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The EU's Accession to the ECHR: Conflict or Convergence of Social Rights?

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Introduction

The EU legal order has long been at the forefront of the development of social rights as a means of equalising and, in some instances, furthering employment protection for particular groups of workers and in certain specified circumstances. The underlying rationale for the development of associated rights has traditionally been one of economic reasoning whereas at an international level, such rights are articulated as fundamental human rights in the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) and in 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, ILO Conventions have been ratified by the vast majority of the EU's member states. Second, the Charter of Fundamental Rights (CFR) encompasses the 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 ECHR a legal obligation. This gives rise to an interesting conundrum which this paper seeks to explore: How to reconcile the separate and distinct evolution of the two legal frameworks attributable to the Court of Justice of the European Union's (CoJ) jurisprudence on EU provisions on the one hand and the European Court of Human Rights' interpretation and application of international standards on the other. Social rights have been defined broadly in the literature as encompassing individual and/or collective rights.[2] For the purposes of this paper however our primary interest is in a more limited category of labour rights, specifically the right to non-discrimination in employment and the rights to participate in trade unions and to engage in collective bargaining, rather than in the full bundle of social rights which is generally referred to in this context as encompassing education, housing, healthcare as well as a minimum income.[3]

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[2] See, for example, C. Fabre, Social Rights under the Constitution – Government and the Decent Life, (OUP 2000).

[3] See, for example, Ivan Hare 'Social Rights as Fundamental Human Rights' in Social and Labour Rights in a Global Context: International and Comparative Perspectives (edited by B. Hepple), CUP 2002, 153-181 at 153; C. Fabre, Social Rights under the Constitution – Government and the Decent Life, (OUP 2000). We recognise that there is a wider range of relevant labour rights including decent conditions, fair pay and job security but,

The paper begins by introducing the differing rationales underpinning social rights in EU and international law before examining the debate surrounding the constitutionalisation of social rights. Against this background, the paper then explores the effect of the increasingly formalised relationship between the ECtHR and the CoJ on the labour rights of EU citizens. The reconciliation of these two distinct bodies of case law throws up certain questions regarding the future relationship between the two courts. For example, Article 52 (3) of the Charter of Fundamental Rights (CFR) which provides that the ECHR will provide the minimum standard of human rights applicable under EU law, does not provide that the CoJ will be bound by the ECtHR's case law in areas of overlap, giving rise to the possibility of jurisdictional conflict or convergence in social standards, To date, 'the labour constitution of the Union encompasses a comprehensive catalogue of labour-constitutional rights'[4] including the social rights which are the subject of this article. However, the limited competence of the European institutions leads to 'missing congruence between these rights […] and the possibility of articulating them through the European legislature and the European Court.'[5] Accession of the EU to the ECHR opens up the possibility that this gap will be closed through the establishment of a 'constitutional stockpile of social rights'[6] by elevating their status to that of fundamental human rights, 'with the maximum level of visibility and effectiveness inherent in the supranational legal order.'[7] The principle objective of this paper is to consider whether and to what extent the impact of international law in this area is likely to assist in the constitutionalisation of social rights within the EU legal order. The constitutionalisation of social rights is generally understood as 'the goal of securing the recognition of labour rights as fundamental human rights at the transnational and national levels.'[8]

Differing rationales for social rights

The concept of an EU internal social policy has its origins in a report written by a group of independent experts appointed by the Governing Body of the International Labour Organisation. The report noted that:

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as a starting point, we have focused on those with which both courts have had the opportunity to engage on several occasions.

[4] F. Rödl, 'The labour constitution of the European Union' in R. Letelier and A.J. Menéndez (eds.), *The Sinews of Euroepan Peace – Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, ARENA Report No 7/09 and RECON Report No 1 at p. 390.

[5] Ibid at p. 393.

[6] Ibid at p. 398.

[7] S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (CUP, 2006) at pp. 105-106.

[8] J. Fudge, 'Constitutionalizing Labour Rights in Europe' citing R. Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) *Journal of Law and Society* 314 at p. 342.

> So long as we confine our attention to international differences in the general level of costs per unit of labour time, we do not consider it necessary or practicable that special measures to 'harmonise' social policies or social conditions should precede or accompany measures to promote greater freedom of international trade.[9]

As a result, European social policy in the founding Treaty of the European Economic Community (EEC) was limited to the free movement of workers, equal pay and cooperation in the area of social security. Although EU competence for developing a social policy has been expanded considerably[10] under the umbrella of a 'European Social Model' since the entry into force of the EEC Treaty – especially following the adoption of the Single European Act in 1986 – the underlying rationale for a European social policy has remained an economic one: the demand for broad equivalence in labour standards to alleviate unfair competition.

The protection of social rights as fundamental human rights was left to the ILO to which all EU member states are party. The EEC Treaty made provision for cooperation between the EEC and the ILO and it was hoped that ILO Conventions could be used to 'solve certain of the social problems connected with closer European economic co-operation'[11]. Effective cooperation between the two organisations has however proved to be and remains sporadic; occurring mainly in the sphere of European external trade relations.

In more recent years, the rationale for social rights as a corollary to economic freedoms has become particularly pronounced in the increased use of new forms of governance[12] – 'framework agreements, joint declarations and guidelines and codes of conduct'[13] – in the furtherance of social integration which accompanied the launch of the EU's Lisbon Strategy in 2000. The Strategy aimed to turn the EU into 'the most dynamic and competitive knowledge-based economy in the world,

[9] ILO, *Social Aspects of European Collaboration (Ohlin Report)* (ILO Studies and Reports, 1956) at pp. 40-41.
[10] However, the competence regime does not cover the full breadth of social policy at national levels and at times the need for political compromise halts social policy legislation. For an overview of its development see, for example, Part II on 'History and strategies of European labour law' in B. Bercusson, *European Labour Law*, CUP, 2009 at pp. 99 – 256.
[11] ILO n 8 at p. 116.
[12] There is a vast amount of literature on this topic. For a good overview of the shift to new forms of governance including references to other literature see K. Armstrong & C. Kilpatrick, Law, Governance, or New Governance? The Changing Open Method of Coordination (2007) *CJEL* 13, 649-77; K. Armstrong, *Governing Social Inclusion – Europeanization Through Policy Coordination* (OUP, 2010); C. Sabel & J. Zeitlin, *Experimentalist Governance in the European Union* (OUP, 2010); M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (CUP, 2011).
[13] P. Marginson, Europeanisation and Regime Competition: Industrial Relations and EU Enlargement. (2006) *Industrielle Beziehungen* 97 at p. 103.

capable of sustainable economic growth with more and better jobs and greater social cohesion'[14] by 2010. The social goals of the Lisbon Strategy sought to 'modernise the European Social Model and to build an active welfare state'. Although it arguably failed in that aim, there is a general consensus that it 'enlarged the EU employment and social agenda on matters of national priority.'[15] The Lisbon Strategy came to an end in 2010 when, following a broad consultation, the European Commission launched the Europe 2020 Strategy whose aim is to 'turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion […], taking into account different needs, different starting points and national specificities so as to promote growth for all'[16]. It has been suggested that Europe 2020 will result in a process 'whereby the European social model can gradually be better defined.' As it stands, however, the European Social Model is a curious character. Initially conceived of as a 'market-correcting' tool and then gradually widened through increased legislative competence so as to foster 'socio-economic integration'[17], it never developed as an all-encompassing and comprehensive European social policy. While Europe2020 keeps social issues on the EU's agenda, it is 'not primarily aimed at social policy, but rather at structural change of the Member States' economies which should enhance competitiveness of the EU economy as a whole'[18]; the economic underpinning of European social policy thus remains.

The entry into force of the Lisbon Treaty in 2009 – which resulted in the CFR becoming a legally binding instrument with the same legal value as the Treaties and which requires the EU to finally[19] accede to the ECHR – has the potential to alter the economic underpinning of the European Social Model. The Charter is significant for a number of reasons. For the purposes of this article, it has the potential to legitimise European internal social policy as a policy in its own right rather than one linked to economic integration.[20] The Charter brings together the fundamental social rights

[14] European Council, *Presidency Conclusions – Lisbon European Council*, 2000

[15] J. Goestschy, 'The Lisbon Strategy and Social Europe: two closely linked destinies', in M.J. Rodrigues (ed.), *Europe, Globalization and the Lisbon Agenda* (Edward Elgar, 2009) at p. 222.

[16] European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010)2020

[17] D. Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law* (Edward Elgar, 2012) at p. 50.

[18] Ibid at pp. 50-51.

[19] EU accession to the ECHR has been discussed for over thirty years yet it was only the Lisbon Treaty which removed the barriers to accession. See H. Golsong, *Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften*, Europäische Grundrechtezeitschrift 1978, 346; European Commission, *Memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Bulletin of the European Communities, Supplement 2/79; *Accession of the Community to the European Human Rights Convention, Re* (Opinion 2/94) E.C.R. [1996] I-1759; [1996] 2 C.M.L.R. 265; P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2006), pp.128‑130.

[20] Relevant Articles include those dealing with the prohibition of extreme activities such as slavery and forced labour (Article 5) as well as general provisions regarding freedom of expression and information (Article 11);

contained in ILO Conventions, the European Convention on Human Rights and other international treaties *and* it stresses the importance of social rights by placing them alongside more easily recognisable fundamental rights such as the right to life (Article 2) or the prohibition of torture (Article 4). Moreover, it is the first time the EU has given a text containing fundamental social rights the status of primary law.[21] In doing so with the Charter arguably signifies a process of deconstruction of the traditional hierarchy of rights within EU law which prioritises economic over social rights. However, the Charter is not akin to a bill of rights for the EU legal order. Article 52 of the Charter clarifies that 'the new European guarantees of these rights do not overwrite the distribution of competences between the European and the member state level'[22] thus effectively limiting the articulation of fundamental social rights at an EU level to those areas where the EU has competence.

It is accession of the Union to the ECHR which will formally subject the EU to international human rights standards and which may give new impetus to the protection of fundamental social rights within the EU legal order. As Lock rightly points out:

> [T]he European Union would be subjected to an external control by the European Court of Human Rights (ECtHR or Strasbourg Court) just like its Member States. 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. 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.[23]

The ECHR has been described as 'exceptional amongst international human rights regimes'; having developed into a 'constitutional instrument of European public order'[24].

On the face of it, the ECHR makes limited provision for social rights with the exception of the right to education (First Protocol), confining itself to traditional civil and political rights. However, litigation in

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freedom of assembly and freedom of association (Article 12); freedom to choose an occupation and the right to work (Article 15); the non-discrimination principle (Article 21); and equality between men and women (Article 23). More specifically, Title IV Solidarity provides the right of collective bargaining and action (Article 28), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), and the protection of family and professional life (Article 33).

[21] See Rödl n4 at pp. 367-426.

[22] Ibid at p. 387. See articles 52(1) and (2).

[23] T. Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) *ELR* 777.

[24] See: *Loizidou* v *Turkey* (Preliminary Objections) ECHR [1995] Series A No 310 at [75]; *Bosphorus Airways* v *Ireland* ECHR [2005] Appl No 45036/98 (*Bosphorus*); *Behrami & Behrami* v *France* ECHR [2007] Appl No 71412/01; *Saramati* v *France, Germany and Norway* (GC) ECHR [2007] Appl No 78166/01 at [145]

the ECtHR has gradually expanded the ECHR's reach over social rights. On the level of individual social rights, 'the litigation flow that has recently developed in response to the ECHR's granting of social rights [under art. 14 on the prohibition of discrimination] suggests that judicial formalisation of rights provided a crucial signal about the availability of social rights under provision that did not appear to cover anything but traditional civil rights.'[25] Similarly, the ECtHR has been instrumental in developing a fundamental right to strike and thereby protecting the right to take collective action in Europe through its recent decisions in *Demir and Baykara* and *Enerji Yapi-Yol Sen*[26] which are further discussed below.

The Constitutionalisation of Social Rights

Against this background, this paper is concerned with the role of the CoJ and the ECtHR in the movement towards the full recognition and realisation of social rights – specifically labour rights - as constitutional rights within the EU's *acquis*. In the current context, the movement towards constitutionalisation has been taking place for some time, as demonstrated by the growing convergence between the provisions of international law relating to labour standards and the formalisation of this relationship through such developments as the constitutional status afforded to the CFR and by the EU's accession to the ECHR. However, it is far from complete and, in fact, remains a source of continuing contestation. The legal effect of many of the Charter's provisions has yet to be tested and disagreements about the legal significance of the ECHR and its provisions abound. Some such disagreements, concerning the nature and extent of rights provided by EU law and their incompatibility with more favourable pre-existing constitutional guarantees, have been fought out between the EU institutions and the courts of the member states[27] and others, regarding perceived interferences with sovereign power, are the subject of ongoing and lively debate among domestic politicians concerning their perceptions of the judiciary's role in interpreting the law.[28] Furthermore, as examples from around the world demonstrate, merely giving such rights a particular label and

[25] L. Conant, 'Individuals, Courts and the Development of European Social Rights' (2006) *Comparative Political Studies* 76 at p. 85.

[26] *Demir and Baykara v. Turkey* Application Number 34503/97 and *Enerji Yapi-Yol Sen v. Turkey* Application Number 68959/01.

[27] See the German constitutional court's judgment in *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540, aka Solange I.

[28] For example, the recent and ongoing controversy concerning the ECHR and the respective roles of the UK government and the judiciary with regard to, inter alia, the deportation of terrorist suspects from Britain which has culminated in the Home Secretary Teresa May calling for withdrawal from the ECHR in an opinion piece published in the Daily Mail on 17 February 2013 - see 'It's MY job to deport foreigners who commit serious crime - and I'll fight any judge who stands in my way, says Home Secretary'. This prompted an unusual public response from the President of the Supreme Court Lord Neuberger who said, in an interview, that the Home Secretary's criticism of the judiciary was 'inappropriate, unhelpful and wrong', 'Britain's top judge attacks Theresa May's criticism of judiciary' Daily Telegraph, 4th March 2013.

status within the legal order does not secure their protection. In fact, there is little if any correlation between a country's adoption of a bill of social rights and a reduction in inequality[29] and, as King has noted, '[a]ll countries that provide the best current legislative protection of social rights did so without a constitutional bill of social rights, and a few of them, including Britain, Sweden, the Netherlands and France, did so in legal environments that were distinctly hostile to judicial review of any legislation'.[30]

The lack of consensus surrounding both the means by which such rights might gain constitutional status and the desirability of such development make it necessary to be precise in articulating what it is we are suggesting could and should happen and also why we think it matters. In this paper we argue in favour of the recognition of labour rights as constitutional rights and recognise that their realisation as such will depend on the appropriate judicial interpretation. Our exploration of the respective roles of the CoJ and ECtHR and their current and future relationship is, therefore, contingent on their ability and willingness to fulfil this aim. Labour rights, we contest, are worthy of the protection guaranteed by constitutional status because of the fundamental nature of their application which, under the contemporary arrangements pertaining to their provision, is under threat from contravening political and socio-economic forces, particularly within the EU legal order.

The increasing commodification of labour and the movement away from collective bargaining towards juridification and the predominance of individual methods of dispute resolution, which increasingly characterise the industrial relations of developed economies, call for the enhanced protection of such rights. Alongside this, the globalisation of labour markets through migration of workers and the growth of trans- and multinational employing organisations places greater emphasis on the establishment and preservation of certain international labour standards which, although they constitute a 'basic floor of rights', require elevation in status if they are to be adequately enforced. [31] Added to the requirement for greater international cooperation is the recognition that the old hierarchy of rights expounded by T. H. Marshall[32] has a diminishing application in the current climate whereby social rights are not so readily distinguishable from their

[29] D.S. Law and M. Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California Law Review 101.
[30] J. King, *Judging Social Rights* (CUP, 2012) at p. 2.
[31] See Lord Wedderburn, 'Common Law, Labour Law, Global Law' in B. Hepple (ed) *Social and Labour Rights in a Global Context* (CUP: 2002) at pp. 19-54.
[32] T.H. Marshall, *Citizenship and Social Class and other Essays* (CUP, 1950, reprinted 1992) which is, in itself, contested and open to criticisms 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 p. 66.

civil and political counterparts and the industrial relations landscape has changed so dramatically that their role as a source of individual empowerment and, thus, their compatibility with the market order is far greater than it was in Marshall's day.[33] Changes to the context and relevance of such rights does not, however, correspond with their enhanced recognition either politically or juridically, nor does it guarantee their future development as an inevitable consequence of citizenship making Hepple's call for their categorisation as human rights -'those moral rights which one has simply because one is a human being'[34] – all the more salient.

Although helpful as a potential means of aligning labour standards with recognised fundamental guarantees, labour rights' classification as human rights does pose certain questions. For example, given the potentially wide range of rights that could be identified as labour rights, which should be accorded such status and how should they be identified? In developing guiding principles by which relevant rights could be located and applied, should the status of human rights be preserved to address the most outrageous and extreme (but relatively rare) cases such as slavery and forced labour or should their impact be measured through potential improvements to the working lives of a far greater number of workers by the normalisation of comparatively mundane activities such as the right to strike? The answer, according to the very basis on which the status of such rights derives – our joint membership of the human race - is surely both, although this is not to say that such rights should be invoked lightly or interpreted so as to encourage and entertain spurious claims. The fact that the special status accorded to those rights deemed to be fundamental in nature should be valued and cherished as an intrinsic part of what makes us human and distinct from other living things does not preclude such seemingly mundane but pervasive problems as a lack of collective power from their scope,[35] but rather encourages it. So, if we accept that the inclusion of labour rights under the umbrella of human rights is at least possible, what other hurdles are there to the constitutionalisation of such rights?

The difficulties inherent in ascribing social rights with constitutional status are well documented elsewhere[36] and, to a large extent, hinge on the difficulty in reconciling the universalism of a

[33] B. Hepple, 'The Future of Labour Law' (1995) Industrial Law Journal 303 at p. 317; N. Busby and R. Zahn 'European Labour Law in Crisis: The Demise of Social Rights?' (2013) Contemporary Issues in Law 173.
[34] Hepple ibid.
[35] Rather, as Jones has claimed, it is our capacity to respect and further people's autonomy that gives us 'what is essential to being human and to being able to live a distinctly human life.' P. Jones, *Rights* (Macmillan, 1994) at p. 128. This relationship between social rights and individual autonomy is developed in Fabre's work which is explored in more detail below.
[36] For a clear consideration of the various objections raised, see M. Wesson 'Disagreement and the Constitutionalisation of Social Rights' (2012) Human Right Law Review 1.

constitutional guarantee with the paucity of the resources necessary to realise that guarantee for all who are entitled to it. Following this reasoning, the conflict between the promise of one particular positive right alongside others, the receipt of which depends on the sharing of limited goods and services, in itself gives rise to what Fabre has named the' conflict distinction'.[37] Another (related) objection to the constitutionalisation of social rights asserts that they are non-justiciable and, thus, not amenable to the process of judicial review.[38] On this ground, it is asserted, that to bestow such rights with constitutional promise would blur the boundaries between political and judicial decision-making, placing the judiciary in the role of law-maker by engendering an expectation and, where the realisation of such a right conflicted with existing legislation, a *duty* to decide cases on grounds which conflicted with the actions and intentions of democratically elected representatives. Adjudicating on the nature and impact of such conflicts and how best to remedy them is rightly the role of the legislature which is charged, alongside establishing legislation that is representative of the views of Parliament, with ensuring the fair and adequate distribution of associated resources. In this way the two main objections to the constitutionalisation of social rights, which we shall call 'the resource objection' and 'the justiciable objection', are closely related and acquire a particular relevance when applied to the case of labour rights. We will now consider the application of both types of objections in the context of labour rights' acquisition of constitutional status.

a. The Resource Objection

The argument underpinning the objection to social rights acquiring constitutional status on the grounds of an insufficiency of resources is ostensibly premised by a notion of fairness, i.e. that the fair distribution of resources cannot be achieved if competing claims are given equal credence on the grounds that the satisfaction of such claims is enforceable by legal means. In the EU context, this argument acquires a particular resonance as the related guarantees potentially produce a direct conflict with the unfettered operation of market forces which are deemed to be the most efficient determinants of resource allocation. By their very nature social rights interfere with this process by giving preference to certain objectives, such as the guarantee of minimum wage levels, so that market freedom is compromised. There is no doubt that the reservations raised through the resource objection are very real as the targeting of resources for the achievement of specific goals will, in any context, require hard decisions to be made regarding which claims to prioritise and, in

[37] C. Fabre 'Constitutionalising Social Rights' (1998) Journal of Political Philosophy 263 at p. 264.

[38] See King n 29, especially Chapter 6 in which he sets out the grounds for objection and presents a compelling justification for the use of a judicial mandate as a means of providing democratic legitimacy. For a similar argument relating to the relationship between welfare and constitutional guarantees, See Wesson n 35.

the case of competing claims, what criteria to adopt for selection. This resource objection could be said to epitomise the clash between the free market and enforced social protection identified by Marshall as the primary reason why such rights could not attract equal status with their political and civil counterparts.[39] However, Marshall also recognised the fundamental nature of those rights – identified as 'civil rights' – which 'harmonised with the individualistic phase of capitalism'[40] and were, thus, compatible with the smooth operation of the market. In Fabre's work on the constitutionalism of rights, it is social rights that are singled out as having acquired a specific importance in the realisation of that cornerstone of liberalism - individual autonomy. Because of autonomy's status as 'what is essential to being human and to being able to live a distinctly human life',[41] those rights that protect it acquire a particular prominence so that the fair and efficient operation of the market is not possible *without* the fundamental protection of social rights. In asserting that autonomy requires the support of a range of social rights to give its moral character, Fabre argues that,

> Autonomy captures an essential characteristic of human beings, which distinguishes them from other beings, namely their ability rationally and morally to decide what to do with their life, and to implement these decisions, over long periods of time, so as to lead a meaningful existence and through it develop an awareness of the kind of persons they are.

When applied to the range of labour rights with which this paper is concerned, this reasoning is particularly salient as it is those rights which seek to redress the power imbalances inherent in the labour market that provide – through economic independence - the most direct route to individual autonomy. This, in turn, recognises that the labour market is not a 'free' market in the traditional sense as it is by its very nature subject to a range of interferences through, for example, pressures imposed by the business lobby and, to a lessening degree given the current political landscape, trade union influence, leaving it particularly susceptible to direct political manipulation. When considered in the context of the relationship between the EU and its member states, fears surrounding the compromise of national sovereignty by the development and progression of social rights at the EU level exemplify this point: the wishes of member state governments' to retain tax raising powers and the ability to control fiscal expenditure at the domestic level are borne out of a realisation that the market is vulnerable to manipulation at all levels and for a variety of justifications, including political

[39] Marshall n 31. In Marshall's view social rights provided a 'basic conflict' (at p. 42) with the market as they carried the threat of 'a universal right to real income which is not proportionate to the market value of the claimant', (at p. 28).
[40] Ibid at p. 26
[41] Jones n 34 at p. 128.

expediency. This in itself provides an argument in favour of the constitutionalism of labour rights in order to safeguard against political pressures, represented in the contemporary context by the neoliberal threat to enhanced labour rights, as a failure to do so poses a direct threat to our individual autonomy which is a crucial component of the liberal ideal of a market economy. Perhaps the clearest example of this arises through the ability of such rights to protect against poverty through a guaranteed minimum income but, if political expediency through the alignment of political power to either side of the industrial relations equation – workers or employing organisations – is to be kept under review, associated rights including those to non-discrimination and to collective bargaining are equally worthy of protection.

The obvious solution for those concerned with protecting and strengthening valuable social rights by moving them out of the grasp of shifting temporal ideologies perpetrated by democratically elected but, nevertheless, transient governments would seem to be to re-categorise them as fundamental human rights. Such a move would ostensibly be supported by the inevitable convergence of the relevant provisions of EU law and the ECHR, but there are certain hurdles which must be overcome in the achievement of this aim. The first is the paradoxical threat posed to certain basic guarantees provided under the EU Treaties, such as those provided by the free movement provisions. When pitted against the specificity of rights of association, collective bargaining and non-discrimination, the EU's free movement provisions are of varying importance in shaping the overall package of rights and obligations relevant to the protection of labour depending on the member state within which such rights are exercised. As the CoJ observed in giving its judgement in the *Rüffert* case, the imposition of a legally sanctioned collective agreement which protects wage rates in one country (Germany) does not enable workers from another country (Poland) 'to achieve genuine equality of treatment with German workers but rather prevents workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer is unable to exploit his cost advantage with regard to the competition'[42]

The Court's decision in that case and in its related judgements[43] has been the subject of much debate and disagreement[44] but it does highlight the delicate nature of the balancing act required to

[42] C-346/06 *Rüffert* [2008] ECR I-1989, at para. 15. On this point, see J. Fudge and G. Mundlak, Justice in a Globalizing World: Resolving Conflicts Involving Workers' Rights beyond the Nation State – not yet published.
[43] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.
[44] See Busby and Zahn n 32; M. Rönnmar (ed.), *EU Industrial Relations vs National Industrial Relations. Comparative and Interdisciplinary Perspectives*, (Kluwer, 2008); R. Blanpain and A.M. Swiatkowski (eds.), *The*

preserve the free movement rights of posted workers alongside the pursuance of social objectives intended to maintain and improve working conditions across the EU for *all* workers. This emphasises the necessary existence of the justiciable space within which the Court is expected to interpret international and supranational standards in order to give effect to such rights and this leads us to the second of the objections commonly levelled against the constitutionalisation of social rights, namely the justiciable objection.

b. The Justiciable Objection

In noting the difficulty in enforcing such rights, Hepple has stated that 'Social rights are like paper tigers, fierce in appearance but missing in tooth and claw.'[45] The non-specificity of social rights is one of the features often cited as justification for them not having more effective enforcement mechanisms. This harks back to Marshall's classification under which such rights were deemed to be largely aspirational and thus imprecise and not amenable to juridical enforcement and judicial interpretation in contrast to the clear legal status afforded to civil and political rights.[46] The movement towards soft law enforcement in the EU would seem to support this view and there is, undoubtedly, a good argument for the resolution of disputes concerning labour rights to be settled by alternative methods rather than by the imposition of hard law sanctions.[47] However, the current socio-political environment within which labour law operates does make it necessary to question whether, if Marshall's presumption ever did in fact hold true, this is still the case or whether combined factors such as the changing nature of working relationships, increasing globalisation of the labour market and developments within the international legal order provide compelling reasons to reassess the suitability of judicial involvement in the interpretation of such rights.

The history of the EU and, more specifically the CoJ, in its previous incarnation as the ECJ, provides a useful case study in this respect as it was through the very process of juridification and judicial interpretation by the Court 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,*[48] the

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Laval and Viking Cases: freedom of services and establishment v industrial conflict in the European Economic Area and Russia, (Kluwer, 2009); R. Zahn, 'The Viking and Laval Cases in the context of European enlargement', (2008) Web JCLI; and articles by A. Dashwood, T. Novitz, M. Rönmar, S. Deakin and S. Sciarra, in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, (Hart,2007-2008).

[45] B. Hepple, *Enforcement: the law and politics of cooperation and compliance' in Social and Labour Rights in a Global Context* (CUP: 2002) at p. 238.

[46] See Marshall n 31.

[47] See see B. Hepple, M. Coussey, and T. Choudhury, *Equality: A New Framework* (Hart, 2000).

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

Court considered the role of Article 117[49] and, whilst acknowledging that it could not give rise to direct effect, found that it could be used as a teleological tool for interpreting other Community law provisions. The Court held that, where pay inequality was due to sex discrimination, compliance with the aims of Article 117 enabled wages to be raised to the higher level. In justifying its decision, the Court declared that the equal pay provisions of Article 119[50] 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]'[51] Article 119's direct effectiveness has, of course, been pivotal in expanding the non-discrimination principle across a range of activities beyond equal pay between the sexes,[52] but history also teaches us that the high level of activity that characterised the Court's jurisprudence from *Defrenne II* up until the mid-1980s contributed to criticisms of judicial activism levelled against the Court resulting in claims that it was acting more as law-maker than interpreter.[53] This illustrates the delicate balance that must be struck between the EU's need to keep pace with its changing environment whilst managing to avoid charges of democratic deficiency and the lack or misuse of its legitimacy in certain areas.

So much has happened since the Court's early foray into social policy in respect of its own evolution, and in its relations both externally and with the other EU institutions that it is perhaps time to question whether such criticism of the Court's activities is still relevant. Of primary importance here is the fact that 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. Accordingly, the Court has a key role in the enforcement and interpretation of its provisions. [54] Arguably the greatest hurdle to progress in

[49] Article 117 EC, which provided the aims and principles of the limited Social Policy Chapter of the Treaty of Rome 1957: 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this treaty and from the approximation of provisions laid down by law, regulation or administrative action.' Now found in Art 151 TFEU with addition of an express recognition of subsidiarity and supplemented by Art 152's recognition of the role of social dialogue.

[50] Now Art 157 TFEU.

[51] Case 43/75 [1976] ECR 455.at para 10.

[52] From the incorporation of equal treatment as well as equal pay for men and women and up to and including the introduction of Article 13 EC (now Art 19 TFEU) which extended the reach of the anti-discrimination principle to encompass protection on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation and disability as well as sex.

[53] See, for example, 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).

[54] See 'For a Europe of Civic and Social Rights', report by the Comité des Sages chaired by Maria de

this respect lies with the restrictive nature and limited reach of the Charter'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 standards.[55] 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[56] so that the dynamism shown by the Court over the past 30 years as regards the recognition of fundamental rights as general principles of Community law may eventually be applied to promote, and perhaps expand, the fundamental rights on employment and industrial relations in the CFR.

Whatever the future impact of the Charter itself, the complex and multi-layered framework within which it is placed is at least *capable* of coherence and cohesion, detracting from Marshall's claim regarding the nebulous and imprecise nature of social rights. In addition to the EU's primary and secondary legislation and related case law, the Charter encompasses the ECHR and ILO principles and so can be seen as a linchpin in the consolidation of the EU and international law regimes – a relationship that will be further endorsed by the EU's forthcoming accession to the ECHR. Assuming that its ability to draw on the enhanced range of provisions will provide further possibilities for the Court's precise interpretation of social rights, does this herald 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 regarding the potential constitutionalisation of labour rights.

Jurisprudential Evolution of the CoJ and ECtHR – Conflict or Convergence?

In her analysis of the contributions of both courts to the developing human rights *acquis*[57] Douglas-Scott posits that 'human rights provide a fresh focus for European integration in a new millennium',[58] noting that 'the Luxembourg courts refer to Strasbourg far more often than does

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Lourdes Pintasilgo, (Office for Official Publications of the European Communities, Brussels, 1996) at pp. 12-13. Although Protocol (No) 30 to the Treaties on the application of the Charter to Poland and the United Kingdom restricts its interpretation by the Court of Justice and the national courts of these two countries, in particular regarding the rights relating to solidarity in Chapter IV.

[55] See, for example, 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).

[56] 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; Busby and Zahn n 32.

[57] S. Douglas-Scott, 'A Tale of Two Courts; Luxembourg, Strasbourg and the Growing European Human Rights *Acuis*' (2006) CMLR 629.

[58] Ibid at p. 629.

Strasbourg to Luxembourg.'[59] This is largely attributable to the ECJ's early acknowledgment that the EEC was bound by fundamental rights and, with no Community catalogue, 'it had to find a source for those rights'.[60] However, although the ECHR was cited in over 70 of the Court of Justice's judgements 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.'[61] This paper proposes to look at the relationship between the two courts in light of their jurisprudence on, first, the rights to participate in trade unions and to engage in collective bargaining and, second, the right to non-discrimination in employment. 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.[62] Differences 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.[63]

a. Collective labour rights

The differing rationales underpinning social rights protection in the EU and under the ECHR have become particularly visible in recent decisions of the CoJ and the ECtHR on collective labour rights. The decisions taken by both Courts in *Viking, Laval, Demir and Baykara*, and *Enerji Yapi-Yol Sen* arguably sit at opposite ends of a spectrum of protection and it is unclear how to reconcile this jurisprudential clash unless accession of the EU to the ECHR results in a constitutionalisation of social rights in an EU context. Historically, neither Court interfered in the regulation of the right to collective bargaining and its corollary the right to collective action, deferring instead to the national level where protection is assured to varying degrees by the member states.

[59] Ibid at p. 644.
[60] Ibid.
[61] Ibid at p. 645.
[62] Article 34 and 35(1) ECHR.
[63] 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.

The ECtHR has been faced with the right to collective bargaining on a number of occasions in cases brought under article 11 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'. Similarly, while the ECtHR recognised the existence of a right to take collective action as 'a complement to collective bargaining' or as 'one of the most important means' for trade unions to protect their members' interests, it had always found restrictions on the rights to be justifiable as being 'necessary in a democratic society' thereby deferring to the national level. The Court first departed from this approach in Wilson v UK and ASLEF v UK. However, it was the decision in *Demir* and *Baykara*, where the Court held in reliance inter alia on ILO Conventions 98 and 151 and the EU's CFR that 'the right to bargain collectively […] has, in principle, become one of the essential elements of […] Article 11 of the Convention', which enshrined a fundamental right to collective bargaining in the ECHR. Interestingly, the case was decided (in 2008) shortly before the CFR became a legally binding document but after the CoJ had begun to regularly rely on the Charter as an influential source of human rights norms thereby illustrating the potential of the CFR to act as a linchpin and potential vehicle for consolidation of jurisprudence between the two courts in the sphere of labour rights.

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.' On this basis, 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.' Also, unlike in previous cases, the court did not accept the justification put forward by the Turkish government. 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 such 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. If the same interpretation were given to article 28 of the Charter guaranteeing the right to collective bargaining and action which is framed from the outset in broader terms than article 11 ECHR, then this could have the potential to introduce a 'human rights' conception' of collective labour rights into the European Social Model.

At an EU level, 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 social rights as constitutional rights into the EU legal order, deferring instead to their protection at a national level. However, in more recent decisions this fragile balance has been upset by the CoJ recognising the existence of fundamental collective social rights but not accepting their constitutional nature. It is in these more recent cases that the economic rationale underpinning the European Social Model comes to the fore. To demonstrate this point, one must look at the cases in chronological order. In *Albany* – the first case where the CoJ was faced with a question on collective labour rights – the CoJ was tasked with judging whether a collective agreement which underpinned a sectoral occupational pension fund should be considered an anti-competitive agreement under the EC Treaty. Although recognising that 'certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers ' , the CoJ found that provided collective agreements pursue social objectives in line 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 attaching collective agreements.

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 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.'[64] The rulings have been analysed and criticised elsewhere and this article does not purport to do the same but suffice to say that these decisions are not only 'a flagrant breach of the principle of the protection of member

[64] Fudge n 8 at p. 264.

state labour constitutions against European law' , but also reinforce the economic underpinnings of the EU to the detriment of social rights. While the CoJ much like the ECtHR in *Demir and Baykara* and in *Enerji Yapi-Yol Sen* referred to the CFR[65] and relevant ILO Conventions[66] in its judgments in both cases, it did not attach the same significance to these documents thus failing to recognise the constitutional nature of the collective labour rights at issue. As the CoJ's decisions in *Viking* and *Laval* preceeded those of the ECtHR, it is perhaps not surprising that the CoJ did not refer to Strasbourg jurisprudence.

b. 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.[67] 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' interplay regarding the application of the principle in cases concerning the rights of transsexuals illustrates.

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 ECJ's very first reference to the ECtHR's jurisprudence was in *P* v. *S* [68] 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 CoJ and ECtHR 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. The relationship between the two courts in this context, although understated, has been significant in that, in the absence of any explicit reference to transsexualism

[65] At para 25 in *Viking* and at para 90-91 in *Laval*.
[66] 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*.
[67] 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 p. 99.
Article 157 TFEU.
[68] Case C-13/94, *P* v. *S*, [1996] ECR I–2143.

in the Treaties (even post-Lisbon), 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, producing 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 Court of Justice decided in the affirmative on the basis that 'the right not to be discriminated against on grounds of sex constitutes a fundamental human right',[69] 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. In reaching its decision, the Court cited the definition of transsexualism laid down by the ECtHR in *Rees v UK* 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 .[70] This was surprising as the *Rees* judgment hardly displayed a progressive approach to transsexual rights and thus did not provide support for the ECJ's judgment in *P* v. *S*.[71] In fact, Rees's claim was unsuccessful and the ECtHR's judgment was later overruled in *Goodwin v United Kingdom*[72] in which reference was made to the ECJ'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 the Articles 8 and 12 ECHR. In *KB v National Health Service Pensions Agency and Secretary of State for Health*[73] the ECJ 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 the ECtHR's judgment in *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

[69] At para. 19

[70] [1986] 9 EHRR. The Court held 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.. [*Rees v United Kingdom*, para 38]. *P. v. S.* judgement, para 16.

[71] Douglas-Scott n 56 at p. 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 (ex-Article 13 EC) under which sexual orientation is specifically covered by the anti-discrimination principle.

[72] [2002] 35 EHRR 447.

[73] Case C-117/01 [2004] ECR I-541.

a more recent reciprocal move the ECtHR in *Schalk and Kopf v. Austria*[74] made an 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'.[75]

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'. [76] 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.

Conclusion

This paper set out to explore whether and to what extent the impact of international law is likely to assist in the constitutionalisation of social rights – in particular the right to non-discrimination in employment and the rights to participate in trade unions and to engage in collective bargaining – within the EU legal order. What has become evident is that a very different picture emerges in respect of both rights. Whereas international law has the potential to endow collective labour rights with constitutional status in an EU context, 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. The reasons for this lie not only in the jurisprudence of the courts but also in the treaties underpinning both legal orders. Thus, accession of the EU to the ECHR may indeed herald a new dawn for the CoJ's engagement with collective labour rights as at present a chasm is opening up between the jurisprudence of the ECtHR and the CoJ and, in particular, the importance that they attach to the

[74] *Schalk and Kopf v Austria*, Application No 30141/04, Judgment of the ECtHR 24 June 2010.
[75] Ibid at paras 93-94.
[76] Recital 3.

fundamental right to strike. If Ewing and Hendy are correct in suggesting 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 then surely the CoJ's approach to limiting the fundamental right to strike when it conflicts with economic freedoms enshrined in the EU Treaties is no longer tenable. Unfortunately, *Demir and Baykara* and *Enerji Yapi-Yol Sen* were decided after the CoJ's judgments in *Viking* and *Laval* and there has so far not been a case before either court which might resolve this conflict. 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 has the potential to culminate in the constitutionalisation of collective labour rights within the EU legal order. Both courts' reliance on the CFR may provide the linchpin in this process of constitutionalisation.

A different picture emerges in the area of non-discrimination. Despite the EU's economic rationale for the introduction of social rights, it provides stronger protection in the sphere of non-discrimination than the ECHR's comparable provisions and jurisprudence. In part, this has been driven by economic considerations within an EU context: the abolition of discrimination is necessary in order to promote fair competition amongst workers and enterprises so as to ensure the proper functioning of the internal market. However, there is also a more fundamental or constitutional dimension to the protection from discrimination within the EU legal order: that of EU citizenship.[77] Thus, as a right it is already afforded greater protection within the EU legal context than the right to engage in collective bargaining not only in legislation but also through the jurisprudence of the CoJ. Within the ECHR, on the other hand, the right to non-discrimination does not exist as a stand-alone right and the ECtHR's jurisprudence has been comparably weak in this area. Nonetheless, the right to non-discrimination has certainly benefitted from interplay between the courts, albeit in limited areas, and it is interesting to note the ECtHR's willingness to draw on the provisions of the CFR for authority in its own jurisprudence. The next few years which will see the Charter's provisions bed in, providing the opportunity for enhanced protection in certain areas within the ECtHR's jurisdiction, and the accession of the EU to the ECHR will undoubtedly create a space for increased judicial dialogue with the potential to strengthen and revisit the status of many pre-existing labour rights.

[77] Since the Treaty of Maastricht and by virtue of article 21 TFEU, every national of an EU member state holds EU citizenship and is endowed with a right to non-discrimination. For an in-depth discussion see, for example, J. Shaw, *The Transformation of Citizenship in the European Union*, (CUP, 2007) at pp. 9-10.