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*The protection of the right to strike within the European Union :*

**Evaluating the degree of the labour law harmonisation and the  
state of the European social model**

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## ABSTRACT

One of the main intention of the European Union is to create a proper social model based on good economic performance, high levels of social protection, education and social dialogue. Due to the complexity to commonly define the social area, the Union shall share or be excluded in social affairs. The right to strike, broadly understood as a concerted work stoppage of the employees to support professional claims, has remained one of the most complex rights to define from a comparative law perspective. Its inherent psychological and social conceptions have made it very difficult to agree on a single conception. Such a right has represented the logic of the European Union towards the social area as it has been elevated as a fundamental right but the competence of the European Union has been excluded. The current jurisprudences before the Court of Justice of the European Union has confirmed this legal view. However, the right to strike may constitute a fundamental right but shall not impede the exercise of economic freedoms. Social rights have, consequently, appeared to be restrictions that the users should justify. Trade unions have demanded that the European Union serve not only technical needs and economic interests.

Faced with these tensions through the right to strike and its effective application in the European zone, we can wonder :

*How does the right to strike represent the state of the harmonisation of labour law within the European Union and, broadly, the degree of progress of the European social model?*

## ACRONYM

<b>ECHR</b>	European Court on Human Rights and Fundamental Freedoms.
<b>ECJ</b>	European Court of Justice, the Court of Justice of the European Union.
<b>EU</b>	European Union.
<b>ESCIC</b>	Economical, Social and Cultural International Covenant.
<b>CPIC</b>	Civil and Political International Covenant.
<b>T-U</b>	Trade Unions.
<b>Unions</b>	Trade Unions.
<b>MS</b>	Member State

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*“But my intention being to write something of use to those who understand, it appears to me more proper to go to the real truth of the matter than to its imagination; and many have imagined republics and principalities which have never been seen or known to exist in reality; for how we live is so far removed from how we ought to live, that he who abandons what is done for what ought to be done, will rather learn to bring about his ruin than his preservation.”*

*Niccolò Machiavelli, Il Principe, Florence: 1514, Chapter XV.*

## INTRODUCTION

Professor Van Canegem stated that the nationalist legal approach in Europe and the constitution of national codes have come into force for no longer than two centuries. Updating a new European Ius Commune would only be, a legitimate return to the historical continuity <sup>1</sup>.

At the time that the idea of the elaboration of a common European civil code <sup>2</sup> had been launched, the perspective was that, one day, European citizens shall share a common law. It is not as unrealistic as it could have appeared at the signing of the treaty for the creation of a European coal and steel community <sup>3</sup>.

The European adventure currently constitutes “a new legal order of international law”<sup>4</sup> with “a proper legal order integrated to the member States' legal systems”<sup>5</sup>. This calls for a real European identity and has tackled, of course, the traditional politico legal theories of the State such as the concept of a National State and its inherent sovereignty <sup>6</sup>.

For the sovereignists, the state institution remains the sole horizon for a political

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1 Caenegem, 2005, p 11.

2 Clergerie, Gruber, Rambaud, 2006, pp 772-773.

With the initiative of the European Parliament, the Commission proposed in a communication dated July 11, 2001 to undertake a codification of European contract law, through the development of common principles, review and improvement of existing legislation with the new regulations much broader.

3 Clergerie, Gruber, Rambaud, 2006, pp 772-773.

4 European Court of Justice, 5 February 1963, Case 26/62, N. V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos and Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration).

5 European Court of Justice, 15 July 1964, Case 6/64, Flaminio Costa contre Ente Nazionale per l'Energia Elettric.

6 Ziller, Marquis, Taoufiqi, 2003, pp80-81.

community. The State is the only warrantor of the territory and national identity coherence<sup>7</sup>. If the State is questioned, the political community loses its meaning immediately<sup>8</sup>. In that regard, as national borders play an important role in the determination of a proper identity that extends to create its own features, it is necessary to confront the different systems.

To that perspective, the “Nation State” was founded on the juxtaposition of the political and legal identity of a State and the Nation<sup>9</sup>.

In the context of globalization, there is an acceleration of the Nation State's excess since countries are interconnected and interdependent on economical, political and even cultural levels. Instances can be easily found in our daily life :

Who has never watched videos on Youtube? Who has never eaten a banana from Latin America<sup>10</sup>?

That is why the established State has to face different challenges that necessary imply questioning its economic and social organization.

The creation of a community of European states has constituted a great answer to influence more of the international scene, especially the great economic superpowers such as the United States and, more recently, China.

With the great achievement of the common market, which has developed a free-market zone of capital, services and gender, this pooling has aspired to go further on the economic aspect<sup>11,12</sup>. Indeed, the organization of a common economic and social area

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7 Barbier, 2008, pp 243-251.

8 Habermas, 2000, pp 118.

9 Nation considered as individuals that consider themselves belonging to the same group, is the most functional and credible system.

10 I am referring to the Banana cases before the World Trade Organisation Dispute Settlement: Decision by the Arbitrators: WT/DS27/ARB, 9 April 1999(European Communities, Regime for the Importation, Sale and Distribution of Bananas , Recourse to Arbitration by the European Communities under Article 22.6 of the DSU).

11 Barnard, Europa Institute Mitchell Working paper series, 5/2008.

12 Jacobs, 1975, pp1-2.

has been a nucleus, without which the European community would be meaningless and without political will<sup>13</sup>. Efforts have been accomplished on the elaboration of common legal standards, such as the fight for the equity before jobs<sup>14</sup> or the notion of salary<sup>15</sup>, but critics have highlighted the obvious weaknesses of the so-called European social model that the Union has tried to build.

The social dimension was perceived as to be set in four separate but not entirely compatible purposes. Juliet Lodge<sup>16</sup> stated that :

“Firstly, it was designed to allay fears that the development of an economic and monetary union would be achieved at the expense of and without recompense to the deprived, poorer, less competitive and peripheral regions of the EC.

“Secondly, it was seen as an essential adjunct to the realization of the Four Freedoms and notably to the promotion of labour mobility through the removal of barriers (such as exclusion from social security benefits) to workers seeking employment in an EC state other than their own.

“Thirdly, it was expected to alleviate public anxiety that the EC was and remained no more than a business club serving commercial and employers' interests without regard to employees' interests, and hence was expected to instill the idea of a European Union with a credible and genuine 'Human face'.

“Fourthly, it was seen as an instrument to reinforce the democratic legitimacy of the exercise in European integration initiated by the Commission.”<sup>17</sup>

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13 Referring to the Jacques Delors' speech on 17 January 1990, Strasbourg.

14 Rodière, 1998, pp 180- 200.

15 Rodière, 1998, pp369-380.

16 Lodge, 1994, pp 63.

17 Lodge, 1994, pp 63.

Many European specialists have stressed the lack of coherence of the European construction based on blurred objectives without a very concrete objective<sup>18</sup>. As a consequence, there have been several discussions about the compatibility of an ambitious social policy and economic development<sup>19</sup>.

In 2002, the Barcelona European Council defined the European social model as being « based on good economic performance, a high level of social protection and education and social dialogue. »<sup>20</sup>

Aiming simultaneously at a good economic performance, a high level of social protection and a fair social dialogue within the European area supposes that the Union shall carry out the necessary actions to bring closer the national legislations and the existence of the common market. This should lead to the long-term harmonisation of the member States' legislations<sup>21</sup>.

Labour law as one of the main components of Social law<sup>22</sup> constitutes a tremendous stake for the fulfilment of the European social model. Labour legislations cover the legal rules in the private sectors that imply the relationship between employers and its employees; professional relationships that have a collective dimension, such as the right to join a trade union, to collective bargain or to strike<sup>23</sup>. Consequently, these legislations naturally belong to the elaboration of the European social model since they set out rules that the common market needs to respect. The reasoning is simple: the free-movement of workers necessarily implies a protection system for them<sup>24</sup>.

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18 Sidjanski, 2010, pp 110-114.

Costa, 2010, pp 124-125.

19 Dubouis and Bluman, 2009, pp 113.

20 Definition of the European Social Model during the Barcelona European Council available on this following website :<http://ec.europa.eu/emplRodière>. *Droit social de l'Union Européenne*, LGDJ, 1998, pp 6-11. [oyment\\_social/social\\_model/index\\_en.html](http://ec.europa.eu/emplRodière) (accessed January 28, 2009).

21 Rodière, 1998, pp 6-11.

22 Péliissier, Supiot, Jeammaud, 2008, p 5.

23 Guillien and Vincent, 2005, pp 250-315.

24 Angel et Chaltiel-Terral, 2008, pp 50-52.

The orientation of such laws could define the model of the economic market and the meaning of the social aspect that the European level is trying to impose<sup>25</sup>. Needless to say that the degree of harmonisation is also representative to that regard. The competence in the social area has been widely shared between the Member States and the European Union<sup>26</sup>.

The latest treaty on the functioning of the European Union has elevated social rights of the Charter of Fundamental rights to the level of primary law. Above the strong political commitment, some rights, such as the right to strike, have received an uncertain status, since it is considered as a fundamental right but the competence of the European Union has remained excluded<sup>27</sup>. The right to strike, as broadly understood to be a concerted work stoppage of the employees to support professional claims<sup>28</sup>, has remained one of the most complex rights to define from a comparative law perspective. Indeed, such right has recalled both psychological and social arguments with a diverse scope of application<sup>29</sup>. The right to strike has, however, belonged to the collective conflicts that are essential to maintain a high level of social protection and social dialogue, an inherent aim of the European social model.

In the controversial cases held by the Court of Justice of the European Union, the judges chose to rule that “the right to take collective action must be recognised as a fundamental right which formed an integral part of the general principles of Community law”<sup>30</sup>. However, the right to strike could not render Community law inapplicable.

The fact that the economical freedoms shall undermine a fundamental means to

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25 Servais, 2008, pp 295-296 (para 947-950).

26 Dubouis, Bluman, 2009, pp 13-45.

27 Mazeaud, 2006, pp 239-298 .

28 Mazeaud, 2006, pp 239-298.

29 Servais, 2008, pp 230-231.

30 European Court of Justice, Judgment of the Court, Grand Chamber, Case C-341/05, 18 December 2007, *Laval un Partneri Lt v Svenska Byggnadsarbetareförbundet and Others*.

collectively bargain has created tension between the European Union's aspiration to create a “social economy market” (through the European social model based on the preservation of a high level of social protection), and the reality that tends to put the various national social protection laws in competition with each other because of a lack of harmonisation of labour laws.

Thus, it is legitimate to wonder :

How does the right to strike represent the state of the harmonisation of labour law within the European Union and, broadly, the degree of progress of the European social model?

Answering that question will lead us to study at first the creation of a social diplomatic language, employed to cover the lack of coherence of the European Union actions towards labour law and in the creation of the social model (I). These findings will permit us to understand the logic of the different rulings before the Court of Justice of the European Union that confirmed the inherent tension inside the will and the inability. With the help of different national regulations on the right to strike, the difficulties over the labour law harmonisation will be highlighted, and may confirm the *prima facie* feeling that by the absence of harmonisation the European Union has reinforced the threat over social dumping (II). This has revealed the tremendous European issues that have evolved from a mere economic organisation to a political and legal union.

## CHAPTER I

### **The Right to strike : A social European debunked myth.**

This part is dedicated to the study of the European and International legislations that deal with the right to strike. Through this work, it will be interesting to study the protection of the right to strike in the European legislation (A) and how the international sources shall play a role in case of harmonisation (B).

#### **1.The Right to strike in the European Legislation: A Growing Consideration.**

*(From the intent of the Fundamental workers rights to Lisbon)*

« Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements that first create a de facto solidarity. »<sup>31</sup> declared the French minister of Foreign affairs, Robert Schuman, in the declaration on May 9<sup>th</sup> 1950 that announced the creation of a treaty that would establish a European coal and steel community. This statement has exactly represented the method of the previous fifty years that tried to create the « United States of Europe »<sup>32</sup>. Indeed, the method of the « small steps and concrete projects »<sup>33</sup> has proved its sufficiency. It was, at first, a cooperation that had to stay economical to overcome the historic rivalries in order to live eventually in peace on the European continent<sup>34</sup>. That is why the social aspect of

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31 Robert Schuman, Declaration on the future elaboration of the Treaty establishing the European Economic Community, available at : [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm).

32 Victor Hugo, « The United States of Europe », speech at the International Peace Congress held in Paris in 1849.

Sidjanski, 2010, pp 110-114.

Quermonne, 2010, pp 106-110.

33 Monnet, 1976, p 642.

Cartou, Clergerie, Gruber, Rambaud, 2006, pp 27-35.

34 Quermonne, *Ibidem*, pp 106-114 .



this economic solidarity had been neglected by the Treaty's reviewers<sup>35</sup>.

Nevertheless, it might be argued that the modernisation of the economy was used to enhance the working conditions of the labour force<sup>36</sup>. Among the economic goals, it was undeniable that there was a real ambition to improve the daily work life of the workers, although there were only a few provisions that did not create any rights for them.

That was, of course, the logic from the birth of the European adventure to the consolidation of the solidarity into a Community. Throughout the evolution of the international political scene and economic crisis, “the Europe of the 9” were committed to developing the social aspect, as long as the economic community and its four economic freedoms were sufficiently secured.

The real shift was initiated by the Single European Act<sup>37</sup>, when the social issue was on

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35 Hennion, Muriel le Barbier-le Bris, Marion Del Sol, 2010, pp 41-42.

36 Article 3 provision e) of the Treaty establishing the European coal and steel community .

“Within the framework of their respective powers and responsibilities and in the common interest, the institutions of the Community shall : (...)

e)promote the improvement of the living and working conditions of the labour force in each of the industries under its jurisdiction so as to make possible the equalization of such conditions in an upward direction.”

Article 2 of the Treaty on European Economic Community

“The Community shall have as its task (...)high level of employment and of social protection, the raising of the standard of living and quality of life (...).”

Title III (Social Policy), Articles 117 and 118 of Treaty on European Economic Community:

“Member States hereby agree upon the necessity to promote improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction.

37 Article 21 (ex Article 118 a) From the Subsection III – Social Policy of the European Single Act :

« 1.Member States shall pay particular attention to encouraging improvement especially in the working environment, as regards the health and safety of workers ; and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made. ».

Dubouis and Blumann, 2009, para 155, pp 112-113.

everybody's lips<sup>38</sup>. It was clearly admitted that the unified market should bring social progress with its consolidation. With it was “the creation of a European social area, within which the trade unions expect to see the spread of better systems for protecting workers and improving working conditions”.<sup>39</sup>

### *1.1. From the Community Charter of the Fundamental Social Rights of Workers to Amsterdam.*

#### *a) The Community Charter of Fundamental social Rights of workers*

The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States<sup>40</sup> (with the exception of the United Kingdom), was the main milestone in the elaboration of major principles on which the European labour law model was supposed to rely. The Member States<sup>41</sup> agreed to set the basis and the shape of the European social model in the following decade<sup>42</sup>, although the value of this Charter was only political. As a consequence, it could not give any direct rights to the workers. It was more of a political sign to prepare the Treaty of Maastricht than a step at taking real action in the labour field<sup>43</sup>. The Charter recognized the right of association in order “to constitute professional organizations or trade unions of their choice in order to defend their economic and

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38 Angel, Chaltier-Terral, Geremek, 2008, pp 51-56.

39 Jacques Delors, *The Single Act and Europe: A moment of truth*. Luxembourg: Office for Official

*Publications of the European Communities*, 1986, pp. 22-37. Also available at :

[http://www.ena.lu/jacques\\_delors\\_acte\\_unique\\_europeen\\_moment\\_verite-01-7842](http://www.ena.lu/jacques_delors_acte_unique_europeen_moment_verite-01-7842) (last consulted on 14 March 2011).

Lodge, 1994, pp 65-66.

40 In the 1989, there were eleven Member States (The Netherlands, Belgium, Luxembourg, Germany, France, Greece, Italy, Spain, Portugal, Denmark, Ireland with the exception of the United Kingdom).

41 With the exception of the United Kingdom.

42 European Social Charter, Short Guide, 2000, pp18-19.

Dubouis, Blumann, 2009, p 113.

43 European Social Charter Short Guide, 2000, pp18-19.

social interest”<sup>44</sup>. The dialogue between the two sides of industry at the European level had to be developed<sup>45</sup>. Article 13 provided:

« 13 . The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.

In order to facilitate the settlement of industrial disputes, the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouragement in accordance with national practice. »

To that regards, the Commission's programme stated that it should seek to develop dialogue with social partners and discuss their role in collective bargaining<sup>46</sup>. It can be noted that the Commission preferred to refer to a global word “collective bargaining” instead of the right to strike as it was set out by Article 13 of the Charter of Fundamental social rights.

The Title about the implementation of the Charter should undermine the enthusiasm concerning the legal effects of such instruments, since it provided that the responsibility of the Member States should be committed when guaranteeing the fundamental social rights of this charter. However, such commitment did not cause any legal sanction<sup>47</sup> because the Commission was required to submit legal instruments for effective implementation<sup>48</sup>. To sum up, this charter was only a political step to show how the process started to think about the elaboration of the social part of the European Community<sup>49</sup>. The member States have remained the only sovereignties bound to these rights; which have given the European labour Community various protections. The Treaty of Maastricht on the Elaboration of the European Union was designed to go

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44 Article 11 of the European Social Charter.

45 Article 12 of the Charter of Fundamental social rights.

46 Dubouis, Bluman, 2009, p 113.

47 Referring to the Title II, “implementation of the European Social Charter, Articles 27, 28.

48 Lodge, 1994, pp 63-65.

49 Wasescha, 1991, pp 70-80.

forward with this first important political step.

*b) The Treaty of Maastricht*

With the Treaty of Maastricht, the Community clearly went beyond its original economic objective<sup>50</sup>, i.e the creation of a common market, and its political ambitions came to the fore. In this context, one of its five goals was the development of the social dimension within the Community. The first stone of the building was the political statement through the Charter of Fundamental Workers Rights that set out twelve principles which were only implemented in 1992 with a comprehensive social dimension for the 1992 programme. The social discussion did not go as well as expected by those with strong belief in social values. In fact, there was a division between countries, which was why the social policy issues were usually attached as a protocol<sup>51</sup>. The Protocol's basis was that the Member States, with the enshrined 'opt out' of the UK, were able to continue developing social policy in line with the 1989 Social Charter and have the authorisation to make use of the institutions, procedures and mechanisms of the Maastricht Treaty in order to give effect to the Agreement<sup>52</sup>. To this end, the Member States could implement measures which took account of the diverse forms of national practices (in particular in the field of contractual relations) and the need to maintain the competitiveness of the Community economy<sup>53</sup>.

It should be highlighted that even in the social policy text, there was always an economic aspect which seemed to prevail in the case of a conflict of rights. This logic

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50 Hennion, Le Barbier-le Bris, Del Sol, 2010, pp 41-42

51 Referring to the Protocol on social policy

Webber, 1999, pp 144-146.

52 Lodge, 1991, pp 65-66.

53 Referring to the Article 1, provision 2 of the Treaty of Maastricht :

“2. To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.”

has remained, until the recent cases from the European Court of Justice of the European Union<sup>54</sup>. On the other hand, Article 2 provided that “the Community should support and complement the activities of the Member States in the following fields” such as the informing and consultation of workers, but the provisions of this Article shall not apply to workers' pay, the right of association, the right to strike or the right to impose lock outs<sup>55</sup>. This protocol stayed on the same red line of the treaty on the right to strike. Indeed, the Article 118 a) set out:

“With a view to achieving the objectives of the Article 117, the Community shall support and complement the activities of the Member States in the following fields:

e) the information and consultation of workers;

f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (...)

6. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”

The Treaty of Maastricht showed the European will to transfer some competence to the EU level, although an harmonisation on Labour law seemed impossible. The great expectations of social policy are, nevertheless, justified as there is the official impulsion to improve the labour fields through communication with the trade unions and the workers, but there is absolutely no improvement at the European level of the right to express its disagreement and to undertake concrete collective actions. The rights that

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54 The European Court of Justice, Case C-341/05, 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*.

55 The European Court of Justice, Grand Chamber, Case C-438/05, 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.

Article 2 of the Protocol on social policy of the Treaty of Maastricht:

“(...) The Community shall support and complement the activities of the Member State in the following fields :(...)

3) the information and consultation of workers.

6) The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock outs.”.

resulted from the consultation with associations and the workers did not exist at the European level as a possible harmonized law, as Member States had exclusive competence.

This provision gives more of the impression of a “European social draft” rather than a strong social commitment because there was a common goal, albeit with diverse legislation. In addition, Council Directive 94/45/EC of 22 September 1994, with the purpose of improving the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings, did not deal with the right to strike issue as well. Even if efforts are made, crucial social rights such as the right to strike are excluded.

*c) The Treaty of Amsterdam*

Amending the treaty of the European Union in November 1997, the Treaty of Amsterdam stood in the same position as Maastricht in its article 117<sup>56</sup>. There was, however, a direct link to the Community charter on fundamental workers' rights<sup>57</sup>.

At first, the new agreements started with enunciating the Member States' objectives, such as the improvement of living and working conditions and improving the dialogue between management and labour, but to this end the Community and the Member States were to implement measures which took into account the diverse forms of national practices and the need to maintain competitiveness<sup>58</sup>. European Social Policy always

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56 The European Court of Justice, Grand Chamber, Case C-341/05, 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*.

The European Court of Justice, Grand Chamber, Case C-438/05, 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*

57 Hennion, *Le Barbier-le Bris*, Del Sol, 2010, p 48.

58 Lejeune, 1997, pp 53-54.

came as a second choice<sup>59</sup>. Namely, the scope of the European social protection was always framed in a way to protect the common market. It seems that it was more of a restrained protection than a proper full social choice. It is not surprising to find Article 118 excluding the support of the Community from the right to pay, the right of association and the right to strike<sup>60</sup>. The right to strike could be the mirror of the European contradictions because the Union wanted concrete common standards of some essential rights that could guarantee workers' rights. Political will has been positively strengthened when it has been provided that such development would ensue not only from the functioning of the common market but by treaties, regulation or administrative actions<sup>61</sup>.

## *1.2. The Charter of Fundamental Rights, Treaties of Nice and Lisbon : Diplomatic Speech Or Crucial Shift ?*

### *a) The Charter of Fundamental Rights*

The Charter of Fundamental Rights represents the tremendous hopes of the trade unions<sup>62</sup>. It is a set of rights, divided into seven chapters, designed to preserve the Union's cultural foundations<sup>63</sup>. These rights were, in fact, already respected by the Union<sup>64</sup>. However, the elaboration of a charter was a way to inventory of all the rights that founded the values of the European Union<sup>65</sup>. It was inaugurated on 7<sup>th</sup> December

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59 Angel, Chaltier-Terral, Geremek, 2008, pp 74 -76.

60 Lejeune, 1997, pp 60-64.

61 *Ibidem*.

62 European Trade Unions Confederation's report, *Charter of Fundamental rights: a Crucial statement of social and trade union rights*, available at :<http://www.etuc.org/IMG/pdf/BrochCharteEN.pdf> (last visited 12 March 2011).

Lenaerts, 2000, pp 575-600.

Hennion, Le Barbier-le Bris, 2010, pp 110-111.

63 Referring to the Preamble of the Charter of Fundamental rights.

64 Petiti, 2004, pp 108-109.

65 Benoit Rohmer, 2009, pp 151-152.

2000 by the European Parliament, the Council of Ministers and the European Commission<sup>66</sup>, however its legal value was very uncertain for a long time<sup>67</sup>.

The crucial breakthrough in the social field is definitely provided by Chapter IV, Solidarity and its articles 27,28<sup>68</sup>. Indeed, the Charter is one of the very first documents that sets out the right of collective bargaining and strike action as fundamental rights<sup>69</sup>.

Article 28 provides :

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

The enthusiasm shall be limited, however, as the article says that the right of collective bargaining, including the right to strike, is still applied in compliance with Community law and national practices<sup>70</sup>. This means that the right to strike is necessarily subjected to the protection laid down in the national law since the Community's competence is excluded. Consequently the Charter only consecrates the right to strike as a fundamental right without adding a “protection value”<sup>71</sup>.

Legally speaking, this article does not mean anything new because it did not extend the exercise of such a right<sup>72</sup>. This protection is not a rampart in the case of a conflict of rights, such as with a fundamental economical freedom like the Freedom of Establishment or the Freedom to Provide Services Cross-Borders<sup>73</sup>. These findings are

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66 Dubouis et Blumann, 2009, pp 113-114.

67 Hennion, le Barbier-le Bris, Del Sol, 2010, pp 143-164.

68 *Ibidem*.

69 Hinarejos, 2008, pp 521-522.

70 Alston, 1999, p 233.

71 Hinarejos, 2008, pp 521-522.

72 Petiti, 2004, pp 108-109.

73 The European Court of Justice, Grand Chamber, 18 December 2007, Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others.



all the more true as Article 53 of the Charter, which deals with the scope of fundamental rights, provides that the provisions of such an instrument are applied to Member States when they are applying European law. In other words, this gives a minor value to the right to strike since the Treaty of Nice set out with its Article 137 that the competence of the European community should be excluded from the right to strike. Above the value of the Charter<sup>74</sup> in the hierarchy of rights at the European level, the protection of the right to strike relies on the presence of other such rights at the European level as a right that could be subject to harmonisation. That is, in fact, one of its only ways to compete with fundamental freedoms since the Community would have the opportunity to elaborate on the meaning and the scope of the right to strike and in what may constitute a public overriding reason.

Professor Benoit Rohmer stated that the Charter promoted, in fact, the construction of a European identity founded on the conservation and the development of a collective heritage of principles and values in which citizens shall recognize themselves<sup>75</sup>. The issue with the right to strike is that the Charter elevated it as a fundamental right, but it must be read as a political attachment to this form of collective bargaining<sup>76</sup>. Consequently, the right to strike may be a fundamental right but its protection at the European level relies more on a political statement than as a concrete right. We can notice the recurrent behaviour of the European Union that is always engaged in making political statements without giving any legal effects. This ambivalence translates a use of “social diplomatic speech”, carried out when it comes to social rights in general but very obvious with the right to strike.

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The European Court of Justice, Grand Chamber, 11 December 2007, Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*.

Dubouis and Blumann, 2009, pp 113

74 Since the Treaty of Lisbon, the Charter on fundamental rights has acceded to the European primary law.

75 Benoit Rohmer, 2009, pp 144-145.

76 View also shared by Christophe Petiti :  
Petiti, 2004, pp 108-109.

### *b) The Treaty of Nice*

The Treaty of Nice, however, which entered into force on 1<sup>st</sup> February 2003, did not change much the perspective of the recognition of the right to collective bargaining<sup>77</sup>, including the right to strike, since Article 137 still expressly excludes the Community support to complement the activities of the Member States in the right to pay, the right to association and the right to strike. Aside from this legal provision, the Intergovernmental Conference still left the Charter's status unbinding. The Charter had just a political value. The Member States were cautious about giving the Union a more independent mandate in the protection of fundamental rights because of the evolution of the Community legal system into a separate, autonomous legal order which had a strong enforcement system. This was a cold calculus. By not giving the Community, or the Union, its own set of fundamental rights protections for the Union, the Member States were restricting the Court of Justice from stepping into the field and starting to set the level of fundamental rights protection of Member States.<sup>78</sup>

On the other hand, the unbinding value gave an undeniable confirmation that the Union was morally bound by fundamental rights and by the Court of Justice's position<sup>79</sup>. The right to strike was far from being a full proper European protected right, especially with the “opt out” of the United Kingdom concerning the adoption of the Charter of Fundamental Rights. It also shed the light on the fact that there there was a tremendous gap between semantics and the legal reality. The Union has been forced to manage the social side without extending its competence and fundamental economic interest.

### *c) The Treaty of Lisbon*

After the rejection of the Constitution by the French and the Dutch, European leaders

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<sup>77</sup> Dubouis and Blumann, 2009, p 113.

<sup>78</sup> Res Publica, 1995, pp118,119.

<sup>79</sup> Barnard, 2010, pp 262-264.

agreed on a mandate for an intergovernmental conference to draw up the reform Treaty at the end of 2007 with a view to implementation by 2009. The new text was to make the Charter of Fundamental rights legally binding whether the United Kingdom and Poland chose either to opt out or to limit the scope of the Charter.<sup>80</sup>

The need to take a concrete step to use the Charter's potential and to take position vis-à-vis to fundamental rights quickly became an obvious fact. The official will of the European Union was said to want a renovated institutional structure that could find the necessary balance between the market economy and the social aspiration. The idea is very well illustrated in Article 1, Provision 1 of the Treaty of Lisbon:

“The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.(...)”<sup>81</sup>

In accordance to that objective, the Charter of Fundamental rights was declared binding and considered as important as primary European law<sup>82</sup>. That may change the scope and the protection of the consecrated rights such as the right to strike if the provision of the Treaty opened the harmonization of the fundamental rights.

This binding nature should have had a tremendous effect at a national level, meaning that the fundamental rights protected by the Charter should have had the value of primary law. Professor Benoit Rohmer highlighted the obvious added value of the enunciation of the values whose compliance is a condition for the adhesion in the Union, and the legalisation of the Charter of Fundamental rights, while not integrated in the Treaty has the same legal value<sup>83</sup>. The reality is different, however, which should

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80 Sauron, 2008, pp 39-41.

81 Article 1 provision 1 of the Treaty of Lisbon.

82 Article 6 provision 2 of the Treaty of Lisbon.

83 Benoit Rohmer, 2009, pp 143-144.

disappoint the most enthusiastic, at least for the right to strike. On the first read, one can imagine that the text provides a secure exercise, but this is not the case. Legally speaking, the exercise of such right should be in accordance with the European Union law and the national practices. In absence of any concrete European law, the main references within the national judgements are of course the national legislations. The national legislations can be bound by the respect of such rights but the national level shall stay free to regulate it on the way it decides.

As the European Union does not have any directive that could precisely identify the “right to collective actions,” specifically the right to strike, there are no other sources than the Charter and national legislation. The right to strike is recognised by the Charter but lacks consistency at the European level to be effective enough in front of European and national judges. That is why it is doubtful that the binding charter shall give an effective right to strike to European workers that they could freely invoke in front of the judges, which it could be argued is all the more true because the United Kingdom and Poland chose to opt out of this Charter<sup>84</sup>. Namely, if it was a real legal breakthrough at the European Union's level, it would have been impossible that the United Kingdom and Poland decided not to give a binding value to the Charter. As provision 2 of Article 1 of the Protocol on the application of the Charter of Fundamental rights of the European Union to Poland and to the United Kingdom sets out, nothing in Title IV (called Solidarity, which protects rights such as the right to collective bargaining, including the

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84 Referring to the Article 1 of the Protocol on the application of the Charter of Fundamental rights of the European Union to Poland and to the United Kingdom :

“NOTING the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter;

DESIROUS therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justifiability within Poland and within the United Kingdom (...).”

Article 1 :

“1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.”

right to strike) shall create applicable rights.

This shows the current limits of the Charter and the application of the right to strike. Social rights protection has been relying on “variable geometry”. As the Member States have very diverse legislations over social rights, this means that there are also many degrees of protection. This situation may lead to a case when you might be better protected in France than you would be in Lithuania. This is surprising in a Union that has been declaring its goal to tend to the creation of common values and principles. Needless to say that it may correspond to the state of the building of the Union itself. That is to say that the Member States are not ready to abandon some of their powers in the social labour field in the European Union, and the Charter's status can represent the division inside the Union relating to controversial fundamental rights.

In addition, the new Article 153 provision 5<sup>85</sup> still excludes from the shared competence the regulation of the right to strike. In conclusion, the Charter of Fundamental rights and the treaty of Lisbon do not change the protection of the right to strike in letting the Member States choose a proper national regulation even if now they are, at least, bound to recognise it. But, this all the more reveals the lack of means that the European Union has been granted over the social sphere. Consequently, a diplomatic social lullaby has been setting out instead of a common regulation of labour through legal means.

The European Union has taken much inspiration from the international level. The treaty of Lisbon has reaffirmed the attachment of the Union to the international treaties, particularly with the adherence to the European Convention on the protection of human rights and fundamental freedoms and the reaffirmation of the Social Charter rights. These diverse international sources have been very useful to guide European judges in their judgement and their understanding of the social labour rights.<sup>86</sup> The real question

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<sup>85</sup>Article 153 (ex Article 137 TEC) :

“5.The provisions of this Article shall not apply to pay, the right of association, the right to strike.”

<sup>86</sup> Referring to the paragraphs For instance in Laval and Viking cases, the European Judge examined the international sources.

to be asked is whether these international sources could lead the Union to protect the right to strike under its proper legislation and whether it is possible to do so.

## **2. The International Sources and the Right to strike.**

In this sub-section, I shall explore international sources that dealt with the right to strike in order to see how such rights are tackled and how the European Union can construct its own labour social line from their inspiration. We shall focus on the right to strike within the Social European Charter, the European Convention on Human rights and Fundamental freedoms and the jurisprudence of the Court, the International Labour Organisation, the Universal Declaration on Human rights and the International Covenant on Economic, Social and Cultural rights.

### *2.1. The Right to strike and the Council of Europe.*

The European Convention on Human rights and Fundamental freedoms has been criticized for its exclusive focus on the protection of civil and political rights. This scepticism shall be addressed although certain extends<sup>87</sup>:

First of all, several rights have been added through additional protocols to the European Convention on Human Rights which have a strong economic and social dimension.

Secondly, the broad interpretation accorded to many civil and political rights has led to a strong inter-linkage between these rights and economic, social and cultural rights through the European Court of Human rights and its so called “second generation of rights”<sup>88</sup>.

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87 Bowers and Lightman, 1998, pp 712-720.

88 Clapham, 2007, pp 24-25.

The European Council's main instrument that dealt directly with the right to strike was the European social charter. Adopted in 1961 and amended in 1988 and in 1996, the growing need to have an effective regional treaty providing direct focus on social and economic rights was concretised<sup>89</sup>. The original text from 1961 had already dedicated a provision on the protection of the right to strike. Indeed, the main version of Article 6 provision 4 of the European social charter, set out:

“With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake (...) and recognise:

4.the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligation that might arise out of collective agreements previously entered into.”

Besides this early recognition of the right to strike, the first important legal aspect is the nuance between the words “undertake” and “recognise”<sup>90</sup>. It was not by chance that the legislators chose to use two separate words. In legal terms, “to undertake” means that the Member States should take a positive action to comply with the provisions of the Treaty. For instance, in order to implement the duty to promote a joint consultation between workers and employers, the Contracting Party shall make a law that would create a duty to honour such a goal. For the right to strike, as long as only the Member States recognise it, the situation is different because there is a negative obligation, which implies that the given country should abstain and respect it<sup>91</sup>. Even if this legal method corresponds to the old division between active and passive human rights, it is interesting to highlight that the authors of such a charter intentionally chose to distinguish the different components of the right to bargain collectively.

In conclusion, the right to strike should be recognised by the the Contracting Parties, but

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89 Carraud, 1994, pp 17-19.

Petiti, 2004, pp 108-109.

90 Sudre, Marguéraud, Andriantsimba Zoniva, Gouthenoire, Levinet, 2010, pp 20-21.

91 Clapham, 2007, pp 10-15.

they were not legally bound to take any step in order to protect it. Consequently, they should just avoid that the Public force violates such a provision<sup>92</sup>. It could appear to that regard that the right to strike was a “second background protected right”. Again, the great intention had been shown to recognise such a right without giving it any concrete legal effect. The contracting parties were bound to that empty provision if they had chosen Article 6 of the Charter<sup>93</sup>.

In addition, according to Part III (Art A) of the revised Charter, each State party undertakes at least six of the following nine articles of Part II of this Charter, as Article 6 protects the right to bargain collectively<sup>94</sup>. So far, all of the Union's Member States have signed and ratified the European social Charter but none of these rights did provide justiciable rights before national courts unless the rights were directly protected by the national laws.

Indeed, the mechanism laid down by the European Charter in its amendments in 1995, which came into force in 1998, allowed complaints of violation of the Charter to be lodged with the European Committee of Social Rights in the event that all states had accepted the procedure<sup>95</sup>. Trade unions, non-governmental organisations with participative status with the Council of Europe<sup>96</sup>, Employers' organisations and trade union in the country concerned, national Non-Governmental organisations, are enabled to formulate a complaint .

Complaints are examined by the Committee of Ministers, who adopt a resolution

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92 Clapham, 2007, pp 20-21.

93 Article 20 of the European Social Charter : “Undertakings”

”1. Each of the Contracting Parties undertakes: a. to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part; b. to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19; (...).”

94 Article 6 of the revised European Social Charter.

95 This comes to complement the original 1961's country reviews.

96 Article 9 of the Protocol of the European Social Charter.



closing the procedure on the basis of the report of the European Committee on Social Rights. Where the European Committee of Social Rights has found a violation of the Charter it will address to the State Party a Recommendation<sup>97</sup>. However, the work of this committee is still very weak because it is not a judicial review but recommendations to the Member State. The contracting party would be supposed to correct its national law, but there is no system of following up after the review mechanism<sup>98</sup>.

Surprisingly, the complaints concerning the right to strike have been few compared to the blur of the provision that recognises the right to strike. Furthermore, the Committee of the Ministers chose not to take a tremendous risk when it deals with it. Indeed, every time that the Committee needs to face the Article 6 paragraph 4 issue, it does not explain the consistence of such right<sup>99</sup>, as the latest cases submitted to the Committee can witness.

Even if the Committee took a very decided option, the impact of the European social charter on the European Union would still be weak since the Charter did not contain any true entitlements<sup>100</sup>. Indeed, from the single European act to the Treaty of Lisbon, the Charter elaborated in Turin and its amendments have been taken into account but there is no legal obligation itself. The Community and the Member States shall just have in mind “fundamental social rights such as those set out in the European Social Charter signed Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers”<sup>101</sup>.

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97 Article 9 of the Protocol of the European Social Charter.

98 Wiebringhaus, 1963, pp. 709-721.

99 Complaint before the European Social Charter Committee:

No. 9/2000 :Confédération Française de l'Encadrement CFE-CGC v. France

No. 59/2009 European Trade Union Confederation (ETUC)/ Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/ Confédération des Syndicats chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v. Belgium

100 Tomuchat, 2008, pp 171-172.

101 Treaty of Amsterdam, Article 137.

The legal link between the international treaty and the European Union has not been tremendous, apart from the fact that the European Social Charter could represent an indicator of the social labour right to recognize. However, its statute may change with the accession of the European Union to the Convention of Fundamental Freedoms as it is provided in the Treaty of Lisbon. Nevertheless, the position of the right to strike may not change with it since there is still the tension between the recognition in the European social charter, the Charter of Fundamental rights and Article 118 of the Treaty of Lisbon that sets out the exclusion of the Community's activity in the right to strike.

## *2.2 The European Court on Human Rights and the Right to strike.*

### *a) The Evolution of ECHR On Trade-Union Rights – The Dynamic of the Right to strike*

For the right to strike, the most hopeful document for a future harmonisation could be the European Convention on Human rights and Fundamental Freedoms.

The relationship between the European Union and the European Court on Human rights has always been very interlinked. This has been all the more the case since every European Union's Member State acceded to the Convention and it has been a requirement to join the European adventure.

However, for a long time, the judges in Strasbourg were denied the possibility to rule on a decision that could imply the Community's law<sup>102</sup> because the Union was not party to the Convention and the Community was supposed to propose an equivalent protection<sup>103</sup>.

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102 Decision of European Human Rights Commission, Application number, n°8030/77, 10 July 1978, *CFDT v European Community*, para 152.

103 European Court of Human rights, Grand Chamber, Application no. 45036/98, 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim v Ireland*.

Schorkopf, 2005, pp1255-1264.

In order to get around this impossibility, the judges in Strasbourg chose to focus on the role of the Member State. Namely, the Community was not the one held responsible but the Member State because it was the one that implemented unlawful disposition vis à vis the Convention<sup>104</sup>. At last, the European Court on Human rights declared itself competent to appreciate the compatibility of a national decision with the provisions of the European Convention on Human Rights and Fundamental Freedoms. The Member States shall be responsible for their own actions even if it is directly inspired by international sources<sup>105</sup>.

Nevertheless, the true issue arose when a blameworthy national action was in fact the direct translation of a European regulation, meaning that the Member State had no margin of appreciation. It was only in *Bosphorus Airlines v Ireland*<sup>106</sup> that the answer was eventually found. In this case, the Court started by reaffirming that it is not because a state is party to another international organisation that it should block its obligation regarding to the Convention. The states are held responsible due to Article 1. Furthermore, the Court stated that acts that were from national and international law should respect the Convention wherever the norm is in the national legal order. However, there was a great presumption of compatibility to the Convention when it came to national measures that only apply the Community law<sup>107</sup>.

There was in fact a “presumption of an equivalent protection”<sup>108</sup>. The protection is said to be similar but not uniform. Indeed, that is to say that the Court is aware that the European Union has its own effective mechanism for the protection of fundamental

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104 European Court of Human rights, Grand Chamber, Application no. 45036/98, 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim v Ireland*.

105 European Court of Human rights, Grand Chamber, Application n°19392/92, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, para 29 and para 153.

106 European Court on Human Rights, Grand Chamber, Application n° 45036/98, 30 June 2005, *Bosphorus Hava Yollari Turizm ve Turizm ve Ticaret Anonim Sirketi v Ireland*.

107 *Ibidem*, para 157.

108 *Ibidem*.

rights with the European Court of Justice<sup>109</sup>. “The equivalent protection” could be overtaken as the dominant notion, as it could evolve over time<sup>110</sup> and be changed directly by the Court if there was a “manifestly deficient element”<sup>111</sup>. The “manifestly deficient element” was found following a proportionality control where the right of the Convention and the Community's interests were balanced.

The main issue is that there is not really a clear idea of manifest deficiency in the cases before the European Court of Human Rights. Many commentators have raised the question whether it was a ceiling or a floor protection. For social rights such as the right to strike, there would have been tension in that case because of the low protection from the Court of Justice of the European Union. This is all the more true as Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (amending the control system of the Convention and the Treaty of Lisbon) may solve the problem since the European Union should accede to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>112</sup>. The consequences of such accession shall be, however, discussed within the Council of Europe, but we can preclude that the Court on Human rights and Fundamental freedoms shall be entitled to study and to condemn directly all form of the Community law and to consider the Union responsible itself.

The question to be asked is whether the jurisprudence of the Court in Strasbourg is on

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109 European Court of Justice, First Chamber, C-36/02, 14 October 2003, Omega Spielhallen-und Automatenaufstellungs, GmbH, Oberbürgermeisterin der Bundesstadt Bonn, para 30-34.

110 European Court on Human Rights, Grand Chamber, Application n° 45036/98, 30 June 2005, Bosphorus Hava Yollari Turizm ve Turizm ve Ticaret Anonim Sirketi v Ireland, para 165.

111 *Ibidem*, para 166.

112 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No.: 194.

Article 6 provision 2,3 of the Treaty of Lisbon:

« 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. »

the same wavelength as the European Union's action in regard to the right to strike.

In order to answer this tricky question, it is necessary to come back to the history of the Court on Human rights and Fundamental freedoms with the limit of Article 11 of the Convention when it comes to the exercise of the trade unions' duty to maintain the social dialogue.

Article 11 of the Convention on Human Rights and Fundamental freedoms, on the Freedom of assembly and association, sets out that :

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

“2.No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

For a long time, the right to strike had been not considered as an inherent part of the right to join a trade union that needed to be protected by the Convention. In fact, the Convention was only utilised to safeguard the freedom to protect the actions of trade union members<sup>113</sup> but the actual compliance to the requirements of Article 11 were left to the margin of appreciation of the State party<sup>114</sup>. The logic of the court was that even if

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113 European Court on Human Rights, Court Plenary, National Union of Belgian Police v. Belgium, Application no. 4464/70, 27 October 1975, National Union of Belgian Police judgement, 1975, Series A no. 19, p. 18, para. 39.

114 European Court on Human rights, Schmidt and Dahlström v. Sweden, Application n° 5589/72, 6<sup>th</sup> February 1976, para 36:

“The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11 (art. 11), may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter

the right to strike grant was granted, it represented without any doubt one of the most important of these means. In addition, there are other ways to achieve the same goal that could be exercised and protected by national law.

In other words, there was not one single means to protect the activities of the trade unions when they took effective actions. The form of the exercise of the right to safeguard its interests was ipso facto diverse, which is why the Court did not consider that the right to strike was not enshrined in Article 11 and may be subject under national law to the regulation of limits in certain cases<sup>115</sup>. Consequently, there was no breach of Article 11(1) and hence no need to consider justification under Article 11(2)<sup>116</sup>.

The evolution of trade unions' rights and of Article 11 of the Convention have undergone similar trends. Article 11 of the Convention has received broader protection and the trade unions' rights have been broader than they were in the past. The eventual recognition of the right to strike through the case *Enerji Yapı-Yap Sen v Turkey* in 2009 has been in fact the achievement of a long “letting go” of the Judges in Strasbourg. It was not simple and the jurisprudence had been blocked for a long time. In addition, a large margin of appreciation has always been given a long latitude to the Member States to implement the trade unions' rights<sup>117</sup>.

The difficulty to integrate a narrower margin of appreciation in the guidance of the labour relationship within the different Member States, was not easy since the European Social charter (from 1961) required to choose only 6 rights to be part of this treaty<sup>118</sup>. That is why countries like the United Kingdom that chose to opt out from this charter

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of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to "further restrictions" compatible with its Article 31, while at the same time recognising for employers too the right to resort to collective action (Article 6 para. 4 and Appendix). For its part, the 1950 Convention requires that under national law trade unionists should be enabled, in conditions not at variance with Article 11 (art. 11), to strive through the medium of their organisations for the protection of their occupational interests.(...)"

<sup>115</sup>*Ibidem*.

<sup>116</sup> Ewing and Hendy QC, 2010, pp 2-6.

<sup>117</sup>*Ibidem*.

<sup>118</sup> Referring to the Amended version of the Social European Charter, Part III, Article A, “Undertakings”.

but are still party to the Convention on Human Rights and Fundamental Freedoms would not see its sceptical trade union regulation in jeopardy. That is why, the Court of Human rights and Fundamental Freedoms chose to overthrow its jurisprudence even after the cases *Laval* and *Viking* from the Court of European Justice<sup>119</sup>. The next idea to highlight is when and how the European Court on Human rights does protect the right to strike.

*b)The outcome of the jurisprudence Demir & Baykara and Enerji Yapi-Yol Sen v Turkey*

The main shift in the jurisprudence of the European Court of Human rights has been highlighted in *Wilson and Palmer versus United Kingdom*. The case concerned discrimination by employers against their workers who join and take action through trade unions<sup>120</sup>. The Court held that the United Kingdom has positive obligations to secure the right to join freely trade unions and to enjoy rights such as the right to bargain collectively<sup>121</sup>. *Demir and Baykara* and *Enerji Yapi-Yol Sen v Turkey* are the natural extension.

The two different cases concern the public sector and the protection of two distinct trade union rights: the right to form trade unions and enter into collective agreements (*Demir and Baykara*) and the right to strike (*Enerji Yapi-Yop Sen*).

The actions were both against Turkey, which is revealing the current trend of the

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119 Indeed, we can see that the European Court on Human Rights did not really take the same position than its Court fellow with *Laval* and *Viking* cases (to be studied in the Part 2) that are really considering the main economic goal of the Union as a superior interest than the protection of the right to strike.

120 European Court on Human Rights, Second section, applications nos. 30668/96, 30671/96 and 30678/96), 2 July 2002, *Wilson, National Union of Journalists and Others v The United Kingdom*.

121 Palli, 2004, pp 417-438.

European Court on Human Rights, Second section, applications nos. 30668/96, 30671/96 and 30678/96), 2 July 2002, *Wilson, National Union of Journalists and Others v The United Kingdom*. para 46:

« It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers. »

European Court on Human rights jurisprudence that is trying to reverse its very narrow reading of Article 11 regarding the trade unions' rights. This is due to the fact that the Convention on Human Rights and Fundamental Freedoms, as a living convention, has the duty to to make its point of view comply with present-day conditions and international legislations<sup>122</sup>. The first very U-turn with a restrictive trade union occurred with the case *Demir and Baykara*<sup>123</sup>

### *Demir and Baykara case*

The case concerned Ms Vemal Demir, a member of civil servants trade union “Tüm Bel Sen” and its president Mr Vicdan Baykara. The union and the Gaziantep Municipal Council signed a two-year collective agreement in 1993. A union was founded by officials from various municipalities and concluded with a common, collective agreement that covered all aspects of working conditions in municipal services, including salaries, allowances and welfare services. However, the town did not fulfil its obligations under the collective agreement, and Ms Demir, Tüm Bel Sen, and its president Mr Vicdan Baykara sued before the civil courts. In 1995, the Turkish Court of Cassation considered that at the time when the union was founded, the Turkish legislation in force did not allow employees to form unions and to conclude ipso facto collective agreements. Thus it was ruled by the Turkish Court of Cassation that the applicant union had failed to acquire legal personality upon its creation and was

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122 European Court on Human Rights, Grand Chamber, Application number n°34503197, 12 November 2008, *Demir and Baykara v Turkey*, para 146:

“This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003 II; and *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999 V).”

123 *Ibidem*, para 1:

“The applicants complained that the domestic courts had denied them the right to form trade unions and to enter into collective agreements. In this connection they relied on Article 11 of the Convention”



therefore not entitled to sue, since at the time of the facts no law authorized the civil servants to form trade unions and to conclude agreements<sup>124</sup>. After exhaustion of the local remedies, the plaintiffs went before the European Court of Human rights.

The legal issue to be answered was whether the Turkish interference –“the annulment of the collective agreement that the trade union *Tüm Bel Sen* had entered into following collective bargaining with the authority that employed the applicants, should be regarded as having breached Article 11, unless it can be shown that it was 'prescribed by law', that it pursued one or more legitimate aims, in accordance with paragraph 2, and that it was 'necessary in a democratic society' to fulfil such aims.”<sup>125</sup>

The judges of Strasbourg admitted very easily the actual violation of Article 11 of the ECHR, recognizing the “organic link between freedom of association and freedom to bargain collectively, as previously referred to by the Social Charter's Committee of Independent Experts.”<sup>126</sup>

What is interesting to observe is the method adopted to come to this conclusion. We see that since the beginning the Court conducted a true analysis of the international sources, emphasizing the fact that all of the international and European legislations supported the right of civil servants to strike. The common view adopted at the international level<sup>127</sup> encouraged the Court to go further on its analysis. Namely, it can be highlighted that the Court immediately showed the practice of interpreting Convention provisions in light of other international texts and instruments<sup>128</sup>.

Indeed, in order to render its rights practical and effective instead of theoretical and

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124 European Court on Human Rights, Grand Chamber, 12 November 2008, Application number n°34503197, *Demir and Baykara v Turkey*, para 14-31.

125 *Ibidem*, para 159

126 *Ibidem*, para 129

127 This method was first adopted in the case *Soering* that concerns a man from a Contracting party to the Convention that was convicted to the death penalty.

128 European Court on Human Rights, Grand Chamber, Application number n°34503197, 12 November 2008, *Demir and Baykara v Turkey*, paragraph 65.

illusory<sup>129</sup>, the Court has the duty to produce an outcome that will be in accordance with internal and international trends<sup>130</sup>.

In its analysis, the civil servants' right to strike is accorded in the name of Article 11 of the Convention. In its conclusion, the ECHR's judges still stressed the international and European common view on the allowance of the right to strike to civil servants within the public sector. In addition, the Court also took into account the fact that the right to form a trade union in the public sector is recognised in the Contracting States of the Convention. Consequently, it was concluded that not only the right to form a trade union<sup>131</sup> was attached to the reading of Article 11 but the enjoyment of the right to engage in collective bargaining with the employing authority constituted “one of the inherent elements in the right to engage in trade-union activities, as secured to union by Article 11 of the Convention<sup>132</sup>.”

It is important to understand this first step to understand the recognition of the right to strike as an element of Article 11. The *Demir and Baykara* case was only attached to the right to form a trade union and to make collective agreements within the public sector. However, this case was very representative of the evolving method of the Court and of the way to recognise social labour rights. In other words, it revealed how the Court is able to change its jurisprudence in light of the evolution of international instruments and to give a greater focus on the importance of common trade unions' set of rights. As a matter of fact, the recognition shall be set out in accordance with international sources. This may influence the European Court of Justice since it uses the same method when it works with international sources. First of all, the judges have looked at the existence of a consensus at the international level. Second, if such a consensus is found, it shall influence the European Union's jurisprudence.

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129 *Ibidem*, para 66.

130 *Ibidem*, para 85.

131 In the public sector.

132 *Ibidem*, para 155.

### *Enerji Yapi-Yol Sen v Turkey*

The right to bargain collectively and the right to strike have always been interlinked in the jurisprudence of the European Court on Human Rights since the case *Federation of Offshore Workers' Trade Unions (OFS) v Norway*<sup>133</sup>, when the ECHR held that the right to strike is a 'complement to collective bargaining'<sup>134</sup>. *Enerji Yapi- Yol Sen v Turkey* is the extension of the previous case *Karaçay v Turkey*<sup>135</sup>. In *Karaçay v Turkey*, the judge ruled that the warning given to a public sector employee that had participated in a strike movement was a breach to the freedom of association<sup>136</sup>.

In the case *Enerji Yapi-Yol Sen v Turkey*, on 21<sup>th</sup> April 2009, the Court went even further since the eventual right to strike was celebrated<sup>137</sup>. As was mentioned above, there was a great reluctance to do so because the contracting parties to the Convention were large and international instruments restricted being able to find a common view on this issue. As with the first case, the litigation first began within the public sector. What it is important to see in the study of the case is the trend and the insurance that the Court dared to take in a situation where most of the contracting parties had completely different legal regulations for the right to strike.

The case concerned a civil servant's trade union in the energy sector and in the services of the construction of highways and infrastructures whose seat was in Ankara . A circular that forbade the exercise of the right to strike for civil servants was published

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133 Sudre, Marguéraud, Andriantsimba, Gouthenoire, Levinet, 2010, pp 675-677.

134 Ewing and Hendy QC, Vol. 39, 2010.

135 European Court on Human Rights, Second section, *Karaçay v Turkey*, Application n° 6615/03, 27 march 2007 (only in French), para 37-39.

136 *Ibidem*, para 139.

137 European Court on Human Rights, Application n°5589/72, 6 February 1976, *Schmidt et Dahlström v Sweden*, para 34 and 36.

European Court on Human Rights, Grand Chamber, Application n°68959/01, 21 April 2009, *Enerji Yapi-Yol Sen v Turkey*, para 29-36.

five days before the the trade union was planning to carry out a strike. Misters Cevat Kaya, Ataman Zengin and Cengiz Faydah (members of the trade-union administration council) attended the strike and were afterwards inflicted with disciplinary sanctions.

The applicants asked the Council of State to annul such a circular but their application was dismissed because the act could not be tackled on this basis, and it did not change the legal statuses of the trade union itself and its applicants<sup>138</sup>. The Court of Cassation refused in the end to review its judgement<sup>139</sup>. The first interesting thing is that we see that the case is a great deal less detailed than in Demir and Baykara, as it only referred to this previous case when it analysed international sources<sup>140</sup>. The court only noted that the right to strike was recognised by the International Labour Organisation as the corollary of the freedom of association.

In addition, it also recalled that the Social European Charter recognised the right to strike as an effective means to the right to collective negotiation. It is incredibly important to note that there is a gap between the enthusiastic Demir and Baykara case and this one. Even the right to strike was recognised as a part of the trade union's freedoms, although it was done in softer terms.

What is especially striking is that throughout the case the right to strike was taken in a special way because the legal arguments were weak and not detailed. The Court recognised that the right to strike should not have an absolute status but one that could be submitted to restrictions. Consequently, the judge took attention to mention that a ban on the right to strike is not necessarily contrary to Article 11 but such restrictions should be clearly defined as narrowly as possible. However, according to the facts and the current legal situation, the judge cannot conclude that the Turkish government did

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138 European Court on Human Rights, Grand Chamber, Application n°68959/01, 21 April 2009, Enerji Yapi-Yol Sen v Turkey, para 6 to 16.

139 *Ibidem*.

140 *Ibidem*, para 24.

not achieve proof of a necessity of such a ban in the so-called democratic society<sup>141</sup>.

What we can firstly say about this judgement is that the judge took great attention not to attach the right to strike to the core of Article 11. However, restrictions to the right to strike may constitute a clear way to deter unionists or other people who want to attend a day of strike (or to actions aiming at defending its interests)<sup>142</sup>. In other words, limiting the right to strike is possible but a balance between the different interests must be done before imposing a general ban as it was done. It must respect the imperious social needs to be in conformity with the right exercise of Article 11 of the Convention.

Enerji Yapı-Yol Sen v Turkey is in fact a “shy” jurisprudence compared to the strong position taken by the Court in Demir and Baykara. There is a large difference between both. Whilst in Demir and Baykara the right to bargain collectively becomes 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<sup>143</sup>, the right to strike is said to be subjected to some restrictions.

We see that the judges did not go as far as they did with the right to bargain collectively, but the jurisprudence is still promising for a full recognition of the right to strike as a component of the core of the “right to form and to join trade unions for the protection of [one's] interests”.

However, the practices of the contracting parties and the international sources shall evolve in this way first. As a result, I do not believe that there is great tension between the jurisprudence of the European Court of Justice<sup>144</sup> and of the European Court on

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141 *Ibidem*, para 25.

142 *Ibidem*, para 32.

143 European Court on Human Rights, Grand Chamber, Application n°68959/01, 21 April 2009, Enerji Yapı-Yol Sen v Turkey, para 54.

144 The European Court of Justice, Grand Chamber, Case C-341/05, 18 December 2007, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others.

The European Court of Justice, Grand Chamber, 11 December 2007, Case C-438/05, International

Human rights, since the right to strike is still not inherent to Article 11. Even if the latest case concerned the public sector, we can imagine that it would be the same for the private sector in the case of disproportionate action.

The issue would be if there is jurisprudence of the European Court of Human Rights then that would already be part of the Convention. As it was pointed out, both cases concerned the public sector but I believe that the outcome would have been the same considering that the judges announced general rules and the international sources did not make a strong difference between the two sectors.

*c) The EU's accession : Can the ECHR be the only way to make the EU evaluate its protection on the right to strike ?*

The Treaty amending the Treaty on European Union and the treaty establishing the European Community in its Article 6 provision 2 sets out that:

“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.”

What if the ECHR judges decided to make a more protective jurisprudence on the right to strike, limiting per se the margin of appreciation of the contracting states to the Convention? What would happen to the jurisprudence of the Court of Luxembourg?

These questions are supposing that the European Union acceded to the Convention<sup>145</sup>

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Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.

<sup>145</sup>It is not already the case since the negotiations still need to detail the requirements. The specialists are

and that the Court of Justice of the European Union would remain the same as the position taken in the Viking and Laval case<sup>146</sup>.

First, what needs to be explained is the future possible relationships between the European Union and the Convention on Human rights and Fundamental Freedoms or the Court of Justice of the European Union and the European Court on Human rights and Fundamental freedoms.

After the adhesion, the European Union will be a contracting party of the European Convention on Human rights and Fundamental Freedoms. The European Union will be consequently submitted to review its legislation to be in compliance with the Convention on Human Rights and Fundamental Freedoms.

From a judiciary point of view, this means that the European Union will be able to be sued to the European Court on Human Rights<sup>147</sup>.

From this, there are several feasible scenarios:

In order to avoid competition between the Court of Justice of the European Union and the European Court on Human rights, the Court in Luxembourg would conform its jurisprudence with the Court in Strasbourg. If the jurisprudence on the right to strike evolves in a more protective way, this would mean that the Court of Justice of the European Union would be forced to change its jurisprudence. In fact, this would allow the European Union to give consistency to the common traditions laid down in the Charter of Fundamental rights and the Convention. For the right to strike, that would be the achievement of several political steps taken in the past that recognises such a

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quite pessimistic about the breakthrough because it is not going to be easy to discuss of this adhesion with major contracting parties such as the Republic of Russia.

146 Laval and Viking cases are the European Court of Justice jurisprudence about the right to strike.

Putting a great emphasis on the Freedom of establishment instead of the right to strike.

147 Benoit Rohmer, 2009, pp 160-165.

right<sup>148</sup>. The coordination between the two judiciary organs would give birth to a greater care of labour social rights by the European Court of Justice in Luxembourg, and it may permit the European Union “to quit” the social labour diplomatic speech that it has employed for years. Namely, through the evolution of the convention, the European Union shall be invited to change and to protect social rights.

The second scenario may lead to the same conclusion, but also may position the European Court on Human Rights as the top of the the judiciary process. Indeed its subsidiarity position may put it in the situation of being the solution of last resort for human rights issues. In other words, when a case with a human rights issue will not satisfy the applicants, they may go in front of the Court of Strasbourg to get the human rights problem clarified and corrected. That would suppose that the Court of Strasbourg would become a sort of highest European authority on human rights<sup>149</sup>; that it would have the capacity to correct the legitimised Court of Luxembourg and the European legislation itself.

For the protection of the right to strike, in the case in which the Court in Strasbourg would become the highest authority on human rights, this would be more difficult since the accessibility for the individuals to go in front of the Judge in Luxembourg is very restricted<sup>150</sup>. In addition, this would also lengthen the duration of the procedure.

As the negotiations have not resulted in one of the two options, the future relationship between the two Courts on the level of protecting human rights in general may still be blurred. However, I am sure that the situation of the right to strike may evolve in a more protective way to the extent that the European Court of Human rights may adopt a less economic approach. But for now, if the European Union should accede with the current jurisprudence of Strasbourg I do not think that there will be much tension between the

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148I am suggesting the existence of the European Social Charter in Turin or the Charter of Fundamental rights of the workers that are not binding.

149 Benoit Rohmer, 2009, pp 160-165.

150 In this case, the possibility is quasi zero.



two organisations, since the right to strike may be considered as a fundamental right but is not inherent to Article 11 of the Convention, and may be subjected to restrictions.

### **3. The Right to strike and its recognition at the International level: International Labour Organisation and economic, social and cultural International Covenant.**

#### *a) International Labour Organisation<sup>151</sup>*

International sources play a great role to judges when it comes to their decisions. The right to strike was not an exception, since the European Court on Human rights quoted the International Labour Organisation sources in its judgement. Surprisingly, the right to strike is not set out in International Labour Organisation Conventions and Recommendations even though it has been discussed several times in the International Labour Conference during the course of preparatory work on instruments dealing with closed issues. Nevertheless, a true agreement never gave rise to international standards (conventions or recommendations) that would rule on the right to strike<sup>152</sup>. But thinking

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151“The ILO is the international organization responsible for drawing up and overseeing international labour standards. It is the only 'tripartite' United Nations agency that brings together representatives of governments, employers and workers to jointly shape policies and programmes promoting Decent Work for all. This unique arrangement gives the ILO an edge in incorporating 'real world' knowledge about employment and work.”

<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited on 15 April, 2011).

152 ILO, 1996b, p. 89 and 1996a, p. 660:

The right to strike is, however, mentioned incidentally in a Convention and in the Abolition of Forced Labour Convention, 1957 (No. 105), prohibits the use of forced or compulsory labour “as a punishment for having participated in strikes” (Article 1, sub-paragraph (d); and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), first mentions strikes in paragraphs 4 and 6, then states in paragraph 7 that no provision it contains “may be interpreted as limiting, in any way whatsoever, the right to strike.”

ILO, 1996b, p. 89 and 1996a, p. 660

Gernigon, Otero and Guido, Vol. 137, No. 4, 1998.

that the International Labour Organisation pays no attention to the right to strike would be a mistake. Indeed, two resolutions of the International Labour Conference itself can provide quite a feasible framework for ILO policy.

First, there is the “Resolution concerning the Abolition of Anti-Trade Union Legislation in the Member States of the International Labour Organisation”, adopted in 1957, which called for the adoption of “laws ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers”<sup>153</sup>.

Second, the “Resolution concerning Trade Union Rights and Their relation to Civil Liberties”, adopted in 1970, invited the Governing Body to instruct the Director-General to take action in a number of ways “with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense,” with particular attention to be paid to “the right to strike”<sup>154</sup>.

Broadly, the right to strike within the International Labour Organisation is closely attached to the freedom of association since the Freedom of Association and Protection of the Right to Organise Convention (1948 [No.87]) establishes the right of workers' and employers' organisations to “organise their administration and activities and to formulate their programmes”(Article 3), and the aims of such organisations as “furthering and defending the interests of workers or of employers” (Article 10)<sup>155</sup>.

The Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have often dealt with the right to strike and have defined the limits within which it may be exercised<sup>156</sup>. But the most

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153ILO,1957, p 783.

154ILO,1970, pp 735-736.

Mills, 2011, pp 623-640.

155ILO,1996a, pp 528-529.

See the 1996 Digest, 334th Report, Case No. 2258, para. 454-477.

156 These principles are contained in particular in ILO: Freedom of association and collective bargaining,

important fact is that both committees eventually stated that the right to strike was a fundamental right of workers and of their organisations<sup>157</sup>.

In a recent 2010 report destined to Great Britain, the International Labour Organization (ILO) has pointed out that the latest ECJ's cases were contrary to the most fundamental ILO standards – Convention 87 on freedom of association.

Through these observations, the International Labour Organisation Committee recalled that they were not judging the correctness of the ECJ's holdings in *Viking and Laval*, as they were carrying out an interpretation of European Union law. They were examining the impact of these decisions at the national level as to deny workers “freedom of association rights under Convention No 87”. The Committee nevertheless gave its opinion, pointing out that when the Court in Luxembourg elaborated its position on the *Laval and Viking* case, “it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services<sup>158</sup>”. The Committee eventually said that there was a great concern about the protection of the right to strike.

Indeed, the *Laval and Viking* duo made per se the application of the convention impossible. Above this direct criticism to European Union legislation, the Committee could only demand that the Member States concerned change their laws to make them more in accordance with the ILO's principles, although this was not simple as there was always the influence of the European Union. Although a mechanism for lodging complaints has been established, the outcome of more protective legislation for the right to strike within the European Union may stay doubtful if we only relied on the ILO to

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a General Survey of Conventions No. 87 and No. 98, conducted in 1994 by the Committee of Experts on the Application of Conventions and Recommendations (ILO, 1994a); and in ILO:

Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (ILO, 1996d). These are frequently referred to in ILO publications in their abbreviated forms: General Survey, 1994 and CFA Digest, respectively.

157 See the 1996 Digest, 338 Report, para 282-473, Case No. 2407, para. 491.

158 See the 1996 Digest, 338 Report, para 282-473, Case No. 2407, para. 491.

impulse a shift at the European level.

The greatest hope that we can put on the ILO is that it may influence Europe (as it did in *Demir & Baykara*) for the right to bargain collectively, and the judges in Strasbourg for the right to strike and influence the ECHR's jurisprudence. This may inspire the Court in Luxembourg and, broadly, the European labour legislation, however this appears very hypothetical.

Supervisory bodies in the International Labour Organization (ILO) have been remained inflexible that in every state a “right to strike” should be protected under domestic laws. In defending this, contracting parties to the International Covenant on Economic Social and Cultural rights 1966 (ICESR) concurred.

*b) The Universal Declaration of Human Rights (1948).*

The Article 23 of the Universal Declaration of Human Rights states : (...)

“(4)Everyone has the right to form and to join trade unions for the protection of his interests.”

We see that the right to strike does not appear although the interpretation is quite open as the *raison d'être* of the trade unions seems to be “the protection of his interests”. Since the Universal Declaration of Human rights only provided a basis of important principles and values which were later elaborated into legally binding United Nation treaties, Article 23 had served as a basis for Article 8 of the International Covenant on Economic, Social and Cultural Rights.

*c) The economic , social and cultural International Covenant<sup>159</sup>*

Article 8 of the Economic, Social and Cultural International Covenant sets out that:

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<sup>159</sup> Novitz, 2004, pp 271.

“1. The States Parties to the present Covenant undertake to ensure:

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

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention<sup>160</sup>”

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<sup>160</sup>The international Covenant about Economical, Social and Cultural rights is available on:  
<http://www2.ohchr.org/english/law/cescr.htm>

This would seem to be the position of certain members of the Committee who have stressed that the right to strike was central to the ability of unions to conduct collective bargaining. The possibility of conducting meaningful collective bargaining without the right to strike would eventually end into a “exercise in futility”, as one of the member of the Committee chose to note<sup>161</sup>.

However, there are no general comments about the application of Article 8 of the International Covenant on Economic, Social and Cultural Rights. Some information in General Comment No. 18, adopted on 24<sup>th</sup> November 2005 about the application of Article 6 of the International Covenant on Economic, Social and Cultural Rights, laid down the modality of the exercise of the right to work. In order to fully comply with their international obligations concerning Article 6, state parties should, through international agreements where appropriate, ensure that the right to work as set forth in Articles 6, 7 and 8 of the Covenant is given due attention<sup>162</sup>.

What it is striking in the Covenant is that the right to strike is generally exercised as a form of collective action taken by trade unions but is framed as an individual right in the Covenant, as in the French law. Unions should not be the only ones granted the right to strike, but also the individual, who should be protected. We note that the provision on the defence of the right to strike was broad enough to include every form of situation that could happen.

In addition, there is no mention made about the specific purpose in which strike action might be taken. We notice again, that the strong intention of the Covenant's author to keep the scope as large as possible. On the contrary, Article 8 (I)(a), setting out the right to form and join trade unions, is specific to the “promotion and protection of his economic and social interests”.

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<sup>161</sup> Matthew Craven, 2002, p 271.

<sup>162</sup> The right to work, General comment No. 18, Adopted on 24 November 2005, Article 6 of the International Covenant on Economic, Social and Cultural Rights, para 29.

In a nutshell, this might imply that all strikes are to be protected, irrespective of their purpose. This may be explained by the fact that Member States are also free to decide which legal means they shall use to protect such a right since “it is exercised in conformity with the laws of the particular country”.<sup>163</sup>At the end, the fundamental consideration should be whether or not the action taken has for its main goal the economic and social interests of the workers themselves. This approach was shared by the ILO committee of experts which considered that the right to strike may be recognized either implicitly or explicitly in legislation.

The European Union Member States are party to the International Convention. Article 8 of the International Covenant on Economical, Social and Cultural Rights may represent a source of inspiration for the European Court on Human Rights and the Court of Justice of the European Union. However, its open, broad scope of the protection of the right to strike is also very easy to circumvent as there is no general comment which provides a concrete way to approach this right.

#### **4. General concluding remarks**

The European Union has not yet elaborated on legislation for the right to strike. We see that this right is still the “devoted area of the Member States” even after the ratification of the treaty on the functioning of the European Union, the binding Charter on Human Rights and Fundamental Freedoms and international instruments such as the European Social Charter.

We may note that different international texts give hope in the way that they all recognize the right to strike to a certain extent, which may inspire the European Union in a protective way in case the right to strike becomes an harmonized European topic. However, it can also be highlighted that most of the Member States are part of these

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<sup>163</sup> International Covenant on Economic, Social and Cultural rights, Article 8 provision 1 d).

international conventions, and the protection of this social labour right has remained as disparate as before. The European Convention on Human Rights and Fundamental Freedoms and the jurisprudence of the European Court on Human Rights currently show the slow evolution of the full recognition of the right to strike as an inherent part of the right to association<sup>164</sup>. All of the international sources may lead the European Union one day to take at least some guidelines for a proper protective framework of the right to strike.

The situation of the right to strike has revealed one of the great paradoxes of the European Union. In fact, the European Union would like to aspire to create a proper European social model that would protect the European citizens in their daily life, but it lacks essential legal means to succeed. Good working conditions and the means to claim them are essential to the European social model because they touch the rights of the workers that are able to work in other Member States and the relationship between employers and employees. The true question to be asked regarding the situation is how the Union can state that it tries to provide European protection to its workers without legally consecrating common standards for one of the essential means to bargain collectively.

The Treaty of Lisbon, in framing European competences and in stopping the spillover process, may not encourage the progressive harmonisation of social rights (such as the right to strike) unless a new treaty provides common guidelines for harmonisation. It shows the difficulties in moving from a simple economic community to a legal-political union. The Court of Justice of the European Union has all the more confirmed this position.

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<sup>164</sup>European Court on Human Rights, Application n°68959/01, Grand Chamber, 21 April 2009, *Enerji Yapi-Yol Sen v Turkey*:

For now, the jurisprudence, as seen Above only recognized that the right to strike constitutes an important aspect for the trade-union's members in the defence of its interests . It is recognize as an effective mean to bargain collectively.



## CHAPTER II

### **Harmonised economic Freedoms vs non-Harmonised Fundamental Rights : the Right to strike, between European recognition and Member States' competence.**

This part is dedicated to the study of the Court of Justice of the European Union's cases where the final position about European considerations regarding the right to strike had been taken. It will be interesting to highlight that the social labour diplomatic speech no longer works since the the judges decided to apply the articles protecting the economical freedoms on the right to strike. These analyses are going to help us to answer our key question about whether the European Union is creating, even slowly, a proper social labour model.

#### **1. The judgements of the court of justice of the European Union: a backlash in the protection of the right to strike ?**

The *Laval and Viking* cases have provoked the indignation of the trade unions. Indeed, following these cases, the European Trade Union Confederation called on the European Union to confirm that “it is not just an economic project”.

##### *1.1. Facts.*

*a) International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.*

*Viking* is a Finnish company with a large ferry operator. One of its big ships, the *Rosella*, which sailed under the Finnish flag linked Tallinn (Estonia) and Helsinki

(Finland). All the members of the crew of the boat were members of the Finnish trade union, FSU. FSU was itself affiliated with the International Federation of Transport Workers' unions that was fighting for "the Flag Convenience". Such an international trade union favoured the establishment of a genuine link between the flag of the ship and the nationality of the owner. That was to protect, ipso facto, the conditions of seafarers<sup>165</sup>. Due to the increasing Estonian competition, Viking took the decision to reflag its ship in order to take advantage of lower-wage salaries. According to the Finnish law, Viking gave notice of its plans to FSU and to the crew of the Rosella that manifested a strong disagreement. The FSU organised a strike action and the ITF sent a circular, encouraging workers to refrain from entering the negotiations and to maintain its strike action. In May 2004, Estonia acceded to the membership of the European Union, provoking consequently the involvement of European legislation. As Viking pursued its intention to reflag the vessel to Estonia, an action was filled in front of the English Court<sup>166</sup> in June 2005 in order to stop the dispute between FSU and Viking. By the decision, the judges ruled that "the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to the Article 43 EC and it constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC."

Following this judgement, ITF and FSU brought the decision on appeal. That shed light on the fact that the right of trade unions to take collective action to preserve jobs is a fundamental right. The British Court of Appeal decided to stay the proceedings and referred the following questions to the Court for a preliminary ruling:

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165 European Court of Justice, Grand Chamber, 11 December 2007, Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, para 9.

166 Claiming that they were forced to capitulate because of the threat of a strike action, Viking subsequently commenced proceedings in the Commercial Court, England and Wales seeking an injunction to prevent the Finnish Seamen's Union (FSU) from taking industrial action at some time in the future in order to protect its member's jobs. Viking also sought to prevent the International Transport Workers' Federation (ITF) in the future from calling on its affiliate members to show solidarity to the FSU. Viking was able to bring proceedings in England because the ITF has its headquarters in London.

The **first question** to be asked was whether the collective actions fell outside the scope of the free movement provisions<sup>167</sup>.

The **second question** issued was the horizontal direct effect: Was a company able to invoke the Article 43 EC against trade unions?<sup>168</sup>

The **last questions** (from the third to the tenth) may be the most important: did collective actions in this case constitute a restriction to free movement and, if so, to what extent was such a restriction justified<sup>169</sup>?

On the other side, a week after the Viking case, the second controversial case on the right to strike had emphasized the position of the Court because it had implied the right to strike and the freedom to provide services.

*b) Laval un Partneri Ltd Svenska Byggnadsarbetareförbundet*

The case dealt with *Laval*, a Latvian company whose registered office is in Riga (Latvia). This firm was selected to work on a school building in Vaxholm (Sweden). In order to comply with its economical obligations, the company posted 35 Latvian workers to Sweden to work on building sites. Laval had signed (in Latvia) collective agreements with the Latvian building sector's trade union. As a matter of fact, Laval was not bound by any Swedish collective agreement entered into with Byggnads, Byggettan or Elektrikerna<sup>170</sup>.

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167 European Court of Justice, Grand Chamber, 11 December 2007, Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, para 32-66.

168 European Court of Justice, Grand Chamber, 11 December 2007, Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, para 67-87.

169 *Ibidem*, para 87-90.

170 Trade Unions in Sweden.

However, contracts were established between Byggettan and Laval, alleging that Laval would sign the collective agreement for the building sector. Laval refused some of the provisions of the agreement and the trade union, Byggettan, also rejected the system of hourly wage. The negotiations were unsuccessful and Byggettan requested Byggnads to take measures to initiative collective action against Laval. The blockading of the Vaxholm building site began on November 2004 and consisted in preventing the delivery of goods into the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. This provoked sympathy actions from other trade unions which started to boycott all Laval's sites in Sweden, with the result that the undertaking was no longer able to be carried in the Member State. In 2005, Vaxholm requested that the contract with the company Laval be terminated due to the impossibility of execution.

On December 2004, Laval commenced proceedings “before the Swedish Court, against Byggnads, Byggettan and Elektrikerna, seeking a declaration that both the blockading and the sympathy action affecting all its worksites were illegal and an order that such action should cease”<sup>171</sup>.

Two main questions were asked by the Swedish Court:

The **first question** was, whether the collective action of the trade union, including the blockade and the boycott in order to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions in the collective agreement for the building sector, was compatible with rules of the EC treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC on posted workers<sup>172</sup>.

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171 European Court of Justice, Grand Chamber ,18 December 2007, Case C-341/05Laval un Partneri Ltd Svenska Byggnadsarbetareförbundet and Others, para 39.

172 *Ibidem*, para 40.

The **second question** tackled the right to collective action itself, meaning that whether the rules of the EC treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 precluded collective actions in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden<sup>173</sup>.

### *1.2. Solutions given by the Court of Justice of the European Union*

In both cases, the judgement has stayed in the same direction. The right to strike may be a fundamental right but its use shall be proportionate to defence of the worker interests<sup>174</sup>.

#### *a) International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*

First, the Court ruled that collective action initiated by a trade union or a group of trade unions against an undertaking in order to force that undertaking to enter into collective agreement, fell into the scope of the Article 43 EC laying down the freedom of establishment<sup>175</sup>.

The judges “jumped” to this conclusion due to the fact that the working conditions were governed by various provisions, laid down by law, regulation and collective agreements and other acts concluded or adopted by private persons. All depended on the Member State's legislation. Thus, it would be unequal not to extend the application of Article 43 EC to such activities<sup>176</sup>. Consequently, the national employment law came inside the

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<sup>173</sup> *Ibidem*.

<sup>174</sup> Barnard, 5/2008, pp 15-20.

<sup>175</sup> Hinarejos, 2008, pp 714-729.

Barnard, 5/2008, pp 15-20.

<sup>176</sup> European Court of Justice, Case C-438/05, 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, paragraphs 44 and

scope of Article 43 EC<sup>177</sup>.

The second answer regarded the horizontal effect of Article 43. In other words, whether the undertaking was enabled to subject the trade unions to the freedom of establishment. Regarding this horizontal effect of Article 43, the judge chose to answer positively.

The judgement stressed the full achievement of the freedom of movement for workers and the freedom to provide services. The judges stated that the freedom of movement for persons and the freedom to provide services “would be comprised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy”<sup>178</sup>.

Thus, the restrictions due to Article 43 EC could be applied to “associations or to organisations exercising a regulatory task or having quasi legislative powers”<sup>179</sup>. This is why the Court concluded that Article 43 EC enabled the private undertaking to have some rights that may not be in favour of the trade unions. According to the judgement, Viking (the private undertaking) has some rights, such as the ability to take trade unions to Court, to get a judgement on the legality of a collective action<sup>180</sup>.

The last legal problems were to define whether a collective action could constitute a restriction to the freedom of establishment and to what extent such a restriction was to be justified<sup>181</sup>. Answers to the previous questions gave us a slight idea about the

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177 *Ibidem*, para 55.

178 *Ibidem*, para 57.

179 *Ibidem*, para 65.

180 European Court of Justice, Grand Chamber, Case C-438/05 11 December 2007 Case C-438/05, International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, paragraphs 65-66.

181 *Ibidem*, paragraphs 67.

eventual wording. The Court highlighted the fact that the freedom of establishment constituted one of the fundamental principles of the Community, and it provided the right of establishment in another Member State for nationals and companies. Such right would be illusory if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. That implies, however, the same treatment in the host Member States. That is why the Court concluded from this that the requirements for the registration of vessels must not form an obstacle to the freedom of establishment with the meaning of Article 43 EC to 48 EC. Consequently, the collective action taken by FSU in order to implement ITF's policy constituted a restriction to Viking's Freedom to establishment.

In addition, the second part of the legal issue may be the most interesting, in the extent that the Court ruled whether the collective action undertaken by FSU constituted or not an overriding reason of public interest. The Court did not hesitate to consecrate the right to take collective actions as a fundamental right but the litigious collective action taken by FSU was disproportionate since the jobs or conditions of employment at issue were not jeopardised or under serious threat<sup>182</sup>.

Even if the aim of the ITF's policy was to protect and improve seafarers' terms and conditions of employment; a collective action as such, which sought to force an undertaking, that is registered in a given Member State, to enter into a collective work agreement, with a trade union established in that state and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that Article. On that account, the collective action should not be unlimited but had to be justified by overriding reasons of public interest, and did not go beyond what was necessary to achieve that objective.

By this judgement the Court strictly framed the exercise of the right to strike by introducing the legal control of proportionality in order to identify whether or not the

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<sup>182</sup> The Court also stated that it belonged to the National Court to analyse if the jobs or conditions of employment at issue are not jeopardised or under serious threat. If not, the collective action is said to be disproportionated. See para 84 of the present case.

collective action constitutes a overriding public reason.

*b) Laval un Partneri Ltd Svenska Byggnadsarbetareförbundet*

In the Laval case, the judgement followed the same trend regarding the compatibility of the last strike action and the provisions of the Treaty of Amsterdam (establishing the freedom to provide services), the application of non-discrimination and directive 96/71 on posted workers. The European judges used the control of proportionality previously introduced in Laval case law. They made clear that collective actions for the protection of the workers in the host Member State against social dumping may be an overriding reason of public interest that could justify a restriction on fundamental freedoms, although such a right was not to render Community law inapplicable. As a consequence, the strike action may be a legitimate overriding public reason until it does not go beyond what it is necessary to attain its lawful purposes.

The second question considered the existence of a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended<sup>183</sup>. In other words, it concerned the application of the provisions of the Swedish labour law which introduced a system to combat social dumping, pursuant to which a service provider was not entitled to expect any account to be taken of the obligations under collective agreements to which it was already subjected in the Member State in which it was established<sup>184</sup>. The Court stated that it was clear that the national rules that failed to take into account the collective agreements to which undertakings that post workers to Sweden are already bound in the Member State of origin in which they were established, giving rise to discrimination since the foreign undertakings were treated the same way as national undertakings that

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183 The European Court of Justice, Grand Chamber, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, para 112.

184 *Ibidem*, para 113.



have not concluded such collective agreement<sup>185</sup>. Such discrimination could be motivated by an overriding reason such as public policy, public security or public health. The judges refused to validate legislation that could rely on the prejudice that the collective agreements from other Member States could not be considered equivalent to the ones in the host Member State.

### *1.3. Analysis of the two milestone cases.*

With Viking<sup>186</sup> and Laval<sup>187</sup> cases the Court drew at least three important aspects of the framework of the right to take collective actions:

Indeed, the recognition of the fundamental aspect of the right to strike and its unavoidable relationship with trade unions and the power of the national judges to rule on the necessity of such action to pursue a legitimate objectives.

Even if the eventual framing is restrictive, the right to take collective action including the right to strike must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law. Nevertheless, the Court ensures that that the right to strike may be subjected to some restrictions. It cannot be considered as an absolute right<sup>188</sup>.

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185 *Ibidem*, paragraph 118.

186 The European Court of Justice, Grand Chamber, Case C-438/05, 11 December 2007, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:HTML>

187 The European Court of Justice, Grand Chamber, Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0341:EN:HTML>

188 The European Court of Justice, Grand Chamber, Case C-438/05, 11 December 2007, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, para 44.

The Court recalled its previous jurisprudence with fundamental rights<sup>189</sup>. However it may constitute a restriction to the fundamental freedoms of the Union, the right to take collective action, including the right to strike, by its inherent nature, is different in the extent that it must not render the exercise of the freedom of establishment or services inapplicable. That is to say that this right has to be reconciled with the rights protected by the Treaty<sup>190</sup>. Catherine Barnard stated that the judge could have concluded that labour law and fundamental social rights fell outside the scope of Community law. The result would have been different and more in line with the previous cases on fundamental rights<sup>191</sup>. The judge preferred to adopt the Säger market approach<sup>192</sup>, supposing, the observance of a breach, research for a justification and the use of the balance of proportionality<sup>193</sup>. As a consequence, the judge in both cases relied on the national judges to rule on the good basis of the exercise of the right to take collective actions, including the right to strike.

That is again evidence of the importance of the good relationship between the European Union judges and the national judges; meaning that there is one who frames the right and another who is in charge of its implementation according to the national legal

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The European Court of Justice, Grand Chamber, Case C-341/05, 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, para 90.

189 The European Court of Justice, Grand Chamber, Case C-36/02, 12 October 2004, *Omega Spielhallen- und Automatenaufstellungen-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, para 35.

The European Court of Justice, Grand Chamber, Case I-9609 and C-112/00, 12 June 2003, *Eugen Schmidberger v Austria*, paragraph 74.

190 Hinarejos, 2011, pp 714-729.

191 The European Court of Justice, Grand Chamber, Case I-9609 and C-112/00, 12 June 2003, *Eugen Schmidberger v Austria*, para 74.

Barnard, 2008, pp 262-264.

Judgement of the Court (First Chamber), C-36/02, 14 October, *Omega Spielhallen- und Automatenaufstellungen, GmbH, Oberbürgermeisterin der Bundesstadt Bonn* para 30-34.

192 The European Court of Justice, C-76/90, 25 July 1991, *Manfred Säger vs. Dennemeyer & Co. Ltd.*, ECR 1991 p. I-4221.

193 Barnard, 2008, pp 262-264.

specificities<sup>194</sup>. The fact that the judge imposes a balance of proportionality is not necessary a fateful aspect for the trade unions and one knows about the evolution of the jurisprudence because of the international instruments impulsion. I believe that if protective actions are taken at the legislative level, the evolving jurisprudence has a chance to turn into a more protective way than the present cases. The main disadvantage of the control of proportionality is that it will leave to the national judge the freedom to decide whether or not the industrial actions is legitimate<sup>195</sup>.

This implies that the trade unions will not be as free as they are used to being in the spontaneity of their actions, and that may be dangerous for the protection of the workers. In addition, as many commentators have highlighted, there is a difference of treatment between the undertaking that applies its freedom of movement, which has nothing to justify, and the trade unions that have to give explanations about the good basis of its actions while it is expressing its inherent duty to protect the right of the workers. Killing the spontaneity of the trade unions in strike action may be an impediment to their *raison d'être* as they have to answer quickly to obvious working abuses in order to preserve the well-being of the workers. I think that the Court will have to specify what constitutes a strike action that does not go beyond its objectives.

On the other side, the judge took the opportunity to confirm also the important role of the trade unions in the exercise of the right to take collective actions. In fact, the Court tried to frame the means taken to achieve to their goals<sup>196</sup>. But again, how can the trade

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194 Barnard, 2008, pp 262-264.

195 Ales and Novitz, 2011, pp 108-111.

196 Opinion of Advocate General Mengozzi gave on 23 May 2007, para 309 :

“Article 49 EC must be interpreted as not preventing trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives.” (Passages

unions defend rights in the difficult struggle with the undertaking when the margin of their actions is very limited?

Does the European Union, in order to protect its economical aspect, tend to achieve a more consensual labour system or is it just, as many have said, another “step back” in the social area?

#### *1.4. The following up – destruction of the “Social Europe” ?*

The Laval and Viking cases highlighted the great tendency of the Court of Justice of the European Union to restrictively frame the social sphere to protect economic freedoms<sup>197</sup>. The trade unions saw it as an open invitation to social dumping<sup>198</sup>. As Conny Reuter, the Secretary General of Solidar<sup>199</sup> stated in Brussels, 3<sup>rd</sup> April 2008 following the announcement of another judgement from Luxembourg regarding a similar issue<sup>200</sup>:

“What this judgement re-confirms, following the similar verdict in the Laval and Viking cases is that in today’s Europe not everyone is equal. In the battle between the “freedom to provide services” and the responsibility to protect workers, the workers have lost out yet again. It is not surprising then that many citizens question whether the Europe we are creating is a social Europe, with decent jobs or a haven for free-market ideologues which seek to undermine the fundamental principle of equal pay for equal work”<sup>201</sup>

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highlighted by the author).”

197 I am referring to the cases Laval and Viking and its the following cases as Dirk Ruffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen and Commission v Luxembourg cases.

198 Reactions of the European Trade Union Confederation (ETUC) after the Dirk Ruffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen which is the following case of the Laval and Viking cases.

Catherine Barnard, 5/2008, pp 13-15.

199 SOLIDAR is a European network of NGOs working to advance social justice in Europe and worldwide: [http://www.solidar.org/Page\\_Generale.asp?DocID=13965&la=1&langue=EN](http://www.solidar.org/Page_Generale.asp?DocID=13965&la=1&langue=EN)

200 European Court of Justice, Second Chamber, Case C-346/06, 3 April 2008, Dirk Ruffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH&Co.KG v Land Niedersachsen.

201 Statement reported by the NGOs Solidar in the following article :

This statement commented on the case-law *Dirk Ruffert v. Land Niedersachsen*<sup>202</sup> that set out that Directive 96/71 on posted workers sought at first to protect the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty<sup>203</sup>. As a consequence, it precluded the authority of a Member State from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree to pay their employees at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed<sup>204</sup>. In other words, measures taken by the Member State in order to protect its national workers competitiveness against the lower-wage salaries are considered likely to undermine the freedom to provide services.

This solution was given following a conflict that arose between Lower Saxony and the undertaking Objekt und Bauregie. In autumn 2003, Objekt und Bauregie was awarded a contract for the building of Göttingen-Rosdorf prison<sup>205</sup>. The contract contained a provision regarding compliance with collective agreements that required that the employees employed on the building site to be paid at least the minimum wage in force at the place where those services were to be performed<sup>206</sup>. In 2004, Objekt und Bauregie used as a subcontractor an undertaking established in Poland in 2004 and employed Polish workers on the building site at a wage below that what it was provided by

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“ECJ ruling another blow to decent work in Europe”, written in 04/04/2008 available on the section “Media release” of the website of the NGOs Solidar: [http://www.solidar.org/Page\\_Generale.asp?DocID=13955&thebloc=17117](http://www.solidar.org/Page_Generale.asp?DocID=13955&thebloc=17117)

202 European Court of Justice, Second Chamber, Case C-346/06, 3 April 2008, Dirk Ruffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen, para 36.

203 *Ibidem*.

204 European Court of Justice, Second Chamber, Case C-346/06, 3 April 2008, Case C-346/06, Dirk Ruffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen, para 10 to 16.

205 *Ibidem*.

206 *Ibidem*.

collective agreements in “Building and Public Works”. The company Objekt und Bauregie was accused of failing to fulfil its contractual obligation to comply with the collective agreement by paying its posted workers less. The case came to appeal where the Oberlandesgericht, the higher regional Court required the interpretation of Article 49 EC. Then it decided to stay the proceedings and to refer the question to the Court of Justice for a preliminary ruling. The issue was whether obliging an undertaking to pay its posted workers at least the remuneration prescribed by the collective agreement in force at the place where those services are performed constituted an unjustified restriction on the freedom to provide services under the EC treaty<sup>207</sup>.

As has already been stated above, by ruling that the measures of Lower Saxony were unjustified restrictions to the freedom to provide services, the Court of Justice of the European Union extended the limits of the social field.

Commission of the European Communities v Grand Duchy of Luxembourg<sup>208</sup> did not refer to the protection of the right to take collective actions, but is directly linked to the framing of the social area. In this case, the Commission of the European Communities accused the Grand Duchy of Luxembourg of having an extended conception of the public policy that went beyond what is admissible by the Posted Workers Directive<sup>209</sup> and undermined Article 49 of the Treaty EC that protects the freedom to provide services<sup>210</sup>.

These jurisprudences have recalled the trade unions' concerns that the European Union has been organising a free social dumping<sup>211</sup> market instead of social economy

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207 *Ibidem*.

208 I am referring to the case Commission of the European Communities v Grand Duchy of Luxembourg, Case C-319/06 available on the website :<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0319:EN:HTML>

209 European Court of Justice, First Chamber, Case C-319/06, 19 June 2008, Commission of the European Communities v Grand Duchy of Luxembourg, Para 15 to 22.

210 *Ibidem*.

market<sup>212</sup>. We see that the right to take collective actions – specifically the right to strike - represents the uneasiness of the European Union's position regarding its intervention within the social sphere while it has to protect the economical freedoms to maintain its first *raison d'être*. In addition, the right to take collective actions linked the crucial balance between the economical objectives and the necessary social possibility to bargain collectively to regulate the free market, in order to maintain a high level of social protection<sup>213</sup>. Catherine Barnard stated that the balance is more in the semantics instead being in substance. The fact that collective action is found to be a “restriction,” and thus in breach of Community law, shows that the “social interests” cannot defend themselves on an equal basis since they are only on the back foot<sup>214</sup>. However, the main question to be asked is whether the Member States themselves are ready to leave their social sovereignty to the European Union<sup>215</sup> and if the right to strike as such is open to be regulated. Furthermore, what it is surprising is that the harmonized freedoms are defeated non-harmonized fundamental rights. It is necessary to wonder whether the issue around the right to strike and the social sphere and their compliance with the economic freedoms are not in the fact that there is always this hierarchy of rights and freedoms that corresponds to the order of the European objectives. The economic goal was the first to be achieved and was supposed to bring about the social development and the well-being of the European people, which might be why the economic freedoms shall be more protected than the social rights.

## **2. Social dumping over diverse legislations? Instances of different**

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211 Barnard, 2008, pp 262-264.

212 I am referring to the statement of the European Court of Justice in Laval case paragraph 105:

“105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy”

And I am referring to the Article 3 of the Treaty of Lisbon :

“3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress (...)”

213 Hinarejos, 2008, pp 714-729.

214 Barnard, 2008, pp 262-264.

215 Barnard, 5/2008, 21-23.

## **legislations with the MS (France; UK ; Germany; Romania)**

### *2.1. France, the European homeland of the Right to strike?<sup>216?</sup>*

Often seen as a national sport or a typical instance of the French paradox<sup>217</sup>, the effective implementation of the right to strike has been the result of long political conflicts and negotiations.

Its history and its implementation is largely linked to the trade unions and the means to employ the social dialogue.

At first, the right to strike was not recognised by the d'Allarde Decree<sup>218</sup> and even banned by the Le Chapelier Law<sup>219</sup> since the workers' corporations were not allowed because it was said to constitute a threat for the authority of the state as it used to be during the middle-ages with the powerful confederations of workers<sup>220</sup>.

Striking remained as an illegal crime until the Ollivier Law of 25<sup>th</sup>, May 1864 that abolished the Le Chapelier Law. Such a right was still a reason to break the work contract between the employer and the employees. The legal U-turn was taken when the trade unions were officially allowed through the Waldeck-Rousseau Law.

But it was only in 1946 that the right to strike was eventually constitutionally recognised in the preamble of the Constitution of 27<sup>th</sup> October 1946, to which the present Constitution proclaimed its attachment<sup>221</sup>.

Its provision 7 provided that :

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216 Sirot, 2002, pp 19-23.

217 Ray, 2008-2009, p 59.

Bouère, 1958, pp 10-11.

218 Referring to the Articles 1 and 2 of the *Decree d'Allarde* ; 2<sup>nd</sup> March 1791 .

The Decree forbade all form of corporations.

219 Referring to the *Law le Chapelier* ; 14<sup>th</sup> June 1791; Articles 1,4,6 and 8.

220 Dossier « *Vers la refonte du dialogue social ?* » de La Documentation française , chronology, available on the following website : <http://www.ladocumentationfrancaise.fr/dossiers/dialogue-social/chronologie.shtml> (Last visited on 11 June 2011)

221 Decision of the French Constitutional Council from 16 July 1971 on the Freedom of association.



“the right to strike shall be exercised within the framework of the laws governing it.”<sup>222</sup>

This is why such a recognition limits the restrictions that could be placed by the law on the exercise of this right, since it is said to be a constitutional right<sup>223</sup>. These limits are all the more difficult to identify since there is no definition of the right to strike in the private sector and no real regulation in the French Code of Labour law<sup>224</sup>. The only provision that could describe a strike as a concerted stoppage by employees, is when the legislator framed the exercise of such a right within the public sector<sup>225</sup>. Furthermore, what it is notable is that the right to strike is considered as an individual right because all of the employers and the employees are entitled to exercise such a right<sup>226</sup>, although a single worker cannot strike alone. From this perspective, French law is very different from the other European legislations since the right to strike is perceived as a collective right, or a Union's right.<sup>227</sup> However, the French Courts set at least three criteria to know whether a strike is lawful or not<sup>228</sup>:

a full-stoppage of work<sup>229</sup> following a consultation of the employees that necessarily implies a common will<sup>230</sup>, based on professional claims<sup>231</sup> such as working conditions improvements or a raise of salaries...

Furthermore, under French law, a strike can be decided on by employees but it is not the

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222 Article 7 of the Preamble of the Constitution from 27 October 1946.

223 Trebilcock, 1995, p 17.

Youngs, Cotter prizes, 2007, pp194-195.

Mazeaud, 2004, pp 361-362.

224 See Article L2521-2 of the French Labour Code :

« The disputes arising between employers and employees referred to in Article L. 2521-1 are the subject of negotiations or when the applicable collective bargaining agreements contain provisions to that effect, or when the parties take the initiative. »

225 Also See the current Article L2512-3 of the French Labour Code.

226 See the current Article L2521-1 of the French Labour Code.

227 *Ibidem*.

228 Cour de Cassation, Chambre Sociale, n°0617802, 23 October 2007, D.2008 jur 662.

229 *Ibidem*.

Soc, 21 July 1986:D.1987.

230 *Ibidem* and :

Soc, 17 January 1968 : bull.civ.V,N°35,1ère arrêt and Civ,1ère, 15 janvier 1991.

231 *Ibidem*.

solution of last resort to the contrary of some other member States<sup>232</sup>.

The exercise of the right to strike shall not lead to redundancy, except in case of a serious mistake (*faute lourde*)<sup>233</sup>, but it is very difficult for the employers to demonstrate that its employees have committed it. The blockade of the site access<sup>234</sup>, degradation of the buildings or the materials do not cover the strike and can be criminally suited such as the acts of violence<sup>235</sup>. The trade unions and the strikers shall be held responsible in case of abuses during the strike. The employers and the non-strikers can go before Courts for compensation. In addition, the employers may deduct a percentage from the wages of strikers<sup>236</sup> but it is forbidden to employ extra employees to compensate for the strike or to close the factory during the strike since there is no right to lock out<sup>237</sup>.

The private sector is not said to be problematic regarding an excessive exercise of the right to strike, even if we see that such right is not necessarily regulated by legal texts<sup>238</sup>. The issue arises not because of the right per se but questions the position of the trade unions<sup>239</sup>. The current trend shows that the number of strikes has been reducing to the profit of a conciliation system instead of confrontation<sup>240</sup>. It seems like the traditional cliché of the “old” form of bargaining has slowly changed, although the legal framework has remained very open since there have not been many limits to that

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232 See the current Article L2521-1 of the French Labour Code, 2011.

233 See also *Article L.2511-1* of the French Labour code and the following judgement :

Cour de Cassation, Chambre Sociale, 22 janvier 1992 : Bull.civ. V,n°19 ; D.1992.IR 45 ;  
Dr.soc.1992.271;CSB 1992.71,A.14

Cour de Cassation, Chambre Sociale, 29 november 1990 : Dr soc, 1991, 105.

234" The right to strike does not imply that to have arbitrarily company premises."

Cour de Cassation, Chambre Sociale, 21.juin 1984 : Bull civ V, n°263 ; Gadt,4ème edition,n°212;Dr  
soc.1985.15 and

23 Juin 2004 : Bull.civ.V °n180;RJS 2004.835,n°1187.

235 Cour de Cassation, Chambre Sociale, 19 déc 1990 : bull.Civ.V,n°196;D.1990:D,1991.IR 25.

236 See the current consolidated Article R3243-4 created by the Decree N°2008-244 from 7 March 2008.

237 Pélissier, 2011, pp 1600.

238 Cook, Davie, 1999 , pp 101-103.

239 *Ibidem*.

240 *Ibidem*.

constitutional rights.

## 2.2. *the United Kingdom and the Right to strike: “not more much than a slogan”?*<sup>241</sup>

The opposite of France would be the United Kingdom which does not recognise a right to strike under common law<sup>242</sup>. In the traditional British conception, striking is rather perceived as a freedom rather than a right itself<sup>243</sup>, which might be why British legislators chose not to protect and recognise it, since the State does not need to intervene in private relations between an employer and an employee, even through the recent effects of the compliance to international sources made United Kingdom law recognised a right to strike<sup>244</sup>. Striking has remained as a breach of the contract and the strikers may be sacked without compensation<sup>245</sup> which applies regardless of the reason of the strike. However, the collective actions were made possible through different texts.

Stephen Hardy stated “the law regulating strike action in Britain is extremely complex and can only be understood in the context of a century of overlapping and conflicting and legislative documents.”<sup>246</sup>

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241 Dukes, 2010, pp 82-91.

242 Statement of the Lord Justice Elias :

“The common law confers no right to strike in this country. Workers who take strike action will usually be acting in breach of their contracts of employment. (...)”

ILO Convention 87 included a provision guaranteeing the right to strike. Consequently, the ILO Committee of Experts was able to criticise United Kingdom restrictions on secondary action and the freedom of United Kingdom employers to dismiss strikers.

243 Novitz, Blanpain, 2009, pp179-181

Fredman, 1987, pp 176-182.

244 Referring to the consequences of the Human rights act 1998 and Article 11 of the European Convention on Human rights.

245 Current legislations have been turned in that way .

Davies and Freedland, 2004, *p.cit* 755: “potential liability [which] acts like a time bomb in our labour law but no one can be sure whether it will ever go off.”

First, the Trade Disputes Act legislation in 1906<sup>247</sup> conferred immunities to the organisers of strikes from certain tort liabilities arising from strike actions<sup>248</sup>. However, as Lord Denning highlighted in his famous statement in 1979<sup>249</sup>:

“Parliament granted immunities to the leaders trade unions, it did not give them any rights. It did not give them the right to break the law or to do wrong by introducing people to break contracts.<sup>250</sup>”

However, in 1942, British judges declared that strike constituted as being “an essential element in the principle of collective bargaining”<sup>251</sup>.

Two sets of obligations shall be respected when a strike action is planned. On the right hand, the Trade Union Act 1984 introduced the obligation that a trade union that is planning to organise industrial action must hold a ballot of the relevant workers and most of the workers must support the action<sup>252</sup>. On the other hand, the Trade Union Reform and Employment Rights Act from 1993 implemented that the union should be obliged to provide information and notice of the ballot and to the pursuant industrial actions to the employers of the workers that are about to strike<sup>253</sup>. Amended twice in 1999 and 2004, the provisions have stayed very unclear and difficult to fulfil for the trade unions<sup>254</sup>. It can be noted that the fact that being obliged to provide a ballot to make the strike lawful is very different from France since employees need only to declare a strike<sup>255</sup>.

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246 Hardy, 2011, pp 284-306.

247 Barrow, 2002, pp 279-283.

248 Brodie, 2003, pp 201-203.

249 Dukes, 2010, pp 82-91.

250 *Ibidem*.

251 Crofter Hand Woven Harries Tweed Co v Veitch, 1942, AC 435, pp 403.

Fredman, The right to strike: policy and principle, 1987, pp 176-182.

252 See the provisions 10 and 11, Part II “Secret Ballots before Industrial Action” of the Trade Union Act 1984.

253 Referring to the Part V of the Trade Union and Labour relations (consolidation) Act 1992 of the TULRCA.

254 Barlow, 2008, p 250.

255 Hardy, 2011, pp 284-306.

The exercise of the right to strike has shown great tensions within the United Kingdom's political landscape. The link between the United Kingdom and international sources has, however, impeded a slow shift, yet such exercise shall be very restricted<sup>256</sup>.

The recent opt-out to certain provisions of the Charter of Fundamental Rights has proved the great British reluctance to accept the “social European conception”. Protocol n°30 of the Treaty of Lisbon, has provided the Charter's scope for the United Kingdom and Poland. It was perceived as a way to exempt the two countries from several obligations laid down in the Charter. The United Kingdom chose to opt out because of the social rights, especially the right to strike. Indeed, a tremendous resistance existed within the employers regarding the social rights set out in part IV of the Charter. Protocol n°30 took great attention to assert that the rights from the solidarity part of the Charter were legally suitable if they were also protected by national law<sup>257</sup>. The scope of such protocol will have to be defined by the Court of Justice of the European Union, but the obligation to respect fundamental rights shall apply to all the Member States. The fact that Article 28 of the Charter of Fundamental rights on the right to strike and its possible restrictions relies on national practices shall not constitute an issue in the case of conflicts of rights since the Treaty of Lisbon still excludes its competence from the regulation of the right to strike.<sup>258</sup>

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256 Fredman, 1987, pp 176-182.

Bowers and Lightman, 1998, p 715.

TULR(C)A ss 237-379.

Mill, 1997, pp 35-53.

257 Benoit Rohmer, 2009, pp 160-165.

258 Reasoning from the Article 28 of the Charter of Fundamental rights:

“Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to defend its interests (...)including strike action. ”

### 2.3 Germany and the Right to strike or the reaffirmation of the power of the Trade Unions?

The right to strike is not directly recognized by the Basic Constitutional Law of the Federal Republic of Germany<sup>259</sup>. Its protection derives from Article 9 provision 3 that sets out<sup>260</sup> :

“The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession (...)

Measures (...) may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions ”<sup>261</sup>

Contrary to French law that recognises an individual's right to strike even if it is one that can only be collectively exercised, the German law consecrates the right to launch a strike to trade unions<sup>262</sup>. As a consequence, a strike action as one of the appropriate instruments for collective bargaining<sup>263</sup> cannot lawfully be launched without the trade unions approval, as unions are enabled to execute a collective agreement. A legal strike in Germany is “the jointly and deliberately executed cessation of work by a number of employees with the intention that they will resume work once by a number of employees with the intention that they will resume work once they have successfully forced through their demands in the form of the conclusion of a new collective agreement.”<sup>264</sup> In addition, the Federal Labour Court developed the principle of

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259 Thüsing, 1998, pp 123-140.

260 Blanpain, Pochet, 2010, p 144.

261 German legislation on the regulation of the Right to strike available on the following website:  
<http://legislationline.org/topics/country/28/topic/1/subtopic/17>.

262 Bermann, Picard, 2008, pp 100-103.

263 Judgement 5 March 1985 1BVL 779/85 (n.11) 226-227: “Collective action including the strike has an auxiliary function for collective bargaining i.e in order to achieve a collective agreement.”

264 Westfall, Thüsing, 1999, pp 521-530.

*Kampfparität* (balance of bargaining power) that implies a control of proportionality of collective actions. That means that if the strike is declared to be legal, workers are protected against dismissal and damages. If not, the situation may lead to claim for damages against a union and its employees or dismissals. That presupposes that strikes may be used as a solution of last resort after voluntaries negotiations<sup>265</sup>.

In practice, German trade unions and confederations are the ins and the outs of the collective actions because they embody the exercise of the right to strike by setting guidelines for strikes such as voting by members before issuing a strike notice, putting pressure of the employers. Nevertheless, the employers have remained constitutionally entitled to exercise their right to lock out<sup>266</sup> in extreme cases of disagreement with strikers.

In general, striking actions are rare since a high consensual approach with trade unions is taken in Germany to achieve the improvement of working and economic conditions.

#### *2.4. Romania and the Right to strike: an Eastern new kid on the European block.*

On 1 January 2007, Romania joined the European Union. It was one the latest Eastern countries with an ex-communist political and economic background to enter into the European adventure. As with every previous central and eastern country that acceded the membership of the Union, the wage salary is more than half lower than in western Member States<sup>267</sup>.

A strike shall be seen as a voluntary and collective cessation of the work by the employees<sup>268</sup>. The protection of the right to strike is provided through the Article 233 of

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265 See BAG.1.AZR/42/02.

266 The right to lock out implies the closing of the firm or a service by the employers in case of strike.

When the employers exercise the lock out, he shall be exempted to pay the non-strikers.

267 Romania's minimum salary is the equivalent of 153 euros while in Belgium, it is 1415 euros.

Information found on the website of the Observatoire des inégalités, le salaire minimum en Europe, last updated on 17 May 2011: <http://www.inegalites.fr/spip.php?article702>.

268 See the Article 234 of the Romanian Labour code.

the Romanian Labour Law which states :

“1.The employees shall have the right to strike with a view to defending their professional, economic and social interests.

2.The employee participation to the strike shall be free. No employee may be forced to participate or not to a strike.

3.The abridgement or prohibition of the right to strike may only arise in the cases and for the categories of employees expressly provided for in the law.”

It should be noted that contrary to the other legislations studied above, Romanian Labour law is very clear both on the definition of the strike action and the frame of such a freedom. Indeed the following articles 235 and 236<sup>269</sup> laid down the provisions that the participation in a strike and its organization in compliance with the law shall not be a breach of the obligations of the employees<sup>270</sup> although the organisation of the exercise of the right to strike shall be regulated by a special law<sup>271</sup>. The threat would be the special law that is not specified by the Labour code. Since 1989<sup>272</sup>, strikes have increased to a peak in 1999 with 85 actions. However, from the period 2003-2007, the figures collapsed to 12 in 2007<sup>273</sup>. As in all the Member States, the trend is to turn to more consensual means.

### *2.5. Social dumping over diverse legislations?*

These four legislations can give an idea of the diversity of protection of the right to strike. It does not only reveal the variety of rights granted to the workers but also the different approaches to the relations between the employers and the workers and their natural rights to bargain collectively. The right to strike is consequently the perfect example of the labour law divisions inside the European Union. The issue that has been

269 Also see the Romanian Labour code on the official website: <http://www.codulmuncii.ro/en> .

270 Also see the Article 235 of the Romanian Labour code on the protection of employees on strike.

271 Also see the Article 236 of the Romanian Labour code on reference to special law.

272 Carey, 2004, pp 434-435.

273 Ciutacu and Chivu, Romania industrial relations profile, Eurofound, Quality of work and employment in Romania, Dublin, further informations shall be found on :<http://www.eurofound.europa.eu/eiro/country/romania.pdf>.



repeated, is whether this diversity of protections of the right to strike can contribute to the creation of a social dumping inside the Union or not. Social dumping corresponds to the situation when an employer uses workers from one country with low wages in another country where the cost of labour is usually more expensive<sup>274</sup>. The fact that there is no harmonisation on the right to strike weakens the countries with higher social standards and wages<sup>275</sup> since such right constitutes a rampart against obvious labour abuses and unfairness. It is even more the case in a situation of crisis where twenty-seven Member States with different economical and social background are in competition. I do not think that the social side of the Union will be constructed aside the economic goals; to the contrary, the rules of the games need to be set out to preserve the so-called “solidarity” between Member States in order to make it real instead of illusory. Through the social dumping issue, two different scenarios are said to be constructed:

The first would represent an effective U-turn in European policies since it would envisage a transfer of social policy jurisdiction to the European Union level. This would induce harmonisation or a uniformity of social and labour standards throughout the Community. It would be the most appropriate because it would reduce and eliminate (to a longer term) the threat of unequal standards distorting competition in favour of Member States with lower standards<sup>276</sup>. However the harmonisation would suppose, an abandonment of one of the hard core part of the Member State’s sovereignty since the elaboration of a welfare state has traditionally been a tremendous stake of it.

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274 Social dumping definition given on the official website Eurofound in its article « Social Dumping » section industrial relations:

“the practice involving the export of goods from a country with weak or poorly labour standards, where the exporter's costs are artificially lower than its competitors in countries with higher standards, hence representing unfair advantage in international trade”

Guillien and Vincent, 2005, p 250.

275 Dubouis and Blumann, 2009, pp 113.

276 Dubouis and Blumann, 2009, pp 113.

The second scenario is the one that looks closest to the current reality. This would let the elaboration of social and labour standards to the national competence in spite of the threat of social dumping. Member States' social regimes would consequently be put in competition<sup>277</sup>.

Choosing between one of them will be the next challenge of the European Union since it is not only harmonising the labour law (or not), but taking a political orientation for this supranational organisation that would like to be considered as a proper international organisation<sup>278</sup>. In addition, the choice also would reveal the sort of solidarity that the European Union relies on. Indeed, especially at this time when the economical solidarity is at stake in the history of the European Union<sup>279</sup>. Are we only an economical solidarity or have we come further?

### **3. General concluding remarks**

The Court of Justice of the European Union's jurisprudence and the diversity of national legislation on the right to strike has shown the great difficulties of the European Union in taking its proper position.

The recognition as a fundamental right of the Union may be a promising perspective for the right to strike. However, the fact that the judges in Luxembourg did not provide a clear scope of the lawful restrictions over the right to strike may be dangerous for the future of such a right. Indeed, the exercise of the right to strike shall not impede economic freedoms, but the true issue is to know to which extent.

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<sup>277</sup> *Ibidem*.

<sup>278</sup> European Court of Justice, 5 February 1963, Case 26-62, *N. V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos and Nederlandse administratie der belastingen* (Netherlands Inland Revenue Administration).

<sup>279</sup> Referring to the situation in Greece and the debate towards the economic solidarity.

The fact that the European Court subjected such a right to the fundamental freedoms may be understandable for obvious economic reasons. Nonetheless, since the European Union has clearly stated that it wanted to found a proper European social model based on high levels of social protection and social dialogue, the priorities shall be reviewed to see if such a project is only social diplomacy to create European feelings towards people and to assuage the trade unions. The current situation has represented the European paradoxes between official will and the legal realities. Consequently, harmonising fundamental labour rights and creating more than a European social chimera do not seem to be on the top of the agenda. The social diplomatic speech shall let the hypocrisy of a social market remain.

## **CONCLUSION**

The issue this dissertation has tried to answer is whether there is an effort at the European level to harmonize labour law through the right to strike, and how this reveals the strengths and the weakness of the so-called European social model.

To answer to that question, it has tried to analyse the effective protections of the right to strike at the European level. It has also tried to discuss the major arguments brought to the debate around a harmonisation and the potential effects.

One factor that has, in some sense, confused the issue was the fact that the right to strike was attached to the exclusive competence of the Member States while also recognised as a fundamental right at the European level<sup>280</sup>.

Another factor has been the outcome of the Court of Justice of the European Union's jurisprudence. In case of a conflict of rights, the right to strike, as a fundamental right, can impede the exercise of the economic freedoms such as the freedom of establishment

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<sup>280</sup> This curiosity all the more remains especially with the Treaty of Lisbon.

or the freedom to provide services, but only under very restrictive conditions.

This confrontation between fundamental solidarity rights and economic freedoms has probably revealed the hypocrisy of the social diplomatic speech that has been utilised for years to cover up the lack of consistency in the idea to harmonise labour law and, broadly, the creation of a proper European social model.

At a time when economic solidarity is discussed toward the Greek problem<sup>281</sup>, the “social solidarity” between the Member States, seems also to be in crisis due to legal delay and the lack of political will.

The right to strike, by its special features (since it implies both an economic and a social aspect <sup>282</sup>), has well embodied the tensions over both the ambitious goal to create a protective social European zone and the hard reality.

Faced to this assessment, it is necessary to doubt the proper labour law outcome at the European level. In other words, the European Union has always claimed its singularity towards other great economic powers such as the United States, and more recently China<sup>283</sup>. But is that really the case from the perspective of the right to strike?

In the United States of America, the right to strike is regulated by the National Labour Relations Act, set out in 1935 during implementation of Franklin D Roosevelt's New Deal<sup>284</sup>. Section 7 of the NLRA recognised that the employees “have a right to engage in concerted activity for collective bargaining”<sup>285</sup>, although, such right was eventually applied with a large scale of restrictions.<sup>286</sup> The limits shall be found in the

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281 Referring to the articles attached the special file on Greece « a stake for Europe » available on the website of the Le Figaro : <http://www.lefigaro.fr/conjoncture/dette-de-la-grece-un-defi-pour-l-europe.php>

282 Economic aspect since the strike has, per se, economical implications as temporary disruption of the economic activity.

Social aspect since the right to strike belongs to the labour law, specifically as a mean to protect collectively the interest of the workers.

283 Visser, 2005, pp 315-316.

284 Scott Clark, 2002, pp 124-126.

285 Golman, Roberto, Corrada, 2011, pp 401-430.

286 Bartlett Lambert, 2005, pp 212-216.

jurisprudence, since the exercise of the right to strike shall be regulated by a series of conditions.

Indeed, where other measures have failed in case of a conflict, employees may resort to strike. In fact, unions and employers are called to first negotiate collectively, and if no result is found in good faith a legal impasse is carried out. To resolve the dispute parties will be entitled to go through a series of options.<sup>287</sup>

One of the main obvious restrictions is that the employers are able to permanently replace striking employees with strikebreakers<sup>288</sup>. Major corporations have utilized this mean with great frequency to break strikes<sup>289</sup>. In addition, the Taft-Hartley act prohibits strikes that would create an emergency affecting the nation's safety and health<sup>290</sup>. The type of collective action that unions can lawfully take is also framed. For example, sympathetic or secondary action, mass picketing, workplace occupations, secondary boycotts and general strikes shall be said to be unlawful<sup>291</sup>. In addition, the American labour law does not grant an employee the opportunity to claim to be paid while engaged in a strike, even if the strike intends to protest the employer's unlawful conduct<sup>292</sup>.

On the other side of the globe, other means have been taken to approach the right to strike. In fact, under Chinese labour law, there is no law regarding the right to strike<sup>293</sup>. However, since the ratification of the economic, social and cultural rights covenant, China has slowly provided a legal base for legislation to enshrine the right to strike<sup>294</sup>.

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287Estreicher, Schwab, 2000, pp 133-146.

288 Following the Supreme Court's 1938 decision in *NLRB v Mackay Radio & Telegraph Co and Belknap, Inc v Hale*, 463 US 491 (1983).

289 Scott Clark, 2002, pp 124-126.

290 Blanpain, 2010, pp 690-692.

291 Howard-Hassmann, Welch, 2006, *Economic rights in Canada and the United States*, pp 145-146.

Also Referring to the Taft-Harley Act.

292 Goldman, Corrada, 2011, p 408 para 745.

293 Chen, 2011, para 277-291.

294Referring to the Article 27 of the Chinese Labour Law mentions the words “stoppages” and

However, the strikers shall not benefit of the exemption from criminal and civil punishment<sup>295</sup>. Likewise, the issue is not inside the law per se but under the protection of the trade unions themselves, which are independent from the State's power. The risk of repression has remained very high<sup>296</sup>.

Each economic power offers its own protection of the right to strike. However, the fact that the European Union has claimed to intend to create its own proper social model merits consideration, at least from the perspective of the right to strike.

China and the United States have nothing to envy from the European Union from the perspective of the right to strike and its compliance with International Labour Organisation standards<sup>297</sup>. Indeed, the International Labour Organisation has noticed that the judgements ruled in 2007 were contrary to most fundamental ILO standards, especially Convention 87 on freedom of association<sup>298</sup>.

The perspective of the right to strike has stressed the European paradox between social idealism and economic realism. The creation of a highly competitive social market economy<sup>299</sup> that would imply full employment and social progress should start by

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“slowdowns”

Taylor, Chang, Li, 2003, pp 281-281.

Chen, 2011, para 277.

<sup>295</sup> *Ibidem*.

<sup>296</sup> NGO's report, Human rights in China : *Sans Issue: Répression et contestation ouvrière lors de la réforme des sociétés d'État en Chine, Droits et démocratie*.

China and the ILO, article available on the website of Human rights in China (last visited on 26, June 2011): <http://www.hrichina.org/crf/article/4804>

<sup>297</sup> The United States is said to infringe the International Labour organization's standards with all the restrictions admitted for the right to strike. China has for the moment chosen to reservation on the Article that protects the trade unions... Referring to International Organisation Committee on the Freedom of Association 2010 review on the situation concerning the Freedom of Association, 1948 (No. 87) in Great Britain.

<sup>298</sup> Referring to International Organisation Committee on the Freedom of Association 2010 review on the situation concerning the Freedom of Association, 1948 (No. 87) in Great Britain.

<sup>299</sup> See the Article 3 and the official website Europa in the sub-section “Does the Treaty of Lisbon weaken the social achievements of the European Union ?” (last visited on 26, June 2011): [http://europa.eu/lisbon\\_treaty/faq/index\\_en.htm#16](http://europa.eu/lisbon_treaty/faq/index_en.htm#16)

elaborating common labour standards, including the basic fundamental rights, in order to set out the rules, instead of putting different labour legislations in competition.

Despite the difficulties, several achievements have been made, such as in the consultation with social partners in the decision-making process at the supranational level<sup>300</sup>. That is why the European Union still has the opportunity to be the example for which the world is waiting. Above the legal harmonisation, the more urgent need is to define the political orientation of the so-called model that we would like to invoke in this globalised world. May this dissertation be a humble contribution.

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300 Informations available on the website of the European commission, Employment, Social Affairs and Inclusion:  
Article Consultations of the social partners :<http://ec.europa.eu/social/main.jsp?catId=522&langId=en>

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