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*A judicial pathway to
overcome
Laval and Viking*

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***A judicial pathway to overcome
Laval and Viking***

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Table of contents

Introduction*	2
1. The <i>Laval</i> /Quartet	3
2. On Legal pluralism and dialogue between courts.....	4
3. The relation of the European legal order to the constitutional orders of the Member States	6
4. The Member States and the European Union: can the constitutional courts strike back?.....	9
5. A new avenue: the European Court on Human Rights as guardian of fundamental social rights	13
6. The constitutional obligation for the European Union to submit itself to the <i>Strasbourg rule of Law</i>	15
7. Prospects of the accession of the EU to the ECHR.....	16

Introduction*

There are many ways to overcome the attack the Court of Justice has undertaken on the constitutional values of the Finnish and the Swedish constitutional order after the Laval and Viking cases. In our view the best solution is a reform of the economic constitution of the European Union. The so-called Social Progress clause advocated by the European Trade Union Confederation (ETUC) provides such a conclusive solution. Since this would require a Treaty revision, the likelihood of such a revision is poor. Legislative intervention amending e.g. the Posting of Worker Directive, including a so-called Monti-clause into the Directive might be more realistic, but is insufficient to redress the situation. The Court of Justice might indeed overrule such a legislative intervention acting in its capacity as the guardian of the fundamental economic freedoms enshrined in the Treaty. A recent judgment of the Court ⁽¹⁾ illustrates this. In *Commission against Belgium*, the Court ignored the "immunity" deliberately provided by the recent Temporary Agency Work Directive to the sovereignty of Member States in defining national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary work agencies. The judgment of the Court is also at odds with the wish of the legislator expressed in the Services Directives not to touch upon services of temporary work agencies, to which the Services Directive is not supposed to apply. The Court of Justice overruled the professed neutrality of the EU Treaty by applying the freedom of establishment enshrined in Article 56 of the TFEU. In this paper, I will explore another avenue which is the avenue of dialogue between Courts against a background of legal pluralism. A stronger and more critical dialogue between Courts might soften the way the CJEU deals with conflicts between fundamental social rights and so-called fundamental economic freedoms. This path way does not require any legislative nor constitutional amendment. To the contrary, it requires courage of constitutional Courts upholding the values of their constitutional and it requires in fact the decency to execute the solemn obligation for the European Union to accede to the European Convention on Human rights.

* This Research Paper seeks to summarize recent research which was undertaken in the following publications: Andreas Bücken, Filip Dorssemont & Wiebke Warneck, (2011) "The search for a balance: analysis and perspectives", in Andreas Bücken, Wiebke Warneck, *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, Baden-Baden, Nomos, 351-389. Dorssemont, F., (October 2011, forthcoming) "The Right to Take Collective Action: The Prospects of the Accession to the European Convention on Human Rights. How the European Court on Human Rights Gave us Energy to Cope with Laval and Viking" in M.-A. Moreau, *Before And After The Economic Crisis. What Implications for the 'European Social Model'?* Edward Elgar Publishing Ltd, Cheltenham.

1. CJEU, 30 June 2011, C-397/10, (*Commission v. Belgium*).

1. The *Laval*/Quartet

Though it is customary to speak of the *Laval* quartet as a whole, two (*Laval* and *Viking*) of the four judgements ⁽²⁾ relate to a tension between genuine fundamental rights guaranteed by the Finnish and Swedish Constitutions as well as by human rights treaties on the one hand and EU fundamental freedoms on the other hand. As indicated by the late Brian Bercusson in “The trade union movement and the European Union: judgement day” ⁽³⁾, which he published prior to the judgements in *Laval* and *Viking* the approach adopted by the Court was far from inevitable. To the contrary, the Court had to overcome a lot of conceptual hurdles in order to arrive at its questionable “balancing operation”. He stated that “nineteenth century doctrinal ghosts of the dominance of market freedoms have returned to haunt EU labour laws of the twenty first century” ⁽⁴⁾.

In the infamous *Viking* and *Laval*, the Court did recognize a right to have recourse to collective action as a general principle of EC law ⁽⁵⁾. The Court construes the right to have recourse to collective action partially by reference to ILO instruments related to the freedom of association and partially by reference to the European Social Charter. So far so good. The Court of Justice decided however that these “general principles” could and needed to be balanced against the mere “legal” principles of the European economic constitution, *id est* the so-called fundamental economic freedoms. As a result of this judicial exercise, genuine fundamental rights were being restricted in a way which was unprecedented in the national constitutional orders upholding and recognizing these rights. Hence, these judgements illustrate a “constitutional” clash between the domestic order of Finland and Sweden on the one hand and the legal order of the European Union on the other hand.

The judgements also suggest a clash between the legal order of the Council of Europe and of the ILO on the one hand, and that of the European Union on the other hand. That apparent “clash” was in fact confirmed by the ILO’s Committee of experts which recently considered that “it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services” ⁽⁶⁾. The Committee considered that the “doctrine that is being articulated in these CJEU judgements is likely to have a significant

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2. We refer to the following judgments of the CJEU: CJEU, 11 December 2007, C-483/05 (*Viking*) 18 December 2007, C-341/05 (*Laval*), 3 April 2008, C-346/06 (*Rüffert*) and 19 June 2008, C-319/06 (Commission vs. Luxembourg).
 3. B. Bercusson, (2007) “The trade union movement and the European Union: judgement day”, *European Law Journal*, Vol. 13, N°. 3, pp. 279-308.
 4. X, (2009) Labour Law and Social Europe. Selected writing of Brian Bercusson, Brussels, ETUI, 462.
 5. ECJ, 11 December 2007, C-483/05 (*Viking*) and 18 December 2007, C-341/05 (*Laval*).
 6. Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010, p. 209.

restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention”.

The conclusions of the Expert Committee monitoring ILO Conventions and recommendations illustrate that the clash between legal standards finally amounts to a clash between bodies enforcing or monitoring these standards.

2. On Legal pluralism and dialogue between courts

Those clashes inevitably entail confusion for European citizens and even their governments in an era marked by “multi level governance”. The notion of multi-level governance refers to the fact that citizens in a specific situation are governed by legal standards stemming from distinct legal orders. These distinct legal orders can be associated to “levels” of governance. Whereas each legal order can establish a hierarchy of legal *sources*, it is impossible to establish out of “a view from nowhere” a hierarchy between legal *orders*. Each legal order will define its relation to other legal orders and the resulting hierarchies of legal orders can conflict among each other. In sum, the notion of level is somewhat confusing. It suggests that it is possible to identify out of a view from nowhere inferior and superior levels being part of an integrated “system”. In stead we prefer the notion of a “network”. Each legal order will however determine the “level” at which distinct legal orders need to be situated. It can consider these orders to be irrelevant and ignore them. It can also consider these orders to be “relevant”. The reception of precepts of a legal order in a recognizing legal order can take many forms. The precepts can be considered to be superior (with or without reservations), equal or inferior to standards from the recognizing legal order.

The levels at issue in the concept of “multi-level” governance need to be distinguished from the levels at which industrial relations are being organized. In *Viking* the boycott at issue took place at global level. The globalized system of industrial relations which the ITF was seeking to establish was legally governed by distinct “levels”. Legal frameworks stemming from distinct legal orders were relevant for the Finnish trade unions and the ITF. Whereas the Finnish legal framework for industrial relations facilitated recourse to such boycott actions, the European Union legal framework for free movement sets limits to the effective recourse to such actions. In other words, the Finnish trade unions and the ITF were operating in a network of legal frameworks stemming from distinct legal orders. In *Laval* the industrialized relations at issue were those located in Sweden, at plant and to some extent at sectoral level. The Swedish trade union takes action in Sweden with the aim to enforce the conclusion of a Swedish collective agreement. The only transnational element is that workers from Estonia are posted to Sweden. This case is mainly rooted in national Labour law and only the posting of workers brings EU law and the CJEU into play. The quintessential issue was indeed how to integrate posted workers and the Latvian service

provider active on Swedish soil into the Swedish system of industrial relations. The industrial relations concerned were facilitated by legal standards stemming from the Swedish legal order and they were hampered by EU provisions related to the freedom to provide services as well as those enshrined in the Posting of Workers Directive.

In sum, it would be erroneous to describe this network as a legal framework in its own right. The network is not a normative concept. It does not create a hierarchy between the various legal frameworks. Each legal order within such a network defines its relations to other legal orders.

Thus, the Finnish and Swedish trade unions might genuinely believe to exercise a right to take collective action within the limits of the constitutional recognition, whereas the Court of Justice of the European Union seems to instruct a domestic judge to assess the proportionality of the collective action in a way which is unprecedented under Finnish law (*Viking*) or even to instruct a domestic judge to deny that the collective action has a legitimate character (*Laval*). The Court of Justice thus might force domestic judges to act in a way which is contrary to the domestic Constitution of their legal order and to the obligations arising out of international treaties ratified by the State.

It needs no further argumentation to state that industrial relations are deeply rooted in the history and the culture of the Member States. Furthermore, these relations are conflictual. In fact, the Treaty on the Functioning of the European Union provides evidence of the awareness of the sensitive nature of the subject matter. Thus, some core issues of industrial relations, such as pay, the right of association, the right to strike or the right to impose lock-outs have been excluded from the competences in the field of Social Policy listed in Article 153 TFEU. The European Union is competent to regulate on the issue of representation and collective defence of the interests of workers and employers, including co-determination. However, directives related to these issues, which inevitably touch upon the relation between trade union and elected workers representatives, require unanimity. In sum, the European legislator shall not affect the sovereignty of the Member States against their will. In Articles 151 and Article 152 the "diverse forms of national practices" and the "diversity of national systems" (*id est* of industrial relations) are explicitly recognised. Both provisions are in fact addressed to the European Union, *id est* to all the European Institutions. A similar diversity is suggested in Article 155 2) TFEU. Whereas the European legislator has indeed been extremely reluctant to legislate on the issue of the identity of workers' representatives by referring for such a definition in a systematic way to the law or practices in the Member States, the *Viking* and *Laval* judgements do not at all provide evidence of a similar judicial *pudeur*. The latter is astonishing, since the CJEU is operating in a area unaffected by any countervailing legislative

power (⁷). Moreover, the Court has corroborated its reasoning in *Laval* and *Viking* by referring to primary EU law. In this respect, even a legislative intervention can not solve the problem.

Those potential clashes between legal orders can be *softened* in our view, insofar as legal orders recognize human rights instruments of other legal orders. Such a reception of human rights will only provide a satisfactory solution, insofar as judicial or quasi judicial authorities also take the interpretation of these instruments into account developed by the supervisory bodies established to interpret these standards in the legal order from which they originate. Insofar as both conditions are met, it is appropriate to speak about a genuine dialogue (⁸) *between* "courts", even if paradoxically the dialogue might show to have a unilateral character. Insofar as only the first condition is being met, it is more appropriate to speak about a purely inter-textual canon of interpretation (*intertextualité*). In our view, the notion of co-operation is of a different nature. It often tends to be used in order to express how Courts of the *same* or of *distinct* legal orders are involved in ruling on issues of a dispute. Thus EU Law might allow or even urge domestic judges to submit preliminary references to the CJEU. In the same vein, the German Constitutional Court can instruct German judges to submit preliminary references related to EU law that might conflict with German Constitutional law to the CJEU prior to addressing the issue of the constitutionality of EU law. In those circumstances, a dispute will force judges to co-operate on an existing case (⁹).

3. The relation of the European legal order to the constitutional orders of the Member States

In its famous landmark judgement *Van Gend en Loos* (¹⁰), the European Court of Justice described the European Community as a legal order in its own right. The Court did not define the concept of a legal order. However, in a preceding paragraph, it seems to distinguish a Treaty establishing a legal order from an (international) agreement "which merely creates mutual obligations between

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7. See also F.W. Scharpf, (2010) "The asymmetry of European integration, or why the EU cannot be a "social market economy", in *Socio-economic Review*, p. 217: "The effectiveness of the Court's judicial legislation is also greatly enhanced by the extreme difficulty of a political reversal".
 8. See also the semantics in Declaration n° 2 on Article 6 (2) of the Treaty on European Union, where the Conference refers to the existence of a "regular dialogue between the Court of Justice of the European Union and the European Court on Human Rights".
 9. On 19 May 2010 the EP has adopted a resolution on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241(INI)). The EP speaks about "dialogue and co-operation" within an "integral system". The EP also says that: "legislative and case law harmonisation in the field of human rights of the rule of law of the EU and the ECHR will contribute to the harmonious development of the two European courts in the field of human rights, particularly because of the increased need for dialogue and cooperation, and thus will create an integral system, in which the two courts will function in synchrony".
 10. CJEU, 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62.

the contracting parties". The European Community is a distinct phenomenon for two reasons. The TEC establishes "institutions endowed with sovereign rights, the exercise of which affects Member States". Furthermore, the Court indicates that the Treaty also affects the citizens of the contracting States and that these nationals brought together in such community are called upon to cooperate in the functioning of this community through the intermediary of the European Parliament *and* the economic and social committee.

The judgement of the Court did not clarify the exact relation between the European legal order and the domestic legal orders of the Member States. It did create the image of a European citizen which is subject to a kind of multi-level governance.

In *Costa Enel* ⁽¹¹⁾ the Court clearly indicated that Community law prevailed over domestic legislative measures. The *ratio of* such a rule of precedence was highlighted:

"the obligations undertaken under the treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories"

In *Internationale Handelsgesellschaft* ⁽¹²⁾ the Court made it abundantly clear that Community law even prevails over *constitutional* standards of the Member States. The Court stated that

"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".

Thus, the Court clearly manifested a rule of absolute precedence, irrespective of the material content of the constitutional provision concerned, Since these judgments all sprang out of preliminary references, the Court's case law can be seen as an admonition to national judges,

11. CJEU, Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., Case 6-64.

12. CJEU, 17 December 1970, Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11-70.

including constitutional courts, to abide by the interpretation of Community law given by the Court, setting aside national legislative and constitutional provisions in case of conflict.

In a recent case, which related to a conflict of the right to bargain collectively recognised under the German basic law with EU directives related to public procurement as well as with the underlying principle of the freedom to provide services, the Court stated that human rights which were recognized under the constitution of a Member State and under the Charter of fundamental rights need to be exercised in accordance with European Union law ⁽¹³⁾.

In exceptional circumstances, Member States can invoke obligations stemming from international treaties *prior* to the conclusion of the TEC in order not to abide by European Union Law or to avoid the censorship of the CJEU ⁽¹⁴⁾. Thus Article 307 TEC (now Article 351 TFEU) provides:

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude”.

The TEC does not take into account obligations stemming from the conclusion of international treaties posterior to the conclusion of the TEC. The CJEU might disregard secondary EC law which is contrary to primary EC law. However, the CJEU considers itself to be the sole judge of such a test of conformity. In a recent discussion document, the CJEU stated:

“In the judicial system of the European Union, as established by the Treaties, the Court of Justice has the task of ensuring that in the interpretation and application of the Treaties the law is

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13. CJEU, 15 July 2010, European Commission v Federal Republic of Germany, Case C-271/08, nr. 43. “In particular, while it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law”.
 14. In this respect, see: CJEU, 2 August 1993, Criminal proceedings against Jean-Claude Levy, Case C-158/91 and Judgment of the Court (Sixth Chamber) of 3 February 1994 and CJEU, Office National de l'Emploi v Madeleine Minne, Case C-13/93.

observed, and it alone has jurisdiction, as a result of its function of reviewing the lawfulness of the acts of the institutions, to declare if appropriate that an act of the Union is invalid” (15).

4. The Member States and the European Union: can the constitutional courts strike back?

The question arises how domestic legal orders tend to construe the relation between their legal order and that of the European Union. It is obviously impossible to examine this question for all the Member States concerned (16). It will usually be regulated or by a provision in a *written* constitution and/or by the case law of a Constitutional Court. As guardians of the Constitutions, Constitutional courts have a natural vocation to determine the relation between EC law and the Constitution, especially in absence of a clear cut answer in a written constitution. The German and the Italian Constitutional Courts have developed a doctrine on this issue. The stance they took is more explicit and to some extent more courageous than the one developed by other courts. In essence, this is a matter of constitutional law.

The law of the European Union can be placed on equal footing as domestic *legislation* or it can be given a status which is superior to *legislation*. The conviction that secondary EU law is in fact *supra*-national law, instead of *international* law is deeply rooted in the judiciary of Member States. However, the proof of the pudding resides in the relation between EU Law and the *constitutional* standards of the Member States. The question remains to be answered, whether EU law is perceived as being superior to constitutional standards by the judiciary of the Member States. If this is not the case, it is clear that the doctrine of *Internationale Handelsgesellschaft* is being opposed.

The very ruling of the *Internationale Handelsgesellschaft* has been opposed by the referring judge. In stead of just following the Court’s teaching, the referring judge submitted a preliminary references at the German Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*). It asked whether the applicable EU legislation was indeed compatible with the German Constitution. According to the referring court, it had doubts on the compatibility of the applicable EU law with the German basic law (Constitution). The referring Court did not explicitly asked whether the doctrine of the CJEU regarding the primacy of EU law was “acceptable” to the *Bundesverfassungsgericht*. However, if the BVerfG would argue that the

15. See the document posted at the website of the CJEU: “Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

16. For a vast overview of the issue G. Martinico and O. Pollicino (2010), *The national judicial treatment of the ECHR and EU laws*, Groningen, Europa Law Publishing, 525 p.

applicable EU law was incompatible with the German Constitution, the referring judge would inevitably have to make a choice. It would have to apply EU Law and violate the basic law or it would have to refuse to apply it in order to uphold constitutional standards.

The BVerfG in the *Solange I* ⁽¹⁷⁾ ruling did not fail to censure the CJEU. It took the liberty to criticize and reject the doctrine of the primacy of EU law above the German Constitution. Building upon the case law of the CJEU, it rightly ruled that the issue at stake was not just a conflict between legal standards, but a conflict between distinct legal orders (*Rechtskreise*) ⁽¹⁸⁾. It suggested that *both* the BVerfG and the CJEU had an obligation to strive for the *concordantia* of both legal orders. The Court refused to uphold EC law where it enters into conflict with core provisions of the German Constitution, especially the constitutional Charter of fundamental rights. The BVerfG indicated that the existing constitutional provision allowing for a transferral of competence through international treaties (Article 24 Grundgesetz) could not be interpreted as an authorisation to derogate from those fundamental rights. Furthermore, the Court stated that it had to take into account a “procedural” and a “substantial” deficit of the EU legal order. The procedural deficit related to the lack of a democratic control by a parliament endowed with legislative powers that has been directly elected. The substantial deficit related to the lack of a charter on fundamental rights guaranteeing an *identical* protection (*dessen Inhalt ebenso zuverlässig ist*) as provided by the German Constitution.

In view of this double deficit, the Court concluded by its seminal “Solange” phrase. It decided that *as long as* the European integration is not so developed that European Union law is adopted by Parliament and that it enshrines a catalogue of fundamental rights, which is as adequate as that of the German constitution, a preliminary reference of a German judge to the Constitutional Court *following* a preliminary reference to the CJEU is both admissible and necessary, when the referring judge considers the European Union standard *as interpreted* by the CJEU to conflict with one of the fundamental rights granted by the German Constitution ⁽¹⁹⁾.

In a subsequent judgement of 22 October 1986, the *Solange II* ⁽²⁰⁾ judgement, the BVerfG ruled that ever since *Solange I* the European integration had developed in a favourable way. The BVerfG was satisfied with the explicit tribute the European Union institutions now paid to the respect of fundamental rights in the exercise of their powers and in the pursuit of the objectives. They were satisfied with the reference the CJEU paid to human rights as established by the constitutions of the member states and by the European Convention on Human rights. Hence, the BVerfG assessed that the human rights protection in EC law was in its conception, substance and

17. Bundesverfassungsgericht, 29 May 1974, BverfGE 37, 271.

18. Point nr. 23 of *Solange I*.

19. Point nr. 38 of *Solange II*.

20. Bundesverfassungsgericht, 22 October 1986, BverfGE 73, 339.

manner of implementation essentially comparable with the standards of fundamental rights provided for in the German Constitution. For this reason, the BVerfG considered references to assess the constitutionality of the application of secondary EC law in Germany *in the light of fundamental rights under the German Constitution* to be *inadmissible*.

The application of secondary EC legislation can however still be challenged on other grounds related to the conferral of competences to the European European Union and related to the inviolable core content of the constitutional identity of the Basic Law. Furthermore, the German BVerfG can fully review *primary* EC Law on the basis of its conformity to the German Constitution.

Ever since *Solange I*, the BVerfG has monopolized the review of the constitutionality of primary and secondary EC Law within the self-imposed limits. As evidenced by *Solange I*, domestic judges are in fact invited to make a preliminary reference to the CJEU prior to making a preliminary reference to the BVerfG. This can be construed as a good practice of co-operation between the CJEU and the constitutional Court. Indeed, the BVerfG thus avoids interpreting the scope of EU law. It assesses the conformity of EC law as interpreted by the CJEU in the light of the German Basic Law.

On 30 June 2009, the *Bundesverfassungsgericht* had to rule on the constitutionality of the Act approving the Treaty of Lisbon with the German Constitution. Though the BVerfG did not consider the approval to be at odds with the Constitution, it did put forward the competence of the German constitutional Court to review whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferred power. More important for the sake of the issue of a potential clash between constitutionally anchored fundamental rights and EU law, seems to be a more substantial test which is being introduced by the BVerfG. It stated that it would and could review the legal instruments of the European institutions and bodies in the light of the inviolable core content of the constitutional identity. The Court stressed that the Treaty nor the exercise of the competences accorded under the Treaty could preclude that Germany as a Member State would retain sufficient room for the political formation of the economic, cultural and social circumstances of life. It indicated that these circumstances were interwoven with the respect of fundamental rights. The Court elaborated on the scope of this phrase. Some of its considerations clearly indicate that the BVerfG affirmed that the German State constitutes a *Sozialstaat*. Thus, it highlighted the sovereignty of the German State "to shape the circumstances of life by social policy".

The vigorous approach adopted by the BVerfG in our view mitigates the impression which a *prima facie* reading of *Solange II* might generate. The BVerfG does not turn a blind eye on the respect of fundamental rights by EU institutions. The recent *Mangold* decision of the BVerfG of 26 August 2010 illustrates that the BVerfG also considers itself to be competent to scrutinize the rulings of

the Court of Justice as “legal instruments” of the European Union which need to respect the principle of conferred powers. There is no reason to assume why these decisions could not be made subject to an identity review as well, though this identity review was not operated in the case concerned.

In Italy ⁽²¹⁾, the Italian Constitution provides that Italian legislation needs to be consistent with the Italian Constitution and with EU law. This provision does *not* clarify the case of an inconsistency of EU law with the Italian Constitution. The Italian Constitutional Court has developed a so-called doctrine of counter limits in its judgement nr. 183/73 of 18 December 1973. Just as *Solange I*, this judgement can be seen as a more subtle reaction to the indiscriminate language of the CJEU in *Internationale Handellsgesellschaft*. In its judgement of 18 december 1973, the Italian Constitutional Court had to rule on the legitimacy of the ratification of the EC Treaty with the Italian Constitution. The Italian Constitutional Court ruled that this ratification could *not* be considered to undermine the fundamental principles of the Italian State. However, the Court considered it to be inconceivable that the Community would adopt instruments “in a civil, ethico-social and political ambit” which were at variance with the Italian Constitution. Furthermore, it argued that any instrument adopted by the Council which would affect the fundamental principles and human rights protected by the Italian Constitution *would* indeed be sanctioned by the Italian Constitutional Court. Hence, the ICC would *not* declare such a reference to be inadmissible based on a presumption that the EU legal order actually recognizes fundamental rights. The Italian Constitutional Court clarified however that it could not sanction instruments of the EC legal order as such, since it could only sanction regulations (*regolamenti*) of the Italian legal order. In practice, the Italian Court would order the non-application of a European Union instrument ⁽²²⁾. The approach adopted by the Italian Court prefigures the broader formula of the German Constitutional Court in its Lisbon judgement. It does not exclude that Italian judges could and should refuse to apply EU law if violates fundamental principles of the Italian Constitution.

Contrary to *Solange I*, the ruling does not provide much guidance *if* and *how* Italian judges, the Constitutional Court and the CJEU should co-operate when there is at least a presumption that such a conflict exists. On 8 August 2005, the Italian *Consiglio di Stato* was confronted with a situation previously considered to be inconceivable by the Italian Constitutional Court. In the *Fedefarma* ⁽²³⁾ case concerned, the administrative tribunal had to apply an Italian law which had been scrutinized by the Italian Constitutional Court and indeed partially censured in order to protect a constitutionally anchored fundamental right. The applicants claimed that the law was contrary to EU law and asked the tribunal to make a preliminary reference to the CJEU in order to

21. See G. Martinico and O. Pollicino (2010) “Italian Report” in The national judicial treatment of the ECHR and EU laws, Groningen, Europa Law Publishing, 269-300.

22. In the same vein: Italian Constitutional Court, 5 June 1984, C nr 170/1984.

23. Consiglio di Stato 8 August 2005, Diritto costituzionale 2005, 2021.

assess the issue. The *Consiglio di Stato* refused to do so, stating that the procedure was irrelevant, since it would have to rule anyhow upholding the judgement of the Constitutional Court in case of a conflict.

5. A new avenue: the European Court on Human Rights as guardian of fundamental social rights

By the end of 2008 the Grand Chamber of the European Court on Human Rights in *Demir and Baykara* ⁽²⁴⁾ would review its out-dated view on the freedom of collective bargaining as not being an essential element of the freedom of trade union association, paving the way for an unprecedented ruling in *Enerji* ⁽²⁵⁾. Despite its inability to qualify the right to strike as an *essential* means to protect workers' interests, the Court did construe the right to strike to be interwoven with the freedom of association. The Court approved of the ILO's Freedom of Association's assessment that the right to strike is indeed a "corrolaire indissociable" of the freedom of association. If the right to strike cannot be dissociated from the freedom of association, then it would better have to be requalified as "essential" to the latter. The clue to this judicial revolution was the very methodological tool of interpretation which Brian suggested to the ECJ, *id est* "interpretations consistent with international labour standards, where again national labour laws may fell short" ⁽²⁶⁾. In *Demir and Baykar II* the ECHR ruled that

"The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases" ⁽²⁷⁾.

In two judgements of the Strasbourg Court (*Unison and Federation of Offshore Workers' Trade Unions*) which preceded both landmark judgements the Court did adopt a broad interpretation of the conflicting private and public interests which could justify restrictions to the right to take collective actions. Hence, at first sights the prospects seem bad. As indicated earlier on, the Court in *Demir and Baykara* did indicate however that the Court was under an obligation to interpret

24. European Court of Human Rights, 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97.

25. European Court on Human Rights, 21 April 2009, *Enerji Yapi-Yol Sen*, nr. 68959/01.

26. Bercusson, B. (2006) "The European Laws: Help or Hindrance?" in K. Ewing, *The right to strike : from the trade disputes Act 1906 to a trade union Freedom Bill 2006*, Liverpool, The Institute of Employment Rights, 225.

27. European Court of Human Rights, 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97, § 85.

Article 11 of the EConvHR in the light of “international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.”

Since both judgements were ruled in disrespect of the ILO’s supervisory bodies as well as of the jurisprudence of the European Committee on Social Rights, the persuasive authority of these “precedents” is poor. In this respect, it is worthwhile to recall that the European Committee on Social rights has refused to take into accounts mere business interests as a justified restriction for the right to take collective action. Thus, it has refuted that a “proportionality test” was compatible with the exhaustive character of the restrictions under Article 31 ESC ⁽²⁸⁾. In the same vein, the ILO’s Committee of experts has recently considered that “it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services” ⁽²⁹⁾. The Committee considered that the “doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention”.

Irrespective of the accession of the European Union to the EConvHR, the European Court on Human Rights will be a competent forum to challenge national legislation and case law which has been influenced by the ECJ case law in *Laval* and *Viking*. In so far as domestic courts will refer to these cases to restrict the right to have recourse to collective action, this case law can be challenged. Thus, the Court will have the opportunity to scrutinize the ECJ in an indirect way. Unfortunately, the Court is known for being extremely cautious in assessing whether the action by contracting Parties to the EConvHR based upon EC Law is contrary to that convention ⁽³⁰⁾.

The recent report of the ILO expert Committee is an inspiring example for a more courageous stance. The ILO’s Committee refused to accept the defence of the British government which disclaimed any responsibility whatsoever for the attitude adopted by the judiciary, “because any adverse impact of Viking and Laval would be a consequence of European Union law to which the

28. See in this respect: ECSR, XVI-1, Conclusion with regard to Belgium. See for the situation in Belgium: F. Dorssemont, (2009), “La (non) conformité du droit belge relative à l’action collective par rapport à la Charte sociale européenne”, X. *Actualités du dialogue social et du droit de grève*, Kluwer, Waterloo, 167-202.

29. Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010, 209.

30. In this respect, see *inter alia* S. Douglas-Scott, (2006) “A tale of two courts: Luxembourg, Strasbourg and the growing European Human rights acquis”, *CMLR*, 629-630, 639-638 and X. (2005), “Relations between international courts and community Courts: Mutual deference or subordination?”, *CMLR*, 581-585. The leading case is European Court on Human Rights, 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Irlande*, §§ 155-156. See about this case : R. Lawson (2005), “The impact of the EU Constitution on the relationship between Strasbourg and Luxembourg”, in D. Curtin, A. E. Kellermann and S. Blockmans, *The Constitution, the best way forward?*, The Hague, TMC Asser Press, 380-382.

United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself". The Committee stated that it was in no position to judge the correctness of the ECJ holdings as such, but that it did have to "examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention nr 87" ⁽³¹⁾.

6. The constitutional obligation for the European Union to submit itself to the *Strasbourg rule of Law*

Due to the ratification of the Lisbon Treaty, the consolidated Treaty on European Union now provides that "The Union *shall* accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" ⁽³²⁾.

The accession to the EConvHR constitutes a more far reaching step in a constitutional recognition of fundamental rights within the European Union. In our view, it goes beyond a recognition of fundamental rights as mere general principles of the Union's law. In fact, Article 6 § 3 TEU *as such* already recognizes such an impact of the fundamental rights, as guaranteed by the European Convention on Human Rights.

Due to the accession, the status of the fundamental rights enshrined in EConvHR will differ fundamentally from those enshrined in the Charter of Fundamental Rights. In fact, at it best, the rights enshrined in the Charter have the same *legal value* as conflicting fundamental freedoms enshrined in the EU Treaties. Furthermore, the Charter itself has upgraded some of the fundamental freedoms which have the potential to conflict with fundamental (workers') rights. Thus, Article 15 of the Charter has consecrated the freedom of establishment and the freedom to provide services as proper "fundamental freedoms". In *Viking* and *Laval*, both freedoms have been considered to justify restrictions to the fundamental right to strike and the fundamental freedom of collective bargaining. Last but not least, Article 16 of the Charter has consecrated the freedom to conduct a business. The only international Court to interpret the Charter will be the ECJ. For the ECJ, it will be one among other "constitutional" principles to be taken into account.

In sum, in my view, the prospects that the Treaty reference to the Charter of Fundamental rights might provoke a *shift* in the way the Court deals or even has to deal with potential conflicts between the right to strike and so-called fundamental (economic) freedoms are extremely weak.

31. Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010, 209.

32. Article 6 § 2 TEU.

The prospects stemming from the accession to the EConvHR for changing the economic constitution of the European Union or at least adding a flavour of economic governance are more promising ⁽³³⁾. An accession to the EConvHR might add some relief to the flat juxtaposition of fundamental freedoms and fundamental rights integrated into one Charter. It puts genuine fundamental (workers') rights at the heart of the matter. Since the EConvHR is corroborated by a judicial supervision, it will force all European institutions, including the CJEU to abide by the judgements delivered in Strasbourg. As opposed to Luxembourg, Strasbourg will not dwell on the question whether human rights can restrict fundamental economic freedoms. It will assess whether and to what extent these fundamental economic freedoms can actually restrict genuine fundamental rights. It will force the European institutions to justify restrictions to citizens' rights, in stead of forcing citizens to justify the exercise of their human rights.

The accession to the EConvHR is by no means a fact. Though Article 6 TEU provides that the Union *shall* accede, article 218 § 8 of the Treaty on the functioning of the European Union provides that such a decision needs to be taken unanimously by the Council. The contrast between the wording of Article 6 and Article 218 § 8 TFEU is reminiscent of a similar contrast which characterizes the implementations of European (collective) agreements concluded between management and labour at Community level in the meaning of the Articles 139 TEC. The request of unanimity does not as such provide an argument for the Member States to question the obligatory nature of their constitutional duty under the Treaty on the functioning of the European Union to decide in favour of the accession. Article 238 § 8 TFEU does indicate that the ratification of the Lisbon Treaty as such is not sufficient to guarantee that the decision of the Council enters into force. The article provides that the decision will enter into force solely "after it has been approved by the Member States in accordance with their respective constitutional requirements".

7. Prospects of the accession of the EU to the ECHR

The *Luxembourg* Court considers that the European legal order is a *supra-national* legal order. As such, it is a legal order, not unlike any other legal order. It considers EU law to prevail over domestic constitutional law. It also distinguishes EU law from ordinary international law. The Court adopts an attitude in respect of other legal orders which is fairly "dualistic". The EU legal order is characterized by a kind of impermeability. The Court does not receive legal standards of distinct legal orders in their own right, but primarily as general principles of EU law. Insofar as these heteronomous instruments are not being recognized as the result of a legal "reception", it is

33. In the same vein comparing the impact of the Charter and the accession to the EConvHR: Ph. Syrpis (2008), "The Treaty of Lisbon: Much ado... But about what?", *Industrial Law Journal*, 233-234.

consistent that the Court disregards the case law of the distinct legal orders from which they sprang.

The accession of the EU to the European Convention on Human Rights might provoke a more “monistic” approach of the Court. The latter means that the provisions of the European Convention on Human rights will be part of EU law in their own right. Logically, this will force the Court to interpret those standards as legal standards which originate from the Council of Europe according to the interpretation of the Strasbourg Court. In *Solange I*, the German Constitutional Court forced the domestic judges to submit a preliminary reference to the CJEU insofar as they had doubts on the constitutionality under German Law of a European legal standard. This approach fully respects the CJEU as the ultimate guardian of the interpretation of EU law. It also can avoid conflicts. The doubts of a domestic judge might be based upon an erroneous interpretation of EU law. Ideally, the intervention of the CJEU could remedy a potential clash by issuing an interpretation of EU law which avoids a conflict with constitutional standards. In a recent discussion document, the CJEU seems to favour a similar stance ⁽³⁴⁾. It thus stated: “In order to preserve this characteristic of the Union’s system of judicial protection, the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.”

Mutatis mutandis, in the relation between the Strasbourg and the Luxembourg Court, the co-operation between both courts should respect the principle that the CJEU remains the sole judge for the interpretation of EU Law. The ‘supreme’ assessment of the conformity of EU law as interpreted by the CJEU with the EConvHR should be entrusted to the Strasbourg Court. The CJEU however seems to suggest that the European Court on Human rights cannot declare acts of the European Union to be “invalid”. The scope of this observation remains unclear. It gives the impression that Strasbourg can rule there is a lack of conformity with the European Union. It could condemn the European Union, but the Strasbourg Court could not declare that the act is null and void.

It is not crystal clear to what extent the European Court on Human Rights will have the courage to adopt a progressive stance on the right to take collective action. The timid recognition of the right to strike as a corollary right which can not be dissociated from the freedom of association only dates back to 2009 ⁽³⁵⁾. The case related to a clear cut *prohibition* of strikes in the Turkish public sector. In two judgements of the Strasbourg Court (*Unison* and *Federation of Offshore Workers’ Trade Unions*) which preceded both landmark judgements the Court did adopt a broad

34. See “Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

35. European Court on Human Rights, 21 April 2009, *Enerji Yapi-Yol Sen*, nr. 68959/01.

interpretation of the conflicting private and public interests which could justify *restrictions* to the right to take collective actions. Hence, at first sights the prospects seem bad. In *Demir and Baykara* ⁽³⁶⁾, the Court indicated that it was under an obligation to interpret Article 11 of the EconvHR in the light of “international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.” If taken seriously, such a canon of interpretation will urge the Court to see whether restrictions imposed by the Signatory Parties are in fact consistent with the case law developed by the ILO’s Freedom of Association Committee and that of the Council of Europe’s European Committee on Social Rights. Since both previous judgements were ruled in disrespect of the ILO’s supervisory bodies as well as of the jurisprudence of the European Committee on Social Rights, the persuasive authority of these “precedents” is poor. In this respect, it is worthwhile to recall that the European Committee on Social rights has refused to take into accounts mere business interests as a justified restriction for the right to take collective action. Thus, it has refuted that a “proportionality test” was compatible with the exhaustive character of the restrictions under Article 31 ESC ⁽³⁷⁾.

The posterior judgement *Trofimchuk v. Ukraine* ⁽³⁸⁾ relating to a dismissal of a worker for a participation into a “spontaneous” strike is disappointing for its total lack of any dialogue with the aforementioned committees.

In sum, the prospects that accession to the European Convention on Human Rights will provoke a shift in the balance between fundamental economic freedoms and fundamental workers’ rights will depend also on the judicial activism of the European Court on Human Rights. The method of interpretation introduced in *Demir and Baykara* provides the necessary tools to adopt a more progressive attitude based upon the dialogue between the European Court on Human Rights and specialized supervisory bodies monitoring fundamental workers’ rights.

At present, the CJEU is *not* a text book example of a Court which adopts an open attitude towards legal pluralism. Legal pluralism relates to the sound assessment that States do not have a monopoly on the creation of legal orders. Irrespective of whether they recognize, combat or ignore other legal orders, it cannot be denied that there is a plurality of legal orders. An open attitude amounts to the acknowledgment that other legal orders exist and that they might be relevant for

36. European Court of Human Rights, 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97.

37. See in this respect: ECSR, XVI-1, Conclusion with regard to Belgium. See for the situation in Belgium: F. Dorssemont (2009), “La (non) conformité du droit belge relative à l’action collective par rapport à la Charte sociale européenne”, X. *Actualités du dialogue social et du droit de grève*, Kluwer, Waterloo, 2009, 167-202.

38. European Court on Human Rights, 28 october 2010, *Trofimchuk v. Ukraine*, no. 4241/03.

the content and substance of a given legal order. If this is the case, attempts need to be made to avoid clashes.

Both the German Constitutional Court as well as the European Court on Human Rights have given credit to the legal order of the European Union. The question arises whether in a similar vein the CJEU should not give much more credit to the *Rechtsfortbildung* in the field of human rights developed by other courts. The German Constitutional Court as well as the Strasbourg Court adopted a Solange test. The test of the German Constitutional Court is radical. The BVerfG in fact considers preliminary references by domestic judges regarding the constitutionality of European legal standards from the point of view of human rights to be inadmissible. Luxembourg adopts a much more prudent approach. It departs from a presumption that EU law respects human rights standard, but this presumption can be rebutted.

The *Laval* quartet has seriously affected the perception that human rights are at the heart of the "rule of law" in the European Union. The mood for optimism which existed after *Schmidberger* and *Omega*, has long gone by in academic circles of labour lawyers. It would be erroneous to state that both judgements established a hierarchy where human rights prevailed over fundamental freedoms. In fact, the CJEU just recognizes human rights as general principles. In this respect, the human rights protection has never been "equivalent" to that guaranteed by domestic constitutional orders, contrary to what *Solange II* seems to suggest. In a domestic constitutional order, human rights are not just "general principles". They constitute basic principles or cornerstones of the legal order.

The prospects for a clash between courts which are the natural guardian of human rights and the CJEU have never been more realistic. *Solange I* would thus have to be revisited.

The CJEU reacted to *Solange I* by strengthening its lip service paid to human rights being recognized as "general principles" to appease the insurrectional mood. This approach has now proved to be insufficient. More is needed. First and foremost, it will be up to the European Union to fulfil its constitutional obligation to accede to the European Convention on Human Rights. This is primarily a challenge for the Council of the European Union, but it also requires the Court of Justice of the European Union to adapt its hermeneutical approach of the European Convention on Human Rights. It should recognize that it is bound by the Strasbourg interpretation of the Convention, just as it demands that the domestic judges of the Member States are bound by the CJEU's interpretation of European law.

More over, national constitutional courts could identify and acknowledge conflicts between their Charter of fundamental rights and the EU jurisdiction. Constitutional Courts should not just apply EU-Law but should act as the guardians of their constitutional Charter of fundamental rights. A more vigilant approach might put some pressure on the CJEU to consider fundamental rights not just as general principles, but as fundamental principles of the EU legal order. History shows that

these dialectical clashes are in fact beneficial for the protection of human rights at the level of the EU. Thus *Internationale Handelsgesellschaft* as opposed by the Constitutional Court and this insubordination has forced the Court to take human rights (a bit) more seriously in subsequent case law. In sum, clashes between courts have been helpful. They amount to a more satisfactory solution as exemplified by the "truce" *Solange II*.

The prospects of such an evolution based upon the "insubordination" of constitutional courts are uncertain. Not all Member States have a written constitution, nor is such a constitution safeguarded by the existence of a constitutional court. In practice constitutional courts have seldom opposed EU law by refusing to apply it.

However, both the German and the Italian Constitutional Courts now seem to provide leeway to oppose the application of European legal standards insofar as this would undermine the fundamental characteristics of the Italian and German constitutional order.

The *nexus* between fundamental social rights and the constitutional characteristics German and Italian way of life are beyond dispute. Thus, Italy is a Republic based upon labour (*L'Italia è una repubblica fondata sul lavoro*), just as Germany is not just a State, but a *Sozialstaat*. If constitutional courts would cease to insist on the peculiarity of their system of industrial relations as an essential element of the constitutional identity, why would they expect the European Union to take into account those divergences in the field of industrial relations?