Constitutionalizing Labour Rights in Europe

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I. Introduction

Since the mid-1990s, constitutionalizing labour rights has typically referred to the goal of securing the recognition of labour rights as fundamental human rights at the transnational and national levels.[1] The idea is that once there is general recognition of the status of labour rights, especially the rights to bargain collectively and to strike, as fundamental human rights then they can be used as a counter weight to global competition, which, when combined with neo-liberal economic policies, threatens to lower both labour standards and workers' standards of living. Labour rights can achieve this fundamental status either through negotiated constitutional amendment or via judicial recognition. Although fundamental rights can take a variety of institutional forms, justiciable and legally enforceable rights are regarded as the most powerful.

Harry Arthurs juxtaposes labour rights in the "formal constitution" with what he refers to as labour's "real constitution," a key component of which are the transnational free trade regimes and neo-liberal policies.[2] He argues that labour rights are subordinate

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[1] Ruth Dukes, "Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law," (2008) 53(3) Journal of Law and Society 341-63 at 342. See also footnote 1 in which Dukes refers to a number of articles advocating the constitutionalizaiton of labour rights.

[2] Harry W. Arthurs, "Labour and the 'Real' Constitution," (2007) 48 (1-2) Les Cahiers de Droit 43-64 at 61.

to the real constitution, the legitimacy of which ultimately depends "on its promises to make life better by facilitating the operation of markets."[3] If the real constitution fails to make good on this promise, then, according to Arthurs, it may be possible for "labour to assert its rights," although, he cautions that these rights cannot be won by constitutional negotiation or litigation.[4]

In this chapter, I want to explore the relationship between these dual processes of constitutionalism by combining Stephen Gill's notion of new constitutionalism,[5] which refers to the process by which markets have expanded throughout the globe and market rules have been embedded in transnational agreements, with Karl Polanyi's idea of the "double movement," whereby "society protects itself against the perils inherent in a self-regulating market economy."[6] The renewed emphasis on labour rights as fundamental human rights since the mid-1990s is part of a broader movement to recognize the social dimension of globalization and to re-embed the labour market, and, thus, it is a response to neo-liberalism.[7]

The big question is the extent to which the attempts to constitutionalize labour rights reflects rather than challenges the basic tenets of neo-liberalism.[8] Since the goal of many human rights advocates is to have human rights legally recognized, either by the appropriate court or international institution, there is a tendency for human rights to map

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[3] Ibid. at 63.
[4] Ibid, 63-4
[5] Stephen Gill, "Globalization, Market Civilization, and Disciplinary Neoliberalism," (1995) 24 Millennium: Journal of International Studies 3999.
[6] Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (Boston: Beacon Press, 1944) at 76.
[7] Judy Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights?" (2007) 29(1) Comparative Labor Law and Policy Journal 29-66.
[8] David Harvey, A Brief History of Neo-liberalism (Oxford: Oxford University Press, 2005) at 175-6.

strongly on to civil and political rights. However, many human rights advocates also want to broaden the prevailing conception of fundamental right to include social rights with a collective dimension.[9] Thus, it is an open question the extent to which constitutionalizing labour rights marks a substantive return to social protection.

The specific focus in this chapter is the role of the courts in constitutionalizing labour rights. Not only is judicial review a key feature of both processes of constitutionalization, unions, especially those in common law countries, historically have viewed courts with suspicion since courts historically have subordinated labour rights to bargain collectively and to take collective action to the rights of employers to trade. However, recently, prominent courts in Europe have begun to characterize key labour rights as fundamental human rights. In 2007, the European Court of Justice released two decisions that recognized the right to strike as a fundamental right to be considered when interpreting the European Community Treaty.[10] In 2008, the European Court of Human Rights overruled its earlier decisions on the matter to hold that the right to freedom of association in the European Convention on Human Rights includes collective bargaining.[11] Moreover, the decision by the European Court of Human Rights (ECtHR) does not appear to be an isolated event, but rather a harbinger of a trend; in four subsequent decisions the ECtHR confirmed that the freedom of association in Article 11

[9] Ibid., 178-82.
[10] Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti, Opinion of Advocate General Miguel Poiares Maduro, 23 May 2007, ECJ decision, 11 December 2007 (referred to as "Viking"); Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbunde*t*, Opinion of Advocate General Paolo Mengozzi, 23 May 2007, ECJ decision, 18 December 2007 (referred to as "Laval").
[11] Demir and Baykara v Turkey, Application No 34503/97, 12 November 2008 (referred to as "Demir).

of the European Convention of Human Rights included collective bargaining[12] and collective action.[13] Both the Luxembourg and Strasbourg courts referred to the ILO conventions and supervisory body decisions, the Charter of Fundamental Rights of the European Union, and the European Social Charter as a source of law.[14]

However, despite the fact the highest courts in Europe have recognized labour rights such as collective bargaining and collective action as fundamental, the results of the constitutionalization of labour rights are paradoxical. In order to substantiate this claim, the chapter unfolds in three sections, beginning with the conceptual discussion, in which the new constitutionalism, Polanyi's pendulum, and the constitutionalization of labour rights are discussed. The utility of this relational approach to labour rights and constitutionalism is put to the test in a European case study, which begins by briefly describing the two-step process of constitutionalization, although it concentrates upon the recent court decisions that have recognized labour rights as fundamental at a constitutional level. The chapter concludes by explaining why the results are paradoxical.

II. The Dual Process of Constitutionalism

i) New Constitutionalization

Constitutions set limits on the legitimate use of state power and they "are intended to have a level of fixity outside of politics, that is, they are intended to standardize

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12 Danilenkov v Russia*,* Application No 67336/01, 30 July 2009.

13 Enerji Yapi-Yol Sen v. Turkey, Application no 68959/01, 21 April 2009; Saime Özcan v. Turkey, Application No. 22943/04, 12 September 2009; Kaya and Seyhan v. Turkey, Application No. 30946/04, 15 September 2009, which are discussed in Keith Ewing and John Hendy, "The Dramatic Implications of Demir and Baykara," (2010) 39 (1) Industrial Law Journal forthcoming.

14 See discussion infra.

enduring rules of the game."[15] Although traditional notions of constitutionalism are associated with political rights, obligations, freedoms, and procedures that give institutional form to the state, the term has also been used to describe the international institutional arrangements and agreements that nation states have adopted that circumscribe the exercise of their legislative or regulatory power.[16] Constitutionalism is a process that has both transnational and national dimensions.

Globalization refers to the process of greater economic integration across national boundaries and it has been promoted and accompanied by neo-liberal political discourse that prioritizes markets over politics and emphasizes market mechanisms and individual approaches to solving or handling economic or social problems. Neo-liberalism is "in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within and institutional framework characterized by strong private property rights, free markets, and free trade."[17] Neo-liberal restructuring at the national level is closely associated with international economic agreements, such as free trade agreements, which "serve as a restructuring tool or, put differently, as a conditioning framework that promotes and consolidates neo-liberal restructuring."[18] These conditioning agreements can be bilateral, regional, or international. Stephen Gill coined the term "new constitutionalism" to refer

[15] David Schneiderman, "Investment Rules and the New Constitutionalism," (2000) 25 Law and Social Inquiry 757.
[16] Gill, supra note 5.
[17] Harvey, supra note 8, at 2.
[18] Ricardo Grinspun and Robert Kreklewich, "Consolidating Neoliberal Reforms: 'Free Trade' as a Conditioning Framework," (1994) 43 Studies in Political Economy 33.

to the quasi-legal process whereby nation states cede their authority to interfere with the market.[19]

A key element of this process of new constitutionalism is the separation of powers and judicial review.[20] At the transnational (for example, the European Community Treaty and North American Free Trade Agreement) and international (the World Trade Organization, for instance) levels, courts and tribunals have the jurisdiction to hear complaints brought by corporations against social and economic policies of national governments.[21] At the national level, "new constitutionalism" refers to the entrenchment of justiciable bills of rights and it marks a transformation in the relations between courts and representative institutions.[22]

The object of new constitutionalism is to embed disciplinary neo-liberalism, which seeks to insulate "key aspects of the economy from the influence of politicians or the mass of citizens by imposing, internally and externally, binding constraints on the conduct of fiscal, monetary, trade and investment policy."[23] The international agreements are designed to bind future governments (since they are so difficult to amend) and thus

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[19] Gill, supra note, 5.
[20] Isabella Bakker and Stephen Gill, "Ontology, Method, and Hypotheses," in Isabella Bakker and Stephen Gill, eds., Power, Production and Social Reproduction: Human In/security in the Global Political Economy (Houndmills, Basingstoke: Palgrave, 2003) 17-18 at 31. Christine Kaufman discusses the process of integrating constitutional ideas into international obligations, and identifies five key principles: the rule of law, separation of powers, fundamental rights, democratic participation, and social justice. See Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law (Oxford and Portland: Hart, 2007)
[21] Arthurs, supra note 2, 63.
[22] Judy Fudge, "Legally Speaking: The Courts, the Market, and Democracy," (2003) 19 Supreme Court Law Review (2nd series) 111-35, at 119.
[23] Gill, supra note 5, 412. In this collection Danny Nichol has referred to these agreements, in particular, the EU Treaties and the World Trade Agreement, as bringing about a "degree of constitutionalism of neo-liberal policy."

foreclose certain options that the populations of nation states may want to preserve or adopt in the future. The key feature of the new constitutionalism is the discipline imposed on state institutions both to prevent national interference with an extended suite of property rights and to provide entry and exit options for holders of mobile capital with regard to political jurisdiction. But, as Isabella Baker and Stephen Gill remark, "missing from this policy framework are measures to guarantee and secure the rights of workers, and in consequence greater rights and freedoms for capital may result in greater exploitation and economic insecurity for workers."[24]

ii) The Double Movement

The political economist Karl Polanyi's insight was that "every period of economic reconstruction, associated with major technological change and the renewed pursuit of flexibility, has eventually induced a counter-movement to provide new systems of social protection compatible with new structures and processes."[25] This double movement between market expansion and social protection is the motor of institutional change, and it springs from the fact that labour is not a real commodity. Human beings are not conceived and raised as commodities to be sold on the market; instead, we are embedded in a series of natural social relationships that are deeply incompatible with market institutions and impersonal exchange.[26] Thus, the extension of self-regulating market provokes resistance in part because it overturns established and widely accepted social

[24] Bakker and Gill, supra note 24, 31.
[25] Guy Standing, Global Labour Flexibility: Seeking Distributive Justice (Houndsmill, Basingstoke: Macmillan Press Ltd.,1999) 50.
[26] Mark Blythe, Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century (Cambridge: Cambridge University Press, 2002) 3.

compacts on the right to livelihood. Those whose traditional livelihoods and living standards are dislocated by the market will use the state to protect themselves from the consequences, and it is this dynamic, which according to Polanyi, leads to large scale institutional change.

For Polanyi, the force behind the pendulum is a widely held sense of "injustice".[27] Each extension of the market is countered by mobilization for state regulation through social legislation, factory laws, unemployment insurance, and trade unions.[28] Thus, the poor laws of the first industrial revolution in the United Kingdom in 1830s and the welfare state associated with the Fordist production regimes of advanced capitalist countries from the mid-1940s to the early 1980s are both instances of this dynamic in action.[29] Similarly, the current crisis of new constitutionalism and neo-liberalism may mark a turn towards social protection; "the world wide dislocation of established ways of life and livelihood caused by this late-twentieth century swing towards unregulated markets is once again producing a deep crisis of social legitimacy for world capitalism."[30]

iii) Labour Rights as Human Rights

The project of embedding labour rights in transnational instruments and national constitutions is part of an attempt to swing the pendulum back towards social

[27] Beverly J. Silver, Forces of Labor: Workers' Movements and Globalization since 1879 (Cambridge: Cambridge University Press, 2003) 18.
[28] Polanyi, supra note 6, 176-7.
[29] Simon Deakin & Frank Wilkinson, The Law of the Labour Market: Industrialization, Employment, and Legal Evolution (Oxford: Oxford U.P. 2005).
[30] Silver, supra note 27, 178. Silver notes that Polanyi, unlike Marx, does not account for power in his discussion of the motor behind the pendulum, Ibid., 18.

protection.[31] A core component of this project has been to recast labour standards as international human rights[32] and thus transform "the legal matter at hand into a moral one – the moral and unjust denial of human dignity," placing them on a new symbolic plane.[33] Accompanying this shift in discourse has been a change in institutions, away from the traditional vehicles for labour rights, such as social citizenship, the welfare state, trade unions, and collective bargaining, which are in decline in many parts of the world, to legal and constitutional mechanisms.[34]

The campaign to have labour rights recognized as fundamental human rights operates at three levels – the international, the regional, and the national – and uses different, but connected, methods, such as political negotiation, institutional reform, and litigation. The International Labour Organization best exemplifies the first level. Long the champion of labour rights at the international level, in 1998, the International Labour Conference issued the *Declaration on Fundamental Principles and Rights at Work* and its Follow-up, which is known as the *Social Declaration*.[35] The *Social Declaration* identifies four categories of fundamental rights at work, amongst them freedom of association and the effective recognition of collective bargaining, and it has what Bob Hepple aptly

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[31] Patrick Macklem, "The Right to Bargain Collectively in International Law: Workers' Rights, Human Rights, International Rights?" in Philip Alston, ed., Labour Rights as Human Rights (Oxford: Oxford U.P., 2005) 61, 82-4.
[32] Ibid., 70.
[33] Boaventura de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition, 2nd ed. (London: Butterworths, 2002) 483.
[34] Simon Deakin, "Social Rights in a Globalized Economy," in Philip Alston, ed., Labour Rights as Human Rights (Oxford: Oxford U.P., 2005) 25, 52.
[35] International Labour Conference, *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, 18 June 1998, 37 I.L.M. 1233, online: International Labour Organization <http://ilo.org/public/english/standards/decla/declaration/text/index.htm>.

describes as a "unique legal character."[36] The obligations are placed on all member States not by reason of ratification of the named conventions, but "from the fact of membership. This is, therefore, a constitutional obligation not one which rests upon voluntary acceptance."[37]

At the regional level, one of the most significant steps in the constitutionalization of labour rights was the proclamation of the *Charter of Fundamental Rights of the European Union* in Nice in 2000, which includes the rights to collective bargaining and to strike.[38] However, a common feature of the ILO's Declaration and the European Charter is that they lack direct legal effect – they are not enforceable by the traditional method of individual complaints that are adjudicated.[39] The ILO has adopted a promotional mechanism to monitor member state recognition of the *Social Declaration,* instead of utilizing the existing supervisory machinery.[40] Initially, the *Charter* was a proclamation by the European Parliament, Council, and Commission, and did not establish any new power or task for the Commission or member states of the Union, or modify the powers or tasks defined by the Treaties.[41] However, the Treaty of Lisbon gave the Charter legal effect, although several member states have made constitutional reservations to it, and great care was taken to assuage member states that it did not confer

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[36] Bob Hepple, Labour Laws and Global Trade (Oxford: Hart, 2004) 59.
[37] Ibid.
[38] Sandra Fredman, "Transformation or Dilution: Fundamental Rights in the EU Social Space" (2006) 12(1) European Law Journal 41, 56.
[39] Tonia Novitz, International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union (Oxford: Oxford U.P., 2003) 228.
[40] Hepple, supra note 36, 59-60.
[41] Jeff Kenner, "Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility" in Tamara Hervey & Jeff Kenner, eds., Economic and Social Rights Under the EU Charter of Fundamental Rights (Oxford and Portland Hart, 2003) 1,14; Fredman, *supra* note 38, 56.

greater labour rights than already conferred.[42]

Another way for international and transnational labour rights is to have legal effect, albeit indirectly, is for courts to rely upon them in their interpretation of fundamental rights that are recognized as providing individuals with access to judicial review of state or private action. Since freedom of association is a central component of many constitutions that protect civil and political rights, the question is the extent to which these first generation rights can accommodate labour rights, which are part of the second generation and have a more social inflection.[43] As we shall see, the European Court of Human Rights has to grapple with this question, and unions have sought to persuade it to rely on the interpretation of fundamental labour rights provided by the supervisory institutions of the ILO as authoritative.

III. Europe, Constitutionalization, and Labour Rights

i) The European Double Movement

The European Community Treaty, the 1957 Treaty of Rome, was designed to create an integrated common market by guaranteeing the free movement of factors of production – goods, persons, services, and capital – and prohibiting Member State action that distorted of competition. Member State's bore principal responsibility for social policy in general, and labour law in particular, with only limited European competence provided in the Treaty of Rome, that was given effect through directives and

[42] Phil Sypris, "The Treaty of Lisbon; Much Ado … But about What? (2008) 27 Ind. L.J. 219-35; Brian Bercusson, European Labour Law (Second Edition) (Cambridge, UK: Cambridge University Press, 2009) chapter 11; Ruth Dukes, The Constitutional Function of Labour Law in the European Union," forthcoming.
[43] Fudge, supra note 7.

regulations.[44] Differences in labour regulation across the Member States were not regarded as distorting the common market or segmenting the market along national lines. According to the theory of competitive advantage that influenced the architects of the common market, wage differentials and social and fiscal charges, like labour regulation, reflected differences in productivity and could be accommodated by differences in national exchange rate fluctuations.[45] The prevailing wisdom was that differences between state's labour law and industrial relations would be absorbed in the process of creating a common market, which would result in increased prosperity for all the member states. [46]

It is important to place the balance between labour and economic rights that was struck in the 1957 Treaty of Rome in its context. In the mid-1950s, the six original members states were all committed to maintaining strong welfare states, provided legal support for collective bargaining, and had closely aligned cost levels. Moreover, most had adopted post-war constitutions that treated labour rights on par with civil and political rights. Thus, as Simon Deakin notes, under these conditions it was plausible to believe that levelling up of wages and social standards, without that need for labour law harmonization.[47]

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[44] Catherine Barnard, EC Employment Law (3rd Ed.) (Oxford: Oxford U. P. 2006); Jeff Kenner, EU Employment Law: From Rome to Amsterdam and Beyond (Oxford: Hart, 2008); Brian Bercusson, European Labour Law, 2nd ed., (Cambridge: Cambridge U.P. 2009),

[45] Diamond Ashiagbor, "Collective Labour Rights and the European Social Model," (2009) 3(2) Law & Ethics of Human Rights, 223-66; Simon Deakin, "Regulatory competition after Laval," (2007-2008) 10 The Cambridge Yearbook of European Legal Studies 581-609.

[46] Ashiagbor, supra note 45, 229.

[47] Deakin, supra note 45, 604.

However, the expansion of the common market shook these assumptions. In response to litigation brought by traders against state regulation, the ECJ extended the scope of the internal market and, in this way, embarked on the path of negative integration.[48] The Single European Act (SEA), which came into force on 1 July 1987, added new momentum to European integration and the completion of the internal market. It was fundamental to securing a constitutional priority for economic freedoms and subjecting social rights to challenge; it also shifted power to employers.[49] The Maastricht Treaty, which came into effect in 1993, provided for a single currency, reduced member state powers, and further strengthened European community institutions. By 2007, the initial six member states had grown to twenty-seven. The arrival of the euro and the accession of member states with wages costs and social entitlements that were not aligned to those of existing members raised the threat of a race to the bottom for wages and labour standards.

The response to the growing loss of legitimacy of the European social model was to constitutionalize it; [50]

> from an initial silence on the issue of human rights or general principles of law in the founding treaties, the gradual development of human rights jurisprudence and human rights instruments in the EU, as well as the development of free standing

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[48] Paul Davies, "Market Integration and Social Policy in the Court of Justice," (1995) 24(1) Ind. Law J. 49-77.

[49] F. Scharpf, "Negative Integration and Positive Integration in the Political Economy of European Welfare States," in G. Marks et al. (eds.), Governance in the European Union (London: Sage, 1996). My thanks to Ruth Dukes to bringing this work to my attention. Dukes, supra note 42; Bercusson, supra note 42, 390.

[50] As Claire Kilpatrick notes, "constitutionalism both explains and enhances the legitimacy of the EU, "New EU Employment Governance and Constitutionalism," in Gráinne de Búrca and Joanne Scott, ed., Law and New Governance in the EU and the US (Oxford and Portland: Oxford, 2006) 121-153, 142.

social policy mark the evolution of the Union from an "elite-driven liberal trade regime," toward to something akin to a constitutional polity.[51]

There have been a variety of attempts more fully to embed the social dimension within the European Union, the final one of which culminated in the Treaty of Lisbon, which took effect as the European constitution on 1 December 2010.[52]

From the perspective of collective labour rights, one of the most significant developments was the adoption of the European Charter of Fundamental Rights at Nice, which combined the fundamental rights and basic procedural rights with economic and social rights.[53] The newly ratified Charter protects collective labour rights. However, upon inspection, the extent of the protection offered is meagre.[54] Some member states did not want the Charter to create justiciable labour rights, and their concerns are reflected in both in the Charter and the Treaty that implements it. Article 28 of the Charter only guarantees the rights to collective bargaining and to collective action to the extent that they are in accordance with Community laws and national laws and practice. The Charter neither empowers the Community nor requires member states to create a right to strike. The Treaty of the European Union also makes it clear that the provisions of the Charter shall not extend in any way the competence of the Union. As icing on the cake, in a Protocol accompanying the Charter, both Poland and the UK specify that the chapter of

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[51] Ashiagbor, supra note 45, 238, footnotes omitted.
[52] Bernard, supra note 44, 28.
[53] Ibid.
[54] Ibid., 29; Sypris, supra note 42, at 232; Fredman, supra note 38, 56-57; Diamond Ashiagbor, "Economic and Social Rights in the European Charter of Fundamental Rights," (2004) 9(1) European Human Rights Law Review 62-5; Bernard Ryan, "The Charter and Collective Labour Law," in Tamara Hervey and Jeff Kenner, eds., Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective (Oxford-Portland: Hart, 2003); Dukes, supra note 42; Bercusson note 42.

the Charter in which labour rights are located do not create justiciable rights applicable in their countries except in so far as they have provided for such rights in national law. Thus, the Charter of Fundamental Rights does not create justiciable collective bargaining and strike rights, although it can be used as a source of norms by other courts, such as the ECJ.[55]

The ECJ also plays an important role in the constitutionalization of labour rights, albeit in a negative direction. The free flow of goods and services within the single market may "restrict the freedom of Member States to adopt whatever labour law regime they prefer (in those areas where no conflict arises between the national provisions in question and the Community rules adopted under the specific social competence)."[56] The Court's interventions in the area of employment and labour law have been particularly contentious, and commentators have questioned whether the ECJ's process of decision-making, decision makers, and methods of gathering information are appropriate for the task of balancing fundamental labour rights against market freedoms.[57] However, the preliminary reference process, does, as Siofra O'Leary notes, avoid the disadvantages of a bipolar dispute, since the Commission and Member States are entitled to intervene and the Advocate General is on hand with an independent opinion."[58]

The extent to, and the ways in, which the ECJ balances social goals and market freedoms will, in large part, influence the ability of Member States to respect and to

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[55] Barnard, supra note 44, 31-2; Ashiagbor, supra note 45, 71-2; Fredman, supra note 38, 58.
[56] Davies, supra note 49, 50.
[57] See the summary in Síofra O'Leary, Employment Law and the European Court of Justice: Judicial Structures, Policies and Processes (Oxford-Portland: Hart, 2002) 1-4; Fredman, supra note 38, 48-9.
[58] Ibid., at 4.

protect collective labour rights. The Court's legitimacy rests primarily upon its ability to provide convincing reasons for its decisions.[59] Thus, the onus is on the ECJ to provide "a truly constitutional answer concerning how to settle the existing – and possible future – conflicts between social structures in Member States that still remain within their own areas of competence and the dynamics of EC law seemingly favouring the liberal spirit of free movement to the detriment of the social arrangements of … countries with a strong welfarist tradition."[60]

ii) The EJC at Work: *Viking* and *Laval*

The uneasy balance between economic and social rights at the European level was profoundly disrupted by the accession of several low-wage former-Soviet states in 2004, which, as Brian Bercusson remarked, confronted "the legislative and judicial processes … simultaneously … with the same issues."[61] The Services Directive was an attempt to remove obstacles to economic activity within Europe. Since services account for the majority of employment in Europe, the Directive proved to be a focal point for the conflict between market integration and labour rights. Initially, the Directive was premised on the country of origin principle, which would subject service providers only to the laws applying in the country in which they were based. Trade unions feared that service providers based in Eastern European and Baltic States that had low wages and labour standards as well as ineffective trade union representation would use this

[59] See also Davies, supra note 49, 76.
[60] Norbert Reich, "Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ (2008) 9(2) German Law 126-61, 127.
[61] Brian Bercusson, "The Trade Union Movement and the European Union: Judgment Day," (2007) 13 (3) European Law Journal 279-308, 279-80.

comparative advantage to compete with service providers in member states' with strong regimes of labour regulation. Unions lobbied to exclude labour law from the provisions of the Directive, so that the labour law of the host state, instead of home country, would apply to service providers. They also wanted to carve out a space that protected trade union collective action from judicial scrutiny for compliance with the Directive. The final version of the Directive that came into effect in 2006 dropped the country of origin principle for labour law.[62] However, its characterization of collective labour rights was equivocal;[63] "the compromise position reflected in the Services Directive was not to spell out the legitimate scope of collective action in the event of conflict with the free movement provisions of the EC Treaty, but rather to delegate the decision to the Court."[64]

In 2006, two national courts asked the ECJ to determine the extent to which trade union collective action may operate as a legitimate constraint on employers' freedoms under Community law. Thus, it fell to the ECJ to develop an approach that balanced the interests of workers in older members states, workers in newer member states, and businesses and service providers in both old and new member states. However, it did so in a context in which employers, and not unions, would be posing the questions, and market access was the primary objective.[65]

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[62] The Services Directive has continued to be politically charged. Only one third of EU member states had successfully amended it, despite the passing of the 28 December 2008 deadline (three years after the Directive was adopted). Andrew Willis, "EU states miss services directive deadline," 3 February 2010, http://euobserver.com/9/29369?print=1

[63] Ashiagbor, supra note 45,252-5 ; Phil Sypris and Tonia Novitz, "Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation," (2008) 33 European Law Review 411-27, 416-8.

[64] Sypris and Novitz, supra note 45, 418

[65] Ashiagbor, supra note 45, 261.

The first case, Viking, concerned a Finnish company wanting to reflag its ferry, the Rosella, under the Estonian flag so that it could use an Estonian crew to be paid considerably less than the existing Finnish crew. [66] At the request of the Finnish Seaman's Union, the International Transport Workers' Federation (ITF), which is based in the UK, told its affiliates to boycott the Rosella in support of its Flag of Convenience policy, which sought to prevent shipping companies from reflagging vessels in order to ratchet down labour standards. Viking sought an injunction in the English High Court, restraining the ITF and the Finnish Seaman's Union (FSU), now threatening lawful strike action under Finnish labour law, from breaching Article 43 of the EC Treaty, which guaranteed freedom of establishment. The High Court readily granted the injunction; however, the Court of Appeal was not as confident that the unions had breached the Treaty, and referred the case to the ECJ. Viking is a classic case of an establishment moving across borders in order to gain access to cheaper labour.

Laval, by contrast, is a case of a service provider crossing borders and using home state workers who are paid at lower rates. In Laval, a Swedish subsidiary of a Latvian company won a contract to refurbish a school in Sweden using its parent's Latvian workers who earned about 40 per cent less than comparable Swedish workers. The Swedish construction union wanted Laval to apply the Swedish collective agreement but Laval refused, in part because the collective agreement was unclear as to how much Laval would have to pay its workers. There followed a union picket at the school site, a blockade by construction workers, and sympathy industrial action by the electricians'

[66] Viking, supra note 10, paras. 6-12. The Court placed a great deal of significance on the fact that the shipping country promised that all of the Finnish workers would retain their jobs.

union. Although this industrial action was lawful under Swedish law, Laval brought proceedings in the Swedish labour court, claiming that this action was contrary to Community law, specifically the Article 49 freedom of services, and raised the issue of the Posted Workers Directive, which stipulated which country's labour laws were to apply to (posted) workers who were accompanying service providers.[67] The Swedish Court referred the case to the ECJ.

Both cases involved opinions from the Advocates General, and were decisions of the Grand Chamber.[68] Essentially, they raised four main issues for the ECJ to decide. The first concerned the material scope of the EC Treaty; do Articles 43 and 49 apply to fundamental social rights such as the right to the industrial action? The second focussed on whether Articles 43 and 49 had direct horizontal legal effect against trade unions. The third revolved around the question of breach of the EC Treaty; does collective action by trade unions constitute a restriction on free movement? Whether the breach was justified, and if so, whether the action was proportionate comprised the final issue. In both *Viking* and *Laval,* unions asserted the fundamental nature of the right to take industrial action in order to defend themselves from corporations that asserted their freedom of movement

[67] A complicating factor in Laval was the Lex Britannia provisions in the Swedish collective bargaining legislation, which provided that a trade union has a right to take industrial action to set aside or amend a foreign collective agreement such as a collective agreement entered into by a foreign service provider in a home state. The Swedish peace obligation that prohibits trade unions from taking industrial action when there is a collective agreement does not apply in cases in which the collective agreement is foreign. Mia Rönnmer, "Free Movement of Services versus National Labour Law and Nordic Industrial Relations systems: Understanding the Laval Case from a Swedish and Nordic Perspective," (2007-8) 10 Cambridge Yearbook of European Legal Studies 493-523, 504. See Charles Woolfson, Christer Thörnqvist and Jeffrey Sommers, "Labour Migration and the Future of Labour Standards after Laval," (2010) 41 Industrial Relations Journal.

[68] Claire Kilpatrick, "The ECJ and Labour Law: A 2008 Retrospective," 38(2) ILJ 181-2. In this chapter, I will focus exclusively on the decisions of the ECJ and not the opinions of the Advocate General.

against them. Although the old and new member states split over the answers to these legal issues, there was a consensus over the existence of a fundamental right to take collective action.[69]

The trade unions along with the Danish and Swedish governments submitted that the right of trade unions to take collective action should fall outside of community law.[70] For the purposes of this chapter, the argument that fundamental rights, including the right to strike, were outside Community law, is the most important. Referring to the European Social Charter, ILO Convention 87, the Community Charter of the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union, in Viking the Court recognized the right to take collective action, including the right to strike, as "a fundamental right which forms an integral part of the general principles of Community Law."[71] However, it went on to hold that the exercise of the right was subject to certain restrictions, "and must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality."[72] The restrictions the Court identified were those set out in Article 28 of the Charter of Fundamental Rights of the European Union – those imposed by national law and practices and Community law. Thus, the Charter was used to limit, rather than to expand,

[69] Bercusson, supra note 61, 305-6
[70] Together they provided three arguments: that the EU lacked competence as a result of Article 137(5) of the ECT Treaty to regulate with respect to the right to strike; that, by analogy with Albany [1999] ECR I-5751, collective worker action leads to an inherent restriction of the freedom of establishment and freedom to provide services and thus fall outside the scope of the EC Treaty; and the fundamental nature of the right to strike.
[71] Viking, supra note 10, para. 44.
[72] Ibid, para. 46

labour rights. Although the ECJ recognized the right to strike as fundamental, it did so in what Anne Davies characterized as a "defensive" context.[73]

The second issue the Court dealt with was whether Articles 43 and 49 had direct horizontal effect against a trade union. This was a particularly controversial question. Instead of bringing their actions against the governments of Finland and Sweden for having labour law regimes that permitted the trade union action, in both cases the employers who sought to use lower paid labour and avoid host country collective agreements brought the actions directly against the trade unions. Relying on cases that stood for the proposition that private associations that exercised regulatory functions (such as sporting and professional associations) were directly bound by the Treaty, the Court held where trade unions "participate in the drawing up of agreements seeking to regulate paid work collectively"[74] they are covered by the free movement provisions. In doing so, the Court expanded the scope of Articles 43 and 49 beyond quasi-public organizations exercising a regulatory function and emphasized the close link between collective bargaining and collective action. However, the Court did not seem to appreciate that the difference between collective bargaining and regulation is that the former depends upon the balance of power between unions and employers. Nor did it provide a basis for limiting the scope of Articles 43 and 49 when it came to private action.[75]

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[73] A. C. L Davies, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ," (2008) 37(2) Ind. L.J. 126-48, 139.
[74] Viking, supra note 10, paras. 64 and 65.
[75] Davies, supra note 73, 136-137; Catherine Barnard, "Viking and Laval: An Introduction," in (2007-8) 10 Cambridge Yearbook of European Legal Studies 463-93, 472-4; Tonia Novitz, "A Human Rights Analysis of the Viking and Laval Judgments," in (2007-8) 10 Cambridge Yearbook of European Legal Studies 541-61,551-4.

Having established that Community law applied to the trade union action in both cases, the Court followed the standard market access approach analysis of breach, justification, and proportionality. Given the Court's conclusions about the scope of the EC Treaty and the direct application of Article 43 to trade unions, it was almost inevitable that the Court would conclude that the FSU's and ITF's actions were in breach of the Article: "in the present …case it cannot be disputed that collective action such as envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that state."[76]

Although the Court also found a breach of Article 49 in the Laval case, its analysis was complicated by the Posted Workers Directive, which attracted more attention from the Court than did Article 49. The Court's focus on the Posted Workers Directive was somewhat surprising given that the provisions of the Directive are not capable, in themselves, of having direct effect in a case involving private parties.[77] However, the Court simply stated that the Directive had to be taken into account when giving a ruling on Article 49.[78] The Court concluded that the Posted Workers Directive does not permit a member state to impose on foreign-service providers the obligation to conduct on-site negations with trade unions to determine the rates of pay. Nor, according

[76] Laval, supra note 10, para. 72. The Court also said that the ITF's policy of combating the use of flags of convenience "must be considered to at the least liable to restrict Viking's exercise of freedom of establishment. Ibid., para. 73
[77] Barnard, supra note 75, 477.
[78] Laval, supra note 10, para. 61

to the Court, does it allow trade unions to force a foreign-service provider to accept better conditions than the bare minimum standards allowed in the Directive. Thus, the Court found that industrial action by trade unions that was aimed at forcing a service provider established in other member states to agree to terms that are more favourable than those provided in the Posted Workers Directive "is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC."[79] As Deakin pointed out, "the Directive was needed in order to bring Laval within Article 49 in the first place; Article 49, in its turn, supplied the context for the Court's pre-emptive reading of the Directive."[80]

Thus, having found the unions' collective action in the two cases to have breached the Treaty, the Court turned to the issues of justification and proportionality. In both cases, the Court adopted a strict approach to proportionality: a restriction on a fundamental freedom "can be accepted only if [1] it pursues a legitimate aim compatible with the treaty and [2] is justified by overriding reasons of public interest. But even if that were the case, it would [3] still have to be suitable for securing the attainment of the objective pursued and [4] must not go beyond what is necessary in order to attain it."[81] The Court recognized that "the right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding

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[79] Ibid., para. 99.

[80] Deakin, supra note 45, 599, footnotes omitted. In this chapter I am not going to develop an analysis of the ECJ's interpretation of the PWD and its implications. For a collection that looks at the impact of Laval from the perspective of Member States see Andrzej Swiatkowski, eds., The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Area and Russian (Kluwer Law Intl 2009).

[81] Viking, supra note 10, para. 75.

reason of public interest."[82] It also accepted that the secondary action (the blockades) by the unions fell within the objective of protecting workers.[83] However, because the obligations that the unions were seeking to impose on the service provider exceeded the nucleus of minimum rules provided in the Posted Workers Directive, the collective action could not be justified.[84] Moreover, the fact that the Swedish construction union sought to compel the service provider to adhere to a collective agreement that would have provided a framework for pay negotiations was not justified because it did not provide sufficient transparency for the service provider to determine its obligations.[85] Since the Swedish trade unions' action were not justified, it was not necessary for the Court to consider whether they were proportionate.[86] It sent the case back to the Swedish Labour Court, which had to apply the ECJ's decision. On 2 December 2009, one day after the Treaty of Lisbon came into effect, the Swedish Labour Court handed down its decision, which awarded damages against the construction workers and electricians unions.[87]

By contrast, the Court engaged in a more detailed analysis of justification in Viking in order to provide the national court with detailed guidance about how to answer the question of proportionality. The Court stated that "the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of the fundamental freedoms guaranteed by the Treaty" and "that the protection of workers is one of the overriding reasons of public interest recognized by the

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[82] Laval , supra note 10, para 103.
[83] Ibid., para. 107.
[84] Ibid. para .108.
[85] Ibid. para. 110.
[86] The ECJ also held that the Lex Britannia provision in the Swedish collective bargaining legislation discriminated against the foreign service provider and that it was not justified; Rönnmer, supra note 67, 517-8.
[87] Wollfson, Thörnqvist and Sommers, supra note 67, x.

Court.[88] According to the ECJ, "it is for the national court to ascertain whether the objectives pursued by the FSU and ITF by means of the collective action which they initiated concerned the protection of workers."[89] However, it gave the national court very strict guidance about the legitimate scope of worker protection; the ECJ made it clear that the FSU's actions could only be justified "if the jobs and conditions of employment of members of that union [were] liable to be adversely affected by the reflagging of the Rosella."[90] Once the justification was established, the national court "would then have to ascertain whether the collective action initiated by the FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is reasonably necessary."[91] Citing two ECtHR decisions in support, the ECJ noted that collective action "like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members."[92] Thus, collective action could be suitable protecting workers. However, the Court's approach to necessity further narrowed the remit of the right. The national court was instructed to examine whether, on the one hand, under the national rules and collective agreement law applicable to that action, the "FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking and, on the other, that the trade union had exhausted those means before initiating

[88] Viking, supra note 10, para. 77
[89] Ibid, para. 80.
[90] Ibid, para. 81.
[91] Ibid, para. 85.
[92] Ibid., para. 86, referring to Syndicat National de la police belge v Belgium, 27 October 1975, Series A No 19 and Wilson v UK 2 July 2002, 2002-V, para 44.

such action."[93] As regards the ITF's policy of requesting solidarity action against any ship owner that registered a ship in a state of other than that of which it was a national, the Court doubted that it could be justified because the policy "automatically opposes business relocation without regard to whether such relocation would actually be detrimental to the workforce."[94] These questions were never answered since the parties settled the action before the case was sent back the UK Court of Appeal.

Thus, although the ECJ recognized that the right to take collective action in order to protect workers from social dumping constituted a legitimate objective that could constitute a restriction of the freedom of establishment or services, the limitations it imposed on the right's exercise almost completely nullified it. The ECJ did not recognize a right to strike per se, only collective action for a wider approved purpose – worker protection, which it interpreted very narrowly. By implication, as Tonia Novitz noted, collective action for other purposes, such as to protest government policy or policies for workers in the future, was not legitimate [95] The Court also placed the burden on the union to find the least restrictive method to protest social dumping. Social considerations, including the right to strike, are recognized as legitimate but they are conceptualized as derogations from economic rights, which are regarded as truly foundational. Classifying this right to strike as fundamental is paradoxical.

Moreover, in Laval, the ECJ seemed deeply suspicious of collective bargaining as a legitimate form of norm setting. The Court compared collective autonomy unfavourably – too messy, too uncertain, too disruptive – to judicially enforced

[93] Ibid., para. 97.
[94] Ibid., paras. 88-9.
[95] Novitz, supra note 75, 554-9.

legislation as means of setting and protecting standards for posted workers.[96] The Court's preference for a juridified means of determining and implementing standards is a threat to certain types of social models, such as in Sweden and Denmark, in which civil society organizations such as trade unions play a more prominent role in establishing workplace norms than do legislatures and courts.[97]

The ECJ's decisions in Viking and Laval do not demonstrate much appreciation for the distinctive context of industrial relations.[98] By deciding that the Treaty applied directly to trade unions, it clearly placed unions on the defensive. In the UK, employers are more likely to seek and to obtain injunctions to prevent unions from organising and participating in transnational collective action.[99] Unions in Sweden have been found

[96] Laval, supra note 10, para. 110.
[97] Some member states are amending the legislation that implements the PWD, Taco van Peijpe, "Collective Labour Law after Viking, Laval, Rüffert, and Luxembourg," (2009) 25(3) The International Journal of Comparative Labour Law and Industrial Relations 81-109, 106-6; Claire Kilpatrick, "Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers**,"** (2009) 34 (6) *European Law Review* 2009, 34(6), 844-865.
[98] Davies, supra note 75, 148; Claire Kilpatrick, "British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law," LSE, Law, Society and Economy Working Papers 16/2009, 20; Rönnmer, supra note 67, 519-23.
[99] Shortly after the decisions were released, British Airways sought an injunction in the United Kingdom to stop collective action threatened by the union representing its airline pilots that was called to protest the airline's decision to start a new service, called Open Skies. BA proposed to fly passengers from mainland Europe to the US using BA planes, support staff, and BA management, but not BA pilots. The pilots union took a vote of its members to determine their support for a strike to protest Open Skies, and BA claimed that, following Viking, the union was in violation of Article 43 of EC Treaty. The union went to the UK national court and successfully obtained an order for a speedy trial to determine the question of the Treaty violation in order to avoid having the question answered in the context of BA's application for an interim injunction. However, the union withdrew its action in the face of BA's claim for damages and the prospects of a lengthy and expensive litigation. Barnard, supra note 75, 489-90; Ewing, and Hendy, supra note 13.

liable in damages to employers for breaching Article 48.[100] Although the question of union liability for damages for industrial action in breach of Article 43 is an open one, employers are able to exploit this uncertainty when unions threaten industrial action that has a transnational focus.[101]

iii) The European Court of Human Rights and the Swing to Protection

The 2008 decision of the ECTHR in Demir and Baykara v. Turkey stands in marked contrast to the approach adopted by the ECJ in Viking and Laval to collective labour rights. The Grand Chamber of the European Court of Human Rights explicitly overruled its earlier decisions to hold that Article 11 of the European Convention of Human Rights includes the right to collective bargaining.[102] In the 1970s, the ECtHR took a formal and individualized approach to the interpretation of freedom of association under Article 11 of the Convention, treating it as a civil and political right, and contrasting it to the social rights protected under the European Social Charter.[103] It excluded collective bargaining and strikes from its scope.[104] However, in the 1990s, as part of its broader and "integrated" approach to the interpretation of social right claims under the Convention, the ECtHR began to invoke the interpretation of freedom of association provided by the ILO's supervisory bodies in order to justify a change in

[100] Woolfson, Thörnqvist, and Sommers, supra note 67.
[101] Katherine Apps, "Damage Claims against Trade Unions after Viking and Laval," (2009) 34 European Law Rev 141-54. Moreover, it is not clear what gives a particular dispute its transnational dimension. Is national action caught only if there is an actual obstacle to a transnational market relationship, or is it sufficient if it merely (potentially) impedes market access.
[102] Demir, supra note 11, para. 154.
[103] Novitz, supra note 74, 544.
[104] Ryan, supra note 53.

approach to labour rights and freedom of association.[105]

At issue in Demir and Baykara was the lack of express statutory provisions in Turkey recognizing a right for trade unions formed by civil servants to enter into legally enforceable collective agreements.[106] The trade union, which was founded by civil servants, entered into a collective agreement with a municipal council. When the municipality failed to fulfil certain obligations the union brought civil proceedings against it. The municipality claimed that the union did not have the legal capacity to enter into and to enforce the collective agreement under Turkish law, and asked the District Court to dismiss the action. Referring to international law, specifically ILO conventions, the District Court filled in the legal gap and granted the union capacity to enforce its agreement. The Court of Cassation granted the Municipality's appeal and quashed the District Court decision on the ground that the union had no authority to enter into collective agreements. The issue was re-litigated with the same results before both courts. The Turkish Audit Court ordered the union members to repay the benefits they had secured under the now defunct collective agreement. A seven judge panel of the ECtHR held that there had been a violation of Article 11 "so far as the domestic court had refused to recognize the legal personality of the trade union … and had considered null and void the collective agreement between that trade union and [the Council]."[107] The Turkish government asked that the matter be referred to the Grand Council.

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[105] Virginia Mantouvalou, "Is there a Human Right not to be a Trade Union Member? Labour Rights under the European Convention on Humana Rights," LSE Law, Society and Economy Working Papers 8/2007, 4-5.
[106] Demir, supra note 11, paras. 13-53.
[107] Ibid., para 8.

The ECtHR applied its traditional two-step test to Article 11; the first step is to establish whether there is an interference with a Convention-protected right. If so, the second step is to determine if the interference can be justified. To be justified, an interference must be prescribed by law, serve a legitimate aim, and be necessary to achieve that aim.[108] The ECtHR took a broad, integrated approach to the interpretation of rights under the Convention. It referred to ILO Convention 98 and the European Charter of Fundamental Rights as the basis for understanding the right to collective bargaining in the context of the freedom of association.[109] The Court also made it clear "that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State."[110] The Court decided,

> having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the

[108] Janneke Gerards, "Judicial Deliberations in the European Court of Human Rights," in N. Huls, M. Adams, and J. Bomhoff., eds., The Legitimacy of Highest Courts' Rulings (The Hague: T.M.C. Asser Press, 2009) 407-36, 421.
[109] Ibid., paras. 37-52.
[110] Ibid., para.77.

> administration of the State" … – a category to which the applicants in the present case do not, however, belong.[111]

The Court adopted an approach that simultaneously confirmed the freedom of states to develop their own collective bargaining systems, and identified ILO standards and jurisprudence as providing minimum labour rights for the forty-seven members of the Council of Europe.

That Demir marks an important development in the ECtHR's approach to the freedom of association was confirmed by four subsequent cases that dealt with the right to take collective action.[112] The first, Enerji Yapi-Yol Sen v. Turkey,[113] involved an executive order that prohibited public servants from taking part in a one-day national strike as part of their campaign for a collective agreement. Some of the union's members participated in the strike and they were disciplined. After the Turkish courts dismissed the union members' appeals of their disciplinary penalties, they brought a complaint to the ECtHR. The Court noted that strike action constitutes an important aspect of the protection of trade union members' interests, is recognized by ILO supervisory bodies as "an indissociable corollary of the right of trade union association that it protected by ILO Convention 87," and is enshrined in the European Social Charter as "a means of ensuring the effective exercise as the right to collective bargaining."[114] It held that strike action was protected under Article 11(1). Although it acknowledged that the right to strike was not absolute and that a restriction could be justified if it answered a pressing social need and was not disproportionate, the Court held that the Turkish government failed to

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[111] Ibid., para. 154.
[112] Neither of the subsequent cases was a decision of the Grand Chamber.
[113] Enerji Yapi-Yol Sen v. Turkey, Application no 68959/01.
[114] Ibid., para 32 .

demonstrate the general and absolute ban on all public sector workers from striking was a necessary restriction.

The second decision, Danilenkov v Russia,[115] which was released in July 2009, dealt with a complaint by a group of dockworkers that they had been discriminated on the basis union membership because they were members of a union that had engaged in industrial action against their employer. The dockworkers were unhappy because the only method of legal redress for the discrimination they suffered was criminal proceedings against the employer, which was ineffective. After exhausting all of the national courts, the union complained to the ECtHR. The ECtHR invoked ILO conventions and jurisprudence both to emphasize the fundamental status of the right to be free from discrimination on the basis of union membership and to suggest some minimum standards for the effective protection of the right.[116] The Court found that it is "crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action to obtain damages and other relief. Therefore, the States are required under Articles 11 and 14 of the Convention to set up a judicial system that would ensure real and effective protection against anti-union discrimination."[117] It held that Russia had "failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership" and that there was a "violation of Article 14 of the

[115] Danilenkov v Russia, Application No 67336/01, 30 July 2009.
[116] Ibid., paras. 102-8.
[117] Ibid., para. 124. Article 14 provides: " The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Convention taken together with Article 11."[118] Moreover, in two subsequent cases, the ECtHR found that penalites imposed on striking workers constituted a violation of Article 11.[119]

iv) The Status of Labour Rights: THE ECJ versus the ECtHR

The difference in approach taken by the two European courts to collective bargaining, collective action, and trade unions is stark. While both courts refer to many of the same human rights instruments, their treatment of international law is very different. The ECtHR, for example, engaged with ILO supervisory body jurisprudence and used it explore the positive obligations of states to protect collective bargaining, whereas the ECJ simply invoked ILO Conventions at the level of general right and neglect nuance and detail.[120] The two courts also started from opposite premises of the legitimacy of trade union collective action. The analysis at the ECtHR under the Human Rights Convention began with the assumption that collective bargaining and collective action are protected, and the obligation is on the state to show that its restriction is necessary. Before the ECJ, where the task is primarily to protect the freedoms under the EC Treaty, the union has to justify why industrial action was justified in restricting fundamental freedoms. At the ECJ, unions are asserting fundamental rights as a defence against claims brought against them by employers, whereas, at the ECtHR unions are asserting fundamental rights in order to challenge restrictive state action.

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[118] Ibid., para 136.
[119] Saime Özcan v. Turkey, supra note 13, involved criminal sanctions imposed against an individual worker, whereas Kaya and Seyham v. Turkey, supra note 13, the striking workers were disciplined (in the form of written warnings) for participating in the strike. For a discussion of these cases see Ewing and Hendy, supra note 13.
[120] Novitz, supra note 74, 559.

The extent to which the European Court of Human Rights can operate as a restraint on its Luxembourg cousin is an open question. Like the ECJ, the ECtHR is a supranational court with a constitutional stature.[121] The EU Charter refers to the ECHR and Article 52(3) accords deference to the ECtHR jurisprudence on Convention rights. Although the EU is not subject to a party to the ECHR, individual member states must comply with the Convention.[122] Moreover, the Lisbon Treaty commits the union to accession to the European Convention for the Protection of Human Rights.[123] Assuming that accession means that EU institutions would, for the first time, be subject to the jurisdiction of the European Court of Human Rights, it may be possible to argue that the ECJ's decisions in Viking and Laval infringe Convention rights.[124] Moreover, the ECJ has stated that it will take full account of the European Court of Human Right's jurisprudence and Article 6(2) of the EC Treaty already provides that the EU must respect fundamental rights guaranteed by ECtHR.[125]

Keith Ewing suggested that the "decision in Demir …creates the alluring possibility of complaint being made against the Strasbourg Court against an EU member State about the latter's failure to comply with the ECHR because of obligations arising under EU law."[126] However, the precise legal process for bringing such an action is not obvious.[127] Another problem is the ECtHR's limited remedial power. Although

[121] Gerards, supra note 108, 409-10.
[122] Woolfson, Thörnqvist, and Sommers, supra note 67.
[123] On October 3, the second Irish referendum on ratification of the Treaty of Lisbon was successful, leaving only two member states to ratify it before 2009 in order for it to come into effect.
[124] Sypris, supra note 42, 231-33.
[125] Ibid., 234.
[126] K.D. Ewing, preface in Bercusson, supra note 44, X.
[127] Ewing and Hendy, supra note 13.

individuals can pursue actions against their governments for violating their fundamental rights, the ECtHR does not have the power to amend, repeal, or modify legislation or individual decisions by a competent state actor. It can issue a legally binding judgement determining whether a domestic act, court decision, or law is in breach of the ECHR, and it can specify the state's obligations.[128] But it has no direct power to enforce. Using Demir and Baykara and the subsequent violations of the rights of Turkish workers by the Turkish state as an object lesson, Ewing cautions "even great legal triumphs can produce such little progress." [129]

It is disconcerting, to say the least, that Europe's two constitutional courts have taken quite different approaches to the question of fundamental labour rights. It is important for the legitimacy of both courts and the project of European integration for the two courts to come to a shared understanding of the status and role of labour rights in the European union. The need for a dialogue between the courts is especially urgent in light of the ECtHR's trio of decisions that begin with Demir and Baykara.[130] The ECtHR has more legitimacy when it comes to the interpretation of human rights than does the ECJ.[131] It is also beginning to develop a more nuanced and sophisticated approach to treating the ILO conventions and supervisory body decisions as an important legal source for identifying labour rights and the scope of their legitimate restriction. The Luxembourg

[128] Gerards, supra note 108, 409-10. For a discussion of the processes for lodging complaints at the ECtHR and the Court's "judicial restraint" regarding remedies see Ernst-Ulrich Petersmann, "Human Rights, International Economic Law and 'Constitutional Justice'," (2008) 19(4) The European Journal of International Law 769-98, 777-8. Petersmann contrasts access to the ECtHR with access to the ECJ at 776.
[129] Ibid., 22.
[130] Sypris, supra note 42, 234.
[131] Robin C.A. White, "Judgments in the Strasbourg Court: Some Reflections," at 8, http://srn.com/abstract+1435197

Court has recognized "the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter."[132] Although not bound by them, the ECJ cites relevant ECtHR decisions with deference and respect. The problem is that the ECJ follows its traditional template, and treats the fundamental rights as an exception to the fundamental market freedoms such that their exercise must be justified and proportional.[133] This problem is compounded by the direct application of the Treaty to trade unions; unions must persuade the Court that they used the least restrictive means that was suitable for achieving a legitimate objective. In this way, the ECJ reverses the approach of the ECtHR, which is to determine whether the state's restrictions on the right to collective action are proportionate.

The ECJ plays a constitutional role in the European Union, and it is charged with balancing fundamental rights and market freedoms. But the balance it has struck not only encroaches substantially on workers' fundamental freedoms, it narrows the right of member states to determine their national labour regimes. Given the evolution of, and changes to, the European Union, the recognition and protection of a core set of labour rights that is not subjugated to the free movement provisions of the EC Treaty is, as

[132] Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, 12 June 2003, para 77.
[133] Barnard, supra note 75, 492; Alicia Hinarejos, "Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms," (2008) 8:4 Human Rights Law Review 714-29, 727-9.

Hepple noted, crucial if "mutual recognition – as an alternative to harmonizing legislation – is [to be] workable in respect of labour."[134] The ECJ needs to reconsider its approach to fundamental labour rights. Instead of placing the onus on unions to justify the interference to fundamental freedoms caused by their exercise of fundamental labour rights, the ECJ should place the onus on the entity claiming that it is appropriate to restrict a fundamental labour right to justify the restriction as legitimate, suitable, and proportionate. In determining the scope of fundamental labour rights and legitimate restrictions on their exercise, the ECJ should follow the approach of the ECtHR and adopt the international labour law acquis that is composed of the ILO conventions and decisions by supervisory bodies. But, the problem is that such a profound realignment of the ECJ's approach to labour rights calls into question the capacity of the ECJ as it is currently constituted to protect a core of fundamental labour rights.[135] Establishing a specialist tribunal of the ECJ, with the power to exclude competence to override fundamental rights to collective action protected in member states and to authorize the social partner to intervene in cases before the ECJ, would increase the legitimacy of the ECJ's decisions when it comes to fundamental labour rights. [136]

IV. Conclusion

> The paradox of labour rights as international rights is that, for the task they assign to both international labour law and international human rights law, we have globalization and flexible production to thank.[137]

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[134] Hepple, supra note 36, 223.
[135] Ashiagbor, supra note 45, 206.
[136] Brian Bercusson, "The European Trade Union Movement and the European Court of Justice," British Institute of International and Comparative Law Seminar, Internal Market, Social Policy and Protectionism, 6 May 2008.
[137] Macklem, supra note 31, 84.

Although a paradox is not an impossible political condition, according to the political scientist Wendy Brown, it is a demanding and frequently unsatisfying one.[138] This description captures the tension in the double movement of constitutionalism that we are witnessing. The perils of neo-liberalism are obvious. In Europe, employers can use their right to move freely throughout the common market to discipline unions that have the political and economic clout to prevent social dumping on a transnational basis. Countries with strong corporatist arrangements that give unions a great deal of political and economic strength are particularly vulnerable to attack. Recourse to fundamental labour rights as a counter to capital mobility rights is defensive. Law replaces politics as the vehicle for articulating needs in the public setting. Neo-liberalism is not only about constructing markets; it is also about restructuring political power. It involves a shift from parliamentary to judicial and executive power. In the context of Europe, it means that the ECJ is "the most juridically powerful and … least democratic institution in the EU."[139]

The promise of constitutionalizing labour rights is that it will help to restore the legitimacy of the European Union and to preserve distinctive national social models. With the new political geography of Europe[140] it is difficult to achieve a political consensus about how to balance the fundamental freedoms that favour capital against workers' fundamental rights. Thus, to a large extent, it falls to the ECJ to balance these competing freedoms and rights. Hence, Alain Supiot's claim that "juridical devices

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[138] Wendy Brown, States of Injury (Princeton: Princeton U.P., 1995) 430.
[139] Alain Supiot, "Possible Europes," (2009) 57 New Left Review at 3, http://www.newleftreview.org?A2780
[140] Kilpatrick, supra note 98, referring to the accession of 12 new Member States since 2004 with vastly different wages, labour law regimes, and standards of living.

specific to democracy, whether electoral freedoms or freedom of association, make it possible to process the stuff of political and social unrest and to convert tests of strength into test cases."[141]

That the current balance set by the European Court of Justice does not have much social legitimacy is illustrated by two high profile industrial disputes in 2009 (at Total, an oil refinery in the north of England, and Alsom, at a power station in the south) in which British workers mobilized to halt sub-contracting arrangements in which UK contracts were awarded to businesses from other EU Member States. The key issue in both disputes was the use of posted workers. While some portray this protest as narrow protectionism, the unions, supported by the European Parliament, argued that their dispute is not against free movement of persons, but against the inappropriate balance currently being struck between business and workers and between the social and economic dimensions of the EU project.[142]

As these strikes demonstrate, the contest of expectations in the daily "lived world" of industrial relations is the true arbiter of whether developments in labour standards are in a regressive or progressive direction. Although framed and endorsed by the legal system, expectations in the arena of industrial relation are *socially* legitimised in the ongoing conflict of social classes over distributional issues.[143] In a similar way, "legitimacy among the citizenry is the binding agent [that] sustain[s] such societal

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[141] Alain Supiot, "Viking-Laval-Rüffert: Economic Freedoms versus Fundamental Social Rights – Where Does the Balance Lie?" ETUI-REHS, 4-5. The original version of this article, in French, was published in the "Revue Permanente du Mauss," www.journaldumauss.net/spip.php?article283

[142] Kilpatrick, supra note 98, 6; Guglielmo Meardi, "Strikes against Foreign Contractors," (2009) 16(3) International Union Rights.

[143] Woolfson, Thörnqvist, and Sommers, supra note 67.

contracts as constitutions."[144] The legitimacy of the Lisbon Treaty and the European Union are jeopardised by the lack of democratic accountability regarding both its ratification and ramifications.

The ECtHR's recent decisions on labour rights must be put in the context of the public dissatisfaction to the European Court of Justice's decisions in Viking and Laval. The promise of the constitutionalization of labour rights is that it provides an opportunity to build a social model that extends protections to all workers rather than excludes some from the benefits of integration. This chapter suggests that the ECJ has a long way to go if it is to make good on this promise. Thus, it is crucial that all political institutions, including trade unions, grapple with the deeper problem.

[144] Stephen Clarkson, "Global governance and the Semi-peripheral State: The WTO and NAFTA as Canada's External Constitution," Marjorie Griffin Cohen and Stephen Clarkson, ed., Governing Under Stress: Middle Powers and the Challenges of Globalization (London: Zed, 2004) 153-75, 165.