The Right to Collective Action
– in Particular the Right to Strike –
as a Fundamental Right

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1. INTRODUCTION

The freedom of association is closely interwoven with the right to collective bargaining and collective action. This was clear during the twentieth century and remains so. In fact, the existence of a right to collective action without a freedom of association is inconceivable. This chapter will focus on the development of the right to collective action and the right to strike as a fundamental right in the light of the freedom of association.¹

Many different sources, institutions and charters have contributed to the development of the right to collective action. The aim of this chapter is to analyse certain normative systems, which have had an impact on the right to collective action and, in particular, on the right to strike, and to analyse convergence and divergence trends in law, especially from an EU legal point of view.

As a starting point, three normative legal systems that contribute to and define the right to collective action are considered. These are:

– the International Labour Organisation (ILO) Conventions Nos 87 and 98,
– the European Social Charter and the European Convention on Human Rights and Fundamental Freedoms,

¹ The chapter is based on a presentation at the Conference Labour Law and Social Security Law in an Enlarged Europe – A Social Dimension on the Move? held in Stockholm 3–4 November 2009, organised by the Swedish Network for European Legal Studies.

² Concerning terminology, in this chapter the term ‘strike’ is used, but the term ‘industrial action’ is often used in the literature. See N Bruun, ‘ILO och stridsåtgärder’ (2008) 2 Tidskrift utgiven av Juridiska Föreningen i Finland (JFT) pp 197, 200.

Following an examination of the normative basis and the development of the right to take collective action, the convergence and divergence trends with regard to the right to collective action and, in particular, the right to strike, are analysed.

This chapter does not examine other international regulations protecting the freedom of association and the right to collective action, such as the closely related 1966 United Nations’ Convention on Economic, Social and Cultural rights, in which the requirement to protect, in particular, the right to strike, was set out in Article 8.1.4. of the Convention.

2. ILO CONVENTIONS AND FUNDAMENTAL RIGHTS TO COLLECTIVE ACTION

2.1 Conventions Nos 87 and 98

The right to collective action is not explicitly dealt with in the ILO Conventions usually referred to on this matter. Instead, the right to collective action is an offshoot from the freedom of association founded on ILO Convention No 87 on Freedom of Association and Protection of the Right to Organise (1948) and Convention No 98 on Right to Organise and Collective Bargaining (1949). For instance, Article 2 of Convention No 87:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Furthermore, Article 1 of the Convention No 98 protects workers who exercise the right to freedom of association from anti-union discrimination and from measures taken by the employer with regard to the use of this right.

However, compared with, for instance, the European Committee of Social Rights (see below), the ILO has been more willing to accept that the right to

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1 With regard to the ILO and collective bargaining in particular, see B Gernigon, A Odera, & H Guido, 'ILO Principles Concerning Collective Bargaining' 2000:1 International Labour Review p 139.

2 With regard to discrimination and freedom of association, the European Court of Human Rights, in 2009, considered the fear of potential discrimination, in a situation when the state failed to fulfill its positive obligation to provide protection against discrimination on the grounds of trade union membership, to be a violation of Art 14 taken together with Art 11 of the European Convention; see Case Damlenkov and others v Russia [2009, Application 67336/01, ECHR 2009–[extracts] – 30.7.09).

3 See also P Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet (Uppsala, Iustus Forlag, 2003) p 151.
collective action may be reserved for trade unions. Hence, prohibitions on so-called ‘wild cat strikes’ in law have been accepted by the ILO.6

In two ILO Resolutions concerning trade union rights, adopted in 1957 and 1970 respectively, ILO Member States called for legislation to secure, and fully respect, trade union rights, including the right to strike.7

2.2 The ILO Supervisory Bodies

Interpretations and recommendations on the ILO Conventions are dealt with by the two ILO supervisory bodies: The Committee of Experts on the Application of Conventions and Recommendations; and the Committee on Freedom of Association, the latter working under the supervision of the ILO Board.

These supervisory bodies have frequently referred to the right to strike as a fundamental right, which leads to the conclusion that the right to collective action, including the right to strike, is considered to be an integral component of the right to association.8

The ILO Committees have further developed the interpretations regarding different aspects of the freedom of association, including the specification of restrictions on the right to strike, the objectives of strikes and more.

General prohibitions against collective actions are not accepted. However, the Freedom of Association Committee has stated that ‘in the event of an acute national emergency’, even a general prohibition on strike action could be justified for a limited period. That is, for instance, in genuine situations of national crisis such as serious conflicts, insurrections or natural disaster.9

In respect of public service employees, certain restrictions are able to be accepted, depending on the kind of public service functions the employees fulfill.10

In principle, the restrictions apply to public servants who exercise authority in the name of the state and, if restrictions are introduced, the employees should be afforded appropriate guarantees to protect their interests. It clearly follows from Article 9 of Convention No 87 that restrictions on the right to strike – determined by national law or regulations – should be accepted in the case of the armed forces and the police.

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6 Bruun, ‘ILO och stridsåtgärder’ p 200, above n 2.
8 Gernigon et al, ‘ILO principles’ p 8, above n 3, Herzfeld Olsson, Facklig föreningsfrihet, p 151, above n 5. Periodically this connection has been disputed, for instance, during the 1970s and 1980s when the conflict between the former Soviet Union and Western countries affected the ILO in this regard. See Bruun ‘ILO och stridsåtgärder’ p 199, above n 2.
10 Gernigon et al,‘ILO principles’ pp 17 ff, 23 ff, above n 3.
The aim of strike action, as considered to be defined in the ILO Conventions and implied by the right to collective action, should be to resolve conflicts of interests. Hence, restrictions on the right to collective action, including the right to strike, could in principle apply to legal disputes, at least if there is a competent Court to deal with legal disputes.\(^\text{11}\)

Further, as regards the kind of action that can be accepted, sympathy actions ‘where workers come out in support of another strike’, are justified as conforming to the Conventions, provided that the primary conflict is legal.\(^\text{12}\)

Collective actions of an obviously political nature are not protected by the Conventions, but the Freedom of Association Committee, speaking about ‘strikes of purely political nature’, has expressed a broader view in this regard. The Committee has declared that – beyond industrial disputes that might be resolved by signing a collective agreement – workers and trade unions should have the right to express their discontent regarding economic and social matters. Even general strikes and protests regarding minimum wages have been accepted.\(^\text{13}\)

The restrictions on the right to strike have been further elaborated by the Committee of Experts. A key issue is the concept of ‘essential services’ in society. In circumstances where such services have been threatened in the strict sense, ie where the effect of the collective action has endangered the provision of those services, major restrictions or even prohibitions have been accepted.\(^\text{14}\)

The Freedom of Association Committee has issued further recommendations on the matter, and advocates that, instead of a ban on collective actions (or compulsory arbitration) in situations where vital interests of society are threatened, restrictions may be imposed in order to maintain a minimum level of essential services, for instance, when a strike would endanger ‘the life, personal safety or health of the whole or part of the population’.\(^\text{15}\)

2.3 The BALPA Case

In 2010, the ILO Committee of Experts made a statement concerning EU law in connection with a dispute between British Airways and the British Airline Pilots’ Association (BALPA).\(^\text{16}\) The dispute concerned the employer’s reaction to the pilots’ call to strike in protest against the employer’s establishment of a daughter enterprise in France, ie in another EU Member State.\(^\text{17}\)

\(^{11}\) Bruun, ‘ILO och stridsåtgärder’ p 200, above n 2.
\(^{12}\) Gernigon et al, ‘ILO principles’ p 16, above n 3.
\(^{13}\) ibid p 14.
\(^{14}\) ibid p 20.
\(^{15}\) ibid pp 20, 23.
\(^{16}\) The ILO Committee of Experts (ILO, 2010), Report of the Committee of Experts on the Application of Conventions and Recommendations.
\(^{17}\) See Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No 87.
The Right to Collective Action as a Fundamental Right

The employer, British Airways, claimed that the action did not conform to EU law and the freedom of establishment. Hence, the airline stated – referring to the *Laval* and *Viking* cases[^18] (see below) – that extensive damages could result if the trade union fulfilled their intent to strike. BALPA withdrew the action and submitted an application to the ILO, claiming that the United Kingdom breached Convention No 87. The Committee of Experts declared that the risk of extensive damages, based on previous rulings of the EU Court, meant that the trade union’s rights were disregarded in relation to Convention No 87.

3. THE EUROPEAN SOCIAL CHARTER AND THE EUROPEAN CONVENTION

3.1 The European Social Charter

The European Social Charter was adopted in Turin in 1961, 10 years after the European Convention, and was later subject to a revision in 1996. The European Committee of Social Rights (the Social Committee) is the supervisory body in respect of the Charter. Together with the opinions and elaborations developed by the Social Committee, the Charter provides the most detailed and explicit protection of the right to collective action.

The Social Charter is a non-binding act, but the Social Committee’s activities and standpoints attract much attention and should be considered as important for the development of fundamental rights in working life.

In accordance with Article 6(4) of the 1996 revised Social Charter, workers’ and employers’ rights to ‘collective action ..., including the right to strike,...’ should be protected as part of the right to collective bargaining.

Restrictions or limitations of rights protected by the Charter should meet the criteria established in Article 31. Hence, restrictions should be prescribed by law and, further, they should be ‘necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals’. (As seen below, this is the same criterion as that stipulated in the European Convention.) Thus, both formal requirements and a principle of proportionality should apply when judging if there is a breach of the underpinning principles of the Charter.

The right to collective action – including the right to strike – is restricted to being applicable only where there are conflicts of interest (Article 6[4] of the Charter). Consequently, restrictions on the right to collective action, including the right to strike, could apply to actions aiming for the revision of an agreement during its currency.[^19]


Further, disregarding the scope of the right to strike, the term ‘collective action’ in itself has certain implications. It follows from Article 6(4) that the right to collective action is a ‘collective’ right. However, the Social Committee has taken the view that the right to collective action is an individual right, even though the Committee, when referring to certain prerequisites, also has accepted that the right to collective action has been reserved for trade unions.

Hence, issues have arisen in the interpretation of the wording ‘workers and employers’ in respect of their right to take collective action. Should, for instance, the use of the term ‘worker’ imply that a worker, as an individual, or as a member of a group of workers not organised in a trade union, has the right to take collective action? The answer seems to be that, in principle, the right to initiate a strike should be reserved to an organisation only, as long as there is a complete freedom to form trade unions without any excessive formalities, and that this reservation is not contrary to the provisions of the Charter.20

Furthermore, in 1969–70 the Social Committee emphasised that the right to collective action founded on the Charter is a mutual right, i.e. both employers and employees have this right, even if the Committee has not committed to fully equalising the right to strike with the right to impose a lock-out.21 A pertinent question here is whether a single employer can utilise the right to collective action, and this, it appears, is still a matter of debate.22

As concerns peace obligations regulated in a collective agreement, it is clear that a peace obligation resulting from an agreement stipulated by the parties themselves will be accepted by the Social Committee, at least during the agreement’s period of validity.23

With regard to peace obligations imposed by statute or by case law, the Social Committee, in 2002, at first categorically rejected these obligations. Later, the Committee revised its standpoint and formulated a compromise. Since then, a peace obligation imposed by law, and even case law, may be accepted, if it can be considered to reflect ‘the certain will of the social partners’.24 However, demonstrating this condition may be problematic, even if not in countries where there is a long tradition of dealing with these kinds of problems, such as in the Nordic countries.

20 ibid pp 189 ff. With regard to Swedish law and the reservation of the right to collective action for trade unions, the Committee for Social Rights has been wavering on the matter. In 2002 the Committee’s opinion was that since the Swedish regulation did not ensure unorganised workers this right, the Swedish regulation was not in conformity with the Charter. Earlier, in 2000 and later in 2004, the Social Committee drew the conclusion that since it is easy for workers to establish a trade union in Sweden, it could be accepted that the right to take the industrial action is reserved for associations. However, in 2004 the Committee made the interpretation that the Charter meant that workers should have the right to collective action. In principle, the Committee distinguishes between those who are entitled to take part in a collective action and those empowered to call a strike.

21 ibid p 177.
22 ibid p 178.
23 ibid p 182.
24 ibid pp 182 ff.
Furthermore, it has been considered to be contrary to the European Charter to extend a peace obligation beyond matters regulated in a collective agreement. An extended peace obligation following from a collective agreement should not be indirectly based on judicial practice or law. However, this position, adopted by the Social Committee, has been controversial and has been given different interpretations within the Committee.25

3.2 The European Convention

The right to collective action and, in particular, the right to strike, does not explicitly follow from the European Convention on Human Rights and Fundamental Freedoms (1950). Essentially, the Convention protects, among other rights and freedoms, the freedom of association as a fundamental right, expressed in the following wording of Article 11(1):

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

In principle, no restrictions on the exercise of the freedom of association should be imposed other than those recognised within the scope of Article 11(2) and basically restrictions should follow from law.

However, beyond this formal criterion, restrictions should be considered to be necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.26

The right to freedom to form and to join a trade union is of fundamental importance for the establishment of trade unions, despite the fact that the right is not an independent right but, in principle, merely a sub-division of the freedom of association.27

3.3 The European Court and the Right to Collective Action

The right to strike has been dependent on how the European Court of Human Rights (the European Court) has interpreted the extent of the freedom of association and the right to collective bargaining as a means for (primarily) the employees to protect their occupational interests.

25 Herzfeld Olsson, Facklig föreningsfrihet pp 275 ff, n. 5.
26 Art 11(2). Further, the Article referred to opens the way for lawful restrictions in particular concerning the exercising of these fundamental rights by ‘members of the armed forces, of the police or of the administration of the State’.
In the case law from the European Court the general wording of the European Convention has been further elaborated, both as regards the scope of the meaning of the freedom of association and as regards the restrictions which might be acceptable to that freedom.  

In principle, the examination of whether there is a breach of Article 11 of the Convention requires a two-step procedure. Firstly, the Court inquires whether a case is covered by Article 11(1), ie the freedom of association. Secondly, it asks whether the aim of the measure taken can be justified in accordance with Article 11(2). This means that it is of particular relevance if the restriction is founded in law and, further, if the restriction in question is considered to be “necessary in a democratic society” referring to the legitimate interests listed in the Article. From this, it is obvious that a proportionality principle should apply to the examination, balancing the freedom of association with the rationale for imposing a measure which restricts that freedom.

Even if the right to collective action – and, in particular, the right to strike – is not explicitly embraced by the European Convention, the step-wise elaboration of case law from the European Court shows that this right is clearly regarded as an integral part of the wider right of the freedom of association. In Schmidt and Dahlström v Sweden the question was whether a violation of the freedom of association occurred when non-striking members of a trade union that had carried out a strike action, failed to receive the same retroactive wage benefits as members of non-striking unions and non-organized workers.

In the case, the European Court pointed out that the Convention provided protection for the conduct of trade union activities, but that strike action was not the only means that could be applied. Restrictions on the right to strike might be acceptable if the state provides other means of collective action to be legitimate, ie a right to collective action could embrace different kinds of action, and not all rights must be available in order to safeguard the freedom of association.

Following this case law from the European Court, it was not necessary that a right to collective action needed to take the form of a right to strike, exclusively, even if the right to strike was considered to be unique. Further, as pointed out in Schmidt and Dahlström, the state had recognised the right to strike, and the European Court considered this right to be one of the most important means for the protection of the trade union members’ interests.

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28 See ibid for an overview.
29 Schmidt and Dahlström v Sweden, Application 5589/72, 6.2.76.
30 The Court stated that “The grant of a right to strike represents without any doubt one of the most important of these means, but there are others” and that Art 11(1) “leaves each State a free choice of the means to be used towards this end” (para 36).
31 See also Wilson, National Union of Journalists and Others v the United Kingdom [Wilson & Palmer], Applications 30668/96, 30671/96 and 30678/96, ECHR 2002-V – 2.7.02, paras 45, 46.
32 Also in Unison v the United Kingdom, Application 53774/99, ECHR 2002-I – 10.1.02, the wording indicates a unique position for the right to strike. For instance, the Court stated that this right “represents one of the most important of the means by which the State may secure a trade
The Right to Collective Action as a Fundamental Right

Given that the right to strike in general is recognised in the European states—and given the provisions of the European Social Charter—critics have argued, with reference to the ruling in Schmidt and Dahlström, that the right to strike should be protected under Article 11 as ‘indispensable’.33

In 2008 and 2009, the Court made important new statements regarding the right to collective bargaining and collective action, and the right to strike has been increasingly emphasised as a right in connection with Article 11 and the freedom of association.

A notable case is that of Demir and Baykara v Turkey, which concerns Turkey and the right to collective bargaining for public service employees, including the right to conclude collective agreements.34 The trade union and the employer had concluded a collective agreement, but the employer did not comply with the arrangement. The case was brought before a district court which approved the trade unionists’ claims and the subsequent ruling recognised the right to collective bargaining.

However, the Turkish Court of Cassation declared the collective agreement to be void, and thereby the District Court’s decision was overturned. Subsequently, a complaint was made to the European Court, which ruled in favour of the public service employees’ right to collective bargaining and to conclude collective agreements.

The decision of the Court implied that the Court of Cassation’s ruling that the collective agreement was void was contrary to Article 11. In more general terms, the European Court claimed that the Convention is a ‘living instrument’ that ‘must be interpreted in the light of present-day conditions’. The Court made references to ILO Convention No 98 and the EU Charter of Fundamental Rights (see below) as well as to the developments in international and national labour law.

The important conclusion drawn by the Court in Demir and Baykara was that the right to collective bargaining is an ‘essential’ element of the right of association, including the right to conclude collective agreements.35 Further, union’s freedom to protect its members’ occupational interests’ (para 45). However, in the case, the Court also weighted the employer’s right to conclude agreements with others, referring to Art 11(2) and the formulation ‘protection of the rights and freedoms of others’. Further, in Sørensen and Rasmussen v Denmark, Applications 52562/99 and 52620/99, ECHR 2006-I – 11.1.06, the Court stated that the ‘Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured’ (para 58, s 2). (On this matter the Court referred to Swedish Engine Drivers’ Union v Sweden, 6.2.76 and other cases; see para 58, s 2.)

33 Further, an argument was that the freedom to strike in a democratic society is crucial for the balance of power between the labour market parties. See Harris et al, Law of the European Convention p 544, above n 27.

34 Demir and Baykara v Turkey [GC], Application 34503/97, ECHR 2008, 12.11.08.

35 See Demir and Baykara (para 154): ‘Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become...’
critics of the Court’s former standpoints have noted that in Demir and Baykara the Court sends a signal that it may be shifting its position away from what the critics have seen as an unwillingness to use Article 11 of the Convention for strengthening trade union rights. Moreover, in Enerji Yapı-Yol Sen v Turkey, the European Court made further statements concerning the right to strike. In Turkey there had been an ongoing work to adapt Turkish law to meet international standards on trade union rights, and civil servants planned a one-day action for the recognition of their right to conclude collective agreements. However, prior to the day of the planned action, a Turkish Government circular imposed a ban on strike action which embraced all civil servants. Three trade union representatives who took part in the action were subject to disciplinary consequences. The case was later brought before the European Court, with reference to Article 11 of the European Convention.

With respect to the ban to strike, the European Court found that the ban was directed against all employees in the state sector in order to prevent them from taking part in the strike action. This action on the part of the state was considered excessive and the restriction of the trade union’s rights under Article 11 of the Convention was said to be disproportionate; and nor did the measure meet the ‘pressing social need’ criterion.

A significant point is that the Court dealt with the right to strike without considering other possibilities of collective action. Thus it can be concluded that the Court took the position that the right to strike is an independent right, regardless of whether there are other means for taking care of the trade union members’ interests (compare the Court’s more moderate position in Schmidt & Dahlström).

Hence, a conclusion to be drawn from Enerji Yapı-Yol Sen is that the right to strike is not dependent on an explicit recognition of this right from the state, regardless of whether the state has recognised other alternative means for trade unions to defend their interests. Further, the developed judicial practice from the European Court shows that the right to collective action is protected as a part of the freedom of association regulated in Article 11 of the European Convention.

one of the essential elements of the “right to form and to join trade unions for the protection of [one’s] interests” set forth in Article 11 of the Convention, it being understood that States remain free to organize their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any “lawful restrictions” that may have to be imposed on “members of the administration of the State” within the meaning of Article 11 § 2—.”

36 Harris et al, Law of the European Convention p 548, above n 27.
37 Enerji Yapı-Yol Sen v Turkey, Application 68959/01, 21.4.09.
4. COLLECTIVE ACTION AND THE RIGHT TO STRIKE IN THE EU CHARTER AND THE EU TREATY

4.1 The EU Charter of Fundamental Rights

The 1989 Community Charter of the Fundamental Social Rights of Workers already protected the freedom of association and the right to collective bargaining, as well as the right to resort to collective action, including the right to strike, in situations of conflicts of interests (points 11–13 of the Charter).

Compared with the European Social Charter and the European Convention, the free movement of workers was also explicitly noted as a ‘fundamental social right’ in the 1989 Community Charter, in agreement with the EC Treaty (point 1 of the Community Charter).

Furthermore, the right to collective action – including the right to strike – was emphasised at the summit meeting held in Nice in 2000, when the Charter of Fundamental Rights of the European Union (2000/C 364/01) was proclaimed, and was later confirmed when the Charter was adopted by the Member States in 2007.

It follows from Article 28 of the EU Charter of Fundamental Rights that:

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

Article 28 also makes a distinction between ‘workers’ and ‘organisations’, and refers to differences between Member States, where the right to collective action may be defined as either a collective or individual right (as, for instance, in Sweden and France respectively).

Moreover, even the fundamental rights set out in the EU Charter of Fundamental Rights can be subject to restrictions. According to Article 52(1) of the Charter, the freedoms recognised by the Charter can be restricted by national law. However, it is important that any such restrictions ‘respect the essence of those rights and freedoms’ protected by the Charter.

Restrictions are also explicitly subject to the principle of proportionality (Article 52(1)):

Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others...

Beyond that, the exercising of the rights attached to the Charter must comply with Community Treaties and lie within the limits defined by the Treaties.

38 The Community Charter was taken by the Member States as referring to Art 117 of the then EC Treaty, considering the Resolutions of the European Parliament of 15 March 1989 and 14 September 1989 and to the Opinion of the Economic and Social Committee of 22 February 1989.
With regard to the EU Charter on Fundamental Rights and the European Convention, the EU Charter states that the meaning and scope of the rights protected by the Charter should be the same as those laid down by the European Convention (Article 52[3] of the EU Charter on Fundamental Rights). However, this link to the European Convention should not prevent the EU from providing a more extensive protection.

4.2 The Reformed Treaty on the European Union – Following the Lisbon Treaty

As concerns the right to collective action protected by the EU Charter of Fundamental Rights, it can be noted that already in the introduction of Article 136 of the former EC Treaty (now Article 153 of the Treaty of the Functioning of the European Union; hereafter the TFEU), there were references to both the 1961 European Social Charter and the 1989 Community Charter.39

Further, concerning the right to strike, measures taken for the development of a social dimension in accordance with Article 137(5) of the former Treaty – referring to the objectives of Article 136 – should not apply to ‘pay, the right of association, the right to strike or the right to impose lock-outs’ (now Article 153[5] of TFEU).

Following the Lisbon Treaty, which came into force on 1 December 2009, further steps were taken concerning the European Union and the relationship to the European Convention and fundamental rights.40 The reformed Treaty on the European Union, regulating constitutional and fundamental issues of the Union, and the TFEU, regulating the ‘four freedoms’ and more, was established as fundamental EU law.

The Treaty on the European Union, which followed the Lisbon Treaty, means an important reinforcement of fundamental rights (or freedoms), founded on three sub-articles under Article 6.41 The Treaty on the European Union specifically recognises ‘the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ..., which shall have the same legal value as the Treaties’ (Article 6[1]). It also states that ‘The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms’ and, in the following sentence, notes that ‘Such accession shall not affect the Union’s competences as defined in the Treaties’ (Article 6[2]).

39 Art 136 emanated from the ‘social protocol’ signed in 1992 at the Maastricht summit, and the named references were made in connection with measures that could be made in order to develop the social dimension within the framework of Art 137 of the EC Treaty.

40 The Lisbon Treaty was drafted as a replacement for the Constitutional Treaty which was rejected by French and Dutch voters in 2005.

41 The distinction between ‘freedoms’ and ‘fundamental rights’ might be somewhat academic, and concerning EU law, the ECJ has declared the four freedoms (from 2009 regulated in the TFEU) to be fundamental rights. See for instance Case C-265/95 Commission v France [1997] ECR I-6959 and Case C-320/03 Commission v Austria [2005] ECR I-7929.
Furthermore, as regards the European Convention, it is emphasised that ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States,… shall constitute general principles of the Union’s law’ (Article 6[3]).

Hence, from the reading of Article 6 of the Treaty on the European Union, Article 28 of the EU Charter of Fundamental Rights and the binding judicial practice from the European Court, it is clear that the right to collective action – including the right to strike – applies within the framework of Community law and thereby applies to national law and practice. However, as stated above in relation to Article 52 of the EU Charter of Fundamental Rights and, further, in considering the judicial practice from the Court of Justice of the European Union (ECJ), there are possibilities for the Member States to impose restrictions on the fundamental rights, provided that certain criteria are fulfilled.

4.3 The ECJ and the Right to Collective Action

Regardless of the new development following the Lisbon Treaty, the ECJ had already recognised the right to take collective action as a fundamental right. Referring to the International Conventions, including the EU Charter, taken at the Nice summit, the ECJ in Laval recognised the right to take collective action as a fundamental right forming ‘an integral part of the general principles of Community law …’. At the same time, the Court emphasised that ‘the exercise

42 This was already inherent in the Treaty on the European Union, signed in Maastricht, but was then expressed in the following wording of Art F(2) of that Treaty: ‘The Union shall respect fundamental rights, as guaranteed by the European Convention ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

43 Restrictions on the four freedoms should in general – in accordance with the TFEU (see for instance Art 45[3]) – refer to limitations justified on grounds of public policy, public, security or public health. Concerning the examination of national restrictions, see for instance Case C-55/94 Gebhard [1995] ECR I-04165; according to the ECJ there are four requirements for restrictions on the four freedoms protected by EU law: (1) restrictions must be applied in a non-discriminatory manner; (2) they must be justified by imperative requirements in the general interest; (3) they must be suitable for securing the attainment of the objective which they pursue; and (4) they must not go beyond what is necessary in order to attain it.

44 Case C-341/05 Laval [2007] ECR I-11767 (paras 90, 91). The ECJ pointed out that ‘it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p 1)’. Even prior to this, the Charter of Fundamental Rights has been used for the ECJ’s reference to human rights; see C Barnard, The Substantive Law of the EU. The Four Freedoms, 2nd edn (Oxford, Oxford University Press, 2007) p 126.
of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.\textsuperscript{45}

Furthermore, the Court declared that even if Article 137(5) (now Article 153[5] of TFEU) accepts the right to strike and to impose lock-outs, as mentioned above, this does not mean that collective actions such as those taken in the Laval case should be excluded from the domain of freedom to provide services.\textsuperscript{46}

Even before \textit{Laval}, the Court had recognised the right to collective action – including the right to strike – as a fundamental right in \textit{Viking}.\textsuperscript{47} The case concerned the right to establishment vis-a-vis the right to collective action. The Finnish shipping company Viking Line wanted to register the vessel Rosella in another Member State under a flag of convenience. Since a Finnish collective agreement would apply if the vessel was registered in Finland, the shipping company, by registering the vessel in Estonia, aimed to conclude a new collective agreement in that state and thereby reduce wage costs.

In \textit{Viking} the ECJ stated that the right to establishment is a fundamental freedom, and the Court argued that collective action could be accepted in respect of this aim.\textsuperscript{48} The EU, according to the Court, ‘has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy,...’.\textsuperscript{49} Hence, a principle of proportionality should apply when judging the actions taken, balancing fundamental freedoms against fundamental rights.

Further statements that are of relevance for the application of a principle of proportionality in connection with fundamental rights and freedoms, other than those discussed above, have been made by the ECJ.

In \textit{Schmidtberger}, the ECJ balanced the fundamental rights – freedom of expression and freedom of assembly – against the free movement of goods.\textsuperscript{50} A demonstration had resulted in the complete closure of a major transit route between two Member States. The Court balanced the protesters’ use of the fundamental rights against the fundamental freedom of movement of goods, in the light of the Member State’s obligation to take all appropriate measures in order to fulfill the commitments founded on Community law (compare Article 4[3] of the Treaty of the European Union).

In \textit{Omega}, the ECJ found that human rights and, in particular human dignity, were sufficient grounds to accept restrictions on the freedom to provide services

\textsuperscript{45} \textit{Laval} (para 91).
\textsuperscript{46} ibid (para 88).
\textsuperscript{47} Case C-438/05 \textit{Viking} [2007] ECR I-10779 (para 43).
\textsuperscript{48} ibid (para 59).
\textsuperscript{49} ibid (para 79).
\textsuperscript{50} Case C-112/00 \textit{Schmidtberger} [2003] ECR I-05659.
The Right to Collective Action as a Fundamental Right

In both Schmidtberger and Omega, the Court held that the exercising of fundamental rights does not fall outside the scope of EU law, and that such exercising ‘must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality’.

In order to deal with situations such as in Schmidtberger, the Council adopted the ‘Monti-Regulation’ (Regulation 2679/98) in 1998, which concerned how to handle serious disruption of the free movement of goods. In accordance with Article 2 of the Regulation, the Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike or any other freedom to take actions regulated in the Member States’ national industrial relations systems.

However, it follows from Article 4 of the Regulation that the measures to be taken when there is a ‘serious disruption’ should be proportionate.

Thus, in the light of Schmidtberger, a principle of proportionality should also apply when fundamental rights of a more general character are balanced against measures taken in order to counteract disruptions concerning the four freedoms founded on EU law.

Furthermore, in a report presented in the spring of 2010, a suggestion was made concerning the posting of workers and the right to industrial action on the single market. According to the proposal, a possible solution to the problems highlighted in Laval and Viking and other practice from the ECJ, could be based on the same strategy as Regulation 2679/98 serving as a model on the matter. This would mean that, according to Monti, a new EU regulation should be taken, meaning that the posting of workers should not interfere with the right to take collective action.

51 Case C-36/02 Omega [2004] ECR I-9609. In Omega the restriction on the free movement of services in relation to the public policy criteria was examined. A gambling undertaking wanted to install gambling machines which the Member State considered a violation of human dignity as a fundamental right, since certain games contained simulated killing of human beings. The ECJ stated that the protection of fundamental rights was a legitimate interest which could justify a restriction even with regard to a fundamental freedom protected by the Treaty (para 35).

52 See Schmidtberger (para 77) and Omega (para 36).


5. CONCLUSIONS

The ILO, the European Council and the EU are developing different normative legal systems and criteria on fundamental rights. Further, these systems operate partly on the same territory and cover, more or less, the same Member States, although the ILO as a worldwide organisation has a special position. At the same time, they have a different normative status – both in formal and informal respects – with regard to whether the decisions taken by the different bodies are binding or non-binding.

5.1 Convergence

It is clear that these different bodies often make reference to each other and in doing so they seek to legitimise the status of their respective decisions regarding the fundamental right to strike. This striving for a kind of cross-legitimacy results in an observable inherent convergence trend.

An important factor promoting convergence is the explicit recognition of the European Convention manifested in Article 6(3) of the Treaty on the European Union. This recognition means that the EU is committed to follow the Convention as well as the judicial practice from the European Court. Further, the enhanced status given to the Convention at the EU institutions, will indirectly have a new impact on the national laws of the EU Member States.

This is a new beginning from an EU law point of view, even if the ECJ has repeatedly referred to both the European Social Charter and the developments under the European Convention. Further, as we have seen, the European Court has moved step by step towards a stronger and more independent position on the right to strike as a fundamental right.

At the same time it should be noted that the EU Member States are already committed to the European Convention as members of the Council of Europe. The new scenario since 2009 means that the European Convention founded on the Treaty on the European Union will have a direct normative influence on decisions taken by the core EU institutions such as the ECJ.

Furthermore, the recognition of the EU Charter of Fundamental Rights, including the right to strike, as binding in EU law by Article 6(1) of the new Treaty on the European Union should also be noted as important. Even here the ECJ has referred to the EU Charter as a foundation for decisions concerning the right to strike.

With reference to this new status for the right to strike together with the notion of a ‘social market economy’ goal as set out in the Treaty on the European Union, it has been argued that the conclusions that were drawn by the ECJ in Laval (national regulations on strike action versus the free movement of services) would have been different today.
The Right to Collective Action as a Fundamental Right

Further, the practice and standpoints developed by the ILO and the supervisory bodies have influenced European law decisions in general terms, as they have been referred to both by the European Social Committee, the European Court and the ECJ.

The interplay between the ILO Conventions and EU law has been highlighted in the BALPA case. By turning to the ILO Committee of Experts, the British trade union has compelled the ILO to balance the freedoms founded on the Treaty on the European Union and their status against the right to strike as interpreted by the ECJ in *Laval* and *Viking*. However, while the statement from the Committee of Experts is critical, it is not binding for the EU, and the resulting normative function will probably not have a direct impact on European law.

5.2 Divergence

Contradictory divergence tendencies previously relied on the fact that the different normative systems apply only partly to the same national territories. For instance, the EU has 27 Member States while the number of Member States of the Council of Europe is 47 (to a large extent the same States as EU Member States!), and the corresponding figure for the ILO is 183.\(^{56}\) However, even if the discussion is limited to EU law and the EU Member States, there are still grounds for divergence, given the different national laws and traditions, and considering the acceptance of national adaptations inherent in both EU law and the law following from the European Convention. If the discussion is widened to include the ILO as well, there are even more grounds for divergence in these regards.

In EU law, the four fundamental freedoms enjoy a unique position founded on the EU Treaties. Furthermore, the four freedoms, and a breach of any of those freedoms, rely on a cross-border dimension, as shown in the practice from the ECJ. The free movement of goods, capital, people and services confers a right to move to another Member State, while the application of the right to collective action founded on the European Convention is normally a domestic matter. Even though a cross-border dimension is usually the trigger for activating EU law in regard to the freedoms, this situation can be changed since the EU Charter of Fundamental Rights and the explicit protection of the right to strike need not necessarily rely on a cross-border situation.

\(^{56}\) For a list of the Member Countries of the EU, see The European Union (2010), *The Member Countries of the EU* (2010) [Internet], available from: www.europa.eu/about-eu/member-countries/index_en.htm. For a list of the Member States of the Council of Europe, see The Council of Europe (2010), *The Member States of the Council of Europe* [Internet], available from: www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=001&CM=8&DF=27/09/2010&CL=ENG. Finally, for a list of the Member Countries of the ILO, see The International Labour Organisation (2010) *The Alphabetical List of ILO Member Countries* [Internet], available from: www.ilo.org/public/english/standards/relm/country.htm. With regard to ILO members, note that even if a country is a member of the ILO, this does not necessarily mean that the country has ratified the ILO Conventions.
However, the question remains open as to how the European Court will handle such matters when a fundamental right founded on the European Convention is challenged. From ECJ case law there are, as we have seen, already examples where the proportionality tool has been used for arriving at a solution. Also, guidelines for handling the issue of proportionality are found in the European Convention and in the practice from the Social Committee dealing with the European Social Charter.

Hence, both the ECJ and the European Court should apply a proportionality principle when judging if a restriction on a fundamental right can be legitimised. However, based on the different legal systems, the criteria used for examining the proportionality vary. For instance, the ECJ considers whether a restriction is suitable and necessary to achieve a legitimate objective, and whether the measure goes beyond what is necessary in order to attain it; while the European Court, beyond certain formal criteria, considers whether a restriction is ‘necessary in a democratic society’.

There is a reservation in Article 6(2) of the Treaty on the European Union stating that the accession to the European Convention ‘shall not affect the Union’s competences as defined in the Treaties’. This regulation is still not fully understood, but it is likely that divergence is still a possibility. The right to strike as a fundamental right will most probably still be subject to restrictions in relation to the four fundamental freedoms.

Further, the EU’s accession to the European Convention is a kind of one-sided declaration which, for obvious reasons, does not imply that the EU is a Member of, or subordinate to, the Council of Europe. (For instance, the EU is not a sovereign national state and the EU Member States as sovereign national states are already members of the Council of Europe.)

5.3 Final Conclusions

The main conclusion is that the right to strike as a fundamental right has clearly been strengthened following the establishment of the reformed Treaty on the European Union in 2009, the recently developed practice from the European Court, and, beyond that, the ILO practice, all of which have influenced the way in which the right to strike is regarded as a fundamental right. Further, there is reason to believe that this development has been facilitated and influenced by the interplay between the three normative legal systems around which this chapter has focused.

At the same time it is, for different reasons, highly probable that the fundamental right to strike will still be subject to restrictions, partly as a consequence of the regulations and practice that emanate from the three normative systems and which stipulate different criteria for limitations; and partly as a result of differences at the national level between industrial relations systems and traditions.
The Right to Collective Action as a Fundamental Right

In considering the different territorial coverage and the shifting normative status of the three systems discussed, as well as the differences between national legal systems, there is reason to believe that there is also room for divergence between the normative systems relating to fundamental rights.

The crucial issue will be how the legal practice from, primarily, the ECJ and the European Court interacts and in practice links together these two normative systems. Normatively, the Lisbon Treaty has brought these two systems closer to each other, but that does not mean that either of the Courts involved will be a subordinate to the other, for instance, in situations when the right to strike founded on the European Convention is in conflict with any of the four freedoms founded on EU law. In such situations, the proportionality tool anchored in both legal traditions provides a useful instrument for balancing the different perspectives.