613 (2006).

<sup>34</sup> *Grzelczyk*, *supra* note 34, 2001 at para. 31. See also an unusual (in terms of legal rhetoric) recent *Opinion* of AG Colomer in *Joint Cases 11/06 and 12/06, Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, 2007 (para. 37-68), where he refers to historical aspects of this particular destiny of European citizenship.

the Court phrases this idea reveals certain evolutionary and even constitutional implications, setting a road map (*indication de voies*) for the future of European integration. In this respect, the essential conflict in *Laval* (which brings the jury into the new reality of the EU-27) fitted the case-line with a quasi-constitutional potential.

What is even more interesting in the context of transition upon recent enlargements is whether ‘social citizenship’ is an appropriate construction to describe a legal phenomenon of a supranational EU citizenship. If so, does this approach have consequences for the internal market of the EU-27? Moreover, whether this ‘EU citizenship’ approach has implications for the freedom of establishment and services, i.e. whether it embraces a new perception of legal entities in EC Law is another question to consider. There is a danger that companies could perceive this legal incentive in a way to simplify their conduct of business through evading local company law and tax law requirements. The latter would provoke an overflow of capital to Member States with a less onerous regime.<sup>35</sup> The judgement in *Kaba*<sup>36</sup> with regard to individuals demonstrates limitations of Community law on citizen’s right to free movement and residence though no clear criteria are established so far to limit the influx of non-economic actors to generous welfare states.<sup>37</sup> Finally, the solidarity is another notion, which is to be interpreted in conjunction with citizenship.<sup>38</sup>

When analyzing *Laval*, one should bear in mind that the decision is taken in the specific post-enlargement context, where the Court is expected to rule not just on the legitimacy of the way some country is transposing the EU legislation (the question of the “minimum wages” avoidance in Sweden, stemming from the Posted Workers Directive), but to shed light onto the status of the internal market for the ever biggest EU citizenship. Interestingly enough, the vocabulary of the Luxembourg judges carefully avoids any references to the enlargement context in this case. The sanctuary of the internal market cannot afford those enlargement connotations. The Court avoids the risk of bringing the political debate on the necessity of the affirmative support for the newcomers into the text of its decision. The leitmotif of the pure case-law-sufficient-derogations-test (which the Swedish legislature failed to pass) declines the incentives to discuss the fragmentation of the European citizenship due to the danger of social dumping. Such delicate wording is particularly important taking into account the safeguard restrictions on the working markets negotiated before the enlargement.

## **II. Social Dumping as a Phenomenon of Previous Enlargements**

### **1. Scope of the problem**

There exist a number of factors that might encourage a process of social dumping within the enlarged EU<sup>39</sup>: labour mobility; labour costs; employer’s cost burden and then different welfare standards in terms of a minimum wage and a rest period; minimum workplace safety; health standards; and non-discrimination measures. The question then to be posed is whether the exercise of labour competition is fraught with a temptation for the enterprises and individual workers to seek better employment opportunities abroad<sup>40</sup> and thus, is able to provoke a social dumping through the indirect lowering of wages and labour standards in the countries with traditionally more generous wages. Thus, the notion

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<sup>35</sup> Barnard, *supra* note 14, 402-403.

<sup>36</sup> Case 356/98, *Kaba I*, 2000 ECR I-2623 and Case 466/00, *Kaba II*, 2003 ECR I-2219.

<sup>37</sup> Dougan, *supra* note 6, 114.

<sup>38</sup> The question of ‘European solidarity’ has been profoundly treated in a series of European Law Review: Editorial, *The unbearable heaviness of European citizenship*, 31 E.L. REV. (2006). Also, Oxana Golyner *Jobseekers’ rights in the EU: challenges of changing the paradigm of social solidarity*, 30 E.L.REV., 111, 111-123 (2005).

<sup>39</sup> Further enumeration is based on the article of Prof. Dougan, *supra* note 5.

<sup>40</sup> *Id.*, 7.

of social dumping with regard to workers and services could be arguably compared to ‘welfare tourism’ in the context of free movement of persons. Three factors which need to be taken into consideration when speaking about the risks of social dumping are as follows: the price of work, regulation of work and the role of social partners.<sup>41</sup> Interestingly enough, there is evidence that during the last twenty years certain states, in agreement with social partners, deliberately practiced policy of salary moderation in order to acquire a competitive advantage (e.g., the Netherlands, Finland and Ireland). This approach permitted them to accumulate extra benefits and significantly reduce their unemployment rate.<sup>42</sup>

## 2. Case law upon the enlargement(s)

In the seminal<sup>43</sup> case of *Rush Portuguesa*<sup>44</sup> the ECJ faced the dilemma for the first time upon the accession of Portugal and Spain to the EC. The accession instrument foresaw a transitional phase for the free movement of workers though did not preview any derogation for the movement of services. A Portuguese construction company tried to benefit from this situation and offered its services simultaneously bringing cheap Portuguese labour force into the French construction market.

The decision of the Court is quite ambiguous. On the one hand, the ECJ took a rather defensive position with regard to safeguarding internal market upon the enlargement and ruled that the Portuguese company had to perform services in the host country under the same conditions as imposed by that state on its own nationals. On the other hand, in Paragraph 18 of the judgement ECJ made a revolutionary statement that Community Law does not preclude Member States from extending their labour legislation and collective labour agreements to “any person who is employed, even temporarily, within their territory”.<sup>45</sup> Thus, the effect of the Court dictum is astonishing since it permitted to impose national labour regulations on foreign service providers even though their temporarily post workers could not be regarded as host country’s workers.<sup>46</sup> This approach found its enforcement in the so-called Posted Workers Directive<sup>47</sup> which turned this mechanism to extend national regulation from a mere possibility into an essential requirement. The Posted Workers Directive gives a certain discretion to host states vis-à-vis posted workers in establishing minimum wages, working time and equal treatment.<sup>48</sup> Further in *Laval* the Court will face the problem of the imposition of the Posted Workers Directive into the Swedish legislation where the regulation of the “minimum wages” is traditionally avoided. It is the matter of labour bargaining with the trade unions.<sup>49</sup>

In a series of ‘German’ cases it appeared that the Court took a protective stance with regard to the workers from Southern and Eastern Europe enjoying benefits from a particular regulation of the labour

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<sup>41</sup> *Id.*, 17.

<sup>42</sup> *Id.*

<sup>43</sup> De Vos, *supra* note 15, 361.

<sup>44</sup> Case 113/89, *Rush Portuguesa v. Office national d’immigration*, 1990 ECR I-1417.

<sup>45</sup> *Id.*, para. 18.

<sup>46</sup> De Vos, *supra* note 15, 362. See also Markus Kahmann, *The posting of workers in the German construction industry: responses and problems of trade union action* and Bruno Lefebvre, *Posted workers in France*, 12 TRANSFER 183-196, 197-212 (2006).

<sup>47</sup> EC Directive 1996/71 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, O.J. L18/1.

<sup>48</sup> CATHERINE BARNARD, *EC EMPLOYMENT LAW*, Third Edition, 278 (2007). See also Olaf Deinert, *Posting of Workers to Germany: Previous Evolutions and New Influences Throughout EU Legislation Proposals*, 16 INT. J. COMP. L.L.I.R. 217-234 (2000)

<sup>49</sup> For a comprehensive analysis see Reich, *supra* note 3.

conditions for temporary staff being adjudicated to the rules and conditions of the home country.<sup>50</sup> In the recent edition of her book, Catherine Barnard identifies the four-stage test applied by the Court in the subsequent case law.<sup>51</sup> The Court analyzes (1) whether there is a restriction on the freedom to provide services, (2) whether a justification could be applied (worker protection, interests of the posted workers), (3) whether the same interest is already protected in the home country, and finally (4) whether the measure could be regarded as proportionate.<sup>52</sup> Thus, in *Mazzoleni*<sup>53</sup> the Court finds that Belgian authorities imposed on posted workers a minimum wages measure which is evidently disproportionate since the application of Belgian law to service providers in the frontier region could result in an extra administrative burden to individual service provider, including a complicated system of an hour-by-hour wage calculation upon each crossing of the border and threat to good working relations within a particular undertaking.<sup>54</sup> The same four-stage test is applied in *Laval*, where the court finds a complicated system of wage negotiation with trade unions in Sweden to be disproportionate as it actually contradicts the logic of minimum wages, inherited to the Posted Workers Directive.<sup>55</sup>

In *Finalarte*<sup>56</sup> the Court held that the construction companies based in the UK and Portugal who posted workers to Germany should adhere to the ‘holiday standards’ of Germany even if the number of holidays exceeds the four weeks’ paid leave fixed in the Working Time Directive 2003/88.<sup>57</sup> Although this measure is in breach of the internal market, it is still proportionate. In *Portugaia Construções*<sup>58</sup> the Court ruled that the measure to reduce the allegedly unfair competitive wages was, in itself, incapable of constituting a “valid imperative requirement due to its protectionist economic nature”.<sup>59</sup> In *Commission v. Luxembourg*<sup>60</sup> the Court found proportionate the measure which required a service provider to report in advance on the presence of posted worker(-s), the anticipated duration of this presence and justification of the deployment. However, in this line of cases the Court took a very negative view on the requirement of establishing minimum employment time<sup>61</sup>, granting individual work permits only if labour situation was favourable enough<sup>62</sup>, securing bank guarantee to cover costs in case a worker comes back home and licensing posted work<sup>63</sup>.

In *Laval* the Court accepts that “social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the

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<sup>50</sup> Case 43/93, *Vander Elst v. Office des Migrations Internationales*, 1994 ECR I-3803. See also Case 244/04, *Commission v. Germany*, 2006 ECR I-000. The reference should be made to the rules of *Rome Convention on rules concerning the law applicable to contractual obligations* OJ 1980 L266/1.

<sup>51</sup> BARNARD, *supra* note 48, 278-280.

<sup>52</sup> *Id.*, 278.

<sup>53</sup> Case 165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL*, 2001 ECR I-2189.

<sup>54</sup> BARNARD, *supra* note 48, 279. See also Jean-Philippe Lhernould, *Le principe de non-discrimination à l'égard des frontaliers en matière de sécurité sociale*, ERA, 3/2006 381 (2006). The author provides an analysis of the specific rules of coordination in the fields of social security applicable to frontier workers.

<sup>55</sup> In fact, in para. 103 of *Laval* the Court directly refers to *Mazzoleni*, so the “internal market reasoning” of the ECJ seems to be quite consistent.

<sup>56</sup> Case 68-71/98, *Finalarte*, 2001 ECR I-7831.

<sup>57</sup> EC Directive 93/104 of the Council, of 23 November 1993, concerning certain aspects of the organisation of working time, OJ L 307.

<sup>58</sup> Case 164/99, *Portugaia Construções*, 2002 ECR I-787.

<sup>59</sup> Dougan, *supra* note 5, 137.

<sup>60</sup> Case 445/03, *Commission v. Luxembourg*, 2004 ECR I-10191.

<sup>61</sup> *Commission v. Luxembourg*, 2004 *supra* note 60, and, *Commission v. Germany*, 2006 *supra* note 50.

<sup>62</sup> *Commission v. Luxembourg*, 2004 *supra* note 60, and, *Vander Elst*, 1994 *supra* note 50.

<sup>63</sup> *Id.*, para. 30 and 47.

fundamental freedoms guaranteed by the Treaty”<sup>64</sup> and further refers to the case-law upon previous enlargements to support its view.<sup>65</sup> Hence, although it does not frame social derogations into the “fundamental rights exception”, the Court nevertheless leaves an essential potential for the fundamentalization of social rights in the future, similar to the one in the seminal case of *Rush Portuguesa*.

### **III. Legal Implications of the Pre-Accession Period**

#### **1. Economic concerns and diverging practice of legal approximation**

In particular, it was argued that the enlargement is capable of diverting foreign direct investment from the EU-15 into the acceding states.<sup>66</sup> Naturally enough, the popular expectation was a so-called ‘displacement effect’ for national workers based on a mistaken belief that the number of jobs in the economy is fixed.<sup>67</sup> Another widespread fear is that a massive influx of workers from the EU-10 will lead to a dumping effect for wages (that rhetoric was especially efficient in the volatile days of Le Pen, Pym Fortuyn and Jörg Haider).<sup>68</sup>

‘Wage effect’ expectations were perhaps the most sound since wages in the CEEC (EU-8, i.e. with an exception of Malta and Cyprus) amounted only to 9% of the EU-15 average and the situation seemed to be especially vulnerable for particular industries (textiles and footwear), as well as for particular countries neighbouring with EU-10 (Germany, Austria).<sup>69</sup>

The economists used regional income differentials as the key variable in determining the probable scale of international labour migration.<sup>70</sup> This approach showed that income differentials between EU-15 and EU-10 (and especially between EU-15 and EU-8) were, by no means, higher than those between Portugal and Greece, on the one hand, and the then member states, on the other hand.<sup>71</sup> Nonetheless, the experience of previous enlargements was rather a positive example since it demonstrated that the enlargement itself did not provoke significant disruptions for labour market and social standards of old member states.

Another debate which needs a brief overview with regard to its legal implications is the distinction between the aggregate and the regional impact of enlargement, since it was evident that neighbouring

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<sup>64</sup> Para. 103.

<sup>65</sup> In particular, Case 376/96, *Arblade and Others*, 1999 ECR I -8453, *Mazzoleni & ISA*, 2001 *supra* note 53, *Finalarte & Others*, 2001 *supra* note 56.

<sup>66</sup> Dougan, *supra* note 5, 133.

<sup>67</sup> Doyle, *supra* note 7, 10.

<sup>68</sup> Dougan, *supra* note 5, 121.

<sup>69</sup> HEATHER GRABBE, PROFITING FROM EU ENLARGEMENT, 43 (2001).

<sup>70</sup> Another trend is to concert wage levels at PPP (purchasing power parity). This approach shows that for some countries (especially Baltic States) the absolute gap in per capita incomes to the EU-15 is still capable of provoking large labour migration potential. For other countries (Slovenia and Czech Republic) PPP was quite comparative to the countries of previous enlargement. For a thorough economic analysis see Frigyes Ferdinand Heinz and Melanie Ward-Warmedinger, *Cross-Border Labour Mobility Within An Enlarged EU*, 52 OCCASIONAL PAPER SERIES, 16-17 (2006). For a more politics-oriented study see Marat Kengerlinsky, *Restrictions in EU Immigration Policies Towards New Member States* 2 Journal of European Affairs (2004). For detailed analysis of legal implications dating back to the economic fears see Orsolya Farkas and Olga Rymkevitch, *Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices* 20(3) INT.J.COMP.L.L.I.R. 369 (2004); Adelina Adinolfi *Free Movement and Access to Work of Citizens of the New Member State: The Transitional Measures* 41 CML REV. 469 (2005).

<sup>71</sup> Doyle, *supra* note 7, 121-122.

countries are far more likely to be flooded with migration.<sup>72</sup> Economic and statistical analysis revealed, in particular, that migrants often tend to choose a neighbouring country (being influenced by linguistic, cultural and transport fees considerations). On the other hand, old member states with English as the official language are more popular among migrants with high levels of education.<sup>73</sup> One more contradiction to the widespread beliefs is that European migrants, in fact, tend to be young, well-educated and single.<sup>74</sup> Moreover, linguistic, cultural and social barriers, as well as high transaction costs of migration itself are usually capable of preventing the flood of migration.<sup>75</sup> Economic analysis also concentrated on the so-called ‘welfare magnets’, i.e. on researching the hypothesis that migrants tend to pick up the countries with more sound welfare traditions.<sup>76</sup> Perhaps, it was rather sensitive for such countries as Sweden or Ireland in their motivation to open labour market, but finally the research identified that ‘welfare tourism’ could hardly be a serious pull factor. In general, the social aspect was of particular importance due to another hypothesis, namely that organised crime and unscrupulous employees would be able to use social security system in order to keep wages costs down. The studies also demonstrated that an increased supply of labour may also induce new investments.<sup>77</sup> The latter is capable of counteracting wage decline, thus proving that ‘benefit tourism’ could only have limited consequences. In general, one could observe a spill-over effect<sup>78</sup> in countries’ motivation to open the markets with regard to social policy (especially in case of Ireland) since often the enlargement debate was much more concentrated on protecting the welfare system than on labour market issues.<sup>79</sup>

Economic analysis revealed that a small number of workers tend to migrate to old member states which shall not cause a long-term disruption of labour markets.<sup>80</sup> One of the most interesting economic arguments put forward not to postpone the enlargement was that business is already exposed to global competition and EU business can maintain profitability by using acceding Europe as a ‘low-cost production site’.<sup>81</sup>

Thus, one could conclude that the pre-enlargement fears provoked a specific socio-economic debate which has proven that enlargement in itself is not capable to disrupt Western European labour markets as such but, on the other hand, it could have much more serious consequences for the neighbouring countries. This motivation line led to the legal consequences of imposing restriction period in the majority of EU states with particularly strong derogations for Austria and Germany. On the other hand, EU-15 also accepted certain concessions permitting the acceding states to introduce seven-year restrictions for the foreigners to acquire land in those countries.<sup>82</sup>

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<sup>72</sup> Dougan, *supra* note 5, 122.

<sup>73</sup> Doyle, *supra* note 7, 10.

<sup>74</sup> *Id.*, 20-21.

<sup>75</sup> Dougan, *supra* note 5, 121-122.

<sup>76</sup> Doyle, *supra* note 7, 10.

<sup>77</sup> *Id.*, 19.

<sup>78</sup> In other literature described as ‘domino effect’, see in particular, Samantha Curie, “Free” movers? *The post-accession experience of accession – 8 migrant workers in the United Kingdom*, 31 E.L. REV. 211 (2006).

<sup>79</sup> Doyle, *supra* note 7, 23.

<sup>80</sup> Grabbe, *supra* note 69, 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, 14.



## 2. Transitional arrangements and other safeguard measures: implications for the Accession Treaty

The economic considerations demonstrated in the previous sub-chapter were echoed in the *Act of Accession 2003* (Athens) by way of transitional arrangements.<sup>83</sup> Interestingly enough, those arrangements dealt only with 8 acceding states (Poland, Hungary, the Czech Republic, the Slovak Republic, Slovenia, Estonia, Latvia and Lithuania) since Malta and Cyprus did not pose an evident problem for the labour market of EU-15. Old Member States were permitted to derogate from Articles 1-6 of Regulation 1612/68<sup>84</sup>, thus restricting in time the access to their labour market. This derogation was shaped in the so-called '2+3+2' formula, i.e. old member states were permitted to restrict the principles of internal market with regard to labour vis-à-vis EU-8 following three-stage pattern: (1) from May 1, 2004 until April 30, 2006; (2) from May 1, 2006 until April 30, 2009 and, finally, (3) from May 1, 2009 until April 30, 2011. The third derogation is the most serious one since in order to justify itself it requires evidence of 'serious disturbances' or a 'threat of serious disturbances' for labour market (the so-called 'standstill clause').

Moreover, those states within EU-15 who already opened their markets could still invoke another provision (the so-called 'safeguard clause') which permits them to impose restrictions up until the ultimate terms if there is an evident threat of serious disturbances in their labour markets. This provision is especially interesting in the light of *Laval* since the proof could be based on the threat for the standard of living or the level of employment in a given region or occupation. That was the argumentation leitmotif of the Swedish government. Hence, theoretically social dumping could constitute a legal basis for this back-manoeuvre.

During the already completed first stage only three countries opened their labour market for EU-8, namely Sweden, Ireland and the United Kingdom. Upon the accomplishment of the first phase the Commission presented a Report on the Functioning of the transitional arrangements in the first phase which made some other countries follow open-labour model (Spain, Finland, Greece, Portugal and Italy) and yet more countries open their labour market only partially (Belgium, Denmark, France, Luxembourg and the Netherlands)<sup>85</sup>. Austria and Germany still keep on restricting their market.<sup>86</sup> Upon accession of Bulgaria and Romania the model of graduality has now shifted to '1+2+1' formula, i.e. the stages in opening labour market are now as follows: (1) January 1, 2007 until December 31, 2008; (2) January 1, 2009 until December 31, 2011, and finally, (3) January 1, 2012 until December 31, 2013.

As far as the recent enlargement from EU-25 to EU-27 is concerned, of the former EU-15 only Finland and Sweden totally opened their labour markets, which made, respectively, *Viking* and *Laval* to be the pioneer case-law in the field. France and Italy agreed to open their markets partially. The other countries (Austria, Belgium, Denmark, Germany, Ireland, Greece, Luxembourg, the Netherlands, Spain, Portugal and the United Kingdom) imposed restrictions. Among EU-10 only

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<sup>83</sup> Kirstyn Inglis, *Treading the Tightrope between Flexibility and Legal Certainty: The Temporary Derogations from the Acquis on the Freedom of Movement of Workers and Safeguard Measures under the Accession Treaty*, in LA LIBRE CIRCULATION DES PERSONNES : ÉTATS DES LIEUX ET PERSPECTIVES, CAHIERS DU COLLÈGE D'EUROPE N° 5, ACTES D'UN COLLOQUE ORGANISÉ EN 2003 À LIÈGE, (2007) 99-124.

<sup>84</sup> Regulation 1612/68 of the Council, of 15 October 1968, on freedom of movement for workers within the Community, OJL 257, 2-12.

<sup>85</sup> In Denmark labour market is fully covered, in Belgium, France, Luxembourg and the Netherlands flexible provisions cover only certain sectors or certain professions.

<sup>86</sup> Initially German and Austrian governments insisted on transitional derogations for certain sensitive sectors (e.g., construction, industrial cleaning, home nursing and security activities). This logic certainly dates back to consequences of the previous enlargements. Michael Dougan expressed an interesting opinion that the better alternative for Germany and Austria would be to require payment of their national minimum wage for posted workers from EU-8, despite the judgement in *Mazzoleni*. See Dougan, *supra* note 5, 138-139.

Malta restricted its labour market while Hungary imposed partial restrictions (getting a work permit depends on the sector). These cautions explain why so many governments submitted their observations before the Court in *Laval*.<sup>87</sup> One could hardly stay impartial when the most essential issue of the European integration (free movement of the economically active population) is at stake.

It should be underlined that the transitional arrangements deal only with migrant workers from the newly accepted states. They do not allow old members to limit the free movement of other categories of the EU citizens (students or persons with independent means)<sup>88</sup>. Moreover, no derogation is possible once the worker had been legally employed for the first time in an old member state.

Hence, the key elements with regard to the labour market protection upon the enlargement are flexibility and graduality.<sup>89</sup> The pre-enlargement debate embodied the joint venture of solidarity and conditionality<sup>90</sup> in a legal *telos* of the accession *acquis*.

#### IV. *Laval: A Clear Statement of the New Tendency?*

The approach of the Court is that neither economic nor social arguments are excluded but the crucial question is the one of balancing. The Court follows its traditional sufficient-derogation-test-analysis and recognizes the existence of the conflict without any reference to the affirmative support of the newcomers for the unity of the internal market (*Para. 95, 108*). Nevertheless, the Court emphasizes that the European integration is indeed not exclusively about providing the efficiency of the economic freedoms. (*Para. 104*). The due respect should be paid to social rights. The question behind the judicial vocabulary is to what extent the decision is informed by social factors and a broader social context of the community legal order.

Horizontal effect is made applicable towards the trade unions but the particular benefits of this stance are vague. It is unclear whether the Court will keep on its iron logic of the internal market body-guarding, or whether in the future (where there is no conflict with the imposition of the EU norms on the national level) the horizontal effect has the potential to set up an actual derogation for the internal market, shaped into the social rights protection. Otherwise, it is not a big step for the recognition of the direct horizontal application since in judicial reasoning the trade unions could be easily substituted with the state authorities who do not undertake any efficient measures to stop the trade unions (the reasoning pattern of “*Angry Farmers*”<sup>91</sup>).

The notion of solidarity behind the lines acquires an extra value. Being traditionally regarded as a labor and social value, it encompasses a non-discrimination logic not only before (at the stage of the enlargement negotiation) but also after the enlargements. The implicit message from the Court could be formulated as follows: “The fear of social dumping is not an excuse to discriminate the eastward workers!” The internal market, thus, obtains an additional reinforcement in the context of the EU-27.

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<sup>87</sup> Austria, Belgium, Czech Republic, Denmark, Germany, Estonia, Finland, Ireland, Spain, France, Lithuania, Poland, UK. Even Norway and Iceland did not stay apathetic.

<sup>88</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 – 30 April 2006), COM (2006) 0048 final, 8 February 8 2006.

<sup>89</sup> Curie, *supra* note 78, 210.

<sup>90</sup> Marise Cremona, *EU Enlargement: solidarity and conditionality*, 30 E.L.REV. 3, 3-22 (2005).

<sup>91</sup> Case 265/95 *Commission v. France*, 1997 ECR I-443.

## **C. *Laval* in the Context of Fundamental Rights**

### **I. *Evolution and Scope of Fundamental Rights in EC Law***

The status of fundamental rights in EC Law has for a long time been rather uncertain since initially the Community was established to pursue the goals of economic integration and did not presuppose a separate human rights policy. The situation is even more aggravated by the fact that on the European level there are at least two global systems of human rights observance with separate dispute resolution mechanisms, namely, national courts and national constitutional courts (on the level of states), and the European Court of Human Rights (on the level of the Council of Europe).<sup>92</sup> In combination with a wide range of NGOs dealing with human rights, this mechanism leaves small room for the EC manoeuvres in the field. Nonetheless, the evolution of the internal market revealed an over-whelming need to distinguish a separate human rights *acquis* in the Community.<sup>93</sup> That policy required establishing a comprehensive legal ground for institutional decision-making and dispute-resolution with regard to fundamental rights in the ECJ. This uneasy task revealed several problems including delineation of the frontline between Strasbourg and Luxembourg, particular positioning of fundamental rights vis-à-vis economic freedoms in the Community and, what turned to be even a greater challenge, defining the scope of fundamental rights common for constitutional traditions of all member states.<sup>94</sup> One could seriously doubt in the middle of the 1950s that European integration would reach these horizons,<sup>95</sup> especially taking into account the fact that a separate jurisdiction in the field of fundamental rights was established on a pan-European level which turned to be a success story of Strasbourg.

This institutional contradiction finds its roots and reflection in the bulk of legal instruments which a relatively recently shaped EU citizen could invoke, in particular, national legal norms and principles (first of all, including those of constitutional character), European Convention on Human Rights and Fundamental Freedoms, and *acquis communautaire* including EU and EC Treaties.<sup>96</sup>

Nonetheless, the specification of that range of applicable *acquis* is important, first of all, for the internal purposes of the European Union where the progress of internal market is still a priority. The problem which demands a particular concern is whether one could observe a clash between economic

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<sup>92</sup> “Détriplement fonctionnel” as Prof. Douglas-Scott nicely phrases it. See Douglas-Scott, *infra* note 95, 639.

<sup>93</sup> One could argue that human rights steadily gained their importance from the late 1960s on (Armin Von Bogdany, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 CML REV. 1307 (2000)). On of the first cases (often taken as a reference point) in which the Court explicitly refers to fundamental rights is traced back to the 1970s, namely Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR I-1125. Active reference to the case-law of Strasbourg started only in the mid 1990s. It is interesting to note in the context of present paper (tacking fundamentalization of social rights) that mere in the 1970s one could observe the recognition of social and labour rights in the decisions of the ECJ.

<sup>94</sup> For a profound analysis of the role of the ECJ in filling the empty box of fundamental rights in EC Law see Bruno De Witte, *Le rôle passé et futur de la cour de justice des communautés européennes dans la protection des droits de l’homme* in L’UNION EUROPEENNE ET LES DROITS DE L’HOMME 895-935 (Pili Alston, Mara Bustelo and James Heenan (eds.) 2001). In particular, 905-920 (for a comprehensive evaluation of the Court’s role vis-à-vis national systems, access to jurisdictions, degree of protection, etc).

<sup>95</sup> One could also recall declaration of the Charter of Fundamental rights, adoption of non-discrimination directives under Article 13 EC, and incorporation of human rights initiatives into policies such as the European Neighbouring policy (Cf., Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 13 C.M.L. Rev. (2006). With regard to Article 13 EC in the context of European citizenship see also Catherine Barnard, *Article 13: Through the Looking Glass of Union Citizenship* in LEGAL ISSUES OF THE AMSTERDAM TREATY, 75 (David O’Keeffe and Patrick Twomey (eds.) 1999).

<sup>96</sup> For a detailed review see PIET ECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION, LEGAL AND CONSTITUTIONAL FOUNDATIONS, 465-484 (2005).

(freedoms of movements) and fundamental (human rights) principles of the Community.<sup>97</sup> This clash is analyzed as an interaction between the European Court of Human Rights and the European Court of Justice.<sup>98</sup> The very analysis of this specific interface between the ECtHR and the ECJ has become a popular approach in the bibliography on judicial review of the ECJ since early 1990s.<sup>99</sup> This is not surprising taking into account the peculiarities of the ECJ case-law which has constantly referred to the European Convention of Human Rights and Fundamental Freedoms.<sup>100</sup>

This specific reference to fundamental rights could also be found in other numerous domains of the EC law, in particular, with regard to free movement of persons<sup>101</sup>, competition law<sup>102</sup>, social and employment law<sup>103</sup> etc. The latter is especially interesting in the context of the present article since it shapes the ground of the discussion on the *fundamentalization of social rights*.<sup>104</sup>

In order to discuss the potential for this fundamentalization of social rights, we need to identify the very legal grounds for fundamental rights in the Community legal order. Nowadays within (and even outside) the EU one could distinguish, at least, eight platforms to protect fundamental rights which are as follows (*infra* these sources will be exemplified with the models of judicial reasoning in *Laval*):

- Article 6 (Par. 1-2) EU with a reference to fundamental rights as guaranteed by the ECHR and constitutional traditions common to the Member States, as general principles of Community law (*amicus curiae* submissions)
- Article 13 EC (on non-discrimination)<sup>105</sup>
- The established case-law of the ECJ (especially with regard to a situation of a clash with the internal market)
- Human rights as an inherent part of constitutional traditions of member states (*ius commune* of human rights)<sup>106</sup>

<sup>97</sup> TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT* 332-352 (2004)

<sup>98</sup> For a comprehensive description of the situations, where the ECtHR found jurisdiction over actions involving the EU, as well as about interaction between two courts see Douglas-Scott, *supra* note 95, 629-665, (in particular, 632-639).

<sup>99</sup> See Francis G. Jacobs, *Human Rights in the EU: the Role of the Court of Justice* 26 E.L. REV. 331 (2001), Gráinne De Búrca, *Fundamental Human Rights and the Reach of the EC Law* 13 (3) O.J.L.S. 283-319 (1993), Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the ECHR in Strasbourg and Luxembourg*, in *THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE* 219 (Rick Lawson and Matthijs de Bloijs (eds.) 1994), and D. Spielman, *Human Rights Case Law in Strasbourg and Luxembourg Courts: Inconsistencies and Complementarities*, in PHILIP ALSTON (ED.), *THE EU AND HUMAN RIGHTS* 770 (1999).

<sup>100</sup> In recent literature among other ways-out the following ones were proposed: (1) a solution “à la Keck” (with an interesting parallel to the revolutionary limits established by the Court in case *Keck & Mithouard*, 1993, *supra* note 28), (2) introduction of *de minimis* rule (exclusion from application of human rights derogation in the situations when no significant economic effect is evident), (3) “*Cassis de Dijon* solution” (with reference to Case 120/78, *Cassis de Dijon*, 1979 ECR I-649, where the Court elaborated a compatibility test on the basis of the restrictive effects’ analysis under Article 28 EC escaping from the derogation of Article 30 EC). See Alberto Alemanno, *À la recherche d’un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: quelques réflexions à propos des arrêts « Schmidberger » et « Omega »*, RDUE 4/2004, 709-751 (2004).

<sup>101</sup> Especially with regard to the discussion on the role of Article 6 ECHR which often affects the third countries nationals. Cédric Chenevière, *Régime juridique des ressortissants d’Etats tiers membres de la famille d’un citoyen de l’Union*, in *LA LIBRE CIRCULATION DES PERSONNES : ETATS DES LIEUX ET PERSPECTIVES*, CAHIERS DU COLLEGE D’EUROPE N° 5, ACTES D’UN COLLOQUE ORGANISE EN 2003 A LIEGE, (2007), 125-144.

<sup>102</sup> Sybe De Vries, *Public Service, Diversity and Freedom of Expression and Competition Law*, ERA, 1/2005, 46-57 (2005).

<sup>103</sup> Prechal, *infra* note 111.

<sup>104</sup> Philip Alston, *Labour Rights as Human Rights, The Not so Happy State of the Art in Labour Rights as Human Rights*, Volume XIV/1, OUP, 2006, 1-24. Also, Regina Kreide, *The Range of Social Human Rights*, 18 GLJ (2001), available at: <http://www.germanlawjournal.com/article.php?id=116> (last accessed on 18 November 2008).

<sup>105</sup> Barnard, *supra* note 95.

- Judicial dialogue between ECJ and ECtHR (mostly by way of preliminary rulings)
- General acceptance of International Human Rights Law (it is the EU which promotes the *instrumentalization* of human rights under political frame of the UN)
- The mechanism of human rights clauses vis-à-vis third countries
- Charter of Fundamental Rights<sup>107</sup>

The Charter is a unique mechanism merging two freedoms, namely fundamental (human rights) and social (including labour) ones. The implicit question brought by *Laval* is whether one could observe the emergence of social human rights and which implications it could produce in the transitional (post-accession) context where social rights represent another clash with the internal market.

EC Social Law is the domain which has been even more influenced, if not outright created, by the Court than freedom of movement under the internal market. The decision-making process in the EC has been consistently reflecting the reluctance of particular states to broaden EC powers to harmonize the domain of labour and social relations. This is an extremely sensitive area since, on the one hand, social and labour models in Europe differ significantly, and on the other hand, amendments in the sphere of social and employment rights lead to a risk of essential financial losses for particular states.<sup>108</sup> Recent trends in the area of social policy demonstrate an “increase in the use of complementary or rather alternative methods of regulation to the Community Method”<sup>109</sup> which leads to a ‘transverse form of policy making’.<sup>110</sup>

In fact, it was the ECJ who has been giving impulses for harmonisation of working time, parental leave, equal opportunities, and mechanisms of social dialogue.<sup>111</sup> Another trend is a so-called *soft acquis*, which reveals a shift from legislative initiatives towards policies aimed at fostering employment creation, social protection and social inclusion.<sup>112</sup>

Art. 137 (Par. 4) EC sets limitations for the uniform labour standards with an effect that harmonization, holding that standards “shall not affect the right of Member State to define fundamental principles of their social security systems and must not significantly effect the financial equilibrium thereof;” and “shall not prevent any Member State from maintaining and introducing stringent protective measures compatible with EC Treaty.”

Moreover, the Community lacks competence in harmonizing the right of association, the right to strike or the right to impose lock-outs<sup>113</sup>, which (as we shall see *infra*) has an implication for safeguarding national social standards upon enlargement.

(Contd.) \_\_\_\_\_

<sup>106</sup> Douglas-Scott, *supra* note 95, 665.

<sup>107</sup> The EU Charter of Fundamental Rights of the European Union, O.J. 2000 c 364/01.

<sup>108</sup> For a detailed analysis of the stages in the development of social and labor rights in EC Law see Stefano Giubboni, *SOCIAL RIGHTS AND MARKET FREEDOM IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE* (2006).

<sup>109</sup> Samantha Velluti, *The European Employment Strategy and the Challenges of Enlargement* in TAKIS TRIDIMAS (EDS.), *EU LAW FOR THE 21<sup>ST</sup> CENTURY: RETHINKING THE NEW LEGAL ORDER* 415-436 (2004).

<sup>110</sup> *Id.*

<sup>111</sup> Sasha Prechal, *Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes*, 41 CMLREV. 533, 533-551 (2004); Bernard Ryan, *The Private Enforcement of European Union Labour* in THE FUTURE OF REMEDIES IN EUROPE, 141, 141-147 (Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds.) 2000); Eugenia Caracciolo Di Torella and Annick Masselot, *Pregnancy, Maternity and the Organization of Family Life: an Attempt to Classify the Case Law of the Court of Justice* 26 E.L.REV. 239, 239-260 (2001); Lisa Waddington and Mark Bell, *More Equal Than Others: Distinguishing European Union Equality Directives* 38 CMLREV. 587, 587-611 (2001).

<sup>112</sup> Velluti, *supra* note 110.

<sup>113</sup> Anne Davies, *Should the EU Have the Power to Set Minimum Standards for Collective Labor Rights in the Member States?* in LABOUR RIGHTS AS HUMAN RIGHTS, 177-213 (Philip Alston (ed.) 2006).

## II. A Clash Similar to the Effects of Fundamental Rights?

The eastward enlargement revealed that the danger for labour markets of EU-15 lies not obviously in the influx of workers from CEEC but rather in the difference in wages, social standards and systems of labour relations in the West and East of Europe. The ‘social dumping’ is the term which is acquiring broader recognition both in doctrine and in the judgements of the Court.

Two other factors suggest that things could have been otherwise. First is that collective bargaining seems to be the popular direction of activity coordination at the EU level.<sup>114</sup> Second is that the Charter is arguably enjoying a potential to break new ground by incorporating social and economic rights (including the collective labour rights<sup>115</sup> affecting the laws of Member States on trade unions<sup>116</sup>) into the realm of fundamental rights.

Notwithstanding these arguments, in *Laval* the Court sets out a traditional internal market test, where social rights motivation of Swedish trade unions does not pass the proportionality assessment. The Community enjoys a limited competence to pursue harmonization in the social sphere since Article 137 EC specifically excludes harmonization of national wages from the Community’s competence over social policy and Article 95 EC does not apply to employment matters.<sup>117</sup> Thus, the field for fundamentalizing manoeuvre is restricted. Another way to interpret this ambiguity is to claim that precisely because the harmonization in the field is impossible, the Member States are free to safeguard their social policy traditions, thus limiting the potential for the intervention both from Brussels and Luxembourg. The Court, however, does not seem to approve such a stance. Par. 88 explicitly states 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 such as that at issue in the main proceedings from the domain of freedom to provide services”.

Although the Advocate General thoroughly analyzes the current stance of the ECtHR with regard to industrial actions (*Gustafsson v. Sweden* and *Sørensen v. Rasmussen*)<sup>118</sup>, the Court is not inclined to go into the detailed comparative study of Strasbourg’s case load. Nevertheless, the decision in *Laval* can be implicitly informed by the latter, considering that both main ECtHR cases originate from Scandinavia with its particular trade unions’ status. Moreover, in those two cases Strasbourg took a manifest support of the negative right to association, i.e. the right of an employer not to be forced into a collective bargaining agreement. Thus, ECJ contributes to the “fight” against Nordic model of industrial relations, characterized by such features as self-regulation, non-intervention and wide autonomy of social partners.

Another ambiguous question steps from the hypothesis that if Sweden transposed the Posted Workers Directive with the acceptance of the minimum wages model, the outcome of *Laval* could have been different. In this sense, *Laval* is not the hardest nut for the ECJ who managed both: to proclaim that the EU integration is not only about economic efficiency<sup>119</sup> and simultaneously to safeguard the

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<sup>114</sup> *Id.*, 316.

<sup>115</sup> Davies, *supra* note 113. Cf. also Erika Kovacs *The right to strike in the European Social Charters*, 26 COMPARATIVE LABOUR LAW & POLICY JOURNAL, 445, 445-475 (2005).

<sup>116</sup> *Id.*, 321.

<sup>117</sup> *Id.*

<sup>118</sup> Para. 275, 303 in the *Opinion of AG Mengozzi* (Eur. Court H.R., *Gustafsson*, Judgement of 25 April 1996, Report of Judgements and Decisions 1996-II; Eur. Court H.R., *Sørensen v. Rasmussen*, Judgment of 11 January 2006, unreported). In para. 302 AG discusses another Strasbourg case in the context of the overpowered Swedish trade unions (Eur. Court H.R., *Evaldsson and Others v. Sweden*, Judgement of 13 February 1996, Application no. 75251/01).

<sup>119</sup> Para. 104, 105 (social purpose of the Community), para. 91 (the right to take a collection action is indeed a fundamental right as a general principle of EC Law).

sanctuary of economic freedoms<sup>120</sup>. The argumentation of the court is based on the wages calculation and not on balancing social rights versus fundamental freedoms *stricto sensu*.

Nonetheless, even if presuming that such hypothetical situation checks out, I doubt if the decision could be different. In order to bring the social rights (in particular, the right to industrial action) into the realm of fundamental rights derogations, the Court will need either to establish a sound link with Strasbourg (as it has been demonstrated *supra*, such manoeuvre is hardly possible) or to address the constitutional traditions of 27 Member States where the recognition of social rights differs tremendously. Following the other bases identified in the previous sub-chapter for fundamental rights, Article 13 EU should rather suggest a non-discrimination logic against Swedish trade unions who block the pursuit of the economic freedoms for the foreigners. The right to collective action is, above all, not boundless. To give an example, it is hardly legitimate to raise it, for instance, to prevent racial minorities or women to work at a certain enterprise. The established case law will suggest the path of *Schmidberger* to which Scandinavian commentators implicitly tended to compare *Laval* when awaiting for the decision.<sup>121</sup> However, the pattern of the aggressive protest (with the total blockage towards the exercise of fundamental freedoms) rather fits the logic of “Angry Farmers” in France.<sup>122</sup> Similarly to the French case, the police are asked to intervene but they refuse on the ground of the constitutional protection for the collective action.

However, one could arguably state that the constitutional safeguard of bargaining model in Scandinavia is a part of the constitutional tradition comparable to the status of human dignity in German *Grundgesetz*, thus linking the case to *Omega*<sup>123</sup>. This line is the most controversial since the differentiation of what constitutes a constitutional tradition, i.e. what *deserves* the Community protection, is highly problematic. The comparison here lacks explicit legal grounds.

The Court does not swim deep to those numerous cavities, avoiding the fundamentalization of social rights complexity. The implicit reasoning of *Laval* is informed by the post-enlargement context. The ECJ produced a judgement whose main goal is to confirm as firm as possible the sanctuary of the inviolability of the economic freedoms, thus, protecting the rights of the workers from the newly acceded states against the discrimination. As it has been demonstrated previously, the opening of the internal market(s) is a gradual process where the EU-15 enjoy quite a few relieves. The Court does not seem willing to broaden those privileges which have already put the new-comers into not exactly equal positions.

The position of the Court is definitely not accidental. The very recent case *Dirk Rüffert v. Land Niedersachsen*<sup>124</sup> in the German-Polish context confirmed the logic of non-admissibility of the wage imposition (through “contractual” legislation at the case of Lower Saxony) which could impede or render less attractive the provision of services by workers from the new member states.

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<sup>120</sup> Para. 108 (the obstacle at stake cannot be justified by the social purpose), para. 95 (collective action should be balanced against the internal market).

<sup>121</sup> Ahlberg, Bruun and Malmberg, *supra* note 1. In particular, 163-164 (the reasoning pattern is to frame the right to strike into a public policy derogation to free movement of services, strong enough to pass the proportionality assessment). Thus, the authors hastily predicted that the Swedish model will not be endangered.

<sup>122</sup> Further the juxtaposition is done to *Commission v. France*, [1997] *supra* note 91.

<sup>123</sup> Case 346/02 *Omega*, 2004 ECR I-9609. The Court refers to *Omega* briefly in para. 93, 94 of *Laval*.

<sup>124</sup> Case 346/06 *Dirk Rüffert v. Land Niedersachsen*, 2008. In para. 42 the Court states: “[...]it does not appear from the case-file submitted to the Court that a measure such as that at issue in the main proceedings is necessary in order to avoid the risk of seriously undermining the financial balance of the social security system, an objective which the Court has recognised cannot be ruled out as a potential overriding reason in the general interest”.

#### **D. Conclusions: A Step Back – A Step Forward. Paving the Way for the Fundamentalization of Social Rights**

The enlargement created a unique moment for the ECJ to display the status of the social rights in the Community order, since it brought into judicial agenda a hard-nut which the Court has been quite reluctant to shell so far. Namely, the enlargement articulated the problem of social rights vis-à-vis the internal market.<sup>125</sup> The question is whether social rights are capable of creating derogations similar to those established by fundamental rights.

The first part of this article demonstrated that the internal market provisions on free movement have undergone a revolutionary circle of development where the ECJ has been filling the empty box of EU citizenship with a wide spectrum of legal benefits. The preservation of the internal market interests in *Laval* perfectly fits the case-law pattern of Luxembourg. On the other hand, it became evident that the scope of social rights has also been expanded by the Court to the horizons one could hardly expect half a century ago. Nonetheless, the status of particular social rights (as the right to industrial action) in Community law is rather unclear.

The pre-accession economic fears made the majority of the EU-15 adopt limitations for the access of labour from CEEC. The key word in that system of limitations is graduality. Old member states negotiated the plan of gradual opening of their markets to avoid serious disturbances. Sweden became one of the countries who fully opened their labor markets for the service providers from the EU-10. As time has shown, the potential disturbance for the labour markets of EU-15 lays not in the danger of massive influx of workers from the newly accepted states, but rather in differences of labour costs and social standards. This problem is acquiring a wider recognition under the term of ‘social dumping’, virtually recognized by the ECJ. In *Laval* the Court framed the industrial action into the framework of a possible derogation which turned to be disproportional when balanced with the purposes of the internal market. Nevertheless, the ECJ pronounced explicitly on the potential of social rights to be perceived as fundamental rights under the general principles in the EC Law.

Hence, *Laval* is indeed an evasive indicator of the fundamentalization of social rights. However, I could hardly share the opinion that *Laval* significantly undermined the position of social rights in Europe. Careful analysis of the “blockage” situation reveals that the ECJ is actually consistent with the reasoning of the ECtHR. Implicitly following Strasbourg, the ECJ sets a lesson for the modification of the Nordic industrial model and limits the tyranny of trade unions. “Good manners” are imposed through the non-discrimination logic of the European integration. The arbitrariness of the wage calculation by social partners is an aspect which does not enjoy the cover of fundamental social rights.

The Court delicately avoids the rhetoric of the *post-enlargement solidarity*; however a deeper insight into the pre-enlargement negotiation reveals an implicit motivation of the Court. The sanctuary of economic freedoms as the foundation of European integration is reinforced in the context of the EU-27. Old member states have negotiated the graduation system as a pill against social dumping. The Court does not permit further fragmenting of the internal market through social provisions as a charlatan charter for the back-manoeuve against the *EU citizens*<sup>126</sup> from the new member states.

The decision in *Laval* has significant legal, financial and demographic implications both for old and new member states.

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<sup>125</sup> Cf., Manfred WEISS, *Enlargement and Industrial Relations: Building a New Social Partnership*, 20 INT.J.COMP.L.L.I.R. 5 (2004).

<sup>126</sup> Similarly Prof. Moreau induces the progress of ‘fundamental social rights’ from the perspective of “citizen-workers”. She demonstrates that the internal market is actually structured by social rights, including the right to collective bargaining. Marie-Ange Moreau, *European Fundamental Social Rights in the Context of Economic Globalization*, in SOCIAL RIGHTS IN EUROPE (Gráinne De Búrca and Bruno de Witte (eds.) 2005), esp. 370-371. In *Laval* the Court tackles the abuses of such structuring.



Firstly, as far as a graduality system of market opening is concerned, the decision could either give impetus to final liberalization vis-à-vis CEEC or slow down the process, especially in Germany and Austria.

Secondly, the Nordic model of salary bargaining is proclaimed contradictory to the EC Law as far as it applies to the service providers from other member states. One way out for the Swedish government is to reform radically the whole system which forms an essential tradition of labour relations in this country. Alternatively and most probably, it could keep an old system of the wage bargaining for the pure internal situation and change the rules vis-à-vis the external EU-based context. The major form of the judicial activism is the limitation of the trade union omnipresence. Notwithstanding the fact that a horizontal direct effect applies to them, the trade unions are prohibited to substitute the state. The burden of proof is also set on trade unions.

Thirdly, *Laval* indicates a strong impulse for the EU to keep on developing clear rules in the social sphere through the harmonization instruments. Otherwise a purely political failure to reach the compromise goes to the ECJ for which economic freedoms are obviously holy commands.

Fourthly, it may change the strategy of the old member states in the period of the future EU enlargements. The situation gives an incentive to negotiate an average-salary-protection-clause into the accession instruments.

Fifthly, the decision contributes to a further-migration-encouragement effect. The populist claim will be to question whether this stance shapes a “second sort of *EU citizenship*” – ready to work for the indecently minimum salaries. Around 70 000 people have already left two-million Latvia<sup>127</sup>. Thousands people have been leaving one-million Estonia for labour migration. Not to mention a huge work migration from Lithuania or 1.5 million of Polish workers in the EU-15.

Sixthly, in the context of the British opt-out from the Nice Charter a decision alleviates the anxieties of the British government that further “labour and social law integration” is capable to enforce a union authoritarianism into the UK legislature. The Court avoids explicit references to the Nice Charter. Social rights seem to be imposed on the UK in full effect without regard to the Charter – as the fundamental rights inherent to the general principles of the EC Law.

Hence, in the Luxembourg gallery of the fundamentilization canvas *Laval* decision is portrayed as a dance pavilion with the pan-European media audience. The distinguished judges make *un pas en avant*, accepting the fundamental status of social rights. Then they elegantly step back, giving a bow of respect towards the EU-27 internal market and teach trade unions a lesson of good behaviour on the dance floor. The tango continues.

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<sup>127</sup> There are symptoms that Latvia itself experiences the lack of the construction workers due to the mass influx of the population to the EU-15. Also, see *Migration and the Latvian Labor Market* at <http://latviaeconomy.blogspot.com/2007/08/migration-and-latvian-labour-market.html> (last accessed on 18 November 2008).



# **The Right to Information and Consultation of the Workforce: Context and Content of a Fundamental Right**

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## **Abstract**

The purpose of this work is to analyse the fundamental right to information and consultation of the workforce recognised at EU level. The recognition of the right is contextualised within the current debate on the *theory* and *objectives* of the firm. This paper argues that there is a *mutual influence* between the several levels of EU policy-making (the *national level*, the *fundamental rights* level and the *secondary law* level) that influences the *content* and *practical extension* of the fundamental right to information and consultation of the workforce. The content of the right is embedded with a *contractual* and *stakeholder* view of the company that is capable of expanding into other areas of EU policy-making.

## **Introduction**

The right to information and consultation of the workforce is one of the most polemic themes in Labour Law. The decision of whether and to which extent employees should be involved in the decision-making procedures concerning the actions that may affect their interests obliges us to make some very fundamental assumptions regarding the *nature* and the *objectives* of the firm and the *perspectives* by means of which we should regard the *employment relationship*. The European Union has been extremely active in the area of information and consultation of the workforce; nevertheless, the sources are extremely sparse and raise a number of difficulties regarding their exact reach. The purpose of this paper is to examine the different provisions of the EU concerning the right to information and consultation of the workforce. This paper is organised as follows: the first part will review the EU *acquis* in his subject matter: it will review the level of *fundamental rights*, the *directives* and the relationship to the *national level*. The second part will contextualise this *acquis* within the debate concerning the nature of the firm. The final part will present the conclusion.

## **1. The EU Acquis**

The EU has been extremely active in the area of the information and consultation of the workforce, in particular after the 1970s with the *Collective Redundancies Directive*. The sources of EU Law are, however, extremely *sparse* and *unsystematic*: there is a *constellation* of sources of law that provide for the information and consultation of employees in several situations but with variable *scopes*, *procedures* and *extensions*. This section will attempt to outline and systematise the approach of the EU in terms of the information and consultation procedures. It will initiate by the *fundamental rights* dimension, proceed to the description of *secondary law* and end with a confrontation with the *national systems* of employee participation. The final section will lay out the conclusions to be drawn from the EU strategy.

### **1.1. The Fundamental Rights Dimension**

The discussion concerning the position of the EU regarding the right to information and consultation must necessarily begin by the various legal instruments that bind the activities of the EU. The most relevant legal instruments that deal with the right to information and consultation consist in the *European Social Charter* (ESC – 1996 (revised)), the *Community Charter of the Fundamental Social Rights for Workers* (FSR - 1989) and the *Charter of Fundamental rights of the EU* (CFR - 2000). It is

important to begin the analysis by the content of these legal instruments because they determine the *direction* and *margin of manoeuvre* of the EU in the field of the right to information and consultation.

The **ESC** is the counterpart of the *European Convention of Human Rights* in the field of social and economic rights. It consists in an international treaty that is legally binding on the states that choose to ratify it. Although it is legally binding for the states, it does not provide individuals with a right that may be enforced against a state: the states merely have to undertake all the necessary actions to implement the rights recognised in the ESC. There are two distinct enforcement mechanisms: one mechanism consists in the state's obligation to file a report on the implementation of the ESC that is to be reviewed by an independent body; the second mechanism consists in a *collective action procedure*, according to which some organisations are recognised legitimacy to complain for the lack of implementation of the ESC. The **FSR** was adopted in 1989 and was destined to fill the *social gap* in the common market that took a great leap forward with the Single European Act in 1986. It contained a number of provisions in the field of social rights. Its importance is still nowadays difficult to access because it was completely deprived of a *binding nature* towards the *member states* and it did not provide individuals with *enforceable rights* (it was merely a soft law instrument); it had only a marginal impact in the case law of the ECJ;<sup>1</sup> nevertheless, some claim that it had a very influential political importance because it underpinned most of the post-1989 Labour Law Directives. The final step was given in 2000 with the **CFR**. This charter was destined to take the protection of fundamental rights one step further by means of the recognition of a catalogue of fundamental rights in the EU. This was an extremely important instrument that codified the fundamental rights in the EU that had been previously been protected by several means in the EU. Its most important provision concerns its *enforceability*: it overcomes the traditional distinction between *self-executing rights* and rights depending on *positive action*; it does not provide individuals with enforceable rights; its recipients are rather the EU institutions and the member states when implementing EU law; they must abide by the provisions contained in the CFR. Therefore, its main impact is not one of providing individuals with a *margin of freedom* from the State but to limit the *deregulatory impact* of EU Law on national policies and of formulating *duties to act* of the EU institutions. One may attempt to draw an analogy with the Law of Obligations and consider them as *generally protected interests*, i.e: obligations imposed upon the EU institutions and the member states that benefit individuals without providing them with enforceable rights.<sup>2</sup>

All of these legal instruments expressly recognise the right to information and consultation of the workforce, although with a variable extent. The **ESC** contains two provisions concerning the right to information and consultation: arts.21 and 29. These provisions consider that the parties to the agreement are obliged to *adopt* or *encourage* measures so as to enable workers and their representatives to be *informed* regularly or at the appropriate time and in a comprehensible way about the economic and financial health of the undertaking employing them and to be *consulted* in appropriate time on proposed decisions which could affect substantially the interests of the workers, in particular those that could have a large impact over the employment in the undertaking; this principle is further developed in the situations of *collective redundancies*, providing that the right to information and consultation should be exercised with a view to *avoiding* redundancies, *limiting* their occurrence or *mitigating* their consequences. The **FSR** equally contains two provisions concerning the right to information and consultation of the workforce, although they are much more synthetic: arts.17 and 18FSR simply state that member states should promote the information and consultation of the

<sup>1</sup> It was referred only in one case, *UK vs Council* (C-84/94) [1996] ECR I-5755

<sup>2</sup> Casey, N. (2000). The European Social Charter and the Revised European Social Charter. Fundamental Social Rights. Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights. C. Costello, European Commission. Witte, B. d. (2005). The Trajectory of Fundamental Social Rights in the European Union. Social Rights in Europe. G. De Búrca and B. d. Witte, Oxford. For a general overview of the protection of Fundamental Rights in the EU see Craig, P. and G. De Búrca (2002). EU Law. Texts, Cases and Materials Oxford, Chalmers, D., C. Hadjiemmanuil, et al. (2006). European Union Law, Cambridge University Press.

workforce along the practices existing in the member states in all cases and, in particular, in the following circumstances: (a) implementation of technological changes, (b) restructuring operations, (c) collective redundancies and (d) labour policies pursued by a company established in another member state. Finally, the **CFR** simply states in its art.27 that the workers have a right to be informed and consulted *in the cases and under the conditions provided for in EC Law and national practices*.

A final word must be given to the common constitutional traditions of the member states. The analysis of the Constitutions of the member states reveals that some member states contain a specific provision within their constitutional texts providing workers with a fundamental right to information and consultation. That is the case of *Portugal* (art.54 of the Portuguese Constitution), *Italy* (art.46 of the Italian Constitution), *Belgium* (art.23 of the Belgian Constitution), the *Netherlands* (art.16 of the Dutch Constitution) and *Slovenia* (art.75). To my knowledge these are the only national constitutions containing a positive right to the information and consultation of the workforce.

The former paragraphs reveal that the right to information and consultation enjoys a specific constitutional dimension within the sources of law governing the EU. The right is positively recognised in a number of legal instruments that bind the activities of the EU institutions and the member states. It is important to recognise that the *recognition* of the right was *not* accompanied with its *direct enforceability*. The enforcement of the right is not to be made by means of *direct claims* of the individuals vis-à-vis the employers but by means of the *obligation to act* of the EU institutions and the member states and the setting of limits to the *deregulatory impetus*. This means that both the EU and the member states are obliged by these legal instruments to recognise the right of information and consultation within their national law making and any claims from individuals must be based in the European and national legal instruments only. There are a number of alternative mechanisms destined to encourage EU institutions and member states to act, such as *national reports* and *collective complaints* (in the European Social Charter) and vexatious mechanisms for refusing to cooperate within the EU policy-making. The concrete dimension of the right to information and consultation must therefore be sought in the legal instruments enacted to perform the obligations to act arising from these constitutional instruments.<sup>3</sup>

## **1.2. Instruments of Secondary Law**

The EU has enacted a number of legal instruments destined to enforce the obligations contained in those constitutional documents. The legal instruments contain different provisions concerning the right to information and consultation of the workforce. The sources of regulation are extremely sparse and not altogether clear because they were emanated in distinct periods of time within distinct legal bases and political environments. The most important European instruments are well known *Directives on employee participation*: Directives **98/59**, *on collective redundancies (CRD)*; **2001/23**, *on the transfer of undertakings (ToU)*; **94/95**, *on the European Works Council (EWC)*; **2001/86**, *on employee participation in the European Company* (henceforward **SED**); **2002/14**, *establishing a general framework for the information and consultation of employees* (henceforward **Framework directive**); **2003/72/EC** *on employee participation in the European Cooperative Society* (henceforward **ECS**). There are equally a number of other instruments providing workers with a right to be informed of matters regarding their interests, such as: Directives **91/53/EC**, *on the employer's obligation to inform*

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<sup>3</sup> The absence of *direct enforceability* of those fundamental rights and the dependence of *implementing legislation* and the *legislative/administrative/judicial activity of the EU* for their actual application was analysed in a short but elucidative article by Frenz/Götzkes: Frenz, W. and V. Götzkes (2007). "Ein europäisches Grundrecht der Arbeitnehmerin und Arbeitnehmer auf Unterrichtung und Anhörung im Unternehmen?" *Recht der Arbeit*(4): 216-218. For a systematic overview of the development of the right to information and consultation at the level of fundamental rights see Hassiotis, A. (2000). *Die entwicklung des rechts der Arbeitnehmervertretung auf Information und Consultation in der Europäischen union - unter berücksichtigung des deutschen, französischen, britischen und schweizerischen rechts*, Schulthess Juristische Medien AG Zürich / Verlag Stämpfli+Cie Bern

employees of the conditions applicable to the contract or employment relationship (henceforward **EID**), **97/81** on part-time work (PTW), **99/79** on fixed-term work (FTW) and Directive **2004/25/EC**, on takeover bids (henceforward **TOD**).

Before advancing any further, it is useful to begin with a short overview of the content of these Directives. The **CRD** and the **ToU**, which should be analysed together, are applicable in the situations of collective redundancies and transfer of undertakings. They set out an *information and consultation procedure*, commanding the employer who wishes to engage in each one of these operations to communicate the occurrence to the representatives of the workforce and engage in a consultation procedure that has the objective of avoiding or mitigating the effects of the redundancies or reaching alternative solutions to safeguard the interests of the employees. The **EWC**, **SED**, **Framework Directive** and the **ECS** are a bit different in their scope: they were not designed to provide an answer to crisis situations but to engage employees in a more permanent dialogue with management within the company that should cover all topics capable of affecting their interests. They set out the obligation to have a body representative of the employees that should determine a *procedure* for the establishment of *permanent dialogue* with the management. Although the parties are free and encouraged to set out the most convenient forms to arrange the information and consultation procedure in accordance with their interests, there is a default procedure that is strongly employee oriented to be applied in the event of failure of negotiations. A word must be given to co-determination. Although none of these legal instruments *imposes* co-determination (in the sense of obliging to have the agreement of the employees in order to implement a business decision), they also do not allow the *evasion* of co-determination: this means that employees will always have the strongest legal regime possible; at least, they will have the opportunity to bargain a company-specific procedure for information and consultation.<sup>4</sup>

If one attempts to have a global look at these directives, one can immediately perceive a clear line of evolution. This *line of evolution* consists in the progressive engagement of the workers in the life of the company that the Directives have attempted to make, that departs from a simple right to be informed and bargain subjects fundamental to the interests of the workforce (such as transfers of undertakings and collective redundancies) towards the establishment of a more permanent level of dialogue at the level of the company that attempts to align the interests of employees with those of the managers and the shareholders, achieve *risk anticipation* and *involve employees in the long term strategy of the company and restructuring*. They do not have a strict scope of application but are potentially applicable to all situations liable to have an impact in the strategy of the company. They are not intended to a particular situation but to involve employees in the global strategy of the company. This line of evolution will equally allow us to make a primary classification of the directives between those that I will name as the *reactive* Directives (because they provide a right to be informed and consulted in a strict scope of situations) and the *proactive directives* (because they are destined to engage employers in a more permanent dialogue with the workforce, independently of concrete events). The first group is composed by the *collective redundancies* and the *transfer of undertakings Directives*; the second, by the *EWC*, *SED* and *ECS* and the *Framework Directive*.

The *legislative technique* employed in each one of the directives further confirms this idea; the *reactive directives* can also be named as *static directives* because they provide for a rigid procedure establishing minimum rights to information and consultation from which member states could only deviate in the event that they wished to provide for more favourable provisions; the proactive directives can on their turn be named as *dynamic directives*, because they do not provide themselves for a rigid information and consultation procedure but rather for a *procedure for the reaching of an*

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<sup>4</sup> For a comparative overview of these Directives, see: Brors, T. (2004). *Das system der Arbeitnehmer-Beteiligungs-Richtlinien - grundlage für eine Europäische Betriebsverfassung?* Baden-Baden, Köln, Seitz, K. (2004). *Europäisches Rahmenrecht für eine Europäische Betriebsverfassung - stand und perspectiven*. Tübingen, Köhler-Druck, Schäfer, D. (2005). *Der europäische Rahmen für Arbeitnehmermitwirkung*. Frankfurt am Main, Peter Lang.

*autonomous participation agreement*; i.e the parties themselves are granted the power to bargain the solution which best fits their information and consultation needs. The distinction is more than self-evident: the reactive directives lie upon the traditional technique of *harmonisation*; the proactive directives lie upon the new technique of harmonisation by means of *reflexive law*. This is even so within the context of the Framework Directive, because art.5 of the framework Directive empowers member states to take the option of allowing the relevant information and consultation procedures to be determined by means of an *agreement* between management and labour, as long as the minimum requirements of the Directive are respected. This is a great change in orientation because this means that the legislation is not so much concerned with ensuring a *level playing field* between member states (i.e that the *costs* of information and consultation would weight equally to the companies of all member states) but with ensuring *social dialogue at the level of the company*.

Finally, all of this was accompanied by an evolution of the *objectives underlying the information and consultation procedures*. The reactive directives have *equal burdens* as an objective, by imposing the legislation of the socially most sensible countries upon other less socio-democratic countries. Although the employees in some member states might have benefited to a great extent from powers granted to them by the Directives, the political objective of the Directives was not so much to protect employees but to ensure *equal competition* between undertakings. The *proactive directives* have another strategy; they must be understood within the context of the idea of the construction of a Social Europe introduced by the Maastricht Treaty. The most convincing statement of the objectives underpinning the proactive directives is contained in §§ 1, 7, 8 and 9 of the Framework Directive, where the European legislator clearly states that its purpose is to “*promote social dialogue between management and labour*” and that

“There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, (...) with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.”

The case law of the ECJ also accompanied these trends. The most important cases of the ECJ for this subject matter are the rulings *Commission vs UK* (C-382/92) and *Junk vs Kühnel* (C-188/03). The first ruling put an end to the traditional British monistic system of representation of employees, according to which the representation of the workforce could be made by trade unions only and depended of a voluntary act of recognition by the employer. This ruling, together with other Directives (such as the *Working Time Directive*) opened way for the establishment of a *dualist system* in the UK, in which there would be company-level bodies representative of the interests of the employees of the company that are to engage in a dialogue with the management. The second ruling considered that the CRD opposed a situation in which a labour contract would be terminated in a collective redundancy proceeding without a proper consultation procedure; the practical effect of the judgement was to oblige the employer to engage in a bargaining procedure in a collective redundancy and avoid using the deadlines as a mere formality without any proper dialogue. The question nowadays consists in knowing whether the ECJ intended to limit this obligation to the collective redundancies procedure or whether it wanted to state a *general principle* applicable to all the directives. These two cases reveal that the ECJ has equally considered that there should be *effective* social dialogue at the level of the company.<sup>5</sup>

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<sup>5</sup> The approach of the EU to the information and consultation of the workforce is expected to have further developments soon. Two pending cases concern the actual implementation of the right to be *effectively* informed and consulted in due time and their solution will shape to a decisive extent the actual content of the right. The cases are: *Mono Car Styling SA* (C-12/08) and *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08). *Mono Car Styling* concerned a case in which the ECJ was asked whether the CRD and the CFR provided employees with a right to challenge *individually* a collective redundancy not preceded by an *effective* consultation procedure; *Akavan* concerns a case in which the Finnish courts want

I believe that at this point it is important to retain three very important points regarding the evolution of the Directives and the case law; *firstly*, there was an enlargement of the scope of application of the Directives. This means that the number of subject-matters capable of being covered by social dialogue greatly increased from the already far-reaching *reactive/static directives* (because their scope of application was not determined by the *cause* but by the *effect*) towards the *proactive/dynamic* directives (in which the subject-matters of information and consultation were agreed by the parties). *Secondly*, the legal bases of the Directives reveal that the action of the EU was no longer conditioned to the failure of the common market but to the promotion of a genuine social model as the one set out in the Treaties. *Finally*, the change in the regulatory technique allows for the extraction of two conclusions: one, that there was a willingness to enlarge the number of subject-matters covered by collective bargaining; two, that the legislator limited itself to providing the parties concerned with the necessary mechanisms for them to reach the optimal solution (reflexive law); three, that the political objectives underlying the Directives bet upon the construction of *permanent and integrative social dialogue at the level of the company*.<sup>6</sup>

The remaining Directives (**EID, PTW, FTW and TOD**) intend to make employees aware of the essential elements of events that are essential to their employment relationships. Although they do not set out themselves provisions for the engagement of the employees in a procedure of consultation, their importance should not be underestimated; they are destined to make employees acquainted with the conditions governing and susceptible to have an impact over their employment relationship and serve as a substract for future bargaining to be made in accordance with the former directives.

### 1.3. *The Tension between the European and the National Levels: Minimum Harmonisation*

The final part of this section will attempt to outline the contrast between the *national* and the *European* levels of participation of the workforce. The literature on *Comparative Labour Law* has outlined extensively the diversity of the national structures of employee representation both in their *composition* and in the *extension* of their *powers of influence* (*Mitwirkung*).<sup>7</sup> Some member states have taken the far-reaching option of imposing *co-determination structures* in which some companies have employee participation in their boards and are obliged to have the agreement of the employees in a number of decisions (*maxime*: Germany). Other member states have taken less progressive approach and opted to provide employees with a number of information and/or consultation rights but no co-determination powers (such as France).

The EU has, since its early years, attempted to *harmonise* the systems of worker participation in the EU in order to avoid *regulatory competition* in terms of labour conditions. The first attempt to harmonise the social policy of the EU took place already in 1956 with the Spaak report in which the harmonisation of the Social Policy of the EU was indicated as a perquisite for the building of a common market. Difficulties concerning the agreement between the member states led the harmonisation effort in social policy to an halt. The introduction of the *Social Chapter* (arts.117-122) in the Treaty of Rome 1957 did not provide much assistance to the harmonisation of employee representative structures: it placed an emphasis on the functioning of the common market as a means

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to determine *timeliness* of the procedure in order to evaluate its effectiveness. Advocate General Mengozzi's opinion in *Mono Car Styling* (the only available to date) considers that the *right to information and consultation* and the *right to effective judicial protection* contained in the **CFR** do not necessarily object to the *imposition* of a *collective defense* of those rights as long as the national implementing legislation does not construct those rights individually.

<sup>6</sup> *Fuchs/Marhold* speak of a trend of *generalisation* of the right to the informed and consulted; *Davies/Freedland* speak of a *procedimentalisation* of labour law. This paper prefers the distinction between *reactive* and *proactive* because, in our view, it translates better the *evolution* and *content* of the right. See Marhold, F. and M. Fuchs (2001). *Europäisches Arbeitsrecht*. Wien, Springer, Davies, P. L. and M. Freedland (2007). *Towards a Flexible Labour Market: labour legislation and regulation since the 1990s*, Oxford.

<sup>7</sup> For an excellent overview see: Biagi, M. (2003). Forms of employee representational participation. *Marco Biagi, selected writings*. K. Law: 191-233.



of *harmonising* the social systems and provided only for a *coordination procedure* of national social policies by means of recommendations, exchange of information etc (art.118). Member states' reluctance in transferring their social competencies to the community level led to a *regulatory vacuum* in social measures until the 1970s.

The great change initiated in the summit of Paris 1972 when, drawing upon the work of that the Dutch Foreign Minister Veldkamp had undertaken in 1968, the member states admitted that the *economical integration* demanded also an *autonomous program* of *social integration*. The result consisted in a compromise to issue an action plan to improve the living and working conditions that came out in 1974 and lasted until the 1980s. This action plan gave birth to two extremely important instruments that lay the seed for the harmonisation of employee representative structures in Europe: the *Collective Redundancies Directive* (initially Directive 75/129/EEC) and the *Transfer of Undertakings Directive* (initially Directive 77/187/EEC). These extremely influential instruments set out a procedure for informing and consulting employees that presupposed a mandatory *system of employee representation* (which led to the enactment of a statutory procedure for recognition of trade unions in the UK, terminating the century old tradition of voluntarism) and an *actual bargain* between employee representatives and the employer in the situations laid out in the Directives. The importance of these instruments is such that it should not be underestimated: firstly, these instruments set down a technique of *minimum harmonisation*: although member states were free to determine the extension of employees' powers of influence in those situations, all regulations had to abide by the *minima* laid down in those directives. Secondly, it laid down an *European Model* of employee representation that would be followed in the following Directives: it consisted in a system of *in-company employee representation* (i.e: there had to be a body representative of the employees of that particular company mandatorily recognised by the employer) with powers of *information and consultation* (meaning that the employers would have to communicate certain events to the employees and engage in a dialogue with them). These two Directives influenced to a great extent the instruments that followed.<sup>8</sup>

The evolution of the relationship between the national and the European levels may allow us to extract the following conclusions: (1) member states' social policies and employee representative structures are not out of the competence of the community and member states' competencies in that domain must be exercised within the limits laid down by the community; (2) the EC opted not to harmonise to a full extent the structures of employee representation; such an harmonisation would have to be made by the *maximum* because more protective member states would never accept a reduction of their national levels of protection; (3) the EU opted for a strategy of *minimum harmonisation*: the EU determines the *minimum requirements* regarding employee participation that all member states must abide with and member states remain free to adopt more protective provisions; (4) these minimum requirements are laid out in accordance with the following scheme: there must be a system of employee representation *inside* the company mandatorily recognised by the employer; the employer must engage in certain situations in an *information and consultation* procedure with employee representatives.

#### **1.4. Conclusion**

The understanding of the precise dimension of the right to information and consultation at the EU level depends of the consideration of three distinct inter-related levels: the *national level*, the *fundamental rights level* and the *EU acquis* level. The existence of employee representation at the national level, the need to avoid competition in terms of labour conditions within the community in the progressive completion of the common market led to its recognition as a *fundamental part* of the EU model of industrial relations. This recognition was made at the level of *fundamental rights* within the several legal instruments laying down the fundamental rights recognised at the EU level (ESC, FSR,

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<sup>8</sup> Hassiotis, A. (2000). Die entwicklung des rechts der Arbeitnehmervertretung auf Information und Consultation in der Europäischen union - unter berücksichtigung des deutschen, französischen, britischen und schweizerischen rechts, Schulthess Juristische Medien AG Zürich / Verlag Stämpfli+Cie Bern

CFR). The provision of rights to information and consultation at those fundamental legal instruments is not very extensive due to its absence of *direct enforceability* and *minimum content* of the rights. Since the main recipients of the *obligations* contained in those rights are the EU institutions within their several activities (legislative, administrative, judicial), the precise content of the rights needs to be sought in the main legal instruments providing it with expression - the *EU directives on employee participation*. These legal instruments contain a model of industrial relations that presupposes effective employee representation at the level of the company and the right to be effectively informed and consulted. The national regulations needed to be modified accordingly in order to accommodate the provisions laid down at the EU level. Nevertheless, despite the considerable advances made, the harmonisation effort undertaken at the European level should be considered only as *minimum harmonisation*: member states must respect the minima laid down in the directives but are free to impose more protective regimes. There is nowadays evidence of a *spill-over effect* of these provisions into other areas of national law proving that there are signs of the expansion of the European model.<sup>9</sup> Therefore, the right to information and consultation must be understood within a multi-level system that comprises the *national level*, the *fundamental rights level* and the *EU harmonisation level*, each one of them reciprocally influencing the other.

## 2. The Nature of the Firm and the Rights of Employees to be Informed and Consulted

The understanding of the precise nature of the right to be informed and consulted needs to take into account the theoretical debate on the *nature* and the *objectives* of the firm. This discussion will assist us in understanding the exact position of labour within firms and the reasons why there should be (or not) provisions granting workers with a right to be informed and consulted on certain topics of the life of the company that may affect their interests.

The *nature* of the firm has been an extensively discussed topic; the main conceptions regarding the nature of the firm may be synthesized in the following theories: the *property model*, the *societal interest model* and the *nexus of contracts model*. In essence, the *property model* sees the firm as the property of the shareholders. The defendants of this theory argue that the assets which the shareholders pool in the firm will entitle them to *ownership-like* rights in relation to it and, when there is the separation between *ownership* and *control*, the managers (who are in control of the firm) will act as *agents* of the shareholders. The *societal interest model* engages the company within society. It considers that the company is an invention of society that owes fiduciary duties towards it. This model sees the company (with its main characteristic of *limited liability*) as a benefit granted to entrepreneurs in order to foment investment without placing its whole property at risk. This benefit that society grants comes at a cost however: the company will owe duties towards the society and should be run in such a way as to promote the *aggregate social welfare*. Finally, the *nexus of contracts model* considers the company to be a *contracting site*, at which the parties to a business enterprise agree on the terms on which they are prepared to supply the inputs of the firm and the ways they are remunerated by doing so; the company will act as a *common party* to a number of contracts and avoid the need for cross-contracting between the members of the various groups.<sup>10</sup>

A second discussion that is somewhat related to the former refers to the *objectives* of the firm. The main discussion surrounds the *shareholder vs stakeholder* debate. As a preliminary point, I must refer that none of these theories put in question the fundamental proposition that the company should be run

<sup>9</sup> One practical example is the application of the information and consultation procedure laid down in the directive for collective redundancies to situations of lay-off (temporary suspension of the performance of work) in Portugal (art.330 Portuguese Labour Code). See Gomes, J. V. (2007). *Direito do Trabalho - relações individuais*. Porto, Coimbra.

<sup>10</sup> In order to see the arguments and critics for each one of these positions see: Parkinson, J. (2003). "Models of the company and the employment relationship." *British Journal of Industrial Relations* 41(3): 481-509.

in the interest of the shareholders. If it weren't so, company law would end because there would be no incentives to put the money at risk in a venture as a corporation. The debate concerns the patterns according to which one may measure the interest of the shareholders. *Shareholder theorists* are affiliated to the *property theories* of the firm and consider the company to be the property of the shareholders and that the management should be accountable to them only. They view the company as a "money-making machine" that should be focused in generating the biggest profits possible to the shareholders, even if it means that it would come at the expense of the other constituencies that also bargain with the company: the *stakeholders*. They view the company purely in financial terms. The *stakeholder theorists* are affiliated to the *societal interest/nexus of contracts theories* of the firm and consider that, although the primary responsibility of the firm is in relation to shareholders, the survival of the firm depends on the promotion of the relationship with the stakeholders without whom the company may not survive. In the view of the stakeholder theorists, it is reasonable to refrain from making a profit in the short-term if it is necessary to ensure the survival of the company as a whole (which is not to be confused with the shareholders) in the long term. This dialectic has been questioned lately by the creation of a new theory named as *enlightened shareholder theory*: in short terms, this is reinvention of the *stakeholder theory* that considers that the company should be run in the *interests of shareholders in the long-run*. They consider that the management of the company is under a duty to promote the interests of the shareholders by means of the promotion of the relationships with the remaining stakeholders. The relationships with the remaining stakeholders are to be cultivated having in mind the long-term interests of the shareholders.<sup>11</sup>

The purpose of this theoretical debate is to introduce the reader to the problematic surrounding the question of the information and consultation of the workforce. As it becomes easy to understand, the purpose of the engagement in a procedure for information and consultation of the workforce consists in the involvement of the workers in the decision-making procedure of the firm. This may be achieved by a variety of means: it might depart from a simple communication regarding the situation of the company for the employee to be aware of the future and to take the necessary precautions, to the right to state its opinion, engage in negotiations or even reach the most-extreme case of co-determination. The recognition of this right depends on the perception of the firm: for *property* and *shareholder value* theorists, the employees will never see their rights to be informed and consulted recognised because they see labour as something *external* to the firm, independent of the relationships established between the shareholders and the management. The *societal interest/nexus of contracts* and *stakeholder theorists* will always demand the intervention of the workforce based in the fundamental assumption that any person affected by a decision taken by a company should be informed and be given the opportunity to make their voices heard and have some kind of influence on the decision. The position of the law depends on its positioning in relation to the *nature* and the *objectives* of the firm.

The recent evolution of the doctrinal studies and national regulations have tended to adopt a *contractual* and *stakeholder* view of the firm. The growing reconceptualisation of the firm as a *nexus of contracts* in the company law literature and the general adoption of *fiduciary duties* in national regulations providing for the mandatory consideration of employee interests in the management of the company reveal that employee interests are gaining increasing acceptance in the governance of firms.<sup>12</sup> If we attempt to make a connection with the former section, it becomes easy to observe that

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<sup>11</sup> For an excellent overview of this discussion see: Deakin, S., Hugh Whittaker (2007). "Re-embedding the corporation? Comparative perspectives on corporate governance, employment relations and corporate social responsibility" *Corporate Governance* 15(1).

<sup>12</sup> Peltier, F. (1997). "La convergence du droit français avec les principes de la Corporate Governance américaine." *Revue du Droit Bancaire et de la Bourse* 60: 53 ss, Charlton, L. W. o. (2002). "Employees, partnership and company law." *Industrial Law Journal* 31(2): 99-111, Schwark, E. (2002). Corporate Governance: Vorstand und Aufsichtsrat. *Corporate Governance*. P. Hommelhoff, M. Lutter, K. Schmidt, W. Schön and P. Ulmer. Heidelberg, Recht und Wirtschaft: 77-118, Kraakman, R., P. Davies, et al. (2004). *The Anatomy of Corporate Law: a Comparative and Functional Approach*,

the Directives (both *reactive* and *proactive*) were underpinned in an idea of *nexus of contracts* and *stakeholder models* of the firm. The simple consideration underlying in the Directives that the employer may not implement such fundamental business decisions such as a *transfer of undertaking* (which most often derives from a sale of business) or a *collective redundancy* without first at least try to reach a solution with the employees reveals that the legislator saw labour as an integrating part of the business whose interests must be at least heard in the implementation of the business decisions. This is even more so if we advance to the *proactive directives*: the permanent company-level dialogue that they attempt to establish are destined to align the interests of employees with those of the company and charge management with the duty of bargaining with the employees the promotion of the interests of the company and ultimately of the shareholders. Considering that management is primarily responsible to the shareholders, the promotion of the interests of the shareholders must be achieved by a mandatory bargaining at a more permanent level with the employees, because the Directives set out mechanisms for the promotion of social dialogue at the level of the company. This is nothing but the recognition of a *contractual* and *stakeholder* model of the firm: employees are seen as parts of the business and the management is seen as the central point which must bargain the interests of shareholders and employees; the interests of the employees are expressly recognised in the policy of the firm and the Directives set out mechanisms to make their voices heard.

### 3. Conclusion

The understanding of the approach of the EU in terms of information and consultation of the workforce must not be seen in purely legal terms but must be rather *contextualised* within the several legal sources providing for rights to information and consultation and the theoretical discourse concerning the position of employees within the firm. The short description of the theoretical discussion that is currently taking place regarding the *nature* and *objective* of the firm serves to elucidate the reader that any regulation concerning the recognition of a right to information and consultation is not innocent and reveals a precise conception on the position of labour within the firm.

I believe that there is sufficient evidence to be able to sustain the assumption that the position of the EU in this matter has been one of a *nexus of contracts* and *stakeholder model* of the firm. The first logical step to analyse this question consists in the fundamental rights framework of the EU, composed by the ESC, FSR and the CFR. These instruments recognise the right of the workforce to be informed and consulted but are silent on the extension of that right and the means to be enforced. Since none of these legal instruments is self-executing, their practical effect is to bind the lawmakers of the EU to the recognition and sequential enforcement of that right. The answer of the extent to which labour is to be involved in the company must be sought in the provisions giving practical expression to those rights. The different regulations concerning the right to information and consultation of the workforce and some of the case law of the ECJ may provide evidence that they were issued in accordance with a societal/contractual view of the firm that considers the workforce is increasingly encouraged to engage dialogue with the management and contribute actively to the promotion of the success of the firm. This may be perfectly observed in the evolution from the *reactive* towards the *proactive* directives. In my view, the sparse case law of the ECJ concerning the right of information and consultation of the workforce also reinforces this idea. Therefore, if we interpret the content of the right to information and consultation from the legal instruments enacted to give it expression, one may sustain that the recognition of the right was made with a *contractualist* and *stakeholder* view of the company. The relationship with the *national level* is twofold: if on the one hand the recognition of the right at the level of the EU merely reflected the national systems and intended to avoid regulatory competition in terms of labour (by imposing *minimum standards* that may be improved upon), it is nonetheless undeniable that it is increasingly having more influence over the national level by means of a *spill-*

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Oxford, Carneiro da Frada, M. (2007). "A Business Judgement Rule no quadro dos deveres gerais dos administradores." *Revista da Ordem dos Advogados* 67(1).

*over* effect of its provisions into other areas not directly covered by the EU legal instruments. Finally, one should mention that this conceptualisation of the position of labour within firms has already sufficient *content* to be able of expanding into other areas of EU policy-making in which the interests of the employees may also have an express recognition.



## **Towards New Social Fundamental Rights**

Professor Hans Micklitz (EUI)

D. Kennedy distinguishes in his groundbreaking article on ‘Two Globalisations of Law & Legal Thought: 1850-1968’<sup>1</sup> between the Classical Legal Thought (CLT) 1850-1914 and ‘The Social’ 1900-1968. He associates CLT with individual rights, formal equality, the ideal of freedom, legal positivism, the core function of private law, normative ideas like right, will, fault, the unitary state, on one people, the code as legal instrument in the free market. ‘The Social’ focuses on group rights, social rights, on social justice, on solidarity, on legal pluralism, on social welfare, corporatism, social classes, on special legislation in organizing market alternatives.

The fundamentalisation of social rights is closely linked to the modernization of constitutions in the light of ‘The Social’. France took a leading role in the early 20<sup>th</sup> century. Social rights showed up in national constitutions. They are bound to the jurisdiction of the nation state, more particularly to the tasks and duties of the welfare state to protect its citizens. Social basic or constitutional rights have attracted academic attention ever since. The key issue was and is to what extent they define political objectives which address the nation state or whether the citizens are granted judicially enforceable rights. The fundamentalisation of social rights gained pace after the second world war, internationally by way of the two Covenants on Social and Political Rights and regionally by way of the European Convention on Human Rights. In the late 80’s the European Parliament initiated a debate over the role and function of inter alia social rights in the European Community.<sup>2</sup> Since then social rights play an ever growing role, at least with the boundaries of the European Community. The debate, however, had shifted focus. In the second half of the 20<sup>th</sup> century fundamentalisation takes place under the auspices of the growing importance of the human rights agenda. Social rights are more and more understood as rights which should be granted to each and every person independent from citizenship. Obviously there is a relationship between the decline of the nation state and the rise of social human rights. Whilst ‘the Social’ is internationalized and more and more uncoupled from a particular nation state understanding, no comparable institutionisation at the regional or international level has taken place. Neither the European Community nor International Organisations are in a position to enforce social rights. Despite the constitutional character of the European legal order, European citizens have limited opportunities to address directly European Institutions. Europe is not (yet) a state with powers and resources comparable to a nation state. Even if European citizens are granted standing under EU law and/or under the Human Rights Convention and even if social rights would be enforceable, the primary addressee for doing justice to the EU citizen remains the respective Member State. All what the European institutions be it the ECJ or the ECHR are competent for, is to put pressure on the respective Member States to implement regional social (human) rights to the benefit of the respective national and maybe non-national citizen. Internationally the position of the citizen is even worse off. The appropriate institutions are simply lacking.

The two papers deal with two different social rights: Irene Galtung with the right to food and Diane Roman with the medical basic right. Whilst they are both united in focusing on major aspects of ‘the Social’ nutrition and medical care, the two authors have chosen a different approach. I. Galtung takes the international right to food which is anchored in the Covenant on Economic, Social and Cultural

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<sup>1</sup> Suffolk, University Law Review 36 (2003) 630.

<sup>2</sup> A. Clapham, Human Rights and the European Community, A Critical Overview, Volume I, 1991, A. Cassese/A. Clapham/J. Weiler (eds), Human Rights and the European Community: Methods of Protection, Volume II, 1991; A. Cassese/A. Clapham/J. Weiler (eds), Human Rights and the European Community: The substantive Law, Volume 3, 1991.

Rights as the starting point for looking at the degree to which such an international right may be enforced in national and international courts. She pulls together case law from India and South Africa to demonstrate that the right to food maybe given shape by the courts. Such a right, however, this is her second point, has to be balanced out against the right to property.

D. Roman analyses the effectivity of social rights in Europe around a four step analysis (1) the validity of human rights depends on whether they are proclaimed. This is the case with regard to the right to health in the European Social Charter and the Charter of the World Health Organisation, aiming at prevention and non discriminatory equal access (2) opposability of medical rights refers to the French understanding of justiciability. D. Roman underlines the key role of the ECHR which puts pressure on states, but accepts budgetary choices contrary to the South African court; (3) medial rights efficiency requests a distinction between health care in the EU framework and the European Convention on Human Rights. This brings the complex relationship between enabling economic freedoms and restricting social rights to the fore; (4) medical rights effectiveness deals with the gap between the effect of the law and the awaited objective. This brings the author back to issues of equal access and the role of enforceable rights by the citizens (capabilities in the meaning of A. Sen). Economic efficiency this is her credo shall not become the only parameter for deciding over the enforceability of medial rights.



# The Contribution of International Law to Fundamentalise the Right to Food

Irene Galtung (EUI)

## Abstract

The paper investigates two key inter-dependent questions relating to the fundamentalisation of the right to food (which includes the right to safe drinking water, i.e. the right to food for short). Fundamentalisation is understood here as implying potentially *justiciable* rights. One question concerns the role of litigation in enforcing the right to food; the other question concerns the role of property rights in defining the right to food. This topic is particularly relevant today, due to the recent dramatic rise in food prices. There is little systematic study of these two key questions. Both questions aim at increasing food security and reducing poverty, through change in government policies; in this sense, they represent a puzzle of law, about how this may be achieved.

The two key questions of this paper are the following. First, can the right to food be claimed in national and in international courts, against States - under constitutions, conventions, and customary international law? Secondly, how might the right to food conflict with property rights, such as the privatisation of knowledge (for example, through the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)), and the sale of crops for bio-fuels instead of for food, thus potentially contributing to the recent rise in food prices?

National and international law, which provide for the right to food and water, are double-edged swords. The law has the capacity to act as an obstacle to, but also as a sustainable solution towards, reducing hunger. Very few people know a right to food exists, yet: (1) 22 States provide explicitly for a constitutional right to food; (2) 156 States ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 11 provides for the human right to food); (3) some regional law provides for the right to food (EU law does not); (4) and, although it is true that 34 States neither ratified the ICESCR, nor provide for a constitutional right to food, the core content of this right (the right to freedom from hunger) might already have reached the status of customary international law, and even *jus cogens*, binding States regardless of consent. If the right to food is a justiciable individual or collective right, then people can claim it, which is also why most often it is not justiciable.

## Introduction

This paper is about the contribution of international, regional and national law to the fundamentalisation of the right to food. Fundamentalisation is understood here as implying justiciable human rights. Hence, the paper goes beyond the framework of the EU legal system, and citizenship.

The paper investigates two key inter-dependent questions relating to the fundamentalisation of the right to food (which includes the right to safe drinking water, i.e. the right to food for short). One question concerns the role of litigation in enforcing the right to food; the other question concerns the role of property rights in defining the right to food. This topic is particularly relevant today, due to the recent dramatic rise in food prices. There is little systematic study of these two key questions. Both questions aim at increasing food security and reducing poverty, through change in government policies; in this sense, they represent a puzzle of law, about how this may be achieved.

The two key questions of this paper are the following. First, can the right to food be claimed in national and in international courts, against States - under constitutions, conventions, and customary international law? Secondly, how might the right to food conflict with property rights, such as the privatisation of knowledge (for example, through the Agreement on Trade-Related Intellectual

Property Rights (TRIPS Agreement), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)), and the sale of crops for bio-fuels instead of for food, thus potentially contributing to the recent rise in food prices?

## **Background**

National and international law, which provide for the right to food and water, are double-edged swords. The law has the capacity to act as an obstacle to, but also as a sustainable solution towards, reducing hunger.

Very few people know a right to food exists, yet: (1) 22 States provide explicitly for a constitutional right to food; (2) 156 States ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 11 provides for the human right to food); (3) some regional law provides for the right to food (EU law does not); (4) and, although it is true that 34 States neither ratified the ICESCR, nor provide for a constitutional right to food, the core content of this right (the right to freedom from hunger) might already have reached the status of customary international law, and even *jus cogens*, binding States regardless of consent.

In addition to the sources mentioned above (constitutions, the ICESCR, and customary international law), the right to food is arguably provided for under further conventions of human rights, humanitarian law, refugee law, international criminal law, economic law, environmental law, and regional law.

Specifically, in Europe, the right to food is neither provided for under the Charter of Fundamental Rights, nor under case law. However, the right to food is arguably provided for, first, under some member State national law; secondly, under international law, where the ICESCR has been ratified by all EU member States; and thirdly, under other fundamental rights, such as the right to life, and the right to non-discrimination.<sup>1</sup>

In fact, where the right to food is not explicitly provided for, it might be implied under other, more easily justiciable, rights, such as the right to life, the right to non-discrimination, or the prohibition against inhuman treatment. For instance, Article 3 ECHR against inhuman treatment has been held, in several cases, to imply that the State must support the person monetarily. This was held in recent cases in UK, regarding plaintiff destitute asylum seekers whose right to basic social support was taken away because they had not applied for asylum at the port of entry. They claimed breach of the right not to be subjected to inhuman, or degrading treatment, or punishment under Article 3 ECHR. In *Limbuela*, the House of Lords unanimously held that the Secretary of State had to provide support.<sup>2</sup>

Despite these multiple sources of the right to food, the question of its justiciability remains open; both perceived justiciability, as a well as actual justiciability. The answer to this question might be to try claiming the right in several courts.

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<sup>1</sup> Also, the European Social Charter (revised) Part II Article 8 protects nursing mothers, and Article 4 (Para. 1) provides for “the right of workers to remuneration such as will give them and their families a decent standard of living”. Lastly, the ECtHR has not taken a clear position on whether EU law provides for a right to water. However, Article 5 Protocol on Water and Health (1999) should affirm the right to water of all residents. In 2001, the Recommendation of the European Council reaffirmed the right to water, and equally the Parliament in 2003. There are also directives on drinking water. See Recommendation du comité des ministres aux états membres sur la Charte Européenne des Ressources en Eau. Conseil de l’Europe, 17 octobre 2001, Rec. (2001) 14.

<sup>2</sup> Fredman, Sandra, *Human Rights Transformed: Positive Duties and Positive Rights*, Oxford Legal Studies Research Paper No. 38/2006, Public Law, p.498-520, 2006.

## **The 1<sup>st</sup> Key Question**

The first key question is: Can the right to food be claimed in national and in international courts, against States – under constitutions, conventions, and customary international law?

The first key question arises from the assertion that the right to food is one – if not the - most important legal topic facing humanity. One may disagree with this, of course, as there are other important global legal issues, such as climate change or genocide, which are urgent. And even if one were to agree on its centrality, one might disagree as to the necessary means to ends. Of course, the law is but one of several means.

Nevertheless, one may argue for the importance of the legal perspective for three reasons: since it is the law that decides who owns food and safe drinking water; since more people die of hunger every year than of any other cause; and since the right, in a way, stands at the very heart of law. This last reason is important in two senses. On the one hand, the right to food questions the core function and legitimacy of law. On the other hand, the right to food dismantles the economic and political compassions of law, which favour many rights as self-evidently enforceable in court, while this right is not.

If the right to food is a justiciable individual or collective right, then people can claim it, which is also why most often it is not justiciable.

A contribution of this paper might be to try to show that although the potential litigation strategy is difficult, it is probably not impossible; in other words, it might be worthy of being tested, across space and time. This does not diminish the role of other necessary and complementary strategies. A twin contribution might be the argument that, since the right is not self-evidently enforceable in court, there is a situation here where the law-breaker (e.g. the State) decides when the law applies. This may necessitate revising our legal concept of the right, and the correlative right-holders, duty-bearers, and agents of accountability. To remind one: right-holders are actors with a claimable right against duty-bearers; duty-bearers are actors legally obliged to fulfil responsibilities under the right to its right-holders (e.g. States); agents of accountability are procedures of monitoring and correction to ensure duty-bearers fulfil their obligations to right-holders (e.g. courts).

The main scope of the paper is the core content of this right (the right to freedom from hunger), and the correlative territorial State obligations. Notwithstanding, it is essential to qualify the obligations of non-State actors, and extra-territorial-State responsibility, as well.

The issue is, what this right means. Since, in general, the victims cannot stand up for themselves, the willing lawyer and sympathetic judge might play key roles. Although the right to food is probably the most affirmed right,<sup>3</sup> it is also probably the most violated right. 854 million people suffer from hunger.<sup>4</sup> 1 billion people do not have access to safe drinking water.

Sometimes, extraordinary court cases do occur that change the political, economic and social structure of the State. For instance, the monumental case of the USA Supreme Court decision *Brown v. Board of Education* on May 17, 1954 at 12:52 p.m., might have contributed to the end of segregation. It may be possible to draw parallels with the right to food. Before *Brown*, there was similar scepticism about litigation, as there is for now for the right to food. Sceptics argued that the law providing schools to be “separate, but equal” was not justiciable; they pointed to the fact that black people were too poor to file such a case. Notwithstanding, the Supreme Court held that if schools were separate, they could not be equal, and that this was unconstitutional.

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<sup>3</sup> Alston, P., *International Law and the Human Right to Food*, in Alston, P., Tomasevski, K., *The Right to Food*, Martinus Nijhoff Publishers, 1984, p.9.

<sup>4</sup> Figures from United Nations World Food Programme. See website at <http://www.wfp.org>.

Of course, it is a matter of speculation whether success in court would actually mean a decrease in hunger; or conversely, whether cases lost would backfire on attempts to claim similar rights in court; or whether litigation would contribute to constructive policy and precedent, were it to be legally feasible and economically affordable. Nevertheless, one might start with the following three States.

First, India is home to the world's only successful right to food case, *PUCL v. UOI and ORS* (2001).<sup>56</sup> The Supreme Court of India held the constitutional right to life includes the right to food, and that the State and some of its organs had violated the constitutional right to food. This led to judicially enforced cooked mid-day meals in schools and several schemes of benefits for poor people. Perhaps, it may be possible to reproduce such cases, with effective court decisions.

Secondly, South Africa is a very interesting potential case because its courts are probably the most open in the world to judicial activism, in the sense that it is categorically accepted that economic and social rights are justiciable. The Constitutional Court takes this justiciability for granted (*Nevirapine case*).<sup>7</sup> The South Africa Constitution (Section 27 (1)) states, "everyone has the right to have access to: [...] (b) sufficient food and water". South Africa also signed, but has not ratified, the ICESCR (Article 11 provides for the human right to food). How can the right to food be claimed, also citing this (un-ratified) international convention?

Thirdly, USA is a very interesting potential case, having neither ratified the ICESCR, nor legislated for a right to food; yet, there are 36.3 million people unable to buy adequate food in the USA; 22 million are children.<sup>8</sup> The USA is also a very interesting case because a successful, but even a failed, right to food court case in the USA might be geo-politically influential. How can the right to food be claimed, also citing customary international law, or citing civil and political rights already provided for in the constitution?

## The 2<sup>nd</sup> Key Research Question

The second key question is: How might the right to food conflict with property rights, such as the privatisation of knowledge, and the sale of crops, land, and water for bio-fuels instead of for food, thus potentially contributing to the recent rise in food prices?

First, there are unresolved conflicts between the right to food and privatisation of knowledge. For example, how does patent protection under the TRIPs Agreement affect access to patented GMO seeds and crops for poor people? As is known, some seeds are bred to self-sterilise, so farmers are obliged to purchase new seed every year.<sup>9</sup> Some seeds are even bred to germinate only if they are combined with fertilisers produced by the same TNC.<sup>10</sup>

In some circumstances, it seems that the effects of the TRIPs Agreement can violate the right to food.<sup>11</sup> The TRIPs Agreement concerns minimum standards required for national implementation, protection and enforcement of IPR. Under Article 27(3)(b), States have the obligation to provide for

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<sup>5</sup> See website at <http://www.geocities.com/righttofood/orders/may203.html>. *People's Union for Civil Liberties v. Union of India & Ors*, SC 2001, Write Petition (Civil) No.196/2001 reprinted in *RIGHT TO FOOD* 48 (Colin Gonsalves ed., 2004).

<sup>6</sup> See website at <http://www.geocities.com/righttofood/orders/may203.html>.

<sup>7</sup> *Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (5) SA 721 (CC), at Para 25, 2002 (10) (BCLR 1033) (CC). See website at <http://www.concourt.gov.za>.

<sup>8</sup> See website at <http://www.frac.org>.

<sup>9</sup> Mechlem, K., and Raney, T., *Agricultural Biotechnology and the Right to Food*, 2005.

<sup>10</sup> *Ibidem*.

<sup>11</sup> Edwardson, Shelley, Chapter 6 "Reconciling TRIPS and the Right to Food", in Cottier, T., Pauwelyn, J., Burgu Bonanomi, E., "Human Rights and International Trade", Oxford University Press.

plant variety protection, either through granting of patents, or through an effective sui generis system; or by way of combining the two. This monopoly rights can violate the right to food.

On the contrary, in some circumstances, it is argued that it may be possible to direct agro-biotechnology towards the right to food. Article 1 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or Seed Treaty) (2001) provides for guiding principles regarding the conservation and sustainable use of PGRFA in exchange for access to, and equitable benefit-sharing, of those resources. The Code of Conduct on Biotechnology (1991) will cover five areas: bio-safety and other environmental concerns; intellectual property rights and farmers' rights; appropriate biotechnology for developing countries; reduction of potential negative effects of biotechnology; and monitoring.<sup>12</sup> There is also a Panel of Eminent Experts in Ethics on Food and Agriculture (1999). It is mandatory that agro-biotechnology does not violate the right to food, or biodiversity.

Thus, some scholars argue it is possible avoid conflicts between the right to food and privatisation of knowledge. The practice of sui generis<sup>13</sup> might be one such way; some scholars argue that the WTO Dispute Settlement Panel can be helpful in this context, since non-WTO rules can be invoked before a WTO panel and overrule WTO rules,<sup>14</sup> and since there are a variety of legal standards for the protection of rights of breeders, technology developers, researchers and farmers, such as UPOV, CBD, and the International Treaty on Plant Genetic Resources (ITPGR).

In this respect, some scholars even argue that in terms of accessibility of food, some GM crops (such as insect-resistant cotton) may actually make small farmers richer.<sup>15</sup> However, small farmers are not necessarily poor people, therefore the issue remains how to guarantee the right to food of poor people.<sup>16</sup> Moreover, the SPS Agreement introduces the precautionary principle, thereby limiting national discretion with respect to food security to measures that are based on scientific principles and on a risk assessment.<sup>17</sup>

Secondly, there are unresolved conflicts between the right to food and the sale of crops, land, and water for bio-fuels instead of for food, thus potentially contributing to the recent rise in food prices.

It is possible that bio-fuels might violate the right to food. Jean Ziegler, UN Special Rapporteur on the Right to Food, has named bio-fuels a "crime against humanity". According to him, bio-fuels might violate the right to food in three respects.<sup>18</sup>

The first aspect concerns increasing prices of food, to which bio-fuels might have in/directly contributed. The International Food Policy Research Institute (IFPRI) says the number of people suffering from under-nourishment will increase by 16 million people for each percentage point increase in the real price of staple food.<sup>19</sup> This could mean that 1.2 billion people will be suffering from hunger by 2025.

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<sup>12</sup> *Ibidem*.

<sup>13</sup> Edwardson, Shelley, Chapter 6 "Reconciling TRIPS and the Right to Food", in Cottier, T., Pauwelyn, J., Burgu Bonanomi, E., "Human Rights and International Trade", Oxford University Press.

<sup>14</sup> Pauwelyn, J., "The Role of Public International Law in the WTO: How far Can We Go?" 95 AJIL (2001), 535, 577.

<sup>15</sup> Mechlem, K., Raney, T., *Agricultural Biotechnology and the Right to Food*, 2005.

<sup>16</sup> Kent, G., *Freedom from Want*, Georgetown University Press, Washington D.C., 2005.

<sup>17</sup> Breining-Kaufmann, C., Chapter 6, "The Right to food and Trade in Agriculture", in Cottier, T., Pauwelyn, J., Burgu Bonanomi, E., "Human Rights and International Trade", Oxford University Press.

<sup>18</sup> Ziegler, J., *Report by the Special Rapporteur on the Right to Food*, submitted in accordance with General Assembly resolution 61/163, UN Doc. A/62/289 of 22 August 2007.

<sup>19</sup> *Ibidem*, para.35

The second aspect concerns increasing competition over land and forests, and forced evictions.<sup>20</sup> A rapid increase in the prices of food crops might intensify competition over land and other natural resources, including forest reserves.

A third aspect concerns increasing prices of water.<sup>21</sup> On the one hand, the production of bio-fuels will require substantial amounts of water, diverting water away from the production of food crops. Thus far, there are few studies on the impact of bio-fuel production on water resources – although this was a central concern of the World Water Week international meeting held in Stockholm in August 2006. On the other hand, rising prices of water would limit access to water for the poorest communities. All these aspects, in a way, question the role of property rights in defining the right to food.

## Conclusion and Future Research Outputs

In conclusion, the two key questions in this paper tried to show a potential contribution of international, regional and national law to the fundamentalisation of the right to food.

Building on the concepts in this paper, it could be possible in a future project, to seek two research outputs. On the one hand, the project could aim at creating a State-by-State index on the likelihood of successful right to food court cases, in a similar way that there exist State-by-State indexes evaluating corruption. This necessitates closer examination of, for example, the 22 States providing for a constitutional right to food. On the other hand, understanding how the right to food potentially conflicts with property rights should help elucidate the legal hierarchy of this right; in other words, the relative weight of the right to food, as opposed to other rights.

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<sup>20</sup> *Ibidem*, para.38.

<sup>21</sup> *Ibidem*, para.38.

## The Effectivity of Medical Basic Rights in Europe

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### Abstract

Currently acute, the question of rights effectivity is also complex. As noticed, “whatever the definition specified, one can conventionally agree on the fact that this concept returns to the general question of the passage from “sollen” to “sein”, in other words, of the statement of legal standard to its concretization or its implementation in the world”. The concept of basic rights effectivity thus implies a reflection on the notion of respect of the law. It shows the difficulty of the analysis of the basic rights effectivity, which can be organized according to the following four part scheme. First, one shall reflect upon the **validity** of basic rights; secondly, the **opposability** or justiciability of these rights must be assessed. Thirdly, the **efficiency of basic rights** must be measured. Finally, the **basic rights’ effectiveness** should be examined: this last enquiry has to do with the evaluation of the results of the proclamation of basic rights; the idea is to assess whether it is possible to carry out an assessment of the objective sought by comparison with the awaited objectives. The measurement of rights effectivity results from the combined analysis of these four criteria

### Introduction

*The effectivity of medical basic rights in Europe.* In this form, the precise heading of the working paper raises a three part question, the seriousness and difficulty of each part being greater than the previous one ...

Europe? Certainly, the European Union needs to be examined but also the Council of Europe, and more particularly the European Convention of Human Rights (ECHR) and the other treaties negotiated within the framework of this larger Europe: the Oviedo convention or the European Social Charter.

Medical basic rights? My choice here will be to make no distinction between civil rights and economic and social rights. In other words, such different aspects of medical rights as the “right to protection of health”, equal access to care or the respect of bodily integrity, the protection of consent, the guarantee of medical confidentiality and private life will all be taken into account and will generically be referred to under the label “medical basic rights”.

There remains the third question, a question of considerable difficulty: the definition of “effectivity”... This question of rights effectivity has become central. Is it necessary to see there a trace of an americanization of the law or a concern for pragmatism? From now on, J. Commaille notes, “law and public action (like the new form of public policy) only justify themselves by their results ».<sup>1</sup>

Currently acute, the question of rights effectivity is also complex. As a French author, Veronique Champeil-Desplats, notices,<sup>2</sup> “whatever the definition specified, one can conventionally agree on the fact that this concept returns to the general question of the passage from “sollen” to “sein”, in other words, of the statement of legal standard to its concretization or its implementation in the world”. The concept of basic rights effectivity thus implies a reflection on the notion of respect of the law. It shows the difficulty of the analysis of the basic rights effectivity, which can only be interdisciplinary, for studying the possible shift between the statement of the standard and its respect, the tension between

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<sup>1</sup> J. Commaille, « Effectivité », in D. Alland et S. Rials, *Dictionnaire de culture juridique*, PUF, 2003, p. 584.

<sup>2</sup> V. Champeil-Desplats, « Propos introductifs », *L’effectivité des droits fondamentaux*, Presses de Paris X, 2008, à paraître

“is” and “ought”, the lawyer needs the help of other social sciences such as history, economy and sociology. An even more exotic approach can be adopted, making use of anthropology or psychology. The challenge thus consists in mobilizing extra-legal disciplines without necessarily having full scientific competence in them and without losing sight of the specific nature of legal reasoning.

In the wake of various scholarly studies,<sup>3</sup> it seems to me that the analysis of basic rights effectivity can be organized according to the following four part scheme. First, one shall reflect upon the **validity** of basic rights: are they proclaimed? What kind of consequences can be drawn from such proclamation, or absence of proclamation? Secondly, the **opposability** of these rights must be assessed. Opposability of basic rights has been a trendy concept in France since 2007, and shares much with the concept of justiciability. However, it is of interest to reflect upon the relevant implementation vectors of basic rights. Thirdly, the **efficiency of basic rights** must be measured. I take « *efficiency*” here to mean a quality attached to an action “which produces an effect”. In other words, studying efficiency implies a focus on the effects produced by the fundamentalisation of law. Finally, the **basic rights’ effectiveness** should be examined, in the sense that effectiveness is found when a given course of action produces the expected effects. In other words, this last enquiry has to do with the evaluation of the results of the proclamation of basic rights; the idea is to assess whether it is possible to carry out an assessment of the objective sought by comparison with the awaited objectives. It is my contention that the measurement of rights effectivity results from the combined analysis of these four criteria.

## **Part A      Medical Rights Validity: The Example of the Human Right to Health Care**

**Validity** is the first moment of effectivity: to be applied, a right needs to be recognized, proclaimed. The first step of this analysis involves making an inventory of the European basic rights in the field of health. The existence of two European systems (the Community and then the EU on the one hand, the Council of Europe on the other) has brought about a multiplication of basic rights in the field of medicine. The human right to health care is a good example of these multiple proclamations.

The right to health care is, as a basic right, proclaimed by various texts and especially in the recent European Charter of Fundamental Rights. Its article 35 states, under the heading of “health care”, that “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”. The stipulation must be read in the light of article 34, which develops the question of the means, by recognizing and respecting “the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, (...)in accordance with the procedures laid down by Community law and national laws and practices”. In addition, complementing these general provisions, various provisions protect childhood health (art. 24) the health of the worker (art. 31), the young person at work (art. 32) and, implicitly, the consumer (art. 38).

The right to health care is proclaimed in a more detailed way by the European Social Charter. In its last version (1996), the revised Charter provides, in its article 11, that

“With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic and other diseases, as well as accidents”.

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<sup>3</sup> F. Rangeon, « Réflexions sur l’effectivité du droit », in CURAPP, *Les usages sociaux du droit*, 1989, pp. 126-149 ; V. Champeil-Desplats, précit



Symmetrically, article 12 intends to ensure “the effective exercise of the right to social security” and article 13 states that

“in order to ensure the effective exercise of the right to the social and medical assistance, the Parties undertake: to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want”.

The different European instruments incorporate the objective posed by the Charter of World Health Organization of July 27, 1946, according to which “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”. This requires the achievement of two types of public policy aims, prevention and cure, whose conjunction is necessary to human health care.

### ***Prevention***

An example of human health prevention may be found in environmental protection policies. The right to a healthy environment was gradually deduced from the Social Charter and the ECHR, on the basis of judicial interpretation in fashion with the rising pressure of ecological environmental concerns. On the one hand, various incentive instruments elaborated within the framework of the Council of Europe proclaimed the human right “to a healthy and ecologically-balanced environment whose quality enables individuals to live in dignity and wellbeing”.<sup>[9]</sup> In addition, the judge-made interpretation contributed to establish a bond between the protection of health and environmental issues. Thus, for example, the European Committee of Social Rights based a 2006 decision, on “ the growing link (...) between the protection of health and a healthy environment, and has interpreted Article 11 of the Charter (right to protection of health) as including the right to a healthy environment”<sup>4</sup> Noting that lignite exploitation, although dangerous for human health, is necessary for adequate provision of electricity, the committee recalled that

“overcoming pollution is an objective that can only be achieved gradually. Nevertheless, states must strive to attain this objective within a reasonable time, by showing measurable progress and making the best possible use of the resources at their disposal (...). The Committee assessed the efforts made by states with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations (...), and in terms of how the relevant law is applied in practice”<sup>5</sup>.

At the end of a precise examination, even taking into consideration the margin of discretion granted to national authorities in such matters, the Committee considers that Greece has not managed to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest, and finds that there has thus been a violation of Article 11§1, 2 and 3 of the Charter”. The position of the European Committee of Social Rights supplements that of the European Court of Human Rights which established a link between health and environmental concerns.<sup>6</sup>

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<sup>4</sup> V. CEDS, collective complaint. n° 30/2005 Marangopoulos Foundation for Human rights (FMDH) C. Greece, December 6, 2006, § 195.

<sup>5</sup> Id. § 204

<sup>6</sup> CEDH, déc. 9, 1994, G. Lopez Ostra c/ Espagne, n°16798/90, Série A n° 303-C

The effectivity of the right to health care is indisputably the aim of these ecological-friendly judicial interpretation. It is reinforced by the assertion of equal access to care and non discrimination.

### ***Equal Access and Non Discrimination***

The general principle of non discrimination receives, with regard to the equal access to care, various interpretations. Again, the Council of Europe, and especially the Social Charter's interpretation offers interesting examples. Equal access to health care was particularly reinforced by a decision of the European Committee of Social Rights concerning French restriction of access to medical care for foreigners in irregular situations. The opinion of the Committee is particularly interesting, both because of the reasoning it adopts and because of the conclusion it reaches.

After having recalled that the Charter was considered "as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights", the committee notices that

"Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter".<sup>7</sup>

As we have seen, the implementation the European principle of equal access to care is emblematic of a "cascade-proclamation" phenomenon: in order to reinforce the effectivity of the right to protection of health, "right-rebounds" are devoted: here equal access to care, there the right to a healthy environment. An identical case can be made with regards to the more civil dimension of rights the individual is entitled to within the medical relation. However, and in any case, it seems that the effectivity of medical rights in Europe necessarily implies their formal proclamation as well as a jurisdictional or "proto-jurisdictional" interpretation (in the case of the Committee of social rights), in order to reinforce the legal base. The simple normative statement is the first stage of the effectivity. The legal status of implementation of the right, i.e. its opposability, constitutes a second stage of it.

## **Part B Medical Rights Opposability**

The concept of opposability of rights is to be considered in the French political context, where it has become very "trendy". In 2007, claims for "Social-rights opposability" have led to passing a law creating a "right to opposable housing".<sup>8</sup> Then, French presidential election debates contributed to implementing a claim of an "opposable right" to schooling for the handicapped or to babysitting for babies. Hence the question of the opposability of basic rights entered the mass media's vocabulary... In a more classical – and judicial – way, the question of the opposability of medical rights has to do with guarantees, especially judicial, that are attached to social rights. According to what processes are they implemented by European law? Do they benefit from judicial actions? Two examples shall help measure the existing relationship between effectivity and medical rights.

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<sup>7</sup> Collective Complaint No. 14/2003 Fédération internationale des ligues des droits de l'homme (FIDH) v. France, oct. 07, 2004

<sup>8</sup> (french) Loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale, JORF n°55 du 6 mars 2007 page 4190 ; C. Wolmark, "L'opposabilité du droit au logement", Dalloz 2008, p. 104 -108.

### ***Matter of Public Policies***

The EU does not have a health-care policy that would compare with those other public policies that aim at strengthening the free-market economy or the common agricultural policy. And health-care matters have to do with several public policy domains; also they can be taken care of and resolved at different levels, that of the States or that of the EU,<sup>9</sup> since the latter enjoys a competence in supporting, coordinating or supplementing the action of the States as regards protection and improvement of human health in their European purpose.<sup>10</sup> The Union thus encourages the co-operation between States: article 168 TFEU<sup>11</sup> states, in a preliminary way that

“a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health. The Union shall complement the Member States’ action in reducing drugs-related health damage, including information and prevention”.

Then, TFEU details the initiatives that the European Commission can take on the matter:

“The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation”.

Clearly, this kind of European competence in the field of health care is connected to a global aim of effectivity of health care policies.

Moreover, European law recognizes a direct competence of the Union intended to promote common safety. Article 168-4 TFEU allows the Council to adopt measures setting “high standards” of quality and safety of organs and substances of human origin, medicinal products and devices for medical use; measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health. In addition, according to the new article 168-5 TFEU resulting from the treaty of Lisbon the European Parliament and the Council may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, such as measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

However, as article 168-7 TFEU points out,

“Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them”.

Consequently, in accordance with the principle of subsidiarity, the primary responsibility, as far as health is concerned, remains with the national authorities.

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<sup>9</sup> TFEU, art. 4 K.

<sup>10</sup> TFEU, art. 6

<sup>11</sup> Lisbonn-new article 168 TFEU , ex. article 152 TCE

In sum, the effectiveness of medical rights mostly falls in the responsibility of national authorities who retain the major competences in terms of implementation. A similar conclusion can be reached when examining the situation of the Council of Europe.

### ***Matter of Judicial Guarantees: Theory of the Positive Obligations and Effectivity of the Rights***

While the justiciability of socio-economic rights has been the subject of much political debate, the issue of whether socio-economic rights are justiciable has been illustrated by judicial cases. It is well known that, for the European Court, “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>12</sup> In other words, the ECHR wishes to provide people with the material conditions necessary to the effective exercise of their rights. Far from being satisfied of mere abstention from the State, the “fulfilment of a duty under the Convention necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and there is no room to distinguish between acts and omissions”.<sup>13</sup> The State has “to take reasonable and appropriate measures to secure the applicant’s rights”.<sup>14</sup> European judges consider that article 2 lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.

Although this line of reasoning has developed on the basis of article 2 of the ECHR, and thus largely exceeds the medical sphere, it also has implications as regards health care. For the Court, “The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2”.<sup>15</sup> In the public-health sphere, those principles require States “to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients’ lives”.<sup>16</sup> In a general way, the Court did not hesitate to apply these doctrines of the positive obligations to the question of the public health protection against environmental risks. In the context of dangerous industrial activities, such as the operation of waste-collection sites, the Court pointed out that the State had the duty to install a regulatory framework suitable to ensure adequate protection and information of the public. It was judged that the lack of action of the authorities revealed a failure with respect to the obligation of protection thus stated: the authorities did not do everything within their power to protect their inhabitants from the immediate and known risks to which they were exposed.<sup>17</sup>

The positive-obligations theory leads to guarantee effective rights. However, its implications are limited, insofar as the rights thus guaranteed do not reach as far as conferring the applicants the capacity to require their realization. Neither access to care, nor a particular medical benefit can be required by the patient. A case-law example is emblematic in that respect: it results from *Pentiacova and other vs. Moldova’s* case.<sup>18</sup> The European Court was seized by patients under dialysis complaining about the failure of the State to provide all the medication necessary for haemodialysis at public expense. While the Convention does not guarantee as such a right to free medical care, the

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<sup>12</sup> CEDH, Oct 9 1979, *Airey vs Ireland*, n° 6289/73, § 24.

<sup>13</sup> *Id.*, § 25

<sup>14</sup> CEDH, Dec 9 1994, *Lopez Ostra vs Spain*, précit., § 51

<sup>15</sup> *Powell vs. United Kingdom* (Dec.) n° 45305/99, May 4, 2000, § 1. The court adds: “However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life”

<sup>16</sup> CEDH, n° 32967/96, janv. 17 2002, *Calvelli and Ciglio vs Italy*, § 49

<sup>17</sup> CEDH, GC, nov 30 2004, *Öneryildiz vs Turkey*, n° 48939/99, 2004/XII, § 71 and (§ 109).

<sup>18</sup> *Pentiacova and other vs Moldova*, January 4, 2005, n°14462/03.

Court has held in several cases that Article 8 is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants<sup>19</sup>. So the Court admitted that Article 8 is applicable to the applicants' complaints about insufficient funding of their treatment. However, the Court underlined the State's important margin of appreciation in this respect:

"The margin of appreciation (...) is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources (...) In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court".

The Court says it does not wish to minimise the difficulties apparently encountered by the applicants. It does add that "it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs". Nevertheless, "the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment." And the Court concluded that in the circumstances of the present case it could not be said that the respondent State had failed to strike a fair balance between the competing interests of the applicants and the community as a whole.

The choice of a limited judicial control could be explained by a democratic argument: it is the Parliament's role to carry out budgetary choices. Judges are not legitimate to solve general questions of an economic or social nature. For the Court, knowing which share of the official budget must be assigned to the public health field constitutes a political question.<sup>20</sup> This assertion is reminiscent of American supreme court *Ferguson v. Skrupa* decision, in which Judge Black wrote that: "it is up to legislatures, not courts to decide on the wisdom and utility of legislation (...) courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws".

Such arguments do not fully convince, however. South-African case law, for example, shows the availability of other lines of reasoning. Indeed, in a famous decision, the Grootboom's case,<sup>21</sup> the South African Constitutional Court recognised the judicial enforcement of social rights, especially the right to adequate housing and children's rights to shelter. The applicants, who included children, were squatters in a township. They asked the Government to provide them with adequate basic shelter or housing until they secured permanent accommodation. They were granted relief on the basis of the right of children to shelter mentioned in the Constitution. First, the constitutional court stated that

"all the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. (...) The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them"<sup>22</sup>.

Then, the court added that the constitution gives everyone the right of 'access' to adequate housing. This means that the state must create conditions through laws, budgets and other measures that enable individuals and groups to gain access to housing. Section 26(2) of the Constitution obliges the state to take "reasonable legislative and other measures" to progressively realise the right to access adequate housing. The wording implies that, in addition to legislative measures, administrative, judicial, economic, social and educational measures must be taken. In Grootboom's case, the court indicated

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<sup>19</sup> Zehnalová and Zehnal, o.p.; Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003)

<sup>20</sup> Gheorghe vs. Romania, September 22 2005, N<sup>o</sup> 19215/04:

<sup>21</sup> Aff. Government of the Republic of South Africa and Others v Grootboom and others 2001 (1) SA 46 [DC])

<sup>22</sup> § 2 3-24

that the measures adopted must establish a coherent public housing programme, directed towards the progressive realisation of the right of access to adequate housing within the state's available resources. The court explained that "legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive" (Para 42). Policies and programmes must thus be reasonable both in their conception and their implementation. In interpreting the term 'reasonable', the court paid particular attention to the housing needs of those living in extreme conditions of poverty, homelessness or intolerable housing. It stated that a programme that excludes a significant segment of society cannot be said to be reasonable: "It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test" (§44).

Grootboom's case is probably the most quoted social rights case, laying the foundation for subsequent successful social rights claims in South Africa and elsewhere. The Court lays the foundation for the justiciability of the obligation to progressively realize social rights, which the Court will review on the basis of the "reasonableness" test. This line of reasoning shall be completed in another decision about progressive realization of the right to health care.<sup>23</sup> However, this interpretation is not isolated. By all means, one should keep in mind the "proto-jurisdictional" reasoning of the European Committee of the social rights, which often does not hesitate to state that it is compulsory for the states who have previously accepted the article to grant assistance to people in need in the form of formal rights; the Contracting Parties are no longer merely empowered to grant assistance as they think fit; they are under an obligation, which they may be called on in court to honour".<sup>24</sup> A partial conclusion can be outlined: justiciability of social rights still has to be built.

## **Part C      Medical Rights Efficiency**

Something is efficient when it produces an effect. Efficiency is therefore tantamount to the concept of "impact". Applied to medical questions, the study of efficiency leads us to analyse the effects of the invocation of the laws protecting human health. In other words, the study of efficiency implies a concentration on what is called the "health reserve". That notion is not used here in its common meaning, widely used in international law, but expresses the idea that the European law admits exceptions in the application of its standards, when the protection of public health is at stake. This public health reserve is as remarkable in the UE framework (1) as in European convention of Human rights (2).

### **1.      *The Efficiency of Health Care in the EC Framework***

In various ways, European founding treaties mention public health care as a limit to economic freedoms.<sup>25</sup> For example, with regards to the freedom of movement of goods, the European Court protects the state's capacity to call upon the reserve of public health, and this sovereign power is made even broader in the absence of a common definition of public interest, which would legitimate a restriction on imports.<sup>26</sup> Quantitative restriction on imports may be justified by the fact that it is

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<sup>23</sup> Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC): Court ordered the Government to extend availability of anti-retroviral drugs to HIV positive pregnant women to hospitals, to provide counselors; and to take reasonable measures to extend the testing and counseling facilities throughout the public health sector.

<sup>24</sup> Conclusions I, 1965, article 13, p. 64-65.

<sup>25</sup> Art. 45 Al 3 TFEU

<sup>26</sup> CJCE, February 2, 1989, Commission vs. FRG, aff. 274/87, Rec. p. 229; CJCE, July 25, 1991, Aragonesa, C 176/90, Rec. I, p. 4151 ; CJCE, March 8 2001, aff. C-405/98, Konsumentombudsmannen (KB) and International Gourmet Products, Rec. CJCE 2001, I, p. 1795; CJCE, 13 juill. 2004, aff. C-262/02, Com. EC C France; CJCE, 13 juill. 2004, aff. C-429/02, Bacardi

pursuing an objective relating to the protection of public health. The EFB crisis (relating to the “Mad cow disease”) and the claim for a better health safety that followed have illustrated the stress laid by the ECJ on the protection of human health, which is binding on States<sup>27</sup> and EC institutions.<sup>28</sup>

However justified quantitative restrictions on imports are, when public health is at stake, two conditions have to be met. First, States have to demonstrate actual threats to public interest. The European Court carefully checks the objective pursued;<sup>29</sup> secondly, the measure has to be proportionate to the risk it intends to avoid. European case-law specified the contents and the range of this second condition. According to the Court, the

“principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.

This condition of proportionality must meet two tests:<sup>30</sup> that of effectiveness and that of interchangeability. In other words, the restriction has to be necessary and as limited as possible<sup>31</sup>. The reserve of public health is thus efficient, though in a limited way.

Another example may be found in the social security field. The European Court of Justice admits that Treaty provision allows Member States to restrict the freedom to provide medical and hospital services.<sup>32</sup> The reserve of public health became more specific throughout various cases, in content as well as in range.<sup>33</sup> Thus, the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier to the fundamental principle of freedom to provide services;<sup>34</sup>

In the same way, the objective of maintaining a balanced medical and hospital service open to all may also justify derogations on ground of public health.<sup>35</sup> More widely, the Court still specified that the European treaty allows Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment facility or medical service on national territory is essential for the public health and even the survival of the population.<sup>36</sup>

(Contd.) \_\_\_\_\_

<sup>26</sup> CJCE, December 13, 2001, Commission vs France, C-1/00, Rec. I 9989; add. CJCE, July 14, 1983, Sandoz BV, aff. 174/82, Rec. p. 2445, § 16 and 17; CJCE, July 11, 2000, Kemikalieinspektionen vs. Toolex Alpha AB, aff. C-473/98, Rec. I, p. 5681, point 40.

<sup>27</sup> CJCE, December 13, 2001, Commission vs. France, C-1/00, Rec. I 9989; add. CJCE, July 14, 1983, Sandoz BV, aff. 174/82, Rec. p. 2445, § 16 and 17; CJCE, July 11, 2000, Kemikalieinspektionen vs. Toolex Alpha AB, aff. C-473/98, Rec. I, p. 5681, § 40.

<sup>28</sup> CJCE, May 5, 1998, United Kingdom vs. Commission, C-180/96, Rec. I 2265

<sup>29</sup> CJCE, February 2, 1989, Commission vs. FRG, aff. 274/87, Rec. I, 229; CJCE, July 14, 1994, Van der Velt, aff. C-17/93, Rec. I, p. 3537, § 18.

<sup>30</sup> CJCE, March 8, 2001, aff. C-405/98, International Gourmet; Rec. CJCE 2001, I, p. 1795.

<sup>31</sup> Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte: National Farmers’ Union, , May 5, 1998, C-157/96, Rec. I 2211, § 60.

<sup>32</sup> CJCE, Muller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, may 13 2003, § 67, C 385-99

<sup>33</sup> CJCE, Apr 28 1998, Kohll, C-158/96, rec. I-1931, § 51; CJCE, 12 juill. 2001, Vanbraekel, préc. ; CJCE, 12 juill. 2001, Smits and Peerbooms, préc. ; CJCE, May 13, 2003, Müller-Fauré, préc.

<sup>34</sup> Above mentioned Kohll, § 41; Smits and Peerbooms, § 72, Müller-Fauré and van Riet, § 73

<sup>35</sup> Above mentioned Kohll, § 50; Smits and Peerbooms, § 73, like Müller-Fauré and van Riet, § 67; add. CJCE, May 16, 2006, aff. C-372/04, Watts, Rec. CJCE 2006, I, p. 4325, § 106.

<sup>36</sup> Above mentioned Kohll, § 51; Smits and Peerbooms, § 74, Müller-Fauré and van Riet, § 67; Watts, § 105.

However, the European judge has only admitted the principle of a “reserve of public health” after having checked the contents and the range of it. The Member States are allowed to call upon pressing requirements of public interest, provided that the restriction is founded on objective criteria (non discriminatory, known in advance and applied in a procedural system answering the usual guarantees of reasonable time and recourse to legal claims). It is therefore necessary to determine whether the national rules at stake in the main proceedings can actually be justified in the light of such overriding reasons and, in such a case, in accordance with settled case law, to make sure that they do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules.<sup>37</sup>

## **2. *The Efficiency of Health Care Protection in the ECHR Framework***

The European Convention of Human Rights allows for a similar notion of “reserve of public health” for several guaranteed rights. Thus, the right to privacy, religious freedom, freedom of expression or meeting might be limited in order to protect public health, which is one of the superior aims mentioned among others by the text.

Several cases relate to the placement of children exposed to a danger within their family, because of their parent’s life-style<sup>38</sup> or of mothers’ psychiatric disorders,<sup>39</sup> and therefore placed by social services. Whatever the right called upon (freedom of thought or respect for family life), the Court adopts a twofold reasoning. On the one hand, it is certain that guaranteeing the children development in a healthy environment raises the health-care interest and that article 8 would never authorise measures prejudicial to the health and the development of children. But on the other hand, it is clear that it is as much in the interest of the child that the bonds between him and its family are maintained, except whenever they are shown particularly unworthy: to break this bond amounts cutting the child from its roots. It results from this that the interest of the child requires that only completely exceptional circumstances can lead to a rupture of the family bond, and that all is implemented to maintain personal relationships and, the case falling due, at the proper time, “to reconstitute” the family<sup>40</sup>. The Court forces the official authorities to spare a right balance between the interests of the child and the protection of his health and the rights recognized by the Convention. It insists on the fact that measures should not permanently compromise the chance to recreate the relationship between parents and children and must be strictly proportionate to the risks.

The same argument, based on proportionality, is invoked to protect public-health. It was proved in the case of obligatory vaccinations<sup>41</sup> or the organization of ritual slaughter organization<sup>42</sup> that the European Convention authorized a limitation of private life or freedom of thought in the objective of public health protection (provided that the violation is proportionate to the pursued aims). Thus, the European judge could state “ that a vaccination campaign (...) obliging the individual to incline themselves in front of the general interest and not to put in danger the health of his fellows, when his own life is not in danger, does not exceed the state’s margin of appreciation”.<sup>43</sup>

The judicial dialogue is obvious: both in Brussels and in Strasbourg, European judges admit that the protection of health is a reason to set aside European law, provided that derogatory measures founded

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<sup>37</sup> V. Smits and Peerbooms, above mentioned, § 75, Watts, précit., § 106

<sup>38</sup> ECHR, Schmidt vs. France, July 26, 2007, n° 35109/02, § 84

<sup>39</sup> ECHR, E.P. vs Italy, November 16, 1999, n° 31127/96, CEDH, aff. P., C and S., July 16, 2002, n° 56547/00, Rec. 2002-VI.

<sup>40</sup> ECHR, Schmidt vs France, précit., § 84.

<sup>41</sup> ECHR, Boffa vs St Marin saint, January 15, 1998, req. ° 26536/95.

<sup>42</sup> ECHR, Cha’are shalom ve Tsedek vs France, June 27, 2000, n° 27417/95.

<sup>43</sup> ECHR, Boffa C. St Marin, précit



on the protection of health are proportionate to the aim. Behind this condition of proportionality, the concept of “effectiveness” appeared. After having studied “efficiency” and the effects produced by fundamentalisation of public-health, we now have to examine the **basic rights’ effectiveness** and the content of this notion.

## **Part D      Medical Rights Effectiveness**

Effectiveness is found when a given course of action produces the expected effects. In other words, this last enquiry has to do with the gap between the effect of the law and the awaited objectives. In the public health field, these goals are well defined: they may be enumerated in a catalogue such as art. 11 of the revised European Social Charter, or proclaimed in a general standard. By the way, article 168 TFEU states that “a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”. My purpose is not to study the effectiveness of the European regulation in a general way, but in a more limited one, to analyze how the question of effectiveness may challenge the effectivity of the medical basic rights. Two paths shall be taken: first, I’ll try to underline that the European law effectivity and the effectiveness of the medical basic rights go hand in hand. Secondly, I will place emphasis on the contradictions that might appear : sometimes, European law effectiveness rises up against the medical basic rights effectiveness. Each will be briefly discussed.

### ***Effectivity by Effectiveness***

Strengthening the effectiveness of European law is a way to implement the medical basic rights. In the framework of the Council of Europe and Social charter, the requirement for effectiveness of the law turns toward the effectivity of public-health protection. For example, the European committee of social rights solemnly stated that the health-care system must be accessible to everyone and invited Member States to take as their main criterion for judging the success of health-system reforms effective access to health care for all, without discrimination, as a basic human right.<sup>44</sup> Thus, the right of access to care requires, for example, that, the cost of health care should be borne, at least in part, by the community as a whole. It added that care must not represent an excessively heavy cost for the individual. Steps must therefore be taken to reduce the financial burden on patients from the most disadvantaged sections of the community. Moreover, arrangements for access to care must not lead to unnecessary delays in its provision. Access to treatment must be based on transparent criteria, agreed at national level, taking into account the risk of deterioration in either clinical condition or quality of life.<sup>45</sup> There also must be adequate staffing and facilities.<sup>46</sup> It also considers that a very low density of hospital beds, combined with waiting lists, could be an obstacle to access to health care for the largest possible number of people. Finally, the ECSR outlines that conditions of stay in hospital, including psychiatric hospitals, must be satisfactory and compatible with human dignity.

However, a gap may be deplored between the medical rights proclamation and its implementation. In spite of the significant progress made in this sphere, equal access to health care is far from being fully guaranteed in practice. As various reports clearly demonstrate, access to the right to health comes up against many obstacles. For example, in 2005, the European network Médecins du Monde created a European Observatory on Access to Health Care to look objectively at access to health care for people

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<sup>44</sup> ECSR considers the conditions governing access to care in the light of Parliamentary Assembly Recommendation 1626 (2003) on «the reform of health care systems in Europe: reconciling equity, quality and efficiency». ESCR, Digest of case law, dec. 2006, pp. 92-93

<sup>45</sup> The management of waiting lists and waiting times in health care are considered in the light of Committee of Ministers Recommendation (99)21 on criteria for such management.

<sup>46</sup> In the case of hospitals, the Committee refers to the objective laid down by WHO for developing countries of 3 beds per thousand population

living in precarious situations in different countries in the EU. The aim is to identify the most favourable measures for a real public health policy before they are implemented in each country, enabling the entire EU to move forward. For its first Observatory, the network has chosen to focus its attention on the most vulnerable groups with which the 12 Médecins du Monde organisations work: migrants, and in particular undocumented migrants, since these groups are among the poorest, most excluded and most discriminated against in Europe. This report<sup>47</sup> underlines that a significant part of the European population does not have access either to the most basic prevention or to essential medical care, even though they are living in conditions that are particularly harmful to their health. According to this report, based mainly on seven European countries, only one third of people suffering from a chronic health problem are currently receiving treatment. Almost half of the people who stated that they had at least one health problem had to wait before receiving care. While experiencing a health problem, one person in ten was refused treatment by health professionals. The most relevant thing is that people are generally not informed about their rights: a third of people are not informed about their entitlement to health coverage. Indeed, based on existing legislation, 78% of the people interviewed have a theoretical right to health coverage.<sup>48</sup> In reality, only 24% of people benefit in practical terms from health coverage. In France, only 7% of people managed to exercise their right to health care. For example, most people do not know they are entitled to free HIV screening; child immunisation is another area where information is lacking. Out of the population concerned by this issue, only a small majority know that their child can benefit from free vaccination and/or where to go for them.

The NGO report clearly focuses on the question of the social rights effectivity, such as it could be analysed by Amartya Sen. The Nobel laureate in economics argues that poverty is a failure of rights rather than a failure of market forces or economic policy. “Capabilities”, as Sen called the capacity to mobilize rights, depend narrowly not only on personal characteristics but also on socio-economic ones (health, beliefs, personal origins, financial resources and so on). The evaluation of the effectiveness passes by securing the enjoyment of these “capabilities”. Various reports stress the need to strengthen social rights and to see them as a means of reducing the vulnerability of individuals in the face of structural changes.<sup>49</sup>

In sum, the effectiveness of the European intervention and the effectivity of social rights are shown as strengthening each other: a sustainable development approach based on human rights is promoted and, by the same way, guaranteed social rights are seen as a key factor in the success of the economic, political and social reforms currently under way in Europe. But this link between effectivity and effectiveness is not constant and sometimes, the European law effectiveness may threaten the social rights effectivity.

### ***Effectiveness vs Effectivity***

The free market economy and globalization are putting Europe’s model of social rights under pressure.

“Globalisation places the spotlight on the costs of funding social security and can be associated with a pressure to weaken entitlement to social protection. In a context where governments feel the need for flexibility in how they respond to risks and are increasingly pressurised over wages, costs

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<sup>47</sup> Médecins du Monde, European survey on undocumented migrant’s access to health care, September 2007, [http://www.medecinsdumonde.org/gb/content/download/4518/36169/file/rapport\\_observatoire\\_english.pdf](http://www.medecinsdumonde.org/gb/content/download/4518/36169/file/rapport_observatoire_english.pdf)

<sup>48</sup> However, it is notable that the situation differs widely from country to country, both in terms of access to health coverage and the level of care provided. For example, in Spain, as long as a person is registered on a municipal register, they are entitled to the same access to health care as residents. In contrast, undocumented migrants are entitled to almost nothing in Greece.

<sup>49</sup> Mr. Daly, *Accesses to social rights in Europe*, ED. the Council of Europe, 2002; [http://www.coe.int/t/dg3/socialpolicies/SocialRights/source/MaryDaly\\_en.pdf](http://www.coe.int/t/dg3/socialpolicies/SocialRights/source/MaryDaly_en.pdf)

and competitiveness, social rights may be portrayed in a negative light, along the lines of an optional extra or as being too costly”.<sup>50</sup>

This is particularly true in public-health field, which is a very expensive one. Two examples shall enlighten the gap between the effectivity and the effectiveness of the medical rights: First, economic effectiveness may slow down health-care. Secondly, economic concerns may cut down civil rights.

The first is well known. As Daly’s report noticed,

“there is evidence of shortages in respect of finances, premises and facilities. It need hardly be pointed out that the nature and generosity of social programmes depend on the level of resources made available. Insufficient financial resources affect not just the supply of benefits and services but also quality and effectiveness”.<sup>51</sup>

Other obstacles shall arise from mismatches between the nature of provision and need. Economic calculations became a tool of decision-making aid and bring out discrimination. Choosing “what kind of health problem” to tackle may involve choosing “who” to care, and what kind of patients to leave out of the care. It is the well known “tragic choices” cases, where costly treatments raise ethical and practical dilemmas. The urge to respond to the needs of individuals has to be weighed against the concern to use resources for the benefit of the whole population. Tragic cases demonstrate the awful tension between financial resources available and individual needs. Some authors invoke in these cases “the rule of rescue”.<sup>52</sup> This “rule” suggests that when individuals are suffering life threatening conditions, there is an obligation to intervene even when this may run counter to the concerns of the community as a whole. But the concern of economic effectiveness limits civil and political rights, not only social ones. For example, protection of medical data can be limited in order to protect the economic well-being of the country. The ECHR has admitted that, although respecting the confidentiality of health data is a “vital principle”, it is not absolute. The communication of medical data to social services may be potentially decisive for allocation of public funds. The effectiveness of medical care is here allowed to restrain medical secrecy.<sup>53</sup>

These few examples show that economic effectiveness and rights effectivity can turn from being complementary to becoming contradictory. Certainly a utilitarian approach may lead to ensuring the former’s prevalence over the latter’s. However, it can also be argued that for the law to give up on its own (founding) values and accept becoming a mere tool for efficiency would be a resignation. And it would also certainly be a decline of the rule of law, for all values are not monetary.

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<sup>50</sup> M. Daly, o.p., p.21-22

<sup>51</sup> M. Daly, o.p., p. 42

<sup>52</sup> D Hadorn, “Setting health care priorities in Oregon. Cost effectiveness meets the rule of rescue”, *JAMA* 1991; 265: 2218-2225 ; C. Ham, “Tragic choices in health care: lessons from the Child B case”, *BMJ* 1999; 319:1258-1261

<sup>53</sup> ECHR, *M. S v. Sweden* August 27, 1997, n° 74/1996/693/885, Rec. 1997-I



## Conclusions

### Lessons of the Research Seminar on the «Fundamentalisation of Social Rights»

Professor Marie-Ange Moreau (EUI)

At the conclusion of this research carried out entirely by the researchers of the EUI<sup>1</sup>, the topic of « fundamentalisation » has proved to be a very fruitful one, not just because it reveals a trend that can be seen respectively at the national, European and international level, but also because it provokes thought about the strength of this movement.

The development of social rights is, moreover a topical theme lying at the heart of current affairs. On the one hand, its central importance stems from the new phase of “constitutionalisation” within the ILO (International Labour Organisation) as illustrated by the adoption in June 2008 of the ILO Declaration on Social Justice for a Fair Globalization.<sup>2</sup> On the other hand, the controversial issues raised by the decisions of the European Court of Justice in the cases of Laval, Viking and Rüffert<sup>3</sup> force us to think and re-think about the place of social rights in the European Union.

Social rights and democracy are intimately linked<sup>4</sup>. Their development through a multiplicity of sources points to the need to organise them coherently within national legal orders, at a time when the different forms of social protection built at national level are significantly threatened by the mobility of undertakings, capital and persons, aided by today’s economic liberalism.

When the foundations of capitalism in its current form collapse, social rights, depending on the different forms they take, are key points of reference, each with its own characteristics. Together they constitute ramparts of social protection.

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<sup>1</sup> Research was done by the *Working group in Labour Law* and the seminar was organised by Claire Marzo.

<sup>2</sup> For the text of the Declaration, see [www.ilo.org](http://www.ilo.org)

<sup>3</sup> Laval, 18 December 2007, C-341/05 ; Viking, 11 December 2008, C-438/05, Rüffert, 3 April 2008, C- 346/06; a detailed analysis of these cases is not offered here above ; for further comment on such matters see in particular, P. Chaumette, « Les actions collectives dans le maillage des libertés communautaire des entreprises », *Droit social* 2008, p.210 ; E. Lafuma, *RJS* 3/2008, S. Laulom, « Les actions collectives contre le dumping social », *SSLamy*, janvier 2007, n°1335, S. Robin-Olivier et E. Pataut, « Europe sociale ou Europe économique », *RDT* février 2008, B. Teyssie, « Esquisse du droit communautaire des conflits collectifs, *JCP* ed. S 5 février 2008, 1075, Cavallini, idem, 1087, N. Moizard, « La directive 96/71 du 16 décembre 1996 concernant le détachement des travailleurs dans le cadre d’une prestation de services : un « noyau dur protecteur ? », *Droit social* 2008, p.866, S. Robin Olivier, « Libre prestation de services, marchés publics et régulation sociale : le droit européen privilégie la concurrence fondée sur le coût du travail, CJCE 3 avril 2008 Rüffert », *RTDE* 44 (3) juillet-sept.2008, p. 485, F. Jault-Seseke, *RDT* 2008, 412, J.P Lhernoud, « Illicéité d’une clause sociale dans un appel d’offre de marché public : le pot de terre contre le pot de fer ? », *RJS* 7/08, p. 601 ; for comment in English, see PH Syrpis et T. Novitz, « Economic and Social Rights in Conflict : Political and Judicial Approaches to their Reconciliation », (2008), » *E.L.R.*, p. 411, J.Malmberg et T. Sigeman, « Industrial Actions and EU Economic Freedoms : the Autonomous Collective Bargaining Model Curtailed by the European Court of Justice », *Common Market Law Review*, 2008, vol. 45, p.1115-1146, C. Joerges et Rödl, « On de-formalisation in European Politics and Formalism in European Jurisprudence in response to the « Social deficit » of European Integration project, reflections after Laval and Viking, [www.EUI.eu/WP](http://www.EUI.eu/WP) 2008/Law, B. Bercusson, “The Trade Union Movement and the European Union : Judgement Day”, (2007) 13 *European Law Journal* 279-308, T. Blanke, « Three Steps of Reflections regarding the Viking and Laval Case : Towards an Effective European Right to Strike », in *Mélanges en l’honneur de Teun Jaspers*, dir. F. Pennings et alii, Kluwer, 2008, chapter. 32.

<sup>4</sup> A. Lyon-Caen, « Droit communautaire du marché v. Europe sociale », [www.etui.org/viking-Laval](http://www.etui.org/viking-Laval), *RDT* 2008, 273

This research demonstrates (1) that it is possible to clearly identify the process of fundamentalisation, (2) that nonetheless it remains difficult to establish a single approach to the notion of fundamental social rights, and (3) that the current role of fundamentalisation as a movement needs to be assessed.

## 1. Identification of the Process of Fundamentalisation

This movement, which seeks to create the foundations of fundamental rights, is organised through the establishment of international treaties, through the action of constitutional and legislative bodies as well as through the involvement of judges<sup>5</sup>, thereby constituting a very diverse « legal method » that entails interaction between actors and legal sources that complement one another.

Fundamentalisation can be divided into three phases: the first phase starts with the recognition of fundamental rights prior to “institutionalisation”,<sup>6</sup> the second phase relies on the central role and power of the judiciary but does not exclude the action of a number of different actors, the third phase finds its source through the important interaction between proclaimed social rights and related policies and procedures.

### 1.1. *The Recognition of Fundamental Rights prior to ‘Institutionalisation’*

Regarding the recognition of fundamental rights, one observes that the blur in the terminology reveals conceptual and procedural diversity: e.g. “social rights”, “fundamental social rights”, “core labour standards”, and sometimes “Labour Human rights”.

Four stages mark the life of social rights:<sup>7</sup> their proclamation as such, the introduction of their enforceability and “justiciability”, their effectiveness, and their efficiency in the society as a result.<sup>8</sup> This last stage relates more often to the involvement of the judiciary, which can create the link between social rights and the values that underpin them: this is the case of the relationship between the value of solidarity and the recognition of the collective rights of workers, also the recognition of human dignity and the freedom to work. In practice, the place of fundamental social rights and specifically collective rights is subject to the action of social players and social partners in the work environment.<sup>9</sup>

As regards the proclamation of fundamental social rights, the literature highlights each step of their recognition in order to underline their difference with, on the one hand economic and political rights, often the case in international law, and on the other hand their equality and indivisibility in the Charter of Fundamental Rights of the European Union adopted in Nice in 2000.

In any event, one observes a significant increase in the sources of law, whether at international or at regional level.<sup>10</sup> This creates a complex « normative entanglement »<sup>11</sup> that now finds, within the European Union, a new expression in the framework of Article 6 of the Treaty on the European Union. This multiplication of sources also raises concerns about the current process of individualisation of

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<sup>5</sup> See above C. Marzo

<sup>6</sup> See above N. Hos

<sup>7</sup> See above D. Roman

<sup>8</sup> See above D. Roman

<sup>9</sup> See above B. Mestre et A. Hartzen

<sup>10</sup> See above references, J.Y. Cherot et al, ed. *Les droits sociaux à l'âge de la mondialisation*, PUAM, 2005., J. Fudge, « The new discourse of Labour rights : from social to fundamental rights ? » *Comparative Labour Law and Policy Journal*, 29, 1-32

<sup>11</sup> M. Delmas Marty, *Le pluralisme ordonné*, Le seuil, 2004

social rights, which could be damaging to labour relations if it is not matched by a strengthening of the collective rights of workers.

The judicial enforceability and the procedural mechanisms that underpin this stage are essential in relation to the field of the protection of persons and workers, as shown by certain constitutions (South Africa, India) which allow rights that are recognized by the Constitution to be invoked directly before the judge,<sup>12</sup> or the mechanisms of the European Convention of Human Rights (ECHR). The impact and limitations caused by the lack of judicial enforceability of certain fundamental rights are evident in relation to both health protection and consumer protection in the European Union.<sup>13</sup> Such limitation is all the more striking given that a link between citizenship and the recognition of fundamental social rights in the European Union is the dominant trend.<sup>14</sup>

In the context of labour relations, the ability of workers and trade unions to invoke social rights before the judge is the only genuine guarantee of social protection. The decision of 12 November 2008 of the European Court of Human Rights concerning Turkey, shows how the right to collective bargaining has been strengthened as a result of the possibility for trade unions to challenge Turkish law and the policy of the Turkish government that were in breach of rights recognised in the framework of international labour conventions but that are not directly effective.

The “institutionalisation” stage achieved in 2007 by the creation of the European Union Agency for Fundamental Rights shows the commitment of the Union in the field of fundamental rights. This stage, though typical of the movement of fundamentalisation, nonetheless generates concerns given the status and the mandate of the agency.<sup>15</sup> We ask the question: will European citizens benefit in the future from a stronger guarantee of the respect of the rights recognised in the European Union?

However, the studies presented in this seminar also show that the movement of fundamentalisation of social rights falls within an evolving process that also depends on the involvement of actors and in particular the role of the judge in promoting fundamental social rights on the economic front.

## ***1.2. The Judiciary Clearly Plays a Central Role***

This movement in relation to social rights is without doubt based on the development of a dialogue between judges, which goes beyond the discussion of legal sources as it enables the sharing of ideas.<sup>16</sup> The issue of the organisation of social rights within different legal orders raises a general question.

The ECJ in 2007 and 2008 showed that it did not want absolute recognition to be granted to social rights. In coming to its decision, the ECJ used the principle of proportionality in order to create a balance between economic freedoms and the right to strike, which proved somewhat controversial within the European Union. As has been shown, the context of enlargement has deeply changed the economic, social and political stakes in the European Union.<sup>17</sup> The ECJ, in the absence of legislative intervention to organise the fundamental social rights recognised in the Member States and in the

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<sup>12</sup> See above their importance concerning the right to food, I. Gatlung, and the detailed analysis by A. Maciejczyk

<sup>13</sup> See above I. Benöhr

<sup>14</sup> See above C. Marzo.

<sup>15</sup> See above N. Hos, see also the comments of Olivier De Schutter, cit. in Bilan social de l'union européenne en 2007, Observatoire social européen, ETHUI, Bruxelles, 2008

<sup>16</sup> Authors such as Anne Marie Slaughter in the United States link the development of judicial dialogue to the creation of a global law at international level or Antoine Garapon in Europe who makes the link to the globalisation of the economy. There is no doubt that the movement of goods and persons in the context of the global economy enhances the distribution of judgments concerning fundamental social rights but it also opens new judicial spaces in relation to these movements.

<sup>17</sup> See above Belavusau

Treaty,<sup>18</sup> has used a debatable construction that wavers between the obvious recognition of a fundamental social right as a general principle of Community law and the just as obvious limitation of the exercise of such right.

These cases also show the place of other actors in the process of fundamentalisation: trade unions are in the front line given, on the one hand, their power to «give life» to fundamental social rights as well as, on the other hand, their power to bring claims before the public authorities and before the courts.

However it is also clear that the growing importance of actors who form part of what is known as « civil society » is essential : Non-Governmental Organisations have become front line actors on the international scene, as is shown here in the analyses concerning health protection ( in particular the fight against HIV-Aids) and the right to food <sup>19</sup> as well as consumer protection. Institutional actors, such as the high authorities in the field of discrimination, also play a key role in enabling social rights to become genuinely effective. For example, “la Halde” in France, has publicly denounced illegal and discriminatory working conditions of seasonal workers in the Bouches-du-Rhône in order to oblige the authorities to « amend » the status of foreign workers in the agricultural sector, thereby enabling them to gain a formal status that avoids the risk of discretionary eviction.

The complementary involvement of different actors shows the resulting synergies.<sup>20</sup> Even if obstacles remain present everywhere and still prevent fundamental social rights from having a genuine social effectiveness that would enable citizens and workers to gain solid and specific protection, it remains the case that the synergies identified as resulting from the intervention of different actors do exist and are developing. Activism and the judiciary create this synergy.

### **1.3. The Interaction between Proclaimed Social Rights and Related Policies and Procedures**

The recognition and the proclamation of fundamental rights must be matched by active policies<sup>21</sup>. Given the pre-existing status of Equality (article 13 of the Treaty of Amsterdam) as regards the proclamation of the Charter of Fundamental Rights of the European Union, it would have been interesting to analyse in the course of this seminar the improvements that have been made in the field of Equality and that have arisen as a result of the European policies carried out in the framework of programmes relating to Equality, e.g. through « gender mainstreaming ». The ultimate translation of fundamental social rights is of course to be integrated within active national policies:<sup>22</sup> the same applies to Equality as well as in relation to health protection, consumer protection and worker protection. The challenge for the Charter is to generate positive action within the Union. The creation of the Agency raises the same hope.

It is clear that the movement of fundamentalisation cannot be separated from the link that exists between the procedures established to make fundamental social rights enforceable and effective and the proclamation of such rights. It falls within the transformation of law and the movement of “proceduralisation” of law. Indeed, both the procedural and the substantive aspects of fundamental

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<sup>18</sup> The posted workers directive at the heart of these cases made compromises in 1996 that rely on provisions that are somewhat vague, in particular regarding the application of collective bargaining agreements. The lack of a provision aiming at limiting cases of social dumping together with the interpretation by the ECJ of the economic freedoms were the cause of this « shock ». It is conceivable that the ECJ, by using the principle of proportionality, which normally applies in relation to state policies instead of the acts of private parties has found a solution where it leaves it open to the European legislator to intervene, given the stakes.

<sup>19</sup> See above, D. Roman et I. Gatlung

<sup>20</sup> These synergies are expanded upon in Part 2 of my book, *Normes sociales, droit du travail et mondialisation*, Dalloz, 2006.

<sup>21</sup> See nonetheless the discussions on the need for active policies for the implementation of the Charter, see above N.Hos, and on the political stakes, L. Burgorgue-Larsen.

<sup>22</sup> On the rights of information and consultation, see above the demonstration by B. Mestre



rights are intrinsically linked, which means that at present it is not possible to identify a single conception of what constitutes a fundamental social right.

## **2. *The Lack of a Single Conception and the Normative Entanglement***

Researchers are always faced with the impossible task of finding a uniform definition of what is a fundamental social right.

The boundaries of « social law » remain controversial as does the qualification of fundamental. Being crucial to society,<sup>23</sup> the right is also fundamental because it is proclaimed as such and because the legal source that establishes the right gives it a rank that makes it appear in some way fundamental, even though that element too may take several forms and shapes.

Even where the source is a constitution, it does not mean that all social rights recognised by various constitutions can be put at the same level. Once again, their rank as well as the applicable procedural regime confers different roles to such rights in their legal order.<sup>24</sup> In the situation where the same rights have been recognised at international level, like is the case for instance with the ILO conventions, their role may vary greatly depending upon whether or not the judge has the possibility of turning to them in order to give them legal effect in the internal legal order. The figure of the judge, a central one for the purposes of giving force to fundamental social rights, as shown by the recent situation in France concerning the use of ILO conventions or in Canada, greatly contributes to the movement of fundamentalisation, even though a single conception is not automatically identified as a result.

Ideally, a single conception would be the dream of any lawyer who has not tingled with the riches of comparative law. However, one may ask whether the diversity of sources is not more likely to reinforce social protection, which is the main goal behind the recognition of fundamental social rights.<sup>25</sup>

The question may be posed when one observes that the addition of sources and their diversity sometimes instigate the movement: the rulings of the ECJ in *Mangold* (2005) and *Laval* (2007) that respectively upheld the principle of equality and the right to strike as general principles of Community law, rely on the multiplicity of international and European sources that have recognised these fundamental social rights. Similarly, the reversal of its own case-law by the ECHR in the *Demir v Turkey* case decided on 12 November 2008 concerning the scope of Article 11, which links for the future the freedom of association and the right to collective bargaining, falls within a coherent international evolution that is simultaneously based on the works of the ILO, the Council of Europe and the common constitutional traditions that point in the same direction.

The Supreme Court of Canada has also been asked to adjudicate on the same question, in contrast with the past when that court refused to take into account the international evolution dealing with the link between the freedom to join a trade union and the right to collective bargaining : it is conceivable that in 2009, it too will alter its course so as to grant an effective place to this fundamental social right.<sup>26</sup>

Nonetheless, one may question the legal method that leads to a veritable normative entanglement with the following consequences: no transparency; complete opaqueness for the citizen/worker; great difficulty in assessing the strength of fundamental social rights and understanding in practice how to rely on social rights that have been declared fundamental. In today's European Union, the great

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<sup>23</sup> See above, V. Champeil-Desplat, and G. Scoffoni quoted by C. Marzo

<sup>24</sup> See above A.Maciejczyk

<sup>25</sup> See in this respect the demonstration by J. Judge, loc.cit.

<sup>26</sup> Seminar at the EUI of 21 and 22 November 2008, communication by Gilles Trudeau, Professor at the l'Université de Montréal, (forthcoming publication).

frailness of fundamental social rights is clear, given the lack of a constitutional treaty. The current construction of general principles of law by the ECJ is also fragile. Even if a genuine legal category has been established as demonstrated by Diane Roman, there remains a real contradiction in working for the recognition of fundamental rights given their legal and institutional frailness.

Although one may observe synergies enabling the development of both the place and the role of fundamental social rights, it is nonetheless regrettable that the identification of what is fundamental remains so difficult, while the links between fundamental social rights and democratic values are themselves sometimes challenged.

As Laurence Burgogues Larsen rightly points out, the nature of economic and social rights, just like their definition, remains an inextricable question. It is without doubt a political stake for the future, in the context of the economic crisis that is taking place at the end of 2008 and which forebodes an economic recession in 2009.

The question of the role of fundamental social rights remains more pertinent than ever.

### **3. *New Role of Fundamental Social Rights?***

Historically, the recognition of social rights in the Member States of the European Union has always been connected to a political will to reconcile liberalism with the requirements of social protection. The development of welfare states depicts the key role that social rights have played in creating a balance within the EU's internal market. At the international level, turning specifically to the action of the United Nations or the Council of Europe, the development of social rights has been closely linked to the promotion of democratic values and human rights. Social protection and democracy are in many respects at the core of the movement of fundamentalisation of social rights. Such movement also finds its base in societies that have made liberalism and ultra liberalism their *modus operandi*.

One may therefore ask whether the historic role of social rights is not evolving together with the movement of fundamentalisation of social rights. Surely these rights have gone beyond being rights that simply accompany economic development so as to become rights that build the ramparts of social protection against the devastating effects of uncontrolled economic evolution? Have they not an essential role to play, not so as to enable new rights to be acquired but instead to preserve the key bases of social protection?

Is it not the case that those fundamental social rights that are collective by nature (e.g. freedom to join a trade union, the right to collective bargaining, the right to strike) play a new role in fighting the inequalities that have changed profoundly in the last ten years?<sup>27</sup>

The questions on the current role of fundamental social rights are all the more important given that, since the most recent enlargements of the European Union, conflicts have arisen between such rights and the economic freedoms of the Union, thereby raising the question of the preservation of fundamental social rights at the national level when they are not adapted in relation to either the regional level or the transnational economic environment.

There is no doubt that research on the question of fundamental social rights will continue to delve into these key issues. This seminar has been able to demonstrate the sophisticated analysis it requires, the scale and the topical nature of the matter.

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<sup>27</sup> Transformations linked to a great extent to the consequences of the structural changes brought about by globalisation ; see in particular the excellent analyses of the inequalities in the European Union by M. Heidenreich (macro economic and statistical analysis) and Ramon Peña Casas (experimental aspects) in *European Solidarities*, between tension and contentions, Bo Strath et P. Magnusson, ed. Peter Lang, 2008.