The EU and the ECHR: Collective and Non-Discrimination Labour Rights at a Crossroad?

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This article considers the future development of the constitutionalisation of labour rights, in particular non-discrimination rights and collective labour rights, within the European Union's (EU) legal order following the entry into force of the Lisbon Treaty and in light of the EU's impending accession to the Council of Europe. Accession throws a spotlight on the relationship between the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CoJ). The two courts' respective interpretations of certain labour rights contain elements of overlap and, in some respects, conflict which will presumably have to be reconciled under the new legal order within which the courts will find themselves. It is argued that the constitutionalisation of labour rights would offer some important protections that should be fundamentally guaranteed and thus available to all workers but which, due to transnational changes resulting from globalisation, are under threat. Furthermore, as the case law analysis demonstrates, the traditional hierarchy of rights by which civil and political rights were prioritised over their economic and social counterparts, has given way to an EU legal order whereby the economic imperative remains paramount with social provisions, in the context of labour rights, subjugated and subject to further divisions.

Keywords: *European Union, European Convention on Human Rights, Constitutionalisation, Labour Rights, Court of Justice of the European Union, Charter of Fundamental Rights.*

1. INTRODUCTION

This article considers the future development of the constitutionalisation of labour rights within the European Union's (EU) legal order. This is a timely endeavour for a number of reasons. First it is, perhaps, an appropriate juncture at which to consider the state of EU labour law following the coming into force of the Lisbon Treaty in 2009. The new constitutional arrangements introduced by Lisbon have now had time to bed in[2] and perhaps the most relevant in this respect is the prominent

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[2] Human rights are now more deeply enshrined in the Treaty as basic and foundational values of the EU (see art. 2 TEU).

legal status given to the Charter of Fundamental Rights (CFR) by Article 6(3) TEU which, because of some of its specific provisions,[3] could be significant. Secondly, the EU's impending accession to the Council of Europe and the European Convention on Human Rights (ECHR)[4] throws a spotlight on the relationship between the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CoJ). The two courts' respective interpretations of certain labour rights contain elements of overlap and, in some respects, conflict which will presumably have to be reconciled under the new legal order within which the courts will find themselves. This article presents an argument in favour of labour rights being afforded constitutional status. In our analysis, we focus on non-discrimination rights and collective labour rights. It is submitted that their constitutionalisation would offer some important protections that should be fundamentally guaranteed and thus available to all workers but which, due to transnational changes resulting from globalisation of labour markets, are under threat in developed countries and are not even a realistic aspiration in developing countries.

In the first part of the article, labour rights are considered against a backdrop of existing theory relating to the constitutionalisation of social rights generally. This provides a framework within which an analysis of the recent constitutional changes to the EU's legal order can take place focussing on those provisions that have the potential to impact on the relationship between the two courts and consequently on the nature and form of labour rights. In the second part the distinct development of individual and collective labour rights in the jurisprudence of the CoJ and the ECtHR are contrasted before concluding with some (tentative) predictions of how the constitutionalisation of labour rights is likely to play out in the future.

2. LABOUR RIGHTS IN THE EU

The EU legal order has long been at the forefront of the development of labour rights as a means of equalising and, in some instances, furthering employment protection for particular groups of workers and in certain specified circumstances. The rationale for the development of such rights in EU law has traditionally been one of economic reasoning whereas at an international level, such rights are articulated as fundamental rights in the European Social Charter (ESC) [5], the ECHR as

[3] These include the prohibition of slavery and forced labour (Article 5); freedom of expression and information (Article 11); freedom of assembly and freedom of association (Article 12); the non-discrimination principle (Article 21); and equality between women and men (Article 23) as well as the provisions under Title IV (Solidarity) which includes the right of collective bargaining and action (Article 28).

[4] Article 6(2) TEU

[5] The ESC is a Council of Europe treaty which guarantees social and economic human rights. It was adopted in 1961, came into force in 1965, and was revised in 1996. The European Committee of Social Rights rules on

interpreted by the ECtHR and in the Conventions of the International Labour Organisation (ILO). In recent years the relationship between the EU and these institutions of international law has become increasingly formalised. First, the eight ILO Conventions on core labour standards have been ratified by all of the EU's member states.[6] Second, the CFR encompasses the ESC, ECHR and ILO principles and so can be seen as a linchpin in the consolidation of the EU and international law regimes. Moreover, the Treaty of Lisbon makes the EU's accession to the Council of Europe a legal obligation. This gives rise to an interesting conundrum: how to reconcile the separate and distinct evolution of the two legal frameworks attributable to the CoJ's jurisprudence on EU provisions on the one hand and the ECtHR's interpretation and application of international standards on the other. The focus of this article is in labour rights, specifically the right to non-discrimination in employment and the rights to participate in trade unions and to engage in collective bargaining.

The CoJ has played a pivotal role in giving constitutional status to labour rights: it was through the very process of juridification and judicial interpretation in cases such as *Defrenne II*[7] that the EU's social dimension became more clearly articulated and, thus, the extent, application and enforcement of related rights better defined. In *Defrenne II* the Court famously held that the equal pay provisions of Article 119 EC[8] were directly effective as they 'form part of the social objectives of the Community, which is not merely an economic union, but at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions [of Europe's citizens]'.[9] Such interpretation has been critical in giving effect to the initially weak social provisions of the Treaty. However, the high level of judicial activity that characterised the Court's jurisprudence from *Defrenne II* up until the mid-1980s contributed to criticisms of judicial activism and claims that it was acting more as law-maker than interpreter[10] emphasising the delicate balance that must be struck between the EU's need to keep pace with its often fast-changing

states' conformity with the ESC, the 1988 Additional Protocol and the Revised ESC. In particular, the ESC was the first international treaty to recognise a right to strike as part of the right to collective bargaining in article 6.

[6] Namely Freedom of association and recognition of the right to collective bargaining (Convention Nos. 87 and 98), the elimination of all forms of forced and compulsory labour (Convention Nos. 29 and 105),the abolition of child labour (Convention Nos. 138 and 182), the elimination of discrimination in respect of employment and occupation (Convention Nos. 100 and 111). Ratification of the four priority Conventions on employment policy (122); labour inspection (81 and 129) and tripartite consultation (144) admittedly remains patchy.

[7] Case 43/75 [1976] ECR 455.

[8] Now Art 157 TFEU.

[9] *Supra* n. 5, at para. 10.

[10] E.g. H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study of Judicial Policymaking* (Nijhoff, 1986); P. Neill, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum, 1995).

environment whilst avoiding charges of democratic deficiency and/or the lack or misuse of its legitimacy in certain areas.

So much has happened since the Court's early foray into social policy that it is perhaps timely to question whether such criticisms are still relevant. Interestingly the most significant development in the EU's engagement with social policy in recent years, namely the constitutional status afforded to the CFR, was the end result of a process of endorsement and codification of the Court's jurisprudence and, accordingly, the Court has a key role in the enforcement and interpretation of its provisions.[11] Arguably the greatest hurdle to progress in this respect lies with the restrictive nature and limited reach of the CFR's provisions themselves which have been widely criticised as offering little opportunity for the advancement of social aims particularly in relation to the unification of and/or improvements in minimum standards.[12] Others have mustered more enthusiasm, at least for the Charter's potential, in respect of the possibilities it offers for the assimilation of improved labour standards into the constitutional order[13] so that the dynamism shown by the Court over the past 30 years in its recognition of social rights as being capable of constituting general principles of Community law could potentially be applied to promote, and perhaps expand, its provisions on employment and industrial relations. Furthermore, the CFR's endorsement of and explicit engagement with the key values enshrined in and practical application of ECHR mean that it could become the linchpin that connects and coordinates the ECHR's labour standards and their EU counterparts. This development, if realised, would be a significant step towards the constitutionalisation of labour rights within the EU legal order. In the next section the significance of this will be considered.

2.1. CONSTITUTIONALISING LABOUR RIGHTS

[11] See 'For a Europe of Civic and Social Rights' by the Comité des Sages chaired by Maria de Lourdes Pintasilgo, (Office for Official Publications of the European Communities, Brussels, 1996) at 12-13. Protocol (No) 30 to the Treaties on the application of the Charter to Poland and the UK restricts its interpretation by the CoJ and national courts, in particular regarding the rights relating to solidarity in Chapter IV.

[12] E.g. M. Bell, 'The Right to Equality and Non-Discrimination', T. Hervey, 'The 'Right to Health' in European Union Law' and J. Hunt, 'Fair and Just Working Conditions' all in T. Hervey and J. Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart, 2003).

[13] Albeit with a heavy dose of caution – see S. Deakin and J. Browne, 'Social Rights and Market Order: Adapting the Capability Approach' in Hervey and Kenner *ibid*; N. Busby and R. Zahn 'European Labour Law in Crisis: The Demise of Social Rights?' (2013) Contemporary Issues in Law 173.

Judy Fudge has defined constitutionalisation in this context as 'the goal of securing the recognition of labour rights as fundamental human rights at the transnational and national levels.' [14] Fudge's definition is particularly useful as it articulates the connection between those rights which arise through one's status as a worker and the, perhaps loftier, standards applicable within a human rights framework. In couching the aims of constitutionalisation in such simple terms, the possibility of convergence between labour and human rights standards seems real rather than merely imagined. Of course this ideal might be very difficult to achieve in practice so it is important to establish *why* such a goal might be desirable.

The main reason for arguing in favour of applying the levels of protection guaranteed by constitutional status to labour rights is that such rights are currently under threat. The contemporary arrangements pertaining to their provision are unstable due to contravening political and socio-economic forces, particularly within the EU legal order. The increasing commodification of labour, the movement away from collective bargaining towards juridification and the predominance of individual methods of dispute resolution, which increasingly shape the industrial relations of developed economies, call for the enhanced protection of such rights. Alongside this, the globalisation of labour markets through increased migration of workers and the growth of trans- and multinational employing organisations places greater emphasis on the establishment and preservation of certain labour standards which, although they constitute a 'basic floor of rights',[15] require elevation in status if they are to be adequately enforced within commercially connected but socially, economically and culturally diverse jurisdictions.

The difficulties inherent in ascribing labour rights with constitutional status are well documented elsewhere[16] and, to a large extent, hinge on the difficulty in reconciling the universalism of a constitutional guarantee with the paucity of the resources necessary to realise that guarantee for all who are entitled to it. The conflict between the promise of one particular positive right alongside others and the requisite sharing of limited goods and services gives rise to what Fabre has named the 'conflict distinction'.[17] However, in Fabre's view it is social rights that are singled out as having acquired a specific importance in the realisation of that cornerstone of liberalism – individual autonomy. This is because autonomy's status as 'what is essential to being human and to being

[14] J. Fudge 'Constitutionalizing Labour Rights in Europe' in T. Campbell, K. Ewing and A. Tompkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (OUP, 2011) 244-267, at 244.
[15] See Lord Wedderburn, 'Common Law, Labour Law, Global Law' in B. Hepple (ed) *Social and Labour Rights in a Global Context* (CUP: 2002).
[16] For a consideration of the various objections raised, see M. Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) Human Right Law Review 1.
[17] C. Fabre 'Constitutionalising Social Rights' (1998) Journal of Political Philosophy 263 at 264.

able to live a distinctly human life' bestows on those rights that protect it a particular prominence so that the fair and efficient operation of the market is not possible without the fundamental protection of social rights. [18]

Another (related) objection asserts that social rights are non-justiciable and, thus, not amenable to the process of judicial review[19] so that to bestow such rights with constitutional promise would blur the boundaries between political and judicial decision-making. This would place the judiciary in the role of law-maker by engendering an expectation or, where the realisation of such a right conflicted with existing legislation, a duty to decide cases on grounds which were irreconcilable with the actions and intentions of democratically elected representatives. The legislature is rightly charged with ensuring the fair and adequate distribution of associated resources so that the two main objections to the constitionalisation of social rights - their justiciability and the allocation of resources - are closely related.

A further difficulty relates to enforcement with the non-specificity of social rights often cited as justification for this. Hepple has stated that 'Social rights are like paper tigers, fierce in appearance but missing in tooth and claw.'[20] This harks back to Marshall's classification under which such rights were deemed to be largely aspirational, imprecise and not amenable to juridical enforcement and judicial interpretation in contrast to the clear legal status afforded to civil and political rights.[21] The EU's movement towards soft law enforcement would seem to support this view and there is, undoubtedly, a convincing argument that the disputes concerning labour rights are best resolved by alternative methods to the imposition of hard law sanctions.[22] However, the current socio-political environment within which labour law operates makes it necessary to question Marshall's analysis on the grounds that combined factors such as globalisation, the changing nature of working relationships and developments within the international legal order provide a compelling case for a reassessment of the role of the judiciary in the interpretation of such rights.

The justiciability of labour rights varies depending on the status of existing EU provisions. Some, such as the right to collective bargaining, are not clearly defined so that their exercise depends on their

[18] Ibid at 265.
[19] See J. King, *Judging Social Rights* (CUP, 2012), Chapter 6; *Supra* n. 14.
[20] B. Hepple, 'Enforcement: the law and politics of cooperation and compliance' in *supra* n. 13 at 238.
[21] T.H. Marshall, *Citizenship and Social Class and other Essays* (CUP, 1950, reprinted 1992). Marshall's analysis has been contested on the grounds that the distinctions between positive and negative rights was *always* overstated – see S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008) at 66.
[22] B. Hepple, M. Coussey, and T. Choudhury, *Equality: A New Framework* (Hart, 2000).

(shifting) interpretation by the CoJ. Others, for example the prohibition of discrimination, are reasonably well established within EU law and thus ostensibly guaranteed. However, even where protection appears to be relatively stable, the relevant standards and resulting levels of protection are vulnerable to changes in secondary legislation at both EU and national levels and to restrictive interpretations by the courts. Furthermore, any assessment of the likelihood that social rights will be given constitutional status must be weighed up against the achievement of an integrated free market which is the centrifugal force around which everything else is organised. This brings with it particular challenges as collective notions of solidarity and the high labour costs associated with the achievement of enhanced standards through justiciable social rights can be difficult to reconcile with the liberal values of independence and autonomy and capitalism's required profit motive.

However, the EU is not merely an economic entity, nor does it operate in isolation from other international institutions. As well as developing constitutional recognition of social rights, which will be discussed in more detail below, the member states' formal acknowledgment of certain international standards means that the Union must also aspire to the achievement of specified social goals in fulfilling its wide-ranging international obligations. In addition to the individual member states' ratification of the core labour standards set out in the ILO Conventions,[23] all member states have ratified the ESC. The ESC – 'a milestone in international law'[24] - has the same status as the ECHR and acts as its counterpart in the context of economic and social rights by providing a range of minimum labour standards[25] and is cited in the preambles of both the TFEU and TEU as a source of inspiration for the EU's social objectives as well as in Article 151 TFEU which provides that,

> 'The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

[23] See note 6 above.
[24] S. Evju, 'The right to collective action under the European Social Charter' (2011) *European Labour Law Journal* 196, 198.
[25] See S. Evju, 'The European social Charter', in R. Blanpain (ed.), *The Council of Europe and the social challenges of the XXI century* (Kluwer Law, 2001) 19.

Furthermore, the ESC was instrumental in shaping the provisions of the Community Charter of Fundamental Social Rights of Workers adopted in 1989.[26] Although distinct from the CFR, the ESC is acknowledged in the latter's preamble as a key source of the rights contained within it[27]. In fact the standards provided for in the CFR were mainly adopted from the Revised Social Charter of 1996. While the ESC creates rights and obligations in international law, these only take effect upon incorporation into national legal systems. Moreover, as long as the EU is not a party to the Council of Europe, the provisions of the ESC are only applicable to the Union where the CoJ has recognised them as general principles of EU law.[28]

The ESC's monitoring system which requires member states to submit annual reports to the European Committee of Social Rights (ECSR)[29] has resulted in a number of decisions on the ESC's Article 6 which guarantees the right to collective bargaining and the right to strike (Article 6(4)). In particular, the ECSR has criticised states for restricting the bases for a right to strike, limiting the beneficiaries of the right and for imposing restrictive procedural requirements on the right itself. Overall however the case law of the ECSR has, for the most part, adopted a broad interpretation of Article 6. Thus, collective bargaining has consistently been understood as 'Any bargaining between one or more employers and a body of employees aimed at solving a problem of common interest, whatever its nature may be.'[30] A reference to 'conflicts of interest' can also be found in the ECSR's case law on Article 6(4). In its first Conclusions, the Committee recognised:

> [T]he right to collective action only in cases of conflicts of interests. It follows that it cannot be invoked in cases of conflicts of right.[31]

Divergences in national laws on the right to strike have meant that 'practice under the Charter has not developed normative interpretations with regard to […] the understanding of the concept of collective action' and 'no definitive analytical framework has been developed in respect of [Article

[26] The Charter was adopted as a 'solemn proclamation of fundamental social rights' (Preamble) in 1989 by eleven of the then twelve Member States of the European Economic Community. For a critique of the Charter see B. Bercusson, 'The European Community's Charter of Fundamental Social Rights of Workers' (1990) *MLR* 624 and P. Watson, 'The Community Social Charter' (1991) *CMLRev.* 37.

[27] Alongside the constitutional traditions and international obligations common to the Member States, the TEU and Community Treaties, the ECHR and the case-law of the CoJ and ECtHR.

[28] See J. Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart, 2003).

[29] The conclusions of the Committee are published every year and posted on the website of the Council of Europe (http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex_en.asp).

[30] Conclusions IV (1975) 50.

[31] Conclusions I (1969-1970) 38.

6(4)].'[32] Thus, while 'there has been a long line of development, and a comprehensive body of case law has been generated [from the first Conclusions of the ECSR in 1969], focusing in particular on the right to strike', the ECSR has been described as a 'relatively ineffective system of control'[33] and is only invoked by the CoJ on a selective basis. Interactions between the CoJ and the ECtHR in the field of non-discrimination law as well as the recent jurisprudence of the ECtHR, particularly in the area of collective labour rights, have greater potential not only to impact on the relationship between the two courts but also to shape the nature and form of labour rights. In our analysis of the case law we therefore focus on the ECtHR and the CoJ rather than the ECSR.

3. A NEW LANDSCAPE FOR EU LABOUR RIGHTS?

The entry into force of the Lisbon Treaty in 2009 has the potential to reorientate the economic underpinning of the EU and to give new impetus to those seeking a more prominent status for labour rights in an EU legal order. The CFR is significant for a number of reasons. First, it brings together the fundamental social rights contained in ILO Conventions, the ECHR, the ESC and other international treaties with the primary and secondary sources of EU law thus instilling some coherence to the hitherto nebulous and imprecise nature of social rights so that it can be seen as a linchpin in the consolidation of the EU and international law regimes. Moreover, it is the first time the EU has given a text containing fundamental social rights the status of primary law. In doing so, the CFR signifies a process of deconstruction of the traditional hierarchy of rights within EU law which prioritises economic over social rights. In giving constitutional status to the CFR, the Treaty of Lisbon has provided the opportunity for conflict between labour rights and free movement rights to be played out before the CoJ. The accession of the Union to the Council of Europe will formally subject the EU to international human rights standards justiciable through the ECtHR and will open up the possibility of the EU being subject to the supervisory mechanism of the ESC; which may, in turn, give new impetus to the protection of fundamental social rights within the EU legal order. The subjection of the EU to an external control by the ECtHR in the same way as its Member States is timely. As Lock explains,

> 'Considering that the European Union exercises its own powers transferred by the Member States, an extension of the Strasbourg Court's control to the European Union is only logical.

[32] Evju n 35, 203 and 200 which also contains a detailed discussion of the ECSR's decisions since its inception in relation to Article 6(4).

[33] S. Coppola, 'Social Rights in the European Union: The Possible Added Value of a Binding Charter of Fundamental Rights' in G. di Federico, *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer, 2011), 203.

> Furthermore, for a long time the European Union has made the protection of human rights a requirement for applicant Member States. Therefore, it is high time that the Union itself acceded in order to foster its credibility on human rights issues.'[34]

However, the Charter is not akin to a bill of rights for the EU legal order. To understand the likely impact of the Charter on EU law, it is necessary to consider its scope in terms of both when it is applicable and how its provisions should be interpreted. Koen Lenaerts[35] has stressed the continuing relevance of the CoJ's previous case law with which the interpretation of the Charter's provisions is bound through the provision of Article 51 and associated Explanations.[36] As Lenaerts explains, the wording of Article 51(1) which states that 'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law',[37] must be read alongside the Explanations relating to it.[38] This is because, although the Explanations themselves are not legally binding but rather an interpretative tool, their value is deemed to be higher than that of *travaux préparatoires* due to the particular importance placed on them by the authors of the Treaty of Lisbon and of the Charter. Hinting at the CoJ's difficult past (see above at 3) Lenaerts argues convincingly that,

> '[i]t would be very difficult for the ECJ to interpret the provisions of the Charter in a way conflicting with those explanations. Otherwise, the ECJ would be engaging in judicial activism. In my view, only where the explanations relating to the Charter provide no (complete) answer to the questions of interpretation with which the ECJ is confronted may the latter have recourse to other methods of interpretation.'[39]

Applying the case law, Lenaerts proposes two sets of circumstances where the Charter imposes obligations on the member states, in accordance with Article 51. The first arises where an EU obligation requires the member states to take action and the second where a member state

[34] T. Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) ELR 777.
[35] Vice-President of the CoJ.
[36] K. Lanaerts 'Exploring the Limits of the EU Charter of Fundamental Rights', European Constitutional Law Review, 8 (2012) 375–403.
[37] As Lanaerts notes (at 377, footnote 11) 'Art. 51(1) of the Charter does not refer to private parties. Thus, one could argue that, unlike general principles of EU law (see Case C-555/07, Kücükdeveci), the provisions of the Charter do not apply in a private dispute.'
[38] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF. The Explanation relating to Article 51 provides, 'As regards the Member States, it follows unambiguously from the case-law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of [EU] law'.
[39] Ibid at 402.

derogates from EU law. In situations where a member state enacts legislation that is not related to an obligation under EU law, the Charter is not applicable.[40]

Article 52 CFR lays down certain provisions relating to the scope of the guaranteed rights themselves, with Article 52(1) setting out the limitations of the fundamental rights contained therein. In considering its provisions, Lenaerts compares the Charter with the ECHR concluding that the system of 'qualified rights' provided for under the ECHR by which any limitation must be followed by a specific derogation clause, is distinct from the CFR's horizontal approach under which Article 52(1)[41] provides a 'general limitation clause' which acts to ensure that limitations on the exercise of the rights and freedoms recognized by the Charter must be fulfilled in order to comply with EU law.[42]

Article 52(2) preserves the EU *acquis* by referring to the Treaties, thus, 'Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. However, if read alongside the accompanying provisions of Articles 52(3) and 53,[43] the *status quo* will only be preserved as long as protections under EU law remain the same as or higher than those guaranteed by the ECHR. This is because Article 52(3),[44] which regulates the relationship between the ECHR and the CFR, 'is intended to ensure the necessary consistency between the Charter and the ECHR', 'without thereby adversely affecting the autonomy of [EU] law and of that of the [ECJ]'[45] As Lenaerts posits, EU law's autonomy may only be grounded in the principle 'of the more extensive protection', meaning that the level of protection guaranteed under EU law may never be lower than that guaranteed by the ECHR (as interpreted by the ECtHR). Furthermore, he asserts that 'a combined reading of Article 52(3) and Article 53 of the Charter demonstrates that if the ECtHR raises the level of protection of a fundamental right (or decides to expand its scope of application) so as to overtake the level of protection guaranteed by

[40] Ibid at 378.
[41] Which states that, '[a]ny limitation on the exercise of the rights and freedoms recognised by [the] Charter must be provided for by law'.
[42] Ibid at 388.
[43] Which provides, 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'
[44] Which provides, 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'
[45] Lanaerts ibid, note 37, at 394 quoting the Explanations relating to the provision.

EU law, then the autonomy of EU law may no longer exist'.[46] In such circumstances, the CoJ would be obliged to reinterpret the CFR so as to accord it the same level of protection as the ECHR.

Such a scenario may seem unlikely as the restrictions imposed on the CFR by its own general provisions and by its subjugation to the Treaties mean that its impact on the extension or enhancement of the social provisions of EU law appear to be symbolic rather than substantive. However, Lenaerts argues that the Charter *does* provide added value as its scope is broader than the general principles provided under EU law and may, thus, contribute to the discovery of new general principles.[47] Unsurprisingly (but disappointing nonetheless) he desists from speculating what impact this discovery of general principles from the Charter would have on EU law or indeed the nature or significance of the principles themselves. One reading of Lenaerts's proposition is that the development of new general principles through the application of the Charter could be used as a means of circumventing the pre-existing provisions of EU law in order to extend the scope of the Charter's application.

Assuming that its ability to draw on an enhanced range of provisions will provide new possibilities for the CoJ's precise interpretation of social rights, are we witnessing a new dawn for the Court's engagement with labour rights? In the next section, we consider the interplay between the CoJ and the ECtHR in order to consider whether, and to what extent, there is any evidence of convergence in the courts' jurisprudence, firstly, on the right to non-discrimination in employment, and, secondly, on the rights to participate in trade unions and to engage in collective bargaining in order to consider whether there has been any evidence of the constitutionalisation of labour rights in the decision-making of either court thus far and the likely consequences of this for the future.

4. THE JURISPRUDENCE OF THE COJ AND THE ECTHR: CONFLICT OR CONVERGENCE?

In her analysis of the contributions of both courts to the developing human rights *acquis*[48] Douglas-Scott posits that 'human rights provide a fresh focus for European integration in a new millennium',[49] noting that 'the Luxembourg courts refer to Strasbourg far more often than does Strasbourg to Luxembourg.'[50] This is largely attributable to the CoJ's early acknowledgment that the

[46] *Ibid*, at 394.
[47] *Ibid* at 386.
[48] S. Douglas-Scott, 'A Tale of Two Courts; Luxembourg, Strasbourg and the Growing European Human Rights *Acuis*' (2006) CMLR 629.
[49] *Ibid* at 629.
[50] *Ibid* at 644.

EEC was bound by fundamental rights and, with no Community catalogue, 'it had to find a source for those rights'.[51] However, although the ECHR was cited in over 70 of the Court of Justice's judgments between 1970 and 1998, 'citation of Strasbourg *jurisprudence* in Luxembourg is a relatively recent phenomenon, commencing in the late 1980s with the Opinions of Advocates General, and only occurring as late as 1996 in the case of the Court of Justice itself.'[52] In this context, it is helpful to recall that the two courts operate within different but related legal contexts: both give binding judgments, but the appropriate procedures and the respective competences are vastly different. The CoJ ensures a uniform interpretation of the Treaties and acts of the EU whereas the ECtHR is able to give judgments in individual applications after all domestic remedies have been exhausted.[53] Differences in approach are particularly evident in relation to the prohibition of discrimination. In contrast to the EU's well-developed body of discrimination law, Article 14 ECHR (the main provision prohibiting discrimination) is not a free-standing provision but must be invoked in conjunction with another substantive right in the Convention or the Protocols. When a separate breach of a substantive Article has been found, the ECtHR often does not examine a complaint under Article 14, unless discriminatory treatment forms a fundamental aspect of the case.[54]

4.1. NON-DISCRIMINATION IN EMPLOYMENT

The provision of individual rights, although more directly aligned to the market objectives of the EU and thus the subject of a plethora of case law emanating from the CoJ, have not provided such fertile ground for consideration by the ECtHR as their collective counterparts which are discussed in more detail below.[55] The exception to this arises in specific areas related to the non-discrimination principle where EU law is either silent or unclear as the following example of the courts' harmonious interplay regarding the application of the principle in cases concerning the rights of transsexuals illustrates.

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[51] *Ibid*.
[52] *Ibid* at 645.
[53] Art. 34 and 35(1) ECHR.
[54] For an analysis of Article 14's scope see R. O'Connell, 'Cinderella comes to the Ball: Art. 14 and the right to non-discrimination in the ECHR' (2009) Legal Studies 211.
[55] The CoJ's lack of reference to the ECHR's jurisprudence on non-discrimination is most likely explained by 'the vast case law on non-discrimination on grounds of sex coming from the ECJ and the fact that since the founding the European Economic Community Treaty included a provision on equal pay for equal work, which was interpreted as requiring sex equality in the workplace – the current Article 157 TFEU', European Parliament Report, DG for Internal Policies, Citizens' Rights and Constitutional Affairs, *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights* at 99.

In the courts' evolving relationship in the context of the non-discrimination principle, it is the interpretation of the right to respect for private and family life under Article 8 ECHR and the right to marriage under Article 12 ECHR which have provided the opportunity for interplay. In fact the CoJ's very first reference to the ECtHR's jurisprudence was in *P* v. *S* [56] in which the Court was concerned with the question of whether EU sex discrimination law precluded the dismissal of an individual on the grounds that he or she had undergone or intended to undergo gender reassignment. This was the beginning of an ongoing association between the two courts on the issues surrounding transsexualism and, although neither Court has commented explicitly on the other's activities in this context, the development of the case law displays a willingness to engage with and a benign respect for each other's jurisprudence. Their relationship, although understated, has been significant: in the absence of any explicit reference to transsexualism in the Treaties, the CoJ appears to have turned to the ECtHR for endorsement of its approach in a small but pertinent group of cases with its references to the latter court's jurisprudence reciprocated. This has produced an interesting interplay that, arguably, has led to the development of a substantive right to non-discrimination on the grounds of transsexualism.

In *P v S* the CoJ held that 'the right not to be discriminated against on grounds of sex constitutes a fundamental human right',[57] and could not be confined simply to discrimination based on the fact that a person is of one or other sex. Discrimination on the grounds of transsexualism, the Court held, is based, essentially if not exclusively, on the sex of the person concerned. The Court cited the definition of transsexualism laid down by the ECtHR in *Rees v UK* [58] which was not a case concerned with labour rights but rather with a claim that the UK's refusal to allow the applicant to change her birth certificate following gender reassignment was a breach of Article 8 ECHR. This was surprising as the *Rees* judgment hardly displayed a progressive approach to transsexual rights and thus did not provide support for the CoJ's judgment in *P* v. *S*.[59] In fact, Rees's claim was unsuccessful and the

[56] Case C-13/94 [1996] ECR I–2143.
[57] Para. 19
[58] [1986] 9 EHRR. The Court held (at para. 38) that 'the term "transsexual" is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group. '
[59] *Supra* n 32 at 646. The ECJ subsequently referred to the ECtHR's judgment in *Rees* as illustrative of a restrictive interpretation of Articles 8 and 12 ECHR in finding that neither provision was violated by disparate treatment of same-sex couples in relation to a refusal to provide employment-related benefits available to heterosexual partners to a same sex partner in Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621. This anomaly has now been remedied by Article 19 TFEU under which sexual orientation is specifically covered by the anti-discrimination principle.

ECtHR's judgment was later overruled in *Goodwin v United Kingdom*[60] in which reference was made to the CoJ's decision in *P v S* as the original source of the only legislative reform relating to the position of transsexuals in the UK. Again, *Goodwin* was not concerned with labour rights but whether the UK's prohibition of marriage between two transsexual women was compatible with Articles 8 and 12 ECHR. In *KB v National Health Service Pensions Agency and Secretary of State for Health*[61] the CoJ considered the entitlement of a transsexual partner to benefits relating to an occupational pension payable to a surviving spouse against the UK's prohibition of same sex marriage. The Court again referred to *Goodwin* in ruling that UK legislation which was in breach of Article 8 ECHR would be incompatible with (what was then) Article 141 EC. In a more recent reciprocal move the ECtHR in *Schalk and Kopf v. Austria*[62] made a significant reference to the CFR stressing that its Article 9 on the right to marry does not refer to men and women. On this basis, the Court proclaimed that it 'would no longer consider that the right to marry enshrined in Article 12 [of the Convention] must in all circumstances be limited to marriage between two persons of the opposite sex'.[63]

The application of the non-discrimination principle to transsexualism (and by association the right to same sex marriage) has certainly been developed through the courts' interplay, although their exchanges have been generally polite and deferential rather than wholly enthusiastic and engaging - more a positive acknowledgment of each other's activities than a dialogue. Nevertheless, the fledgling rights arising from the courts' jurisprudence have been significantly strengthened within the EU context through the specific reference accorded to the issue of gender reassignment in the recast Equal Treatment Directive 2006/54 which states within its Preamble that the principle of equal treatment 'applies to discrimination arising from the gender reassignment of a person'. [64] The references to the Strasbourg Court's jurisprudence by the CoJ have usually (although not always) been to the applicant's benefit and, while far from establishing a clear constitutional right to non-discrimination on the grounds of gender reassignment, the inclusion of transsexualism in the Recast Equal Treatment Directive must surely mean that Article 19 TFEU's reference to 'sex' at least has the potential to include transsexualism.

4.2. COLLECTIVE LABOUR RIGHTS

[60] [2002] 35 EHRR 447.
[61] Case C-117/01 [2004] ECR I-541.
[62] *Schalk and Kopf v Austria*, Application (2011) 53 E.H.R.R. 20.
[63] *Ibid* at paras 93-94.
[64] Recital 3.

Differences in the willingness to recognise the constitutional nature of certain social rights have become particularly visible in recent decisions of the CoJ and the ECtHR on collective labour rights. In this regard, the emphasis placed on the provisions of the CFR and the ESC which guarantee collective labour rights has also varied. The CFR provides protection for a number of collective labour rights. Article 12 guarantees the right to freedom of association and specifically includes the right to form and join trade unions. Contained in the Solidarity chapter, Article 27 guarantees that workers must be informed and consulted within an undertaking and Article 28 provides workers, employers and their representative organisations with a right of collective bargaining and action. Both of these Articles find their origin in the ESC and it was thus expected that the ECSR's jurisprudence would be at least persuasive and would result in an interpretation of the provisions consistent with the ESC.[65] From the wording of Articles 12 and 28 it is clear that the aim of both provisions is to provide workers with a clearly defined right.[66] Article 27 however is much more ambiguous in its nature; blurring the 'rights/principles distinction'.[67] The equivalent provision in the ESC can be found in Article 21. The ECSR has consistently interpreted this provision in a broad manner requiring adequate legal remedies for workers to be able to enforce the right as well as appropriate sanctions for employers who fail to fulfil their obligations.[68]

The CoJ had the opportunity to clarify the interpretation of Article 27 in its recent case *AMS v CGT*[69]. At issue in the case was whether it could be invoked horizontally in a dispute between private parties so as to preclude the application of a provision of national law which violated EU law. The CoJ recognised the vagaries of Article 27 and suggested that 'for this Article to be fully effective, it must be given more specific expression in EU law.'[70] However, in distinguishing the case from its decision in *Kücükdeveci*[71] - where the CFR's Article 21 prohibiting age discrimination was found to give individuals an enforceable right – the CoJ found that Article 27 was not sufficiently clear in its content to bestow a subjective right on workers. As such, it could not be relied upon in this case between private parties. It is disappointing that the CoJ – unlike the Advocate General[72] – did not

[65] B. Hepple, 'The EU Charter of Fundamental Rights' (2001) *Industrial Law Journal* 225
[66] *Ibid*, 228-9.
[67] Kenner n 39, 19.
[68] For a general overview of the ECSR's jurisprudence see Council of Europe, *Digest of the Case Law of the European Committee of Social Rights,* 2008. For the nature of legal remedies see Conclusions 2003, Romania, p. 420 and on sanctions see Conclusions 2005, Lithuania, p. 378.
[69] Case C-176/12, judgment of 15 January 2014.
[70] Para 45.
[71] Case C-555/07 *Kücükdeveci* [2010] ECR I-365. For more information see, for example, G. Thüsing and S. Horler, 'Case C-555/07 Seda Küküdeveci v Sedex' (2010) *CMLRev.* 1161.
[72] Opinion of 18th July 2013. Advocate General Cruz Villalón argues in favour of horizontal effect to be granted to Article 27 and discusses whether Article 27 should be seen as a right or a principle. He argues in favour of

discuss the content or scope of the provision; nor did the CoJ engage with the ECSR's jurisprudence on the ESC's equivalent provision upon which Article 27 is based. It therefore remains unclear whether Article 27 contains an enforceable right or should be considered a principle which merely guides social policy. The decision not to give Article 27 horizontal effect is particularly unfortunate as disputes over inadequate information and consultation are most likely to occur between private parties. As such, the CoJ's decision in *AMS* concretises the CoJ's reluctance – which has become evident in a string of recent case law – to endow collective labour rights with a constitutional nature which stands in contrast to the ECtHR's recent engagement with such rights.

The decisions issued by both courts in a string of cases between 2007 and 2009 in *Viking*[73]*, Laval*[74]*, Demir and Baykara*[75], and *Enerji Yapi-Yol Sen*[76] arguably place the courts at opposite ends of a spectrum with the ECtHR invoking *inter alia* the ECSR's case law in order to move towards the constitutionalisation of the right to collective bargaining and the right to collective action, whereas the CoJ has weakened the level of protection afforded to collective rights in an EU context. The CoJ's more recent judgment in *Alemo-Herron v Parkwood Leisure Ltd*[77] issued in 2013 indicates that the CoJ is neither likely to return to its historical preference for not interfering in national industrial relations systems nor does it seem prepared to endow collective rights with the status of fundamental rights and the protection which that would afford them. A discussion of this jurisprudence therefore begs the question to what extent there has been any evidence of the constitutionalisation of labour rights in the decision-making of either Court thus far – especially by way of contrast to the right to non-discrimination – and the likely consequences of this for the future.

The ECtHR has been faced with the right to collective bargaining on a number of occasions in cases brought under Article 11 ECHR which guarantees the right to freedom of association. It has consistently held that 'the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11'[78]. Similarly, it has always found restrictions on the

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the latter and then considers how it may nonetheless be enforceable through implementation by an act such as a Directive.

[73] *Supra* n 29.

[74] *Ibid*.

[75] [2009] 48 E.H.R.R. 54

[76] (2009, unreported).

[77] C-426/11 judgment of 18 July 2013. For an analysis of the judgment see J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) *Industrial Law Journal* 434.

[78] See *National Union of Belgian Police* (1979-80) 1 E.H.R.R. 578; *Swedish Engine Drivers' Union* (1979-80) 1 E.H.R.R. 617; and *Schmidt and Dahlström v Sweden* (1979-80) 1 E.H.R.R. 632.

right to collective action to be justifiable as being 'necessary in a democratic society'[79] thereby deferring to the national level. The Court first departed from this approach in *Wilson v UK*[80] and *ASLEF v UK*[81]. However, it was the decision in *Demir* and *Baykara*, where the Court relied *inter alia* on ILO Conventions 98 and 151, the ESC and the CFR in holding that 'the right to bargain collectively […] has, in principle, become one of the essential elements of […] Article 11 of the Convention'[82], which enshrined a fundamental right to collective bargaining in the ECHR. The Court justified its change of approach to Article 11 on the basis that it should 'take account of the perceptible evolution in such matters, in both international law and domestic legal systems.'[83] Interestingly, the case was decided shortly before the CFR became a legally binding document but after the CoJ had begun to rely regularly on the Charter as an influential source of human rights norms.

In *Enerji Yapi-Yol Sen* the ECtHR went even further by recognising that 'strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests.'[84] Ewing and Hendy argue that not only does this decision 'strongly suggest that the court was accepting that the right to strike, insofar as it is exercised in furtherance of collective bargaining, is equally 'essential'' but also that 'breach of the right to strike alone [in this case] was a breach of Article 11.'[85] Also, unlike in previous cases, the Court did not accept the justification put forward by the Turkish government and instead found the restriction to be unnecessary in a democratic society[86]. Deriving a right to collective action from a right to collective bargaining is not a novel concept; indeed, the same approach is used in a number of European constitutions. However, there are signs that the ECtHR is not confining itself to an ''industrial relations' conception of the right to strike' but is instead following the ILO's example by embracing a ''human rights' conception' of collective labour rights.[87] If the same interpretation were given to either Articles 12 or 8 CFR – both of which areframed from the outset in broader terms than Article 11 ECHR - this could have the potential to introduce a 'human rights' conception' of collective labour rights into the EU's legal order which, in turn, could engender the constitutionalisation of those rights within the EU.

[79] *Ibid.*
[80] [2002] ECHR 552.
[81] (2007) 45 EHRR 34.
[82] Para. 154.
[83] Para. 153.
[84] Para. 24.
[85] K.D. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) Industrial Law Journal 2 at 14.

[87] *Supra* n 62 at 16.

The CoJ's approach thus far has been strikingly different. Rather than progressively widening the status and protection given to collective labour rights as the ECtHR has done, the CoJ initially refrained from incorporating labour rights as constitutional rights into the EU legal order, deferring instead to their protection at a national level. Thus, in *Albany*[88] the CoJ found that, provided collective agreements pursue social objectives compatible with the EC Treaty, such agreements would fall outside the scope of competition law. Writing in reaction to the decision, Rödl argues that:

> The outcome of the case could not correctly have been otherwise. It would be unthinkable to interpret national collective agreements as [anti-competitive agreements], which would then only be valid if they exceptionally did not affect the Common Market. It would have meant a blatant revocation of the social compromise for integration which would have demolished the European integration project politically, if the Court of Justice had annihilated the foundation of every national labour constitution by way of attacking collective agreements.[89]

Such deference to national labour constitutions was also expected of the CoJ in its decisions in *Viking* and L*aval* where the Court was asked to adjudicate between fundamental economic freedoms guaranteed under the EC Treaty and the right to take collective action. Contrary to predictions however, the Court did not adopt an *Albany* approach but instead recognised the existence of a fundamental right to take collective action (citing *inter alia* the CFR) which, if it conflicts with EU economic freedoms, has to be exercised in accordance with the principle of proportionality. As Fudge explains, 'the balance [the CoJ] has struck not only encroaches substantially on the workers' fundamental freedoms, it narrows the right of member states to determine their national labour regimes.'[90] As such, these decisions are not only 'a flagrant breach of the principle of the protection of member state labour constitutions against European law'[91] , but also reinforce the economic underpinnings of the EU to the detriment of labour rights. While the CoJ much like the ECtHR in *Demir and Baykara* and in *Enerji Yapi-Yol Sen* referred to the ESC, the CFR[92] and to relevant ILO Conventions[93] in its judgments in both cases, it did not attach the same significance to these

[88] Case C-67/96 [1999] ECR I-5751.
[89] F. Rödl, 'The labour constitution of the European Union' in R. Letelier and J. Menéndez (eds.), *The Sinews of European Peace: Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, Arena Report No 7/09, at 412.
[90] *Supra* n 12 at 264.
[91] *Supra* n 67 at 413.
[92] At para. 25 in *Viking* and at para. 90-91 in *Laval*.
[93] ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise at para. 43 in *Viking* and at para. 90 in *Laval*.

instruments thus failing to recognise the constitutional nature of the collective labour rights at issue. In particular, in identifying the standards to be used in determining whether collective action was proportionate, the CoJ in *Viking* and *Laval* referred only to the 'hard law' provisions of the Treaty.[94] It thus appears that the CoJ – unlike the ECtHR in *Demir and Baykara* – was unwilling to attach significant weight to the ECSR's jurisprudence or the Charter's collective labour provisions as long as they lacked legal force. The CoJ's decisions in *Viking* and *Laval* preceded those of the ECtHR, so it is not surprising that the CoJ did not refer to the Strasbourg jurisprudence. However, the legitimacy of the decisions must be reassessed in light of the ECtHR's decisions in *Demir* and *Enerji*. Applying Lenaerts' supposition regarding the combined reading of Articles 52(3) and 53 of the CFR in circumstances where the ECtHR raises the level of protection or expands the application of a fundamental right to provide a higher level of protection than that provided by EU law, the autonomy of EU law is called into question.[95] In addition, the Explanations provided for Article 12 CFR clarify that its meaning 'is the same as that of the ECHR [and] that limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR.' Accordingly, the CoJ's interpretation of collective labour rights as being subordinate to the EU's economic freedoms is not consistent with the ECtHR's assertion that the right to collective bargaining and the right to strike form part of Article 11 ECHR and, as such, must be recognised as fundamental rights. As is clear from Articles 52(3) and 53 CFR, in cases where the ECtHR has widened the scope of a right, the CoJ would be obliged to reinterpret the CFR so as to accord it the same level of protection as the ECHR. However, the decision in *Alemo-Herron*, handed down in July 2013, seems to indicate that the CoJ is neither likely to return to its historical preference for not interfering in national industrial relations systems nor does it seem willing to follow the ECtHR in moving towards the recognition of the constitutional nature of collective labour rights.

In *Alemo-Herron* the CoJ refused to allow the applicability of a collective agreement following the transfer of an undertaking from the public sector to a private sector employer who had not been involved in the collective bargaining process ('dynamic protection'). In doing so, the CoJ prohibited UK law fromapplying a more favourable system towards employees[96] than that required under EU law. In order to reach its conclusion, the CoJ invoked Article 16 CFR which guarantees the freedom to conduct a business. Interestingly, the CoJ did not consider the CFR's counter provisions on collective labour rights (Articles 12 or 28). The judgment, while not factually similar to *Viking, Laval, Demir and Baykara,* and *Enerji Yapi-Yol Sen*, illustrates the disinterest which the CoJ shows in

[94] Paras. 104-5.
[95] See page 12 ibid.
[96] Para. 24.

protecting collective labour rights when they conflict with economic considerations. In its judgments in *Demir and Baykara* and *Enerji Yapi-Yol Sen*, the ECtHR provided the CoJ with the reasoning which it could have applied in *Alemo-Herron* in order to give fresh impetus to the constitutionalisation process of collective labour rights and to comply with its obligations under Article 52(3) CFR: allowing for dynamic protection by recognising that it was an essential part of a worker's right to collective bargaining or freedom of association as guaranteed by the CFR. Instead, the CoJ gave preference to economic rights contained in the CFR which, like in *Viking* and *Laval*, trumped collective labour rights.

5. CONCLUSIONS

The changes made to the EU's legal order by the Lisbon Treaty, particularly the constitutional status given to the CFR, undoubtedly carry the promise of guaranteed labour rights. However, although the old hierarchy of rights may now be consigned to the past, the clear constitutional status conferred on the free movement rights available under EU law means that the conflict between social and economic rights is far from settled and is likely to manifest itself in new ways. The most promising route by which collective and individual labour rights might be recognised as fundamentally guaranteed lies in the explicit need to adopt and apply a human rights framework following the EU's accession to the Council of Europe so that the status of such rights is compatible with that provided under international law. However, progress will depend largely on the developing jurisprudence of the relevant courts. In this context a very different picture emerges in respect of individual and collective rights to date. In respect of the former, it is unlikely that accession of the EU to the ECHR will significantly increase the visibility and status of the right to non-discrimination in employment. This assertion is supported not only by the courts' jurisprudence, but also by the treaties underpinning both legal orders. The EU provides stronger protection in the sphere of non-discrimination than the ECHR's comparable provisions and jurisprudence: the right to non-discrimination does not exist as a stand-alone right under the Convention and the ECtHR's jurisprudence has been comparably weak in this area. Nonetheless, expansion of the scope and nature of the right has certainly benefitted from dialogue between the courts, albeit in limited areas. In contrast, accession of the EU to the Council of Europe at least has the potential to herald a new dawn for the CoJ's engagement with collective labour rights. So far, attempts to bring cases on similar grounds as *Viking* and *Laval* before either Court in order to clarify the level of protection and status granted to collective labour rights in a European context have failed. The CoJ's decisions in *Alemo-Herron* and *AMS* indicate that the CoJ is not willing to endow collective labour rights with a

constitutional status. Yet in providing such strong support for the right to engage in collective bargaining and to take collective action, the ECtHR has embarked on a path which makes it difficult to see how both systems of protection can be reconciled. Both courts' increasing reliance on the CFR could provide the linchpin in this respect, particularly in the sphere of collective labour rights, given the obligation imposed by Articles 52(3) and Article 53 CFR to maintain consistency in the scope of the Charter and the ECHR.

In contrasting the ECtHR's jurisprudence on collective labour rights with that of the CoJ, it is apparent that a chasm is opening up. If Ewing and Hendy's assertion is correct and the ECtHR is moving beyond an ''industrial relations' conception of the right to strike' by following the ILO's embracement of a ''human rights' conception' of collective labour rights, then surely the CoJ's practice of limiting the reach of such rights when they conflict with the Treaties' economic freedoms is no longer tenable if the EU is to accede to the Council of Europe?