Labour Rights or Human Rights?
- It is Time to Move On

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I

1 The title of this opening session is 'labour rights or human rights', a title which seems to invite discussion of whether labour rights are human rights, and to consider the implications of the answer. What would it mean to say that labour rights are human rights? And what would it mean to say that they are not?

2 As my adaptation of the title suggests, my own view is that the choice is a false one. This is not a matter on which we need to agonise, for these decisions have already been taken. This is a battle that has been won. Labour rights are human rights. Why? Because a fistful of international treaties tell us so. It is time to move on.[1] Time to stop the introspection.

3 Perhaps the most important of these international human rights treaties are ILO Conventions 87 and 98, with Art 3 of the former providing by that

> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

4 For those who don't know, the ILO is a UN agency, a quite unique UN agency.[2] ILO conventions are treaties under international law, and these latter Conventions have been ratified by 153 and 164 countries respectively, including all EU member states. Not only that. As recently as 2010, the Heads of Government of all EU member states reaffirmed their commitment to respect both of these – other - measures.[3]

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[1] See V Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

[2] See ILO Declaration of Philadelphia of 1944: '. . . the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare'. Although now taken for granted, at the inception of the ILO this was seen to be 'an almost revolutionary novelty and an astonishing break with the tradition of international conferences': E J Phelan, *Yes and Albert Thomas* (London, 1936), p 4.

[3] EU-Korea Free Trade Agreement, Art 13.4: 'The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely freedom of association and the effective recognition of the right to collective bargaining'. For a brief discussion of this agreement, see K D Ewing, 'International Regulation', in C Frege and J Kelly (eds), *Comparative Employment*

5 But of course ILO Conventions 87 and 98 do not stand alone. Also important are the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, both of which make provision for labour rights. In both cases it is expressly provided that the rights in question (to organise, to bargain and to strike in the latter case), should not fall below the level set by ILO Convention 87.[4]

6 Equally important for a European audience are the two great human rights instruments of the Council of Europe, the European Convention on Human Rights of 1950 and the European Social Charter of 1961 (and 1996).[5] Both contain labour rights, largely by implication in the case of the former, but explicitly in the case of the latter. The first country to sign and ratify the Social Charter was the United Kingdom in 1962 – governed then by the Conservative Party.[6]

7 It is quite possible to argue that labour rights should not be regarded as human rights. But as a lawyer I am concerned today only with practical matters of what is, not with metaphysical matters of what should be. It is also possible to contest the content and substance of these human rights,[7] as employers are currently doing at the ILO by implausibly denying that the right to freedom of association includes the right to strike.[8]

8 But having made undertakings time and time again in legally binding documents to respect labour rights as human rights, we are entitled to expect governments to fulfil their obligations and to be able to do so graciously. Indeed, in an important lecture delivered at the University of Cambridge in 2006, Britain's most celebrated judge in modern time was under no doubt that,

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Relations in the Global Economy (London, 2013), ch 23.

[4] See ICCPR, Art 22(3), and ICESCR, Art 8(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'.

[5] On the importance of the Social Charter, see TFEU, Art 151, and EU Charter of Fundamental Rights, preamble: 'This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights'.

[6] The United Kingdom has not, however, ratified the Revised Social Charter of 1996, or the Collective Complaints Protocol of 1995.

[7] It is also possible to contest the manner of their enforcement. See C Gearty and V Mantouvalou, *Debating Social Rights* (Oxford, 2011).

[8] For reasons written about elsewhere, this strikes me as an implausible argument, particularly in light of the explicit recognition of the right to strike in several of the treaties to which I have referred (notably the ICESR and the European Social Charter). For a compelling account, see J Bellace 'The ILO and the Right to Strike' (2014) 153 *Int Lab Rev* 29. Unless I have missed something, it is also instructive that none of the processes discussed below pushing deregulation (EU, OECD) refer to the right to strike as an issue.

> the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious.[9]

9 In addressing this question of labour rights and human rights, my concern today is specifically with the right to bargain collectively, recognised by ILO Convention 98, Art 4 of which provides that

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

10 We can spend time discussing why the right to bargain collectively is the most important of all labour rights, though perhaps it will emerge by implication from what follows.[10] But my concern is twofold:

- first to track the very recent erosion of this fundamental right and its implications for the European project as a whole; but
- secondly to assess the extent to which these developments are compatible with the legal obligations of members states.

Has the financial crisis created a crisis of legality in the European Union?

II

11 I would like to begin by taking you back to a speech made by Jaques Delors, then President of the European Commission to the British Trades Union Congress. This was September 1988. Delors said:

> It would be unacceptable for Europe to become a source of social regression, while we are trying rediscover together the road to prosperity and employment.
> The European Commission has suggested the following principles on which to base the definition and implementation of these rules:
> First, measures adopted to complete the large market should not diminish the level of social protection already achieved in the member states.
> Second, the internal market should be designed to benefit each and every citizen of the Community. It is therefore necessary to improve worker's living and working conditions, and to provide better protection for health and safety at work.

[9] Lord Bingham, 'The Rule of Law' [2007] 66 CLJ 67. Lord Bingham was addressing the provisions of the Constitutional Reform Act 2005, s 1, which refers to the 'existing constitutional principle of the rule of law', without defining what that principle means. Lord Bingham sought to fill the gap in a public lecture. Also T Bingham, *The Rule of Law* (Harmondsworth, 2010).
[10] See also the excellent account by L Hayes and T Novitz, *Trade Unions and Economic Inequality* (Institute of Employment Rights, 2014).

> Third, the measures to be taken will concern the area of collective bargaining and legislation.[11]

12 From its origins in 1957, the European Economic Community was always a business-oriented organisation, in which the interests of the citizens of the States which made it up were very much of secondary interest. Although the social dimension expanded in the 1970s,[12] it froze in the 1980s and would expand under Delors' leadership. Delors realised that support for the European project was conditional and that it could not be commanded or demanded. There had to be something in it for everyone. After setting out his vision for a social dimension in what was undoubtedly a multi-layered political speech, Delors made what appeared to be a promise:

> The establishment of a platform of guaranteed social rights, containing general principles, such as every worker's right to be covered by a collective agreement, and more specific measures concerning, for example, the status of temporary work…[13]

- **Embedding 'Collective Bargaining' as a Source of Law**

13 That promise was kept for about 20 years thereafter, beginning with the Maastricht Treaty in 1992, with its ambitious anticipation of an elaborate and sophisticated framework for the integration of trade unions into the institutional structures of the law – making processes on the one hand, and decision – making within corporations on the other.[14] Thus social dialogue between the representatives of business and capital was to become a way of making law at the Union level, and also a way of transposing it at national level.[15]

14 So in TFEU, arts 154 and 155 we have what Julia Lopez Lopez describes as a 'neo-corporatist and coordinated model of capitalism', which 'survives' at EU level, with 'norms and instruments that have an enormous impact back at the national level, setting a minimal floor of rights and principles for both national-level legislation and judges'.[16] These begin with an obligation on the Commission to promote dialogue between management and labour, to consult generally about social policy and to consult also about specific proposals.

15 But more importantly, this 'neo-corporatist' model not only anticipates agreements between management and labour on a potentially wide range of matters. It also creates procedures for the conversion of these agreements into law, imposing duties on Member States affecting all employers and all workers. By virtue of what is

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[11] TUC Annual Report 1988, p _. Coincidentally, we were reminded of the importance of this speech by a *BBC News* item on Sunday 24 August 2014, when parts of the speech were broadcast in a feature edited by Professor Vernon Bogdanor, including in particular the passage dealing with collective bargaining.
[12] See B A Hepple, 'The Crisis in EEC Labour Law (1987) 16 ILJ 77.
[13] TUC Annual Report, above, p _..
[14] See B Bercusson, 'Maastricht: A Fundamental Change in European Labour Law' (1992) 23 IRJ 177.
[15] For the origins of this 'Social Dialogue' process, see B Hepple, *European Social Dialogue – Alibi or Opportunity* (Institute of Employment Rights, 1993).
[16] J Lopez Lopez, 'Solidarity and the Resocialisation of Risk', in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge, 2013), p 357.

now TFEU, Art 155, some of these agreements concluded at EU level could be implemented at the joint request of both sides 'by a Council decision on a proposal from the Commission', with the European Parliament to be 'informed'.

16 For those of us schooled in the traditions of liberal democracy, the by-passing of Parliament in this way was a bold and radical step.[17] It was perhaps inevitable that this procedure would be challenged on grounds of its democratic legitimacy.[18] But the Court of First Instance dismissed the challenge, taking the view that

> the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.[19]

17 Questions of democratic legitimacy thus resolved, the procedure led to a steady stream of legislative instruments, dealing with parental leave, part-time work, and fixed-term work.[20] Although we may quibble about the content of these instruments, the main point for present purposes relates to the process, and to what Lopez Lopez refers to as the 'crucial role' of the ETUC in constructing this important group of agreements, this providing 'evidence of the governance role played by unions' at the highest level.[21]

18 But not only are these agreements made by a process of social dialogue, with outcomes that have general application. It is also an important feature of the agreements that they may be implemented at national level by a similar process. Thus, the Preamble to Parental Leave Directive provides that 'Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as long as such Member States take all the steps necessary to ensure that they can at all times guarantee the results imposed by this Directive'.

19 But although provision was thus made for the making of law by Social Dialogue, and at the same time for the implementation of law at national level by collective agreement (subject to requirements imposed by the courts),[22] no provision was made

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[17] See *McGowan v Labour Court* [2013] IESC 21, considered more fully below, but turning largely on law making by collective bargaining in a system where the constitution provides that 'The sole and exclusive power for making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State' (Art 15.2.1).

[18] Case T-135/96, *UEAPME v Council of the European Union* [1998] ECR – II 02335. See B Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28 ILJ 153.

[19] *UEAPME*, ibid, para 89.

[20] But not temporary and agency work on which agreement between the social partners proved impossible, as the preamble to Directive 2008/14/EC makes very clear.

[21] 'Solidarity and the Resocialisation of Risk', above, p 360

[22] See B Bercusson, 'Collective Bargaining and the Protection of Social Rights in Europe', in K D Ewing, C A Gearty and B A Hepple (eds), *Human Rights and Labour Law – Essays for Paul O'Higgins* (London,1994), ch 5.

to ensure that the infrastructure existed at national level to enable collective bargaining to perform this regulatory role.[23] This is despite the fact that

> European social dialogue will not succeed if it is not constructed atop strong collective bargaining structures supported by strong trade unions in Member States.[24]

20 European labour law thus presumed the existence of a regulatory framework at national law but did not demand it. With the benefit of hindsight this was perhaps a mistake. But at the time, it must have seemed generally unnecessary to address at Community level that for which provision was already made at national level. Indeed in many of the EU15, the right to bargain collectively was included in the national constitution, perhaps reflecting the prevailing economic orthodoxy at the time these constitutions were drafted – usually between the mid 1940s and mid 1970s.[25]

21 So, if we take Greece, Spain and Portugal, we find that

- 'general conditions of work shall be determined by law and supplemented by collective agreements arrived at by free collective bargaining' (Greece, Art 22);
- 'law shall guarantee the right to collective labor negotiations between the representatives of workers and employers, as well as the binding force of agreements' (Spain, Art 37); and
- 'trade union associations have the powers to exercise the right of concluding collective agreements', though 'the rules governing the powers to conclude collective labor agreements and the scope of their provisions are laid down by law' (Portugal, Art 56).[26]

22 Otherwise, with the exception of the United Kingdom, most member states had robust collective bargaining procedures in place, most member states had multi employer regulatory systems of collective bargaining in place, and according to the OECD in 1994 most member states had high levels of collective bargaining density.[27] In this way, European labour law was built upon national labour, highlighting Bercusson's point that European Labour Law was a synthesis of laws and practices developed at different levels, but being altogether greater than the sum of its parts.

- **Engaging Collective Bargaining as a Regulatory Process**

[23] The closest we got to a right to bargain collectively - whether in the implementation of EU law or otherwise – was the provision in the non binding Charter of the Fundamental Social Rights of Workers of 1989 that 'Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice'.

[24] Alan Bogg and Ruth Dukes, 'The European Social Dialogue – From Autonomy to Here', in Countouris and Freedland (eds), above, p 492.

[25] See further, K D Ewing, 'Economic Rights', in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, 2013), ch 50.

[26] The Portuguese constitution also guarantees trade unions the right to participate in the preparation of labour legislation, the management of social security institutions, the monitoring of the implementation of economic and social plans, and to be represented on bodies engaged in the harmonisation of social questions (Art 56).

[27] OECD, *Economic Outlook 1994*, ch 5 – dealing with 'Collective Bargaining Levels and Coverage'.

23 But not only was collective bargaining thus embedded at the highest level as an instrument for making the law, collective bargaining had/has an important role in the implementation of European labour law, whether made under the Social Dialogue procedure or otherwise. If at least initially the right to bargain collectively was not expressly provided for at European level, steps were thus taken to promote and encourage collective bargaining activity, with collective bargaining being a means for the implementation of European labour law.

24 States that had strong collective bargaining procedures in place would thus have certain flexibilities when it came to the transposition of directives. But in engaging with collective bargaining in this way, it is important to note that it was an engagement with and support for a particular form of collective bargaining, an implicit and perhaps unintended distinction being drawn between the regulatory and representative functions of collective bargaining. It is the former (the stronger form) with which European labour law engaged, not the latter (the weaker form).[28]

25 Apart from treaty provisions that allow for the implementation of directives by collective agreements, this engagement with collective bargaining takes two forms. The first is the recognition of collective bargaining as a **regulatory source**, and the second is by the recognition of collective bargaining as a **regulatory method**. The Pos**ted Workers Directive (96/71/EC)** best illustrates the former, requiring employers posting workers from one country to another to observe certain terms and conditions of employment operating in the host country.

26 But which terms and conditions of employment? The relevant terms and conditions are of course set out in Art 3(1)(a)-(g). But about the source of these terms and conditions? Here Art 3(1) applied to the afore-mentioned terms and conditions where these are laid down by:

- law, regulation or administrative provision, and/or

- collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8.

27 So not all collective agreements, but only those 'declared universally applicable', as provided by Art 3(8), which means 'collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned'. It is also provided that

> In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:
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> - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
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> - collective agreements which have been concluded by the most

[28] On this distinction, see K D Ewing, 'The Function of Trade Union' (2005) 34 ILJ 1.

> representative employers' and labour organizations at national level and which are applied throughout national territory.

28 These are curious provisions, but they provide a glimpse of recognition of the importance of collective bargaining as a regulatory method in member states, with a quasi-legislative role. But if these provisions are curious, they are also paradoxical in the sense that – as interpreted by the ECJ - they privilege the most sophisticated regulatory collective bargaining regimes. There is no such recognition of those systems that have relatively weak collective bargaining regimes, where – as in the United Kingdom - trade unions operate in a representative rather than regulatory capacity.[29]

29 In terms of engagement with collective bargaining as a regulatory method, the most vivid example of this is the Working Time Directive, which anticipates a role for collective bargaining in three ways. First as a way of establishing norms, as in the case of rest breaks, in relation to which Art 4 provides that

> Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.

Indeed as Brian Bercusson pointed out, on this issue collective bargaining is the principle regulatory tool, with legislation to step in only in its absence.[30]

30 But beyond the **norm-establishing** role of collective bargaining, is a **norm-adapting** role. Thus, collective agreements may be the means for derogating from certain standards set out in the Directive, presumably on the assumption that the role of responsible trade unions in the process of securing flexibility will help to ensure that workers are not short-changed. This of course is subject to equivalent protections being introduced in some cases, or appropriate protection where this is not possible.[31]

31 In these ways, the Working Time Directive engages with collective bargaining in a regulatory sense. Without wishing to labour the point, nevertheless, the regulatory function of a process, which may bind those who are not participants and those who have no influence whatsoever over its outcome), is also to be seen in the **norm-extension** role for collective bargaining, it being further provided that any such derogating collective agreements may be extended to other workers in accordance with national legislation and/or practice.[32]

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[29] On the problems caused in systems with weak regulatory bargaining systems, see C Barnard, 'British Jobs for British Workers: the Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU market' (2009) 38 ILJ 245.

[30] B Bercusson, *European Labour Law* (2nd ed, Cambridge, 2009).

[31] Directive 2003/88, Art 18: 'Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level'.

[32] On the principle of extension, see ILO Recommendation 91 (Collective Agreements Recommendation, 1951), Art 5. This is relevant in light of the *McGowan* case above, Art 5(1)

32 This is not to say that the Working Time Directive cannot be adapted to the more primitive representative bargaining arrangements to be found in the United Kingdom, for which special provision appears to have been made. But again without wishing to labour the point, the regulatory nature of this engagement with collective bargaining is to be seen in the important *Pfeiffer* case,[33] where it was held that any agreement to exceed the 48 hour working week must be given individually and not collectively, that is to say personally and not by a representative or agent.

- **Entrenching Collective Bargaining as a Fundamental Right**

33 It is true that the right to bargain collectively was recognised by the Charter of the Fundamental Social Rights of Workers. But this was a programmatic statement of intent rather than a legally binding instrument. For all the importance of collective bargaining in European Labour Law, the burden of carrying the right lay with national law, and in many cases national constitutions. That, however, changed, to some extent, when the right to bargain collectively was swept into the Charter of Fundamental Rights of the EU in 2000, along with other labour rights.

34 The EU Charter is hugely symbolic, not least because it includes social and economic rights in the same document as civil and political rights, and gives them the same legal status. Although not unusual in national constitutions, this is the first time this has been done in a treaty of this kind. It is true of course that the Council of Europe instruments – the ECHR and the Social Charter - cover much the same ground. But despite claims in the preamble to the latter about the indivisibility of human rights, it is clear if only from the manner of their enforcement that the Charter is subordinate to the Convention.

35 So far as the right to bargain collectively is concerned, there are two important provisions of the Charter. The first and most obvious is Art 28, which provides as follows:

> 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.

Note the substance of the right. It is the right of workers individually and their organisations. It is a right defined by Community law and national laws and practices. And it is a right which is open as to the levels at which it may be exercised – enterprise, sector, or national.

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providing that '(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement'.

[33] *Joined Cases 397-01 to 403-01, Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-08835.

36 But note too that Art 28 does not on its own fill the gap in European Labour Law described above, to the extent that it does not create a free-standing right, but is highly conditional on Community law and national laws being in place. At the time of the Lisbon treaty giving the Charter legal effects, there was no Community law guaranteeing the right to bargain collectively, apart from the quite specific forms of engagement explained above. To that extent Art 28 appeared to be rather empty of substance.

37 Art 28 is, however, not alone. Also - unexpectedly - important for the right to bargain collectively is Article 12, which provides that everyone has a right to freedom of association, said to imply 'the right of everyone to form and to join trade unions for the protection of his or her interests'. The latter has become unexpectedly significant in view of the provisions of Article 52(3) which provides that

> 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.

38 The reason why this is important is because of the decision of the ECtHR in *Demir and Baycara v Turkey*,[34] which brought to life the ECHR, Article 11, important because Article 11 of the ECHR corresponds to the EU Charter, Article 12. The ECtHR in that case appeared to impose a duty on member states to have in place collective bargaining regimes consistent with ILO Convention 98 (which all member states have ratified). According to the Court:

> having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.[35]

39 One effect of *Demir and Baycara v Turkey* relates to its impact on the relationship between Articles 12 and 28 of the Charter. The effect of that influence could work in one of two ways. One possibility is that Art 28 of the EU Charter has become redundant because of the higher standard of Art 12. Or Art 28 is informed by Art 12, so that when Art 28 refers to a right in accordance with Community law, that Community law must include Art 12 of the Charter, which by virtue of Art 52(3) must be construed by reference to the Strasbourg jurisprudence

40 But however Arts 12 and 28 are reconciled the other effect of *Demir and Baycara v Turkey* is that the EU Charter may now go some way closer to providing the missing piece in the jigsaw puzzle referred to above. Although there may be no direct obligation under EU law to have 'legislation necessary to give effect to the provisions of the international labour conventions already ratified' by the Member State in

[34] [2008] ECHR 1345, (2009) 48 EHRR 54.
[35] Ibid, para 154.

question,[36] such an obligation arises by virtue of what is probably the unanticipated consequences of Art 12, as informed by the ECtHR.

41 By this circuitous and indirect route, ILO Convention 98 is thus indirectly incorporated into EU law, and with it the rich jurisprudence on collective bargaining produced by the ILO supervisory bodies. This determines not only the scope of the right, but also when it may lawfully be qualified. As such, these unanticipated developments address the need to ensure that the regulatory role of collective bargaining in European law has a guaranteed legal base in domestic law, without which that role would be impossible to perform.

42 But although perhaps unanticipated, nevertheless this ought not to be controversial. Almost exactly two years before the Lisbon treaty came in to force, the ECJ had already recognized the importance of ILO Convention 98 as part of the general principles of law of the EU. But following *Demir and Baycara*, this can no longer be a token gesture, there now being a duty from the Charter not only to engage with the substance of ILO Convention 98 and the manner of its interpretation by the supervisory bodies.[37]

Rowing Back on *Demir and Baycara*?

It is well known that *Demir and Baycara v Turkey* [2008] ECHR 1345 was an important breakthrough for labour rights under the ECHR. It is well known, however, that the ECtHR has been the subject of intense political criticism from those (notably in the British government) unhappy about some of its more liberal decisions. The decision in *National Union of Rail, Maritime and Transport Workers* [2014] ECHR 346 may be an signal that the Court is listening to that criticism, and that it is unwilling to open up new areas of conflict with national governments.

The case concerned a challenge to two aspects of the United Kingdom's strict anti-strike laws. The first related to the detailed notice requirements that trade unions must give to employers before industrial action may lawfully be taken. The second related to the ban on all forms of solidarity action. The Court held – controversially – that the first aspect of the claim was inadmissible, and that there had been no breach of the ECHR, Article 11 in relation to the second aspect, event though the effect of the ban was to prevent the union from taking collective action in support of a small group of workers whose pay and conditions were being cut.

The Court held that the right to strike fell within Article 11, but declined to say whether it was an 'essential' element of trade union activity. It also held that solidarity action fell within Article 11 but also held that a total ban could be justified under Article 11(2), thereby acknowledging the existence of a right that could never lawfully be exercised. In reaching this conclusion, the Court drew a distinction between core and accessory action, suggesting that solidarity action fell within the

[36] Ibid, para 157.

[37] But see now *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366, where there are suggestions that the *Demir and Baycara* decision may be 'reinterpreted': see esp para 86. For discussion, see Alan Bogg and K D Ewing, 'The Implications of the *RMT* Case' (2014) 43 ILJ ___.

latter rather than the former category. A wider margin of appreciation would be allowed for conduct deemed accessory.

In an important passage, the Court said: 'The applicant relied heavily on the *Demir and Baykara* judgment, in which the Court considered that the respondent State should be allowed only a limited margin (see para 119 of the judgment). The Court would point out, however, that the passage in question appears in the part of the judgment examining a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union. It is not to be understood as narrowing decisively and definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade union freedom within the social and economic framework of the country concerned' (para 86).

III

43 Returning to Jacques Delors, we can say that he kept his promise. Here we have evidence of a clear trajectory and evidence too of real outcomes. We have (i) an institutionalised process of making law by a form of 'collective bargaining', (ii) a well developed process of engaging with collective bargaining at national level to implement and adapt legal obligations, and (iii) the entrenchment of the right to bargain collectively as a fundamental right. So where did it all go wrong?

44 Let me take you to an interview, this time not by Jacques Delors but by Mario Draghi, head of the European Central Bank, in an equally well known exchange in the *Wall Street Journal* in 2012. According to Draghi, 'the European Social Model has already gone'.[38] These remarks expressed in the 'bible of global finance',[39] have been hotly disputed.[40] But if the trajectory of collective bargaining and the reasons for that trajectory are any guide, he may be right. To this end there are two forces now at work.

- **Deregulation of Collective Bargaining Structures**

45 We do not speak much any more about making law by social dialogue or collective bargaining, and there is little now to implement by collective bargaining at national level. The focus now is on new economic governance arrangements and the subordination of labour rights generally - and for our purposes collective bargaining specifically – to more closely co-ordinated national economic policies. These have been presented as part of the Europe 2020 growth strategy, with close scrutiny and surveillance of national economies by the Commission on an annual basis.[41]

[38] *Wall Street Journal*, 24 February 2012.
[39] P Mabille, 'Draghi Buries European Social Model', *La Tribune*, 27 February 2012.
[40] See Lord Monks, 'Social Europe is Far From Dead', *Europe's World*, Spring 2014.
[41] Note also the provisions of the Euro-plus Pact: 'Each country will be responsible for the specific policy actions it chooses to foster competitiveness, but the following reforms will be given particular attention: (i) respecting national traditions of social dialogue and industrial relations, measures to ensure costs developments in line with productivity, such as: review the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation

46 The starting point for these purposes is TFEU, art 119, which provides that 'the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives'. TFEU, Art 120 provides in turn that:

> Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

47 Also important in this context is Article 121, which provides that Member States are to regard their economic policies as a matter of common concern, and co-ordinate them with the Council, in accordance with Art 120. This in turn may lead to the adoption of broad guidelines for the economic policies of Member States, to take the form of a Council Recommendation, of which the Parliament is to be 'informed'. Member States will then be subject to surveillance, to ensure compliance with the guidelines, which Member States are expected to follow.

48 In line with the foregoing, on 13 July 2010, the Council, on the basis of the Commission's proposals, adopted a Recommendation on the broad guidelines for the economic policies of the Member States and the Union (2010 to 2014).[42] So far as relevant, Guideline 2 provided

> Member States should encourage **the right framework conditions for wage bargaining systems** and labour cost developments consistent with price stability, productivity trends over the medium-term and the need to reduce macroeconomic imbalances. Where appropriate, adequate wage setting in the public sector should be regarded as an important signal to ensure wage moderation in the private sector in line with the need to improve competitiveness. **Wage setting frameworks**, including minimum wages, **should allow for wage formation processes that take into account differences in skills and local labour market conditions and respond to large divergences in economic performance across regions, sectors and companies within a country**.

49 The foregoing needs to be read carefully. Wage bargaining systems of course is a reference to collective bargaining. What appears to be suggested here is not that such systems need to be developed and expanded where they do not already exist, but that existing procedures should be made to operate with greater flexibility, with possible implications for the regulatory impact of these systems. On 21 October 2010, a number of new guidelines were added, addressing 'employment policies' specifically. So far as relevant what is Guideline 7 reinforces the message in Guideline 2:

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mechanisms, while maintaining the autonomy of the social partners in the collective bargaining process': European Council. Conclusions, 24-25 March 2011.

[42] Council Recommendation of 13 July 2010 (Broad guidelines for the economic policies of the Member States and of the Union) (2010/410/EU), Guideline 2.

> In order to increase competitiveness and raise participation levels, particularly for the low-skilled, and in line with economic policy guideline 2, Member States should encourage the right framework conditions for wage bargaining and labour cost development consistent with price stability and productivity trends.[43]

50 This process leads every year to proposals being made on a number of economic fronts, including wages, with one of the major concerns being international competitiveness. In terms of collective bargaining, however, an important background paper reveals that the intention is reform and by reform is meant deregulation, and by deregulation is meant the movement of bargaining activity from the level of the sector to the level of the enterprise.[44] This is despite the fact that 'it is difficult to find a robust relationship between the centralisation of wage bargaining and economic outcomes',[45] but that

> there is robust evidence that higher levels of bargaining coverage and more centralised or coordinated bargaining, as well as high union density, are associated with a compression of the wage distribution and a reduction of earnings inequality'.[46]

51 Nevertheless, the regulatory impact of collective bargaining is the subject of particular concern, the authors noting that

> The existence of a procedure for legal extension of collective agreements, making them binding to non-unionised employees or non-signatory firms, can significantly broaden the coverage of collective agreements. Extension mechanisms are widespread in the EU and generally concern occupational and sector-level contracts and cover both wage and non-wage conditions;[47]

and claiming that

> As a result of extension of collective agreements, wages may not be able to fully adjust to differences in productivity across firms or geographical areas within the same sector. The more important these differences are, the stronger the risk that the extension results in a misallocation of labour, with too high wages (and low employment, output) in low- productivity firms. Extension mechanisms are also likely to reduce the responsiveness of nominal wages to shocks, as wages are less responsive to local conditions.[48]

52 It is thus unsurprising that the anonymous authors should advocate the 'modernisation' of wage-setting systems, as instrumental to contributing to correcting the large macroeconomic imbalances that have materialised in a number of Member

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[43] Council Decision of 21 October 2010 (Guidelines for the employment policies of member states) (2010/707/EU).

[44] European Commission, *Wage Setting Systems and Wage Developments* [nd], http://ec.europa.eu/europe2020/pdf/themes/26_wage_setting_02.pdf.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid.

States and to reducing unemployment'.[49] As a result a number of countries have been asked to address collective bargaining arrangements in the Country-Specific Recommendations that are made under this process of policy co-ordination and surveillance. It thus ought not to be a surprise that those countries that have embarked upon collective bargaining reforms should thus be celebrated.

53 So far as the process under discussion is concerned, since 2010, three countries in particular have been the subject of this deregulatory impulse. In 2011, **Italy** was told that 'bargaining at firm level can play a significant role, which may also help to address regional labour market disparities',[50] and encouraged to make greater use of opening clauses in collective agreements to derogate from the sectoral wage agreed at national level'. In the same year, concern was expressed that

> The ongoing labour market reform in Spain needs to be complemented by an overhaul of the current unwieldy collective bargaining system. The predominance of provincial and industry agreements leaves little room for negotiations at firm level. The automatic extension of collective agreements, the validity of non-renewed contracts and the use of ex-post inflation indexation clauses contribute to wage-inertia, preventing the wage flexibility needed to speed up economic adjustment and restore competitiveness.[51]

54 In the following year, **Belgium** was told that it too had to 'reform' the system of wage bargaining, in order to facilitate 'the use of opt-out clauses from sectoral collective agreements to better align wage growth and labour productivity developments at local level'.[52] Two years later, **Portugal** is to be told to

> Explore, in consultation with the social partners and in accordance with national practice, the possibility of firm-level temporary opt-out arrangements from sectoral contracts agreed between employers and workers' representatives. By September 2014, present proposals on firm-level opt-out arrangements from sectoral contracts agreed between employers and workers' representatives and on a revision of the survival of collective agreements'.[53]

But of course Italy, Spain, Belgium and Portugal are not the only countries now on a deregulation trajectory in relation to collective bargaining. This is only the beginning.

- **Destruction of Collective Bargaining Systems**

55 In addition to the developments described above, the financial assistance

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[49] Ibid.
[50] Council Recommendation of 12 July 2011 (National Reform Programme 2011 of Italy) (2011/C 215/02).
[51] Council Recommendation of 12 July 2011 (National Reform Programme 2011 of Spain) (2011/C 212/01). For the implications of Spain's rapid de-regulation of its collective bargaining system, see ILO Committee on Freedom of Association, Case No 2947 (Spain), Report No 371 (March, 2014), para 317 – 465.
[52] Council Recommendation of 10 July 2012 (National Reform Programme 2012 of Belgium) (2012/C 219/02).
[53] European Commission, *Recommendation for a Council Recommendation on Portugal's 2014 National Reform Programme*, COM (2014) 423 Final.

packages introduced after the Euro-crisis have been a second and more dramatic source of collective bargaining reform. Whether directly or indirectly this has led to major initiatives in Greece, Ireland and Romania, where entire collective bargaining structures have been abolished, in at least two cases in circumstances that violate the international obligations of the countries concerned.

57 In the case of **Ireland**, in return for financial assistance, the government undertook to 'introduce legislation to reform the minimum wage', and take steps to 'prevent distortions of wage conditions across sectors associated with the presence of sectoral minimum wages in addition to the national minimum wage'.[54] Specific measures included an independent review of the two regimes that provided for wage determination on a sectoral basis, namely Joint Labour Committees on the one hand and Registered Employment Agreements on the other.

58 The terms of reference of the independent review - which were to be agreed with the Commission[55] - was to consider 'whether minimum wages and working conditions more stringent [than] those guaranteed by the national minimum wage for the worker categories covered by EROs are justified on the grounds of fairness'.[56] In a very skillful report, however, the review concluded that 'the current JLC/REA regulatory system should be retained', though radically overhauled to make it 'more responsive to changing economic circumstances and labour market conditions'.[57]

59 But notwithstanding the Independent Review, in 2013 the Supreme Court struck down Ireland's system for the extension of collective agreements,[58] which now ceases to exist. No mention was made of the Independent Review or of Ireland's obligations under International and European law, despite figuring prominently in the report by the review panel. Although having operated successfully for 67 years, the extension procedures were nevertheless found to violate a provision of Ireland's apparently ultra-liberal constitution, which confines law-making powers to the legislature.[59]

60 An altogether more dramatic assault on collective bargaining structures has taken place in **Romania**. Again in a Memorandum of Understanding (2011), Romania undertook 'reforms to the wage-setting system allowing wages to better reflect productivity developments in the medium term'.[60] The principal means by which this was done appears to have been Law 62/2011, which was as controversial for the

[54] European Commission, *Memorandum of Understanding on Specific Economic Policy Conditionality (Ireland)* (3 December 2010): http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.
[55] Ibid.
[56] Department of Jobs, Enterprise and Innovation, *Report of the Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms* (2011).
[57] Ibid, p 2.
[58] *McGowan v Labour Court*, above. The High Court had previously ruled that the JLC system of wage determination was unconstitutional: *John Grace Fried Chicken Ltd v The Catering Joint Labour Committee* [2011] IEHC 277. See the brilliant blog-post by P McMahon, Joint Labour Committee System Declared Unconstitutional', 8 July 2011 (drawing parallels with New York's 'sick chicken' case, *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935)): http://www.extempore.ie/2011/07/08/joint-labour-committee-system-declared-unconstitutional/
[59] See note 17 above.
[60] European Commission, *Memorandum of Understanding between the European Commission and Romania* (June 2012), para 37. These steps were to be taken 'while respecting the autonomy of social partners, national traditions and practices' (ibid).

manner of its introduction as for its content. So far as the latter is concerned, however, the new law abolished national bargaining, and imposed tight restrictions on sectoral and enterprise based bargaining, making both difficult to establish.

61 So far as sectoral bargaining is concerned, this could be established in sectors where the employers taking part employed a majority of the workers in the sector in question. The effect of this requirement has been to make collective bargaining at this level 'so difficult that no sector-level agreement has been concluded'.[61] So far as enterprise based bargaining is concerned, the threshold here is that the union in the enterprise must have a membership of more than 50% of the workers in the enterprise in question. According to the ILO Committee of Experts, there has been a 'drastic decrease' in the number of enterprise agreements.[62]

62 Unlike in the case of Ireland (it is too soon, though Ireland has fallen foul on other grounds),[63] these developments have been considered by the ILO Committee of Experts, which has expressed its concern, and requested the government to amend the legislation to guarantee the application of freedom of association principles.[64] However, proposals to do just that met some resistance from the IMF and the European Commission in a confidential document leaked to the ITUC.[65] Thus, strongly urging the Romanian authorities 'to limit any amendments to Law 62/2011 to revisions necessary to bring the law into compliance with core ILO conventions', the IMF and European Commission representatives warned that:

> The re-introduction of national collective labor agreements with automatic erga-omnes extension risks resulting in a misalignment of wages and productivity developments across firms, sectors and occupations. We strongly urge the authorities to ensure that national collective agreements do not contain elements related to wages and/or reverse the progress achieved with the Labor Code adopted in May 2011 (e.g. on working time regulation).
>
> Sectoral collective agreements: The draft legislation repeals the existing numerical criteria for the registration of collective labor contracts and replaces them with numerical criteria for their extension (Art. 133). We strongly urge the authorities to ensure that the threshold of 50% of the total number of employees in the sector refers either to employers' associations only or to both trade unions and employers' associations.[66]

63 An even more dramatic assault on collective structures has taken place in **Greece**,

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[61] ITUC, 'IMF and EC Apply Behind-the –Scenes Pressure on Romania to Halt the Restoration of Core Labour Rights', 21 November 2012: http://www.ituc-csi.org/imf-and-ec-apply-behind-the-scenes.
[62] ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013), p _.
[63] On the current situation regarding Ireland, see ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013), p _.
[64] ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013), p _.
[65] ITUC, 'IMF and EC Apply Behind-the–Scenes Pressure on Romania to Halt the Restoration of Core Labour Rights', above.
[66] http://www.ituc-csi.org/IMG/pdf/romania.pdf. Steps by the authorities to ensure that national collective bargaining does not include pay would not be consistent with ILO Convention 98, as the ITUC pointed out.

which is perhaps the best known.[67] So far as I have been able to find, these are more far-reaching and more explicit than the demands that have been imposed elsewhere. So under the direction of the Troika, and 'given the sensitivity of labour market and wage reforms':

> it was decided to follow a two-step approach after consultation with the authorities (in particular with the Ministry of Labour) and social partners. Firstly, the government will launch a social pact with social partners to forge consensus on decentralization of wage bargaining (to allow the local level to opt-out from the wage increases agreed at the sectoral level), the introduction of sub-minima wages for the young and long-term unemployed, the revision of important aspects of firing rules and costs, and the revision of part-time and temporary work regulations. Secondly, the government will enforce the required changes in the wage- setting mechanisms and labour market institutions.[68]

64 These demands led to a number of important changes to Greek law, so that both sector and enterprise-based agreements could make provision less favourable than that contained in the national agreement. Moreover, ad hoc associations of employees could negotiate these latter arrangements where there were no trade unions. This last provision was a response of the Greek government to the concerns of the Troika that enterprise-level agreements were not sufficiently widespread. One reasons why is that there were very few trade unions at enterprise level, with enterprise agreements applying only to enterprises with more than 50 workers.[69]

65 It is not possible here to do justice to the full range and scope of the changes that were introduced. Suffice it to say that the ILO Committee of Experts thought the decentralising measures were 'likely to have a significant – and potentially devastating – impact on the industrial relations system in the country'.[70] The Committee also expressed the fear 'that the entire foundation of collective bargaining in the country may be vulnerable to collapse under this new framework'. This was because 90% of the (private sector) workforce was employed in small enterprises, in a system where trade unions cannot legally be formed in enterprises with less than 20 employees. In these circumstances,

> granting collective bargaining rights to other types of workers' representation which are not afforded the guarantees of independence that apply to the structure and formation of trade unions and the protection of its officers and members is likely to seriously undermine the position of trade unions as the

[67] See A Koukiadaki and L Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 ILJ 276.
[68] European Commission, *The Economic Adjustment Programme for Greece* (2010), para 31. These changes were accepted 'Despite the fact that we support Collective Bargaining and Agreements between social partners (a longstanding European value and position recently included in the proposed new Treaty changes): George Papandreou to Christine Lagarde, Jean-Claude Juncker, Olli Rehn and Mario Draghi, 15 February 2012.
[69] For full details see International Labour Office, *Report on the High Level Mission to Greece (Athens, 19-23 September 2011)* (Geneva, 2011).
[70] ILO, 101st Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2012), p _.

representative voice of the workers in the collective bargaining process.[71]

- **The Contribution of the Courts**

66 So where were the courts? It is true that in a number of cases attempts were made to challenge some of these developments in the national courts, but with varying degrees of success in Greece, Portugal and Romania. In Ireland in contrast, the Supreme Court took the lead on the deregulation agenda.[72] It is also true that steps have been taken to challenge underlying legality of the austerity packages generally, but in another major Irish contribution this has been found to be a zone in which the rule of law does not apply.[73]

67 The latter concern is a matter that can be explored more fully elsewhere. My concern here, however, is with the role of the of the CJEU in defending collective bargaining, a fundamental human right, hard-wired into the TFEU, and expressly acknowledged in the EU Charter of Fundamental Rights. Rather than offer protection against this erosion of the right, the CJEU appears gratuitously to have offered its support to the attacks, in the same way that the Supreme Court of Ireland did in the *McGowan* case.

68 There are a number of reasons to be suspicious about the role of the CJEU as the guardian of labour rights, especially after *Viking* and *Laval*, when the Court made it clear that these human rights were for all practical purposes subordinate to the four freedoms, and in particular the freedom of establishment and the freedom to provide services. It is of course the case that these decisions were reached before the Lisbon treaty enhanced the status of the EU Charter. But fundamental labour rights were nevertheless acknowledged as part of the general principles of European law.[74]

69 No one seriously believes that on its own the apparently enhanced status of labour rights in EU law will lead to a revision of *Viking* and *Laval*. So much is clear from the important decision in *Case C-426/11, Alemo-Herron v Parkwood Leisure Ltd*,[75] a fairly straightforward case on its facts. Local authority workers employed in leisure services were covered by a sectoral agreement, the terms of which for the time being in force were incorporated into their contracts of employment, which provided that

> During your employment with [Lewisham], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [NJC] ..., supplemented by agreements reached locally

[71] Ibid. For continuing concerns, see ILO, 103rd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2014): 'national occupational collective agreements have gone down from 43 in 2008 to seven in 2012 whereas firm-level collective agreements have increased from 215 in 2008 to 975 in 2012 (706 signed by associations of persons and 269 signed by trade unions)' (p _).
[72] *McGowan v Labour Court*, above.
[73] *Case C-370/12, Pringle v Ireland*, 27 November 2012. See P Craig, 'Guest Editorial' (2013) 20 *Maastricht Journal* 1.
[74] *Case C-438/05, Viking Line v ITF* [2007] ECR I-10779, para 44. *Case C-341/05, Laval v Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767, paras 90-91.
[75] [2014] 1 CMLR 21. On the domestic proceedings, see *Parkwood Leisure Ltd v Alemo-Herron* [2011] UKSC 26, [2011] ICR 290.

through [Lewisham]'s negotiating committees.[76]

70 In this case the service in question had been contracted to a private company in 2002, the latter business being sold to Parkwood in 2004. The complainants were employees of Parkwood who claimed that they were entitled to wage increases negotiated under a collective agreement in 2004, the terms of the agreement to last for three year. Parkwood refused to pay the new rates, arguing that it was required to do so, as it was not a member of the National Joint Committee that had negotiated the agreement.

71 This was an important decision about the scope of Council Directive 2001/23 (the Acquired Rights' Directive),[77] and the protection of collective agreements at the time of transfer. Was the contractor obliged to pay only the terms of the collective agreement (duly incorporated into the contract of employment) in force at the time of the transfer (the so called static approach), or was the contractor under a continuing obligation to pay the terms of the collective agreement in force from time to time (the so called dynamic approach)?[78]

72 The court predictably adopted the static approach, taking the view that Directive 77/187 'does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other'.[79] To have adopted the dynamic approach would 'limit considerably the room for manoeuvre necessary for a private transferee to make [the] adjustments and changes' that transferee must be free to make, in order to carry on its operations.[80]

73 In reaching this conclusion, there was no mention of the workers' rights under the EU Charter, Arts 12 or 28, or indeed the ECHR, Art 11. The only reference to Art 12 was an oblique – and worrying – reference to the fact that 'the referring court does indeed indicate that the right not to join an association is not at issue in the main proceedings'.[81] This was a reference to the employer's right, suggesting - with loud echoes of the *Ryanair* case in Ireland[82] – that the Charter may confer on employers a negative right not to associate for the purposes of collective bargaining.[83]

74 This putative right of the employer must stand to one side. By failing to engage with the workers' Art 12 and 28 rights, the Court is not denying their existence. And by refusing to acknowledge their right to the fruits of a collective bargaining process

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[76] Ibid, para 10.
[77] See Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006 No 246 for domestic implementation.
[78] See previously, *Case C-499/04, Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] ECR I-2397.
[79] [2014] 1 CMLR 21, para 25.
[80] Ibid.
[81] Ibid, para 31. The issue had been raised in the Supreme Court where Lord Hope said that 'Parkwood has not sought to argue that regulation 5 of TUPE is objectionable because it breached its article 11 Convention right of freedom not to join an association' (para 47).
[82] *Ryanair v Labour Court* [2007] IESC 6. See M Doherty, 'When You Ain't Got Nothin', You Got Nothin' to Lose…. Union Recognition Laws, Voluntarism and the Anglo Model' (2013) 42 ILJ 369.
[83] See *Werhof*, above, where it was said that 'If the "dynamic" interpretation, supported by the claimant, of the contractual reference clause mentioned in paragraph 18 of this judgment were applied, that would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected' (para 34).

from which they have been transferred is not to say that the workers in question are denied the right to bargain collectively. Although they have been excluded from the NJC (in violation of clear terms of their contracts of employment), they still have the right to seek to bargain collectively with their new employer.

75 The reason why the *Alemo-Herron* case is important is because it follows the unfolding narrative of this paper, the Court playing along with the new structures. Workers have the right to bargain collectively but not to the fruits of a particular collective agreement. If Mr Alemo-Herron and his colleagues want a collective bargaining arrangement, it will be at enterprise level, on the company's terms, with outcomes almost certainly less favourable than those in the NJC. That is assuming they can overcome the statutory obstacles to establishing such procedures in the first place.[84]

Transatlantic Trade and Investment Partnership

(TTIP)

The inexorable downwards pressure to decentralize collective bargaining arrangments (and therefore collective bargaining density and trade union impact) may be reinforced by the proposed EU-US Free Trade Agreement (or the Transatlantic Trade and Investment Partnership as it is officially known). This is a highly controversial proposal, negotiations to conclude which are currently underway. It is controversial because of the secrecy around the process, about its likely content, and about the manner of its enforcement in some though not all areas.

In the case of labour rights, it seems likely that - if recent precedents are any guide - including the recently leaked Draft Free Trade Agreement between the EU and Canada – the TTIP will include a labour chapter, similar in terms to the EU-Korea Free Trade Agreement of 2010, referred to in footnote 3 above. There is nevertheless considerable anxiety that this agreement will lead to a leveling down of European labour standards rather than a leveling up of US (or Canadian) labour standards, and a belief that US corporations are not pushing for the agreement in order to enjoy the benefits of European social rights.

A measure of that concern is to be seen in two motions submitted to the TUC Annual Congress in 2014. The first from GMB expresses concern that the TTIP will 'potentially undermine labour standards, pay, conditions and trade union rights as the US refuses to ratify core ILO conventions and operates anti-union "right to work" policies in half of its states'. Putting to one side the fact that the United Kingdom is a right to work state (as indeed is the whole of the EU and beyond), it remains the case that there is skepticism across the labour movement, as the second motion, from Unite the Union makes clear.

Given the desire for continuing structural reforms that 'take into account their external competitiveness implications to foster European growth and participation in

[84] British law has been changed in the aftermath of the *Alemo-Herron* case, so that collective agreements negotiated post-transfer do not apply to the transferee unless the latter is a participant in the collective bargaining for the provision in question: SI 2014 No 16. See R Arthur, *TUPE 2014* (Institute of Employment Rights, 2014).

open and fair markets worldwide', European trade unions may have good cause for anxiety. The US system of enterprise based bargaining has collective bargaining density levels of about 12%, which is the third lowest in the OECD (above Mexico and Korea). No major system of enterprise-based bargaining has a collective bargaining density above 50%, and most are much lower. The fear is that free trade will lead to regulatory convergence, accelerate the trend towards decentralized bargaining, and the decline of union voice and impact.

IV

76 I said in the introduction that the battle for human rights had been won. What I did not say, however, is that many other (*sotto voce* pointless) battles had been won, with an equally inconclusive effect. In this case the problem with human rights is that they have been so devalued by over-use and over-production to have largely lost their value as a currency. At least in the context of the EU, there is **a higher source in the hierarchy of laws**; like the common law, the four freedoms are more important than fundamental rights.[85] And even where labour rights are fundamental, they are **neutralised by the equally fundamental rights of business**.

77 Returning to the *Alemo-Herron* case, apart from obliquely referring to the EU Charter, Art 12 in the context of the employer's rights, the case may be seminal for awakening the potential of Art 16 in the context of employment rights. Art 16 of the Charter is the provision that elevates free enterprise to the status of a 'fundamental right', making provision for 'the freedom to conduct a business in accordance with Community law and national laws and practices'. This right has to be balanced against other Charter rights.

78 In what may be the CJEU's true '*Lochner* moment',[86] the Court considered Art 16 at some length, explaining that it covers 'freedom of contract', which meant that in the context of Directive 2001/23,

> it is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.[87]

79 On the facts of the *Alemo-Herron* case, Parkwood Leisure Ltd was 'unable to participate in the collective bargaining body at issue',[88] not being a public sector body. 'In those circumstances', continued the Court, the company could 'neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future

[85] *Case C-438/05, Viking Line v ITF,* above. *Case C-341/05, Laval v Svenska Byggnadsarbetareforbundet,* above.
[86] *Lochner v New York*, 198 US 45 (1905). Danny Nicol suggests that prize had already been won by the *Viking* and *Laval* cases, above. See D Nicol, 'Europe's *Lochner* Moment' [2011] PL 308.
[87] [2014] 1 CMLR 21, para 33.
[88] Ibid, para 34.

economic activity'.[89] As a result:

> the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.[90]

80 The other problem relates to the **substance of the rights**, which are not fixed but highly contestable and hotly contested, as the *RMT* case discussed above reveals. Nevertheless, in relation to collective bargaining it is quite obvious what is going on. To this end a very important insight is provided by an ECOFIN Report, in which a number of employment related recommendations were made. These included.

> *decrease* the bargaining coverage or (automatic) extension of collective agreements.
>
> reform the bargaining system in a *less centralized* way, for instance by *removing* or *limiting* the "favourability principle", or *introducing/extending* the possibility to derogate from higher level agreements or to negotiate firm-level agreements.
>
> result in an overall *reduction* in the wage- setting power of trade unions.[91]

81 These proposals were no doubt highly controversial, which is perhaps why they come with a health warning that 'the taxonomy of reforms into "employment-friendly" and "other reforms" has no normative implications . . . and should not be understood as necessarily reflecting the recommendations of the European Commission in the field of employment and social policies'.[92] There nevertheless appears to be a clear and expanding trajectory, as indicated in the following year's report from the same source:

> Efforts were stepped-up in 2012 to review the wage-setting mechanisms in a number of Member States, notably as part of the reform packages agreed in the framework of financial assistance programmes or in countries undergoing

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[89] Ibid.
[90] Ibid, para 35.
[91] European Commission, *Labour Market Developments in Europe 2012* (European Economy 5/2012), p 104.
[92] Ibid. Production of the report was co-ordinated by Alessandro Turrini (Head of Unit – Labour market reforms) and Alfonso Arpaia (Head of Sector – Labour market analysis). For comment, see Thorsten Schulten, 'The Troika and Multi-Employer Bargaining – European Pressure is Destroying National Collective Bargaining Systems', *Global Labour Column*, Number 139 (June 2013): 'The consequences of the strategy of radical decentralisation advocated by the Troika are already evident. Systems of collective bargaining that were once robust have been systematically eroded and destroyed. The collective agreement itself – as an instrument for collectively regulating wages and other employment conditions – is manifestly now at risk'. In a very short but lucid piece, Schulten provides an excellent analysis of the four strategies being used by the Troika to 'erode and destroy' collective bargaining arrangements: termination of national bargaining, derogation to firm level, restrictions on extension mechanisms, and the use of non – union 'bargaining' partners. See also Sharan Burrow, General Secretary, ITUC: 'The key objective …is to slash labour costs by replacing multi-employer collective bargaining systems at industry or national level with enterprise level bargaining or to eliminate collective bargaining altogether. A retreat to enterprise-level bargaining is inequitable in all circumstances.' ITUC, *Frontlines Report Summary*, April 2013, p 4. It is hard to argue with that.

> strong market pressure. This includes a drastic overhaul of the wage setting system in Greece, Portugal and Spain . . . , but also a move towards greater decentralisation of collective bargaining in Italy, as well as the reform of sectorial agreements in Ireland. The automatic extension of collective agreements after they expire was also eliminated in Estonia. **Limited progress was however made in countries with less urgent need for reforms, but where the functioning of certain wage setting and wage indexation systems has nevertheless been identified as a possible threat to competitiveness**.[93]

82 The changes are being driven by the new economic strategy and by the policies of austerity. But it is uncertain whether the pressures towards deregulation and destruction of collective bargaining activity are all likely to breach international labour standards. Clearly the most egregious are, notably those relating to Romania and Greece, in relation to which the ILO supervisory bodies have made the position fairly clear.[94] The Spanish collective bargaining reforms have also attracted the censure of the ILO supervisory bodies.[95]

83 But the position is less clear in relation to the less egregious changes, including the process of decentralisation from sector to firm, and the removal of extension mechanisms. This is not to say that the latter should not be contested along with the former, though we should be aware that the ILO supervisory bodies allow flexibility as to bargaining level and extension mechanisms. However, as the supervisory bodies have indicated that flexibility must accord with the wishes of the parties, and ought not to be imposed unilaterally by the State.[96]

84 Even taking the most generous view possible of the recent conduct in relation to collective bargaining by the EU and by selected Member States, there is a lengthy charge sheet that can be drawn up against the EU institutions and a number of national governments. As already pointed out the CJEU has gone AWOL, leaving the IMF, the Commission and the European Central Bank to do pretty much what they like,[97] hiding behind the empty rhetoric of obligations that must be carried out

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[93] European Commission, *Labour Market Developments in Europe 2013* (European Economy 6/2013), p 56. Emphasis added. Unlike the 2012 Report, the 2013 Report is acknowledged to have 'benefited from useful comments and suggestions' from 'experts at the European Central Bank and International Monetary Fund'.

[94] It should also be noted that both the United Kingdom and Sweden have encountered problems in relation to compliance with ILO obligations as a result of the earlier decisions in *Viking* and *Laval*, above. See respectively ILO, 99th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2010), p _, and ILO, 100th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2011), p _ (United Kingdom), and ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013), p _ (Sweden). See also *LO and TCO v Sweden*, European Committee of Social Rights, Case No 85/2012 (European Social Charter, Art 6(2)).

[95] ILO Committee on Freedom of Association, Case No 2947 (Spain), above.

[96] See B Gernigon, A Odero and H Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *Int Lab Rev* 33. Extension mechanisms are not compulsory, but equally they do not violate the principle of voluntary collective bargaining: ILO Committee of Experts, *Giving Globalisation a Human Face* (2012), para 245.

[97] We should not overlook the role of the OECD, which has also made a series of recommendations to members to decentralize or otherwise 'reform' wage bargaining arrangements, in relation specifically to Belgium, Italy, Slovenia and Spain: OECD, *Economic Policy Reforms* (2012). The latter report

consistently with ILO obligations, while simultaneously giving directions almost certainly in breach.[98]

85 So although the battle for labour rights may have been won, it is a pointless victory until a more fundamental battle is won. This is the battle to ensure that all EU institutions and all Member States live up to the commitment to the rule of law enshrined in TEU, Art 2.[99] Human rights serve no purpose if courts have neither the courage nor the will to enforce them. As Jacques Delors had the wisdom to realise, without enforceable rights, workers in some countries may rightly feel that they have no reason to support continuing membership of the EU. The stakes are now very high.[100]

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This paper is part of an on-going programme of work with my colleague, John Hendy QC.

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also highlights that by 2010 (the most recent data at the time), collective bargaining coverage had declined significantly in Estonia, Ireland, Portugal, and Spain (p 146).

[98] As in the case of Romania, discussed above.

[99] See the powerful critique in S Sciarra, 'Social Law in the Wake of the Crisis', Centre for the Study of European Labour Law, University of Catania, Working Paper (2014): 'The state of emergency cannot justify renouncing the rule of law'. Professor Sciarra also raises equally important questions about the democratic legitimacy of the foregoing developments. On the rule of law dimension, see further, K D Ewing, 'Austerity and the Importance of the ILO and the ECHR for the Progressive Development of European Labour Law: A Case Study from Greece', in W Daubler and R Zimmer (eds), *Arbeitsvolkerrecht: Festschrift fur Klaus Lorcher* (Baden-Baden, 2013), p 361.

[100] But human rights are unlikely to provide the answer. Collective bargaining procedures are simply tools of progressive economic policies, and even if entrenched in international human rights treaties or national constitutions, social rights will not be strong enough to constrain the countervailing power of neo-liberal economic orthodoxy, as recent experience reveals. One lesson for lawyers from the crisis is that social democratic legal instruments are no defence against neo-liberal economics, and that to win the campaign for social rights it is necessary to win the campaign for progressive economics. To reflect on an earlier era, Keynesian solutions led to social democratic institutions. But social democratic institutions cannot command Keynesian solutions. At the moment, human rights and economics are in conflict. The latter will prevail, in a matter over which electors have no control.