

**A Framework for Interpreting the Right to Freedom
of Association of Workers and Trade Unions in
European Human Rights Law**

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degree of Doctor of Philosophy

By

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Abstract

The right to freedom of association, as a labour right, has long been protected by Conventions 87 and 98 of the International Labour Organization, and by the European Social Charter. The European Convention on Human Rights and European Union law have more recently emerged as sources of protection of collective labour rights. This thesis identifies a particular concern arising from this development, namely that ECHR and EU norms that diverge from and conflict with ILO and ESC freedom of association guarantees could displace and undermine the authority of the latter, specialist mechanisms, which provide an overall higher level of protection. This thesis proposes that this concern could be addressed to a significant extent through the interpretation of ECHR and EU freedom of association guarantees in closer alignment with ILO and ESC norms. It first argues that there is a normative, moral justification for convergence between ECHR and EU human rights norms, and ILO and ESC specialist labour law norms. On this basis, it proposes that in interpreting ECHR and EU freedom of association guarantees, the respective Courts should look to ILO and ESC norms as key sources of authority; and that a divergent interpretation of these norms should be justified on the basis of appropriate reasons. These could be reasons pertaining to the text or aims of the relevant instruments and legal systems, particular institutional characteristics, or the fact that the ECHR and EU enforcement bodies are courts and not committees. The analysis concludes that the institutional concern cannot be completely resolved through the interpretation of ECHR and EU freedom of association guarantees in line with ILO and ESC norms, since differences between norms are sometimes well-justified. Nevertheless, the proposed interpretive framework could go significant distance towards achieving this goal, and make a substantial contribution to strengthening the protection of collective rights in Europe.

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Table of Abbreviations

BALPA	British Airline Pilots' Association
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CCFSRW	Community Charter of the Fundamental Social Rights of Workers
CFA	ILO Committee on Freedom of Association
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
EPSR	European Pillar of Social Rights
ESC	European Social Charter
IMF	International Monetary Fund
ILJ	Industrial Law Journal
ILO	International Labour Organization
MOU	Memorandum of Understanding
RESC	Revised European Social Charter
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties

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Introduction

1. Background and Aims

The right to freedom of association, or right to organise, as a specific right of workers and employers and their organisations has long been recognised and protected by Conventions 87¹ and 98² of the International Labour Organisation (ILO),³ as well as Articles 5 and 6 of the European Social Charter (ESC). The European Convention on Human Rights (ECHR) and European Union (EU) have more recently emerged as sources of protection of collective labour rights, with the development of the case-law of their respective Courts and entry into force of the Charter of Fundamental Rights of the European Union (CFREU). These legal regimes now protect not only a general right to freedom of association of workers and trade unions, but also the right to collective bargaining and action, including strike action. This has been described as a process of ‘constitutionalisation’ of collective labour rights in Europe,⁴ and as a process of ‘integration’ of social rights into human rights documents.⁵ ILO and ESC norms have constituted an important reference point in this process. The right to freedom of association and related collective labour rights are therefore now protected in both

¹ Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87).

² Right to Organise and Collective Bargaining Convention 1949 (No 98).

³ There are further Conventions related to the right to freedom of association of specific categories of workers, such as the Labour Relations (Public Service) Convention 1978 (No 151) or Rural Workers' Organisations Convention 1975 (No 141), which will not be considered here.

⁴ J Fudge, ‘Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes’ (2015) 68 CLP 267, 286.

⁵ With respect to the ECHR, V Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13 HRLR 529; the CFREU is an integrated document itself since it comprises both civil and political rights and social and economic rights.

specialist labour and social rights instruments and general human rights instruments within the European legal space.

This development in principle provides an opportunity to strengthen the protection of collective labour rights amongst Member States of the Council of Europe and the EU respectively. This is first and foremost because the ECHR, and especially the EU, legal systems are underpinned by far more robust enforcement mechanisms than ILO and ESC instruments. However, it is not without its problems. Even where the same rights are recognised as protected under all four instruments, recent European Court of Human Rights (ECtHR) and Court of Justice of the EU (CJEU) case-law reveals points of divergence and conflict between norms, suggesting that the level of protection under the ECHR and EU law may sometimes be lower than under parallel ILO and ESC guarantees. The legal landscape in this sphere appears ‘fragmented,’⁶ which has led to tensions between these legal systems, as has recent EU activity in the sphere of Eurozone governance and EU economic policy which is or may be incompatible with ILO and ESC freedom of association guarantees.

Two distinct concerns emerge. The first—which I call the ‘substantive’ concern—is that the level of protection accorded to collective labour rights under the ECHR and EU law is insufficient, at a normative level. That is, it is arguable that these human rights instruments should as such protect collective labour rights to a greater extent than they

⁶ That is, results in ‘fragmentation,’ identified as a phenomenon in international law in M Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (2006, UN Doc. A/CN.4/L.682)

currently do, irrespective of and independently from other international standards. The second—which I call the ‘institutional’ concern—is that ECHR and EU norms that diverge from and conflict with ILO and ESC norms could displace and undermine the authority of the latter mechanisms, which on the whole provide a higher level of protection. In other words, the inclusion of collective labour rights in general human rights documents could have negative effects on the more traditional but less prominent institutional structures for the protection of collective labour rights, resulting in weaker overall protection of these rights at international level. Whilst the substantive and institutional concerns are distinct, there is a relationship between them: as the substance of collective labour rights protection under ECHR and EU norms increases to a level which is normatively desirable, the scope for differences between these norms and ILO and ESC guarantees, which give rise to institutional concerns, decreases.

The focus of this thesis is the second, institutional concern. The aim of the thesis is to propose how this concern could be addressed through interpreting relevant ECHR and EU norms in a way more consistent with ILO and ESC freedom of association guarantees, whilst recognising that a certain degree of divergence and conflict is inevitable owing to important institutional differences between the various systems. Whilst the end-goal of the thesis is to propose how convergence between norms could take place at the institutional level, its starting point is at the normative level. Thus, the thesis first proposes a normative justification for the convergence between ‘human rights’ norms and ‘labour rights’ norms in the field of freedom of association which is independent from institutional questions; it argues that, morally speaking, collective labour rights should be protected as fundamental human rights. On this basis, it

proposes how, respectively, the relevant ECHR and EU freedom of association guarantees could be interpreted to accord greater protection to collective labour rights by reference to ILO and/or ESC norms. It also explains why, nevertheless, *complete* convergence is not possible, nor desirable, in light of certain institutional characteristics of the ECHR and EU systems.

2. Structure and Approach

Part A of the thesis explains the institutional concern more fully. This part, consisting of one chapter (**Chapter I**), sets out the main differences and points of (potential) conflict between the right to freedom of association of workers and their organisations emerging as a ‘human right’ under the ECHR and in EU law on the one hand, and the relevant ILO and ESC norms on the other hand. These pertain primarily to the scope of protection of collective labour rights—ie what kind of activity is protected and to what extent—and the range of obligations imposed on states parties—negative or positive in nature. The case-law of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) to date seems to indicate that the scope of protection under the respective systems is narrower and that positive obligations in particular are less extensive. In addition, aspects of EU free movement law and EU-level measures in the sphere of economic governance which have been found to be or may be contrary to ILO and ESC norms are discussed. In essence this part argues that the fact that these ‘human rights’ norms differ from or conflict with the more traditional ‘labour rights’ norms (1) gives rise to uncertainty; (2) means that in cases of direct conflict, particularly with EU norms, ILO and/or ESC guarantees will not be complied with; (3) creates a risk that ILO

and ESC standards will be side-lined where states feel it is enough to comply with parallel ECHR and EU norms in this field; and (4) creates ‘escape routes’ for states to level-down protection.⁷ A further issue (5) arises where EU-level⁸ measures—rather than EU freedom of association norms—conflict with ILO and/or ESC standards, which could undermine the authority and effectiveness of these mechanisms. Issues (2)-(5) arise because of the greater prominence and more robust enforcement mechanisms of the ECHR and EU. It is argued that these are undesirable negative effects of the emergence of the ECHR and EU and their respective courts as norm-setting bodies in the field of freedom of association.

The remainder of the thesis proposes how the scope for problematic divergence and conflict could be reduced through the judicial interpretation of ECHR and EU norms in line with parallel ILO and ESC norms. ‘In line with’ here does not mean direct and complete correspondence between norms. Rather, **I propose that in interpreting ECHR and EU freedom of association guarantees, the relevant courts should take ILO and ESC norms as important reference points and sources of authority; and that a divergent interpretation or application of these norms should be justified on the basis of appropriate reasons.**

⁷ The term ‘escape routes’ in this context is used by M Schlachter, ‘The Right to Strike: A Need to Align Different Interpretations?’, Social Justice Expertise Center, Leiden University, *Global Conference for International Labor Law Judges and Other Adjudicators: Ensuring Coherence in Fundamental Labor Rights Case law* (Leiden University, 22 April 2016) 19; M Schlachter, ‘Soziale Rechte auf supranationaler Ebene: Wirksame Schutzinstrumente?’, *Festschrift Lörcher* (Baden-Baden 2013) 203.

⁸ I use the term ‘EU-level’ measures rather than ‘EU measures’ because it has been decided by the CJEU that some of the measures included under this label—in particular some Memoranda of Understanding—are outside the EU legal order, despite the indisputable involvement of EU institutions in their drafting and enactment: *Joined Cases C-8-10/15 P Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C:2016:701 [59].

This approach is founded on a normative justification for the integration of certain collective labour rights into human rights documents, which rests on a moral argument as to why these should be considered to be fundamental human rights. It is possible to argue that norms in this sphere should converge *simply because* differences between them lead to the problems described above. I call this an anti-fragmentation rationale, or objective. What I argue, however, is that the human rights instruments in question should in any event—independently from issues of fragmentation—include certain collective labour rights within their scope, because these should morally speaking be regarded as fundamental human rights. I have chosen to advance this argument for a number of reasons, including because it provides a deeper, more compelling justification for ‘integration;’ it avoids a hypothetical situation in which the level of protection in human rights instruments would need to be reduced to accord with other international standards; and as discussed in Chapter III, the ECtHR does not see itself as necessarily pursuing anti-fragmentation objectives and is more likely to be persuaded by such a moral argument.⁹ In this sense, I engage with the substantive concern in order to address the institutional concern.

This normative justification is provided in **Part B** of the thesis, which addresses the question of why the (moral) right to freedom of association, as a fundamental human right, should be conceived as including certain collective labour rights, in particular the right to collective bargaining and the right to take collective action. This part, consisting

⁹ See V Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration’ (2010) 31 *Michigan Journal of International Law* 621, discussed in Chapter III.

of one chapter (**Chapter II**), first sets out the valuable interests of the individual in the freedom to associate with others. It then explores three different theoretical models of the right to freedom of association as a moral right, which I call the ‘parallel liberty,’ ‘capabilities’ and ‘empowerment’ models. I argue that the third, broadest, model is the most appropriate as a theoretical underpinning of the right to freedom of association because it is the only one which fully encapsulates all valuable interests in the freedom to associate. According to this model, both the right to collective bargaining and action are recognised as essential elements of the right to freedom of association; furthermore, the model gives rise to positive state duties to take active steps to protect and promote the right to freedom of association and its various elements. I take this model—which I argue is reflected in ILO and ESC norms—as the guiding normative rationale for the development of ECHR and EU norms in this field.

The following two parts (Parts C and D) explore how the empowerment model of the right to freedom of association can be integrated and accommodated within the ECHR and EU legal frameworks. They suggest how, in practice, Article 11 ECHR and Articles 12 and 28 CFREU could be interpreted in accordance with this model, by reference to ILO and/or ESC norms, to achieve a degree of convergence between norms in this area. In principle these provisions could be developed to reflect the empowerment model without reference to international standards, on the basis of other interpretive methods. However, I focus on this particular possibility because reference to these materials has been the practice—albeit not always systematic and consistent—of the ECtHR and to an extent the CJEU; because this would be consistent with the Vienna Convention on the Law of Treaties (VCLT) in respect of the ECHR; and because the

specialist interpretive bodies of the ILO and ESC have expertise in the field of industrial relations which would be valuable to non-specialist Courts and increase the legitimacy of their judgments. In other words, I consider this to be a more realistic and appropriate way for ECHR and EU freedom of association guarantees to be developed in accordance with the suggested normative rationale to take place.

Part C consists of two chapters. **Chapter III** considers how the ECtHR could use ILO and ESC standards in interpreting Article 11 ECHR in accordance with the empowerment model. I argue that apart from as evidence of ‘consensus,’ the Court has and should use these materials as ‘aids to interpretation’; that is, it should take them into account as significant sources of authority in the interpretation and application of Article 11. However, the Court can accord different weight to, and justify departure from, specialist norms by reference to relevant differences and similarities pertaining to, for example, the text, purpose, or institutional operation of the ECHR and the ILO and ESC. I set out a non-exhaustive list of factors to be taken into account in determining the weight attached to specialist norms in ECHR adjudication.

Chapter IV considers one such factor in more detail, namely the fact that the interpretive body of the ECHR is a court and not an expert committee. I argue that this difference should not prevent the ECtHR from seeking convergence in the meaning of Article 11—what activities it protects, what obligations it imposes on states and so on—with specialist norms. However, it should show greater restraint—that is, show greater deference to the state—than ILO and ESC Committees in the assessment of compliance with these standards in order to observe its institutional limitations as a judicial body. I

propose how the Court should take various reasons to exercise judicial restraint into account in the determination of the state's margin of appreciation. The application of this approach might result in divergence between the legal orders, in that restrictions which are contrary to the ILO and ESC comply with the ECHR.

Part D consists of three chapters. This part draws on some aspects of the framework proposed in Part C. **Chapter V** considers how EU freedom of association guarantees—in particular Articles 12 and 28 CFREU—can be interpreted in line with the empowerment rationale and by reference to ECHR, ILO and ESC norms. It argues that apart from aligning Article 12 CFREU with Article 11 ECHR,¹⁰ the CJEU should also draw on ILO and ESC norms as important sources of authority, in particular in the interpretation of Article 28 CFREU. As in the ECHR context, I set out reasons which could justify departure from these norms. **Chapter VI** explores how the limitations of the Charter—its scope of application, the fact that it does not confer any new competences, and the rights-principles distinction—limits the potential of the proposed interpretive approach to address the institutional concern, and its positive potential to strengthen the protection of collective rights in Europe.

Chapter VII discusses the scope for justifying restrictions of the rights contained in Articles 12 and 28 CFREU. It argues that this scope is wider than under the ILO and ESC, and potentially the ECHR, because the Charter recognises a broader range of potentially legitimate objectives of restrictions to freedom of association, and because

¹⁰ As according to Article 52(3) CFREU and the explanatory note to that Article, Article 12 CFREU must have the same meaning and scope as Article 11 ECHR.

there is reason for the CJEU to show an even greater degree of judicial restraint in certain circumstances when assessing compliance with Articles 12 and 28 CFREU. The chapter then considers cases of conflict between collective labour rights conflict with EU fundamental economic freedoms. It is argued that some scope for conflict and divergence between the various legal orders is inevitable, since the ILO, ESC and ECHR do not do not accord the same special status to fundamental economic freedoms as the EU does.

The analysis **concludes** that the institutional concern cannot be fully resolved through the interpretation of ECHR and EU freedom of association guarantees in line with ILO and ESC norms. This is because there are sometimes good justifications for differences in the protection of the right to freedom of association as between these systems; and because some EU-level measures which might conflict with ILO and ESC norms fall outside the scope of the CFREU. However, the interpretive approach proposed here would significantly diminish this concern by reducing the scope for unjustified divergence and conflict, and increasing the status and visibility of ILO and ESC norms as important sources of authority in ECtHR and CJEU adjudication. Continuing efforts to improve compliance with specialist instruments, intensifying cooperation between EU and the ILO and ESC in particular, and accession of the EU to the ECHR would further contribute to addressing institutional concerns, ensuring that these distinct legal frameworks maintain a constructive relationship, and strengthening the protection of the right to freedom of association.

3. Caveats

There are three important caveats to the analysis presented here. First, the analysis is primarily focused on exploring the extent to which the proposed approach to developing ECHR and EU freedom of association guarantees presents a solution to the institutional concern. It explores the limitations of this approach in light of this goal. However, viewed from a different perspective, the approach is also an opportunity to expand and strengthen the collective dimension of these guarantees and thus the protection of collective labour rights in Europe. I call this its ‘positive potential’ or ‘opportunity dimension.’ This dimension is inextricably linked to the ‘solution dimension’ and subject to the same limitations, but also to some additional limitations – such as the effectiveness of the ECHR, or the scope of application of the CFREU. There is no space here for a full discussion of the boundaries of this positive potential, so I limit myself to exploring only some aspects of the positive potential of EU freedom of association guarantees. This is because a broad interpretation of collective labour rights in EU human rights law, as the one proposed here, could in principle have very far-reaching implications—legal, political, economic, social—both at EU and domestic level. For this reason, the discussion in Chapter VI in particular relates to some questions which do not necessarily have a bearing on the institutional concern but constitute some important limitations upon this positive potential.

Second, I propose a *general* framework for the interpretation and application of ECHR and EU freedom of association guarantees. I identify a general set of reasons for and against convergence with ILO and/or ESC norms on which the Courts can draw, not

all of which will be relevant to a particular case. I consider, in the abstract, why and how the Courts should take particular kinds of reasons into account in the interpretation of the meaning of respective freedom of association guarantees and the assessment of compliance with these guarantees. I do not provide a full account the remaining differences between the way in which the right to freedom of association is protected under these legal orders and specialist instruments, which would follow from the application of this approach. I limit myself only to some examples, many of which relate to aspects of collective labour rights which have been the subject of ECHR or CJEU judgments.

Third, the discussion focuses mainly on the use of ILO and ESC norms in the interpretation of ECHR and EU freedom of association guarantees. Due to space constraints, I do not discuss the use of EU materials in the interpretation of the ECHR, although it should be acknowledged that some of the Article 11 judgments have referred to the CFREU and other EU norms. I also do not discuss in detail the use of ECHR materials in CJEU adjudication, apart from in the context of Article 52(3) CFREU. The interaction between the EU and ECHR and the two Courts has, furthermore, already been subject to much academic commentary.¹¹ I therefore acknowledge that there is scope for productive interaction between these two systems, discussed briefly in the concluding chapter, but do not deal with this question comprehensively.

¹¹ See eg S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CMLR 629; T Joris and J Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?' (2009) 15 *Columbia Journal of European Law* 1; S Morano-Foadi and L Vickers (eds), *Fundamental Rights in the EU: A Matter for the Two Courts* (Hart 2015); T Lock, *The European Court of Justice and International Courts* (OUP 2015) Ch 4.

4. Terminology

Some clarification of terminology is necessary from the outset. I refer to the 'right to freedom of association' as the subject of this thesis, which I take to include 'the right to organise' as that right is called under ILO instruments and Article 5 ESC. I often use 'the right to freedom of association' as an umbrella term to include other rights: the right not to associate, the right to form and join a trade union, the right of associations to organise their affairs, the right to collective bargaining, the right to collective action including strike action, etc. I sometimes use the term 'related rights' or 'broader set of (collective labour) rights' to refer to the right to collective bargaining and the right to take collective action. By 'collective labour rights' I mean the rights included under the umbrella term of 'the right to freedom of association' which fall within the domain of labour relations and can be held by workers and their organisations. I refer to the right not to join an association, which is an element of the right to freedom of association, separately. I acknowledge that 'the right to freedom of association' under Article 11 ECHR and Article 12 CFREU and as a general principle of EU law extends beyond the labour law context, but the concern of this thesis is limited only to this context. I acknowledge that under the ILO and ESC the right to organise is a right of employers', as well as workers' organisations. Unless otherwise specified, I discuss only the aspects of the relevant ILO and ESC rights which relate to workers and their organisations. Further clarifications of terminology are found throughout the chapters where necessary.

5. Main Propositions

To sum up, this thesis makes the following propositions in response to the institutional concern, that is the concern that ILO and ESC mechanisms for the protection of the right to freedom of association could be displaced or undermined by divergent or conflicting ECHR and/or EU norms. **First**, the right to freedom of association under the ECHR and in EU law should be interpreted in broader manner, to include specific collective labour rights—in particular the right to collective bargaining and action—and positive state duties to protect and fulfil these rights. This proposition is made in Chapter II, which argues that ECHR and EU guarantees should be developed in accordance with an empowerment conception of the moral right to freedom of association. **Second**, in this process the ECtHR and CJEU should look to ILO and ESC freedom of association norms as key sources of authority. This is primarily because these are *specialist* norms which reflect the empowerment model. This proposition is made in Chapter II and elaborated in Chapters III and V. **Third**, the Courts *may* interpret or apply ECHR/EU freedom of association guarantees differently to ILO/ESC Committees, but any such differences *must be well-justified*. This can be done by reference to reasons pertaining to the text or aims of the relevant instruments and legal systems, institutional characteristics particular to that system (discussed in Chapters III-VII), or the fact that the ECHR and EU enforcement bodies are courts and not committees (discussed in more detail in Chapters IV and VII.1). There is a wider range of such reasons in the EU context than the ECHR context. **Fourth**, some EU-level measures which encroach on freedom of association may fall outside the scope of the CFREU (discussed in Chapter VI). In light of propositions (3) and (4), the analysis **concludes** that propositions (1) and (2) cannot

completely resolve the institutional concern, but can go significant distance towards achieving this goal. Furthermore, despite these limitations the proposed interpretive approach has much positive potential to strengthen the protection of collective labour rights in Europe.

Part A: The Institutional Concern

I. The Institutional Concern

This chapter analyses the effects on specialist mechanisms for the protection of collective labour rights in international law—the ILO and ESC—of the recognition that the ECHR and EU law protect a similar range of collective labour rights but (possibly) to a different degree.¹² For this purpose, Section 1 outlines how the right to freedom of association is protected under specialist ILO and ESC instruments as a ‘labour right,’ both in terms of the relevant substantive guarantees and their enforcement.¹³ Sections 2 and 3 then examine how ECHR and EU parallel ‘human rights’ guarantees, respectively, compare to these ‘labour rights.’

Section 2 discusses how the ECtHR has developed the scope of Article 11 ECHR to include certain collective labour rights, often by reference to ILO and ESC standards. It argues that there are remaining uncertainties over the ambit of Article 11 and points of difference and, at least potential, conflict with ILO and ESC norms. Section 3 discusses the emergence of the EU as a source of both protection and restrictions of freedom of association. It considers some tensions between the EU and ILO and ESC bodies which have arisen as a result of CJEU case-law on collective labour rights and certain EU activities which have been found to encroach on freedom of association. Both sections argue that conflict and divergence of norms is liable not only to cause uncertainty, but

¹² I say ‘possibly’ because there is uncertainty over some aspects of the scope of the relevant ECHR and EU guarantees, but an interpretation is possible which would diverge from ILO and ESC norms. There are aspects of these guarantees which certainly differ from ILO and ESC norms.

¹³ With respect to the ILO, this discussion is limited to Conventions 87 and 98.

also to have a detrimental effect on specialist mechanisms which could be undermined by the emergence of ECHR and EU norms in this field. This is because the latter legal regimes are better known and underpinned by stronger enforcement mechanisms, and in cases of conflict ECHR and EU norms are likely to—or must, in the case of the EU—prevail, and in cases of divergence they are more likely to—or must—be followed, and more protective ILO and ESC norms disregarded.

1. The Right to Freedom of Association as a Labour Right under the ILO and ESC

The ILO is a global organisation founded in 1919 in the wake of World War I, concerned specifically with the protection of labour rights.¹⁴ Social justice and fair competition are themes which emerge most clearly as the original driving forces behind the establishment of the organisation.¹⁵ The ESC is a Council of Europe instrument originally adopted in 1961 which protects a series of social and economic rights, and is the sister instrument of the ECHR;¹⁶ a Revised ESC (RESC) was adopted in 1996 which consolidates the original Charter and its Protocol and adds new rights and amendments.¹⁷ The Council of Europe was established in 1949 as a reaction to the events

¹⁴ The ILO has a well-known history which has been explored elsewhere, eg G Rodgers, E Lee, L Swepston and J Van Daele, *The International Labour Organization and the quest for social justice, 1919–2009* (International Labour Office 2009); B Hepple, *Labour Laws and Global Trade* (Hart 2005) Ch 2; T Novitz, *International and European Protection of the Right to Strike* (OUP 2003) Ch 5.

¹⁵ Novitz (n 14) 96-8, Part XIII of the Treaty of Versailles.

¹⁶ It was preceded by a tripartite conference convened by the ILO, although the final text was adopted by the Committee of Ministers, the Council's decision-making body; Novitz (n 14) 136-142.

¹⁷ 43 out of 47 Council of Europe members have ratified either the 1961 or 1996 Charter. The Charter system allows ratifying states some scope for selection of the provisions that will apply to them which varies between the ESC and RESC. It is possible for a state not to ratify Articles 5 and 6 although they belong to the 'hard core' of rights under Article 20(1)(a), which makes it more difficult to avoid ratification.

of World War II, and is a regional organisation with broader political and social aims than the ILO.

There are significant differences in the institutional structures behind these instruments in terms of history, aims, membership, composition, procedures etcetera. For example, a very important and distinctive feature of the ILO is that many of its main bodies—such as its standard-setting and governing body—have a tripartite structure involving governments and workers’ and employers’ organisations. However, my concern here is not with these institutional structures, although they form an important part of the context of the norms I examine and will be drawn on where relevant.¹⁸ Rather, I provide an outline of the most important aspects of ILO and ESC freedom of association guarantees (a), and how they are enforced (b). I do not seek to provide a comprehensive picture of how the right to freedom of association is protected under each instrument, nor a comparative analysis of the two systems, but to draw out some common threads in their substantive guarantees and supervisory machinery. I argue that, as a general proposition, both systems aspire to a high level of protection of the right to freedom of association, but their ability to guarantee this level in practice is limited by the fact that they predominantly rely on ‘soft law’ enforcement mechanisms (c).

a. Freedom of association guarantees

The main ILO freedom of association guarantees are contained in Conventions 87 (Freedom of Association and the Right to Organise) and 98 (Right to Organise and

¹⁸ For a more comprehensive analysis of the structure and functioning of both organisations, Novitz (n 14) Ch 5 and 6.

Collective Bargaining). These are 'core' ILO Conventions, which member states are obliged to 'respect, promote and realise' by virtue of their membership regardless of whether they have ratified them.¹⁹ Compliance with Conventions is assessed mainly by the Committee of Experts on the Application of Conventions and Recommendations (CEACR),²⁰ and the Committee on Freedom of Association (CFA).²¹ The CFA in particular has developed a significant body of case-law on these instruments.²² Articles 5 (right to organise) and 6 (right to bargain collectively) are the relevant (R)ESC guarantees on which the European Committee on Social Rights (ECSR), the ESC interpretive body made up of independent experts, has also developed an extensive body of jurisprudence.²³ Here I outline some of the main aspects of ILO and ESC freedom of association guarantees which are most relevant to this discussion.

i. The right to form and join workers' and employers' organisations and further specific collective labour rights

Although differently worded, both systems guarantee *a right of workers and employers to establish and join organisations* for the protection of their interests (Article 2 Convention 87 and Article 5 ESC). An important difference is the fact that according to the ECSR,

¹⁹ Declaration of Fundamental Principles and Rights at Work 1998, para 2.

²⁰ Composed of 20 'eminent jurists',

²¹ Composed of an independent person, and three representatives each of governments, employers, and workers; ILO, Committee on Freedom of Association <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>> accessed 30 November 2018. The conclusions of the CFA and CEACR are not legally binding, the explicit competence to interpret ILO Conventions being reserved for the International Court of Justice: ILO Constitution Article 37(1).²¹ However, only one case has ever been brought to the ICJ and the pronouncements of these Committees have been regarded as authoritative and respected.

²² See *ILO Compilation of decisions of the Committee on Freedom of Association* (6th edn, 2018).

²³ Council of Europe, *Digest of the case-law of the European Committee of Social Rights* (Strasbourg 2018).

Article 5 ESC includes a right *not* to join an association,²⁴ because the exercise of a worker's right to join a trade union must be the result of a choice.²⁵ Convention 87 does not include such a right and the CFA has maintained an agnostic attitude to, for example, union security clauses.²⁶

Under both instruments this right includes *further more specific rights*. Some of these relate to the ability of organisations to conduct their affairs. Thus Article 3 of Convention 87 confers a right on employers' and workers' organisations to draw up their constitutions and rules, elect their representatives, organise their administration and activities and formulate their programmes. The ECSR has recognised that 'trade unions and employers' organisations must be largely independent where anything to do with their infrastructure or functioning is concerned.'²⁷ These rights heavily emphasise the importance of organisational autonomy to the effective promotion of the interests of members of that organisation.²⁸ The CFA has stressed that freedom of association implies not only the right to form organisations but also the right of those organisations to pursue lawful *activities* for the defence of their occupational interests;²⁹ whereas the ECSR has ruled that Article 5 protects 'the right of trade unions to organise freely and to perform their *activities* effectively, which is essential for "the protection of workers'

²⁴ Conclusions I - Statement of interpretation - Article 5.

²⁵ Eg Conclusions 2014 - Russian Federation - Article 5 (2014/def/RUS/5/EN).

²⁶ Compilation of CFA decisions (n 22) [552], [554]; 329th Report, Case No 2136 [102]; 332nd Report, Case No 2187 [721]. However, note that union security clauses imposed by law are contrary to the principles of freedom of association, Compilation of CFA decisions (n 22) [551].

²⁷ Digest of ECSR case-law (n 23) 95.

²⁸ Eg Compilation of CFA decisions (n 22) [589] on election of representatives.

²⁹ Compilation of CFA decisions (n 22) [716]; these activities can include activities of political nature subject to some limitations [721-734].

economic and social interests.”³⁰ In other words, both instruments recognise that the right to form and join an organisation is a ‘dynamic’ right – that is the right to do something through an organisation and not merely to be a member of it.³¹

Two significant specific rights to act through an organisation are *the right to collective bargaining* and the *right to take collective action*. ILO Convention 98 recognises a right to collective bargaining,³² which the CFA considers as ‘an *essential* element in freedom of association.’³³ Article 6 (2) ESC imposes an obligation to promote ‘machinery for voluntary negotiations...with a view to the regulation of terms and conditions of employment by means of collective agreements’ (Article 6(2)), that is to promote collective bargaining machinery.³⁴

Article 6(4) ESC recognises a right to collective action, including the right to strike. This right is confined to cases of ‘conflicts of interest,’ which the ECSR limits to ‘any negotiation between employers and employees in order to settle an industrial dispute.’³⁵ This means, for example, that strikes against government policy are not

³⁰ Conclusions XII-2 – Germany – Article 5.

³¹ The term ‘dynamic’ is used by S Leader, *Freedom of Association: A Study of Labour Law and Political Theory* (Yale University Press 1992).

³² See Preamble. Article 4 defines collective bargaining as the ‘voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’

³³ Compilation of CFA decisions (n 22) [1232].

³⁴ This formulation is remarkably similar to Art 4 of Convention 98. Article 6(1) imposes an obligation to promote joint consultation and Article 6(3) an obligation to promote establishment and use of machinery for conciliation and voluntary arbitration. Discussion of these aspects of Article 6 ESC is, due to space constraints, beyond the scope of this thesis.

³⁵ Digest of ECSR case-law (n 23) 103; Conclusions I - Statement of Interpretation on Article 6(4) - 38.

protected by the ESC.³⁶ The ILO guarantee of the right to strike is broader. Whilst not explicitly included in the Conventions, the CFA has derived a right to strike from Articles 3 and 10 of Convention 87.³⁷ According to the CFA, ‘the right to strike is an intrinsic corollary to the right to organize protected by Convention No 87’³⁸ and ‘one of the *essential* means through which workers can defend and promote their interests.’³⁹ This right can be exercised not only in disputes related to collective bargaining but also with respect to economic and social policy questions ‘of direct concern to workers’;⁴⁰ it is a more general right to protest in relation to issues of concern to workers, including against the government.⁴¹ Importantly for the purposes of comparison in Section 2, both systems accord protection in cases of secondary/sympathy strikes.⁴²

ii. Types of obligations

The relevant instruments impose different ‘types’ of obligations on states parties, with respect to the rights outlined above. By different ‘types’ of obligations here I mean: negative obligations to refrain from interference with a right (‘duties to respect’);

³⁶ Digest of ECSR case-law (n 23) 103; however, the Committee has expressed concern that the UK ban on secondary strike action does not comply with Article 6(4) if it prevents unions from taking action against the de facto employer if this was not the immediate employer: 2014, Conclusions XX-3 - United Kingdom - Article 6(4). Note the Committee’s reference to CEACR conclusions.

³⁷ This derivation of the right to strike from Convention 87, confirmed by the CEACR, was challenged by the ILO Employers’ Group in 2012, although in 2015 a ‘ceasefire’ agreement was reached on this point. See C La Hovary, ‘Showdown at the ILO? A Historical Perspective on the Employers’ Group’s 2012 Challenge to the Right to Strike’ (2013) 42 ILJ 338; *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), in relation to the right to strike and the modalities and practices of strike action at national level* TMFAPROC/2015/2 (23-25 February 2015).

³⁸ Compilation of CFA decisions (n 22) [752, 754]; 311th Report, Case No 1954 [405].

³⁹ Compilation of CFA decisions (n 22) [522];

⁴⁰ *ibid* [758-9, 766].

⁴¹ *ibid* [529].

⁴² *ibid* [534]; Digest of ECSR case-law (n 23) 104; Conclusions XVIII-1 – Denmark – Article 6(4).

positive obligations to protect from interference with a right by third parties ('duties to protect') and positive obligations to promote the fulfilment of a right ('duties to promote or fulfil').⁴³ The provisions discussed give rise to negative obligations,⁴⁴ but they also impose positive obligations of both types.

Article 11 of Convention 87 stipulates that member states undertake 'to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.' That is, states must take *active* measures to ensure the ability to exercise that right; the CFA has stressed that the right must be guaranteed in law and in fact.⁴⁵ Convention 98 further imposes 'duties to protect': workers shall enjoy adequate protection against acts of anti-union discrimination (Article 1(1)) and that workers' and employers' organisations should be protected from interference by each other (Article 2(1)). It also imposes 'duties to promote': Article 3 states that 'machinery...shall be established...for ensuring respect for the right to organise;' and Article 4 that 'measures appropriate to national conditions shall be taken ... to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations.'

⁴³ S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 2, citing Guideline 6 in 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691.

⁴⁴ Article 8(2) Convention 87 states: 'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.' Article 5 ESC stipulates that 'the Contracting Parties undertake that national law shall not be such as to impair [the freedom of employers and workers to form and join organisations for the protection of their interests].'

⁴⁵ Eg Compilation of CFA decisions (n 22) [472], [1134-1162].

The ECSR has found that under Article 5 ESC a state 'is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise and, in particular, to protect workers' organisations from any interference on the part of employers.'⁴⁶ The Committee has stressed that the freedom to join must be a concrete freedom in practice, similarly to the CFA.⁴⁷ Article 6(2), like Article 4 Convention 98, is interpreted as imposing obligation on states to take positive measures 'to facilitate and encourage the conclusion of collective agreements,' in particular 'if the spontaneous development of collective bargaining is not sufficient.'⁴⁸ Thus the ESC also recognises positive duties to protect and promote, although on the basis of the ECSR case-law to date it is unclear whether duties to promote relate only to collective bargaining machinery or also to machinery to promote the right to organise more generally, as Article 3 of Convention 98.⁴⁹

iii. Permissible restrictions

The instruments contain qualifications on the application of the relevant provisions to particular categories of workers. Article 9 of Convention 87, Article 5 of Convention 98 and Article 5 ESC all provide that the application of the relevant guarantees to the police and armed forces is to be determined by national laws or regulations. Convention 98 excludes from its scope public servants engaged in the administration of the State (Article 6), protected by the Labour Relations (Public Service) Convention 1978 (No

⁴⁶ Conclusions I – Statement of interpretation – Article 5.

⁴⁷ A Jacobs, 'Article 5: The Right to Organise' in N Bruun, K Lörcher, I Schömann and S Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart 2017) 220, 226.

⁴⁸ Digest of ECSR case-law (n 23) 99; Conclusions I – Statement of interpretation – Article 6(2).

⁴⁹ There is nothing in the Digest of ECSR case-law on Article 5 on this point.

151).⁵⁰ In addition, Article 31 ESC/Article G RESC contains a general provision permitting restrictions to ESC rights which are ‘prescribed by law and are 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.’ ILO Conventions do not contain such a provision; Article 8 Convention 87 states only that the exercise of the rights in question shall respect the law of the land. This does not mean that restrictions and regulation of the right to organise are not permitted—that some such regulation is permitted can be seen throughout CFA case-law—but that no systematic ‘necessity’ test is applied.

There are specific provisions on the circumstances in which the right to collective action can be restricted. The most important one to mention here is that under the ILO the prohibition of strikes ‘could *only* be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term.’⁵¹ Under the ESC restrictions on the right to strike must comply with Article 31 ESC/Article G RESC, although the ECSR has also recognised that restrictions on the right to strike of certain civil servants, and prohibitions of strikes in ‘essential services’ may serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health.⁵²

⁵⁰ Which is not a core Convention.

⁵¹ Compilation of CFA decisions (n 22) [541].

⁵² Digest of ECSR case-law (n 23) 103; see Conclusions I – Statement of Interpretation – Article 6(4), 38-39.

b. Enforcement of ILO and ESC guarantees

There have been significant concerns over the effectiveness of the enforcement mechanisms of both systems. These are primarily based on on-going review and dialogue, cooperation,⁵³ and, ultimately, political peer pressure to ensure compliance. The main supervisory machinery under both the ILO and ESC is based on cyclical reports. Such reports are submitted to the CEACR by states parties every three years when it comes to core Conventions (as Conventions 87 and 98) and the four Governing Conventions, and every six years for other Conventions.⁵⁴ Cyclical reports regarding compliance with a particular ESC provision are submitted to the ECSR every four years.⁵⁵ The Committees, generally speaking, make observations on the state of compliance with the relevant instruments and raise concerns or find violations of the applicable provisions.⁵⁶ These conclusions are normally followed up in the next report cycle. In addition, there are complaints-based supervisory procedures. The CFA complaint procedure is the most relevant here; it examines complaints about violations of freedom of association, which can be made by governments and workers' and employers' organisations. Under the ESC, if a state has ratified the Collective Complaints

⁵³ See eg Compilation of CFA decisions (n 22) [5]: 'The object of the special procedure on freedom of association is not to blame or punish anyone, but rather *to engage in a constructive tripartite dialogue* to promote respect for trade union rights in law and practice;' my emphasis.

⁵⁴ See ILO, 'Committee of Experts on the Application of Conventions and Recommendations' <<https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-en/index.htm>> accessed 15 October 2019.

⁵⁵ This is because the examination of compliance with ESC provisions by the ECSR is divided into four groups, with one group being examined every year, see Council of Europe, 'Reporting System of the European Social Charter' <<https://www.coe.int/en/web/european-social-charter/reporting-system/>> accessed 15 October 2019.

⁵⁶ The adjudicative style and procedures of the CEACR and ECSR are different, but I have tried here to highlight some common general aspects of the follow-up mechanisms of the respective instruments. For more detail on the supervisory procedures of both systems, Novitz (n 14) Ch 8 and 215-224.

Protocol 1995, a complaint could be brought against it by the social partners or certain NGOs, but not an individual.⁵⁷ Normally where the ECSR finds a violation, the Committee of Ministers—the Council of Europe’s main decision-making body—has discretion to issue recommendations asking the state to remedy the situation, which gives more political weight to ECSR conclusions, but it has done so in few cases.⁵⁸

These supervisory mechanisms can be described as ‘soft law’—as opposed to ‘hard law’—mechanisms, which are common in the sphere of international law.⁵⁹ This choice of institutional arrangements has certain benefits, such as making it more likely that states will agree on standards and allowing for flexibility in a context of uncertainty and complexity of subject-matter.⁶⁰ However, such mechanisms are also more easily disregarded. There is much commentary on the (in)effectiveness of the ILO and ESC supervisory mechanisms, so I limit myself here only to a few observations.⁶¹ The effective lack of ‘hard law’ sanctions⁶² at the disposal of the ILO has led to accusations that it is

⁵⁷ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995.

⁵⁸ See S Clauwaert, ‘The Charter’s Supervisory Procedures’ in Bruun et al (n 47) 99. The Committee made no individual recommendations until significant reforms to its voting rules in 1991; since then, it has adopted 37 recommendations only—one in response to a collective complaint—none since 2007.

⁵⁹ ‘Hard law’ mechanisms are defined, for example, by Abbot and Snidal as ‘legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law’: KW Abbot and D Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organisations* 421, 421. They define ‘soft law’ as legal arrangements which are ‘weakened along one or more of the dimensions of obligation, precision and delegation,’ and note that there are many different varieties of ‘soft law’ which deviate from ‘hard law’ to different degrees, 422.

⁶⁰ For analysis of the benefits of ‘soft law,’ Abbot and Snidal (n 59) 434ff.

⁶¹ On the ILO, see eg P Alston ‘Labour Rights as Human Rights: The Not So Happy State of the Art’, and T Novitz, ‘The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO’ in P Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 235-239. On the ESC, see eg Clauwaert (n 58).

⁶² As Novitz puts it, one difficulty with the ILO ‘may be the lack of any sanction greater than the potential embarrassment of States’ (n 14) 207. The ‘hardest’ sanction which the ILO has at its disposal is the expulsion of a state from the organisation for persistent violations, but this has been used rarely, eg see International Labour Conference, *Resolution on the Widespread Use of Forced Labour in Myanmar*, 87th Session (ILO 1999).

'toothless' and 'ineffective' in bringing states into compliance;⁶³ and this is on top of concerns about low rates of ratification of some instruments. The 1998 Declaration was adopted as an attempt to revitalise the ILO system, with a stronger focus on the 'core' Conventions and the provision of technical assistance to states parties.⁶⁴ Similarly, the RESC and the Collective Complaints protocol were part of a move to increase the visibility and impact of the Charter, which was considered to be the less influential sister instrument of the ECHR.⁶⁵ Even this has been deemed only partially successful,⁶⁶ and the (still on-going) Turin Process was started in 2014 to further strengthen the ESC system and 'to improve the implementation of social and economic rights ... in parallel to civil and political rights granted' by the ECHR.⁶⁷

This is not to suggest that these instruments are of no or little relevance and impact. The ILO has long been a well-known and respected organisation in the field of labour standards, and its expertise in that field is highly valued; the pronouncements and expertise of the ECSR have also come to be well-regarded, and the ESC has recently been highlighted as an important instrument which could contribute to a 'social Europe.' I seek only to highlight that there are still considerable issues of implementation, in

⁶³ See Alston (n 61) 14-7.

⁶⁴ See Novitz (n 14) 102-4; J Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269, 270.

⁶⁵ Novitz (n 14) Ch 9, in particular 219-220; Clauwaert (n 58) 132.

⁶⁶ Eg C O'Conneide, 'Social rights and the European Social Charter — new challenges and fresh opportunities' in O De Schutter (ed), *The European Social Charter: a social constitution for Europe* (Bruylant 2010) 167, 173.

⁶⁷ Council of Europe, 'The Turin process for the European Social Charter' <<https://www.coe.int/en/web/turin-european-social-charter/turin-process>> accessed 30 November 2018.

particular in comparison to the ECHR and EU, which penetrate into domestic legal orders to a much greater extent.

c. Conclusion

To sum up, under both ILO and ESC systems the right to freedom of association, or right to organise, is a composite right comprised of further more specific sub-rights to undertake particular activities, including a right to collective bargaining and right to take collective action. These are intended to guarantee the ability of organisations to act effectively in the pursuit of their social and economic interests. The duties corresponding to these rights are relatively extensive, including some duties to promote the right, especially in respect of collective bargaining machinery. Under both systems the rights discussed here are of significant substance, and seek to provide a high (minimum) level of protection. The ESC regards these rights to be fundamental human rights;⁶⁸ and the 1998 Declaration states that the rights enshrined in the 'core' ILO Conventions 'are universal, and that they apply to all people in all States,'⁶⁹ suggesting that these are concerned with the protection of basic human rights.⁷⁰

However, whilst both mechanisms aspire to guarantee a high level of protection, in practice there are significant issues of awareness and implementation of the relevant standards. The 'strength' of protection accorded by these systems depends not only on

⁶⁸ Digest of ECSR case-law (n 23) 40.

⁶⁹ International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work* <<http://www.ilo.org/declaration/lang-en/index.htm>> accessed 3 May 2019.

⁷⁰ Bellace (n 64) 270, 272.

the substance of the rights as they are set out in the relevant instruments and interpreted by respective supervisory organs, but also on the uptake and compliance by states parties. As a general proposition, therefore, it might be said that whereas the protection of the right to freedom of association of workers and their organisations in these specialist instruments is broad, its depth is limited to a certain extent by issues of impact and enforcement.

2. The Right to Freedom of Association under the ECHR

The ECHR is a very well-known and well-regarded instrument which has been at the forefront of the legal protection of human rights in Europe. Its most distinguishing feature is that, by contrast to the ILO and ESC, its interpretive organ is a court which can receive applications from individuals as well as states and other groups.⁷¹ The judgments of the ECtHR are binding on states parties in international law;⁷² their execution is supervised by the Committee of Ministers.⁷³ Whilst the implementation of judgments technically also depends on peer pressure in the Committee of Ministers, these are generally respected and implemented by states parties. The system has been considered

⁷¹ Article 33, 34 ECHR.

⁷² Article 46(1).

⁷³ Article 46(2). Where there is delay in implementing a judgment, a state must justify itself before the Committee and is required to provide comprehensive information on the steps it intends to take to comply with the judgment, see Council of Europe, *The execution of judgments of the European Court of Human Rights* (2nd ed, Council of Europe Publishing 2008) 32-45.

a success, reflected in the large number of applications reaching the Court in the last few decades.⁷⁴

The ECHR is concerned only with the protection of what are traditionally called ‘civil and political’ rights. According to Novitz, social rights were excluded from the text of the ECHR and the ESC was drafted instead because they were considered by some members to be controversial and difficult to enforce.⁷⁵ The decision potentially reflects the, now considered untenable, perception that social and economic rights are ‘desirable goals but not fully fledged rights,’⁷⁶ and therefore different to the civil and political rights guaranteed in the ECHR.⁷⁷ This division has meant that whilst freedom of association is protected by both the ECHR (Article 11) and ESC, this protection takes a different form and, until relatively recently, was of very different scope. However, Article 11 jurisprudence has undergone significant evolution and has come to recognise that Article 11 includes more specific rights which are not explicitly mentioned in its text.

This section traces this evolution and sets out the elements of the right to freedom of association of workers and trade unions as currently protected under the ECHR, pointing out areas of (potential) divergence from these norms (a). It also considers the role which ILO and ESC norms have played in this process (b). I argue that such

⁷⁴ Leading to a ‘crisis of workload’: E Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 475; *3rd meeting of the Committee of Experts on the System of the European Convention on Human Rights* (DH-SYSC), Strasbourg, 10-12 May 2017.

⁷⁵ Novitz (n 14) 129-134.

⁷⁶ JW Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 137.

⁷⁷ This is the ‘traditional’ approach to the ‘type of right’ distinction, explained in Fredman, *Human Rights Transformed* (n 43) 66, Novitz (n 14) 42-3.

(potential) normative divergence, as well as the lack of a clear and consistent approach to the use of ILO and ESC norms in the Court's reasoning is liable to give rise to uncertainty and to undermine the authority of specialist instruments (c). In other words, the development of collective labour rights under the ECHR could have a negative impact on the effective protection of the right to freedom of association as a 'labour right' under those specialist instruments.

a. The evolution of freedom of association guarantees under Article 11

Article 11 ECHR provides:

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.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 11(1) is framed in broad, general terms in comparison to the more detailed provisions of Conventions 87 and 98 and Articles 5 and 6 ESC. Article 11(2) provides for broader restrictions than the ILO, in terms similar to Article 5 ESC, though it also mentions members of the administration of the state, and Article 31 ESC/Article G RESC. Article 11 is a general freedom of association guarantee, but the ECtHR has developed a line of jurisprudence which deals with trade union and labour-related matters.

i. Early judgments: a 'thin' right to freedom of association which does not include specific collective labour rights

The earliest ECtHR judgments suggested that Article 11 was much narrower in scope than ILO and ESC parallel guarantees. The first notable case is *National Union of Belgian Police v Belgium*, concerning the failure of the government to consult members of the police on proposals concerning working conditions of public sector workers.⁷⁸ It was held that the words 'for the protection of his interests' in Article 11

show that the Convention safeguards freedom to protect the occupational interests of trade union members *by trade union action*, the conduct and development of which the Contracting States *must both permit and make possible*. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that *the trade union should be heard*.⁷⁹

Thus, Article 11 is not a mere right to form and join a union but extends to action to protect the interests of trade union members. In this sense some parallels can be drawn to the jurisprudence of the ILO and ESC Committee discussed above. It was stated in the same judgment, however, that

[W]hile Article 11 (1) presents trade union freedom as one form or a special aspect of freedom of association, the Article does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it.⁸⁰

The Convention did not guarantee particular means for the trade union to be heard, such as consultation, but left the State a free choice as to the means to safeguard the 'freedom

⁷⁸ (1979-80) 1 EHRR 578.

⁷⁹ *ibid* [39]; my emphasis.

⁸⁰ *ibid* [38], contrary to the opinion of the European Commission on Human Rights in the same case, App No 4464/70 (Report of 27 May 1974) [74], see [32] of the judgment of the Court.

to protect the occupational interests of trade union members'.⁸¹ A right to consultation was only one such means and not indispensable for the enjoyment of trade union freedom.⁸²

This logic was applied in *Swedish Engine Drivers' Union v Sweden*, which denied that a right to conclude a collective agreement is an 'element necessarily inherent' in the right to freedom of association.⁸³ The case has been cited to support the conclusion that collective bargaining is not indispensable for the enjoyment of trade union freedom.⁸⁴ The last case in this 'trilogy,' *Schmidt and Dahlström v Sweden*, held that Article 11 did not guarantee a right to retroactivity of benefits arising from a collective agreement, nor a right to strike.⁸⁵ Importantly, the judgment states that the grant of a right to strike was only *one* of the means which the state could choose to secure the enjoyment of Article 11.⁸⁶ This can be contrasted with, in particular, the view of the CFA that the right to strike is an intrinsic corollary to the right to organise.

Under this early jurisprudence, Article 11 guaranteed only a thin and abstract right to freedom of association which did not include the more specific rights to certain

⁸¹ *National Union of Belgian Police* (n 78) [38].

⁸² *ibid.*

⁸³ (1979-80) 1 EHRR 617 [39].

⁸⁴ *Gustafsson v Sweden* (1996) 22 EHRR 409, Partly Dissenting Opinion of Judge Ryssdal et al; *Wilson and Palmer v United Kingdom* (2002) 35 EHRR 20 [44]. Though note that eg Novitz argues that the judgment itself actually left this question open, T Novitz, 'Negative Freedom of Association: *Gustafsson v Sweden*' (1997) 26 ILJ 79, 80.

⁸⁵ (1979-80) 1 EHRR 632 [34, 36].

⁸⁶ *ibid* [36].

activities which I outlined in Section 1.⁸⁷ It did not protect any *particular* means to guarantee this freedom such as a right to collective bargaining or to strike, by stark contrast to the position of these rights in ILO Conventions and the ESC. It is interesting that in these judgments the Court referred to the provisions of the ESC as a reason *not* to extend protection to these more specific rights.⁸⁸ These decisions were disappointing for trade unions as it was ‘difficult to discern any real content to the rights for practical purposes’⁸⁹ – the cases involved significant restrictions on the ability of unions to act in furtherance of the interests of their members through consultation and collective bargaining, and an effective penalty for taking part in strike action. The Court has since expanded the scope of Article 11 to include protection of collective bargaining and action. However, the significance of some of the Court’s more recent case-law can only be appreciated against the background of this early jurisprudence.

ii. Right not to join an association: potential conflict between the negative and positive aspect of the right to freedom of association

An important step in the development of Article 11 was the recognition that it protects a right not to join an association, according to *Sigurjonsson v Iceland*.⁹⁰ This ‘negative’ aspect of the right was recognised by reference to other international instruments,

⁸⁷ That Article 11 does not include rights to collective bargaining and strike was confirmed in the later *UNISON v United Kingdom* App No 53574/99 (10 January 2002).

⁸⁸ See *National Union of Belgian Police* (n 80) [38]; *Swedish Engine Drivers* (n 83) [39]; *Schmidt and Dahlström* (n 85) [34], [36]; though the reasoning of the Court is slightly different in the latter case.

⁸⁹ B Rainey, E Wicks and C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 490.

⁹⁰ (1993) 16 EHRR 462 [35].

including Article 5 ESC, and application of the Court's 'living instrument' doctrine,⁹¹ discussed in Chapter III. This step came at a time when collective labour rights under the Convention were underdeveloped and was heavily criticized by labour law scholars.⁹² According to Novitz, this development showed 'a greater interest in the defence of individual autonomy than collective solidarity.'⁹³ It is an important development to note here because there is a potential for normative conflict, depending on the weight which is attached to the negative right to association vis-à-vis the positive one—ie the right to join and form unions and act through them—under Article 11. If the negative aspect is accorded greater weight where the two clash, the result might be contrary to ILO norms—which do not specifically recognise the negative aspect⁹⁴—and ESC norms—which do not attach greater importance to the negative aspect.

It is unclear whether the Court does in fact attach greater significance to the negative right. It has never held that either the negative or positive right takes priority, but has deliberately left this question open.⁹⁵ In *Gustafsson v Sweden*—where an association of restaurant employers had placed the restaurant of the applicant under a blockade because he refused to sign a collective agreement—it was decided only by a slim majority and reversing the decision of the previous instance that the applicant's

⁹¹ *Sigurjonsson* (n 90) [35]; the 'living instrument' doctrine was established in *Tyler v United Kingdom* (1978) 2 EHRR 1.

⁹² Novitz (n 14) 238, Lord Wedderburn, 'Freedom of Association or Right to Organise?' (1987) 18 *Industrial Relations Journal* 244, 251-2.

⁹³ Novitz (n 14) 238.

⁹⁴ Indeed, there is potential for divergence even where the negative right is not accorded greater but equal weight, given that the ILO does not recognise a right not to associate as such.

⁹⁵ *Sigurjonsson* (n 90) [57]; *Gustafsson* (n 84) [45]; *Sørensen and Rasmussen v Denmark* (2008) 46 EHRR 29 [55].

negative right to association had not been violated.⁹⁶ This may have been, however, in large part because the Convention did not at the time recognise a right to conclude a collective agreement and would not recognise a corresponding negative right.⁹⁷ In *Sørensen and Rasmussen v Denmark* it was held that pre-entry closed-shop agreements were a violation of the negative right to association of the applicants;⁹⁸ in this case the negative aspect took precedence over the positive aspect of the right. The judgment strongly emphasised the importance of choice and personal autonomy as a ‘principle underlying the interpretation of the Convention guarantees’ which confirms the importance of the negative aspect of Article 11.⁹⁹ In *Ólafsson v Iceland*,¹⁰⁰ the applicant argued that the imposition of a levy by legislation, paid to the Federation of Icelandic Industries, was a violation of both his positive and negative right to freedom of association.

Whereas the ILO and ESC materials cited in the case found a violation of the positive right, the Court’s reasoning focused on the negative aspect of the right, again referring to freedom of choice and personal autonomy.¹⁰¹

As the judgments are relatively few and so fact-dependent it is difficult to discern whether the ECtHR tends towards according the negative aspect of the right greater weight. The link made in *Sørensen* and *Ólafsson* between the negative right to freedom of

⁹⁶ *Gustafsson* (n 84). The dissenting Opinion of Judge Maartens argues that, ‘in principle’ the negative aspect should prevail. See Novitz (n 14) 235-7.

⁹⁷ *Gustafsson* (n 84) [52]; Novitz, ‘Negative Freedom of Association’ (n 84) 87.

⁹⁸ *Sørensen* (n 95) [76-7].

⁹⁹ *Sørensen* (n 95) [54].

¹⁰⁰ (2013) 56 EHRR 21.

¹⁰¹ *ibid* [54].

association and personal autonomy as a value underpinning the Convention suggests that the Court—as the guardian of individual rights—at the very least perceives this ‘individual’ right to be closer to home. Whether the Court is mistaken to relate only the negative, but not the positive right to the notion of personal autonomy is explored in Chapter II.¹⁰² For now, we might say that ‘the Court’s enthusiasm for the protection of negative freedom of association’¹⁰³ is a concern in so far as it has the potential to undermine collective aspects of the right in a way which might conflict with the protection of that right in specialist labour rights instruments.

iii. Right to collective bargaining: possible differences in substance

The early 2000s saw the Court beginning to give more substance to the collective aspect of Article 11. It was held in *Wilson and Palmer* that the UK was in violation of Article 11 because it had failed to prevent a practice by the employer which placed at a disadvantage workers who chose to adhere to contractual terms determined by a collective agreement.¹⁰⁴ This practice rendered the freedom of the employee to take part in union activities ‘illusory’;¹⁰⁵ the Court looked at the negative effect on the employee *in practice*, consistent with the ILO and ESC approach. Furthermore, the Court in *ASLEF*

¹⁰² See also V Mantouvalou, ‘Is There a Human Right Not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights’ in T Novitz and C Fenwick (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010), who argues that closed-shop arrangements are not incompatible with Convention values.

¹⁰³ Novitz (n 14) 234.

¹⁰⁴ *Wilson* (n 84).

¹⁰⁵ *ibid* [46].

v United Kingdom took a strong stance in upholding unions' rights to 'to draw up their own rules and administer their own affairs.'¹⁰⁶

In its 2008 *Demir and Baykara v Turkey* judgment, the Court reversed some of its long-standing case-law and held that 'the right to bargain collectively ... has, in principle, become one of the essential elements' of Article 11.¹⁰⁷ Other essential elements are: 'the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members.'¹⁰⁸ The Court 'does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance.'¹⁰⁹ That is, it considers that these rights are particularly important aspects inherent in the Article 11 guarantee. It would appear that if a measure interferes with the essential elements of the right a 'lesser margin of appreciation' of the state is recognised and more is required to justify interference under Article 11(2).¹¹⁰

Demir was a significant step towards bringing ECHR jurisprudence in line with ILO and ESC standards. These instruments were crucial to this development. In a significant paragraph the Court held that:

85 The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of

¹⁰⁶ (2007) 45 EHRR 34 [38].

¹⁰⁷ (2009) 48 EHRR 54 [154].

¹⁰⁸ *Demir* (n 107) [145], references omitted.

¹⁰⁹ *ibid* [144].

¹¹⁰ *National Union of Rail, Maritime and Transport Workers (RMT) v 8* it is not clear whether 'essential elements' are congruent with 'the very core' of the right, phrasing used in this paragraph. However, the judgment suggests that the margin of appreciation is reduced when essential elements are affected, [104].

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.

86 In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of Member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.

The Court therefore took into account, amongst others, ILO and ESC instruments and their interpretation in recognising a right to collective bargaining.¹¹¹ However, it is unclear whether that right to collective bargaining under Article 11 is *equivalent in substance* to ILO and ESC guarantees. Some subsequent cases suggest that the Court is less enthusiastic about protecting the right to collective bargaining than in *Demir*, and that Article 11 may be more circumscribed than parallel ILO and ESC norms. *Demir* was brought by the members of a union which had sought to enforce the terms of a collective agreement against a municipal council. A violation was found because (1) national authorities had refused to recognise the right of the applicants, municipal servants, to form a trade union,¹¹² and (2) annulled the collective agreement *ex tunc*.¹¹³ The Chamber in *RMT v United Kingdom*¹¹⁴ stated that *Demir* involved ‘a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution

¹¹¹ Chapter III discusses in more detail the way in which these instruments are used.

¹¹² *Demir* (n 107) [127].

¹¹³ *ibid* [170].

¹¹⁴ *RMT* (n 110) [98].

of a trade union.¹¹⁵ That is *Demir* was an extreme case which effectively involved a complete denial of the right to form trade unions and to bargain collectively, making it very difficult to argue that this was not a violation of Article 11.

The approach of the Chamber in *UNITE the Union v United Kingdom* can be contrasted with *Demir*.¹¹⁶ *UNITE* concerned the abolition of the Agricultural Wages Board (AWB) without a replacement mechanism, which according to the applicants made collective bargaining in the sector practically impossible for many workers.¹¹⁷ Not only did the Chamber find no violation, but it also deemed the application to be manifestly ill-founded. It stated that the situation before it was ‘far removed’ from that in *Demir*, and that the abolition of the AWB did not constitute an interference with the right to freedom of association.¹¹⁸ The decision is disappointing not only because it lacks the sensitivity shown in *Wilson* to the real position of the worker—how a measure impacts them in practice—but also because it seems to be underpinned by a more narrow conception of the substance of the right to collective bargaining, suggesting that only an extreme measure such as the annulment of a collective agreement strikes at the very substance of that right. In this regard, the case takes a step back towards a thin conception of the right to freedom of association under Article 11.

¹¹⁵ *ibid* [86].

¹¹⁶ App No 65397/13 (26 May 2016).

¹¹⁷ *UNITE* (n 116) [29].

¹¹⁸ *ibid* [59]; the Chamber then considered whether the UK had violated the applicant’s positive obligations.

The only subsequent judgment on the right to collective bargaining,¹¹⁹ *Tek Gıda İş Sendikası v Turkey*, does not shed much light on the substance of that right.¹²⁰ The Chamber found that a decision by national authorities to withdraw the representative status of the union because of insufficient membership was not a violation of Article 11.¹²¹ However, a violation was found with respect to the fact that the employer had wrongfully dismissed all members of the union which had sought recognition for the purposes of collective bargaining, such that the union had no presence left at that workplace at all – a measure which might well be called ‘extreme.’¹²² So, a violation was again found only in the extreme case. However, on the facts of that case, it is arguable that the first restriction on the right to collective bargaining did legitimately fall within the state’s margin of appreciation; or that the Court may have preferred to base its finding of a violation on the second allegation given that it concerned a more obvious interference with that right. It remains to be seen how the Court will deal with less obvious and extreme cases in the future, determining the substance of the right to collective bargaining under Article 11 more precisely. For the time being, looking at case-law it is possible that this substance may be interpreted in a relatively narrow manner.

iv. Right to strike: possible differences in substance

¹¹⁹ Which I could find on the HUDOC database of ECtHR decisions until 1 May 2019.

¹²⁰ App No 35009/05 (4 April 2017).

¹²¹ *ibid* [46].

¹²² *Tek Gıda İş Sendikası* (n 120) [56]. The Chamber found that the state had breached its positive obligations in not ordering reinstatement nor compensation sufficient to deter the employer from such measures in the future.

The Court has recognised that the right to strike is protected by Article 11.¹²³ It has left open the question of whether the right is an *essential* element of freedom of association, as considered by the CFA.¹²⁴ Although this is a welcome development in view of the Court's previous case-law,¹²⁵ the precise scope of the right under the Convention is unclear. There are a series of successful applications alleging a violation of the right to strike, especially against Turkey.¹²⁶ Some of these involve relatively extreme restrictions, such as the government circular banning strike action at issue in *Enerji*,¹²⁷ or ban on strike action in *Hrvatski Lijecnicki Sindikat*.¹²⁸ Others have involved less extreme sanctions capable of *dissuading* workers from taking part in strike action. For example, in *Karaçay* the Chamber decided that disciplinary action consisting in a warning to an employee who had allegedly participated in strike action was a violation of Article 11.¹²⁹

However, *RMT* gives rise to uncertainty over how far the Court is willing to extend protection, and how the protection of the right to strike under the ECHR compares to that under the ILO and ESC.¹³⁰ The Chamber confirmed that strike action is protected by the ECHR, including secondary action.¹³¹ It did so by reference to ILO and

¹²³ *RMT* (n 110) [84]; see also *Enerji Yapı-Yol Sen v Turkey* App No 68959/01 (21 April 2009).

¹²⁴ *RMT* (n 110) [84]; most recently *Association of Academics v Iceland* App No 2451/16 (15 May 2018).

¹²⁵ See Novitz (n 14) [229-232].

¹²⁶ Some of these pre-date *Enerji*: *Karaçay v Turkey* App No 6615/03 (27 March 2007) [37]; *Kaya and Seyhan v Turkey* AppNo 30946/04 (15 December 2009) [30], *Sezer v Turkey* App No 36807/07 (26 June 2015) [55]; *Veniamin Tymoshenko v Ukraine* App No 48408/12 (2 January 2015); *Hrvatski Lijecnicki Sindikat v Croatia* App No 36701/09 (27 February 2015).

¹²⁷ *Enerji* (n 123).

¹²⁸ *Hrvatski Lijecnicki Sindikat* (n 126).

¹²⁹ *Karaçay* (n 126). *Kaya and Seyhan* (n 126) similarly found warnings to employees to be a violation of Article 11.

¹³⁰ See in particular A Bogg and K Ewing, 'The Implications of the *RMT* case' (2014) 43 ILJ 221.

¹³¹ *RMT* (n 110) [75-7]. It is not clear also whether the right is only protected when it is exercised in support of collective bargaining/conflict of interests, as per Article 6(4) ESC.

ESC norms, resisting the Government's objections to the existence of a right to strike under Convention 87.¹³² However, contrary to the jurisprudence of ILO Committees and criticism by the CEACR,¹³³ and a finding of non-conformity by the ECSR,¹³⁴ the ECtHR held that the *complete* ban on secondary action in the UK was compatible with the Convention: such a ban was within the (wide) margin of appreciation of the state and did not strike at the very core of trade union freedom because secondary action was 'accessory' industrial action.¹³⁵ It is unclear then to what extent Article 11 does protect a right to strike, for practical purposes, if a complete ban on secondary action does not strike at the substance of the right.¹³⁶

The more recent *Ognevenko v Russia* contrasts with *RMT* in certain respects.¹³⁷ The case concerned the dismissal of a locomotive driver employed by Russian Railways for his participation in strike action.¹³⁸ Russian legislation prohibited strikes of railway workers responsible for the circulation of trains—ie this case also concerned a complete ban on strikes in certain circumstances. The Chamber held that this violated the applicant's right to strike. It referred to ILO and ESC materials excluding railway transport from the concept of 'essential services';¹³⁹ it referred to the fact that the ILO does not consider 'negative economic consequences to constitute a sufficient reason

¹³² *ibid* [96-7].

¹³³ See *ibid* [30-33].

¹³⁴ See *ibid* [35-7].

¹³⁵ *ibid* [87-9].

¹³⁶ Bogg and Ewing, 'RMT' (n 130) 236.

¹³⁷ App No 44873/09 (20 November 2018).

¹³⁸ *Ognevenko* (n 137). The facts are summarised at [5-12] of the judgment.

¹³⁹ *ibid* [72].

justifying a complete ban on the right to strike’;¹⁴⁰ it noted that the CFA, CEACR and ECSR had all criticised the Russian legislation in question;¹⁴¹ and referred to the ILO Digest in its analysis of the ‘necessity’ of the ban.¹⁴² That is, the Chamber used international materials, including pronouncements on the legislation at hand, as important reference points.

In doing so, it focused on compatibility of the legislative ban with the Convention generally, and less so on the violation of the particular applicant’s rights.¹⁴³ This differs significantly from *RMT*, which stressed that the Court must focus on the effect of the secondary action ban on the applicant in the case.¹⁴⁴ The only point of difference which *Ognevenko* highlights is that in *RMT* the Government had provided information explaining the policy choice of the legislature in favour of a ban, which seems insufficient as a justification of the inconsistencies between the two cases.¹⁴⁵ *Ognevenko* thus creates further confusion over how cases concerning the right to strike should be analysed and the role which ILO and ESC standards play in that analysis. In any event, as the case-

¹⁴⁰ *ibid* [73].

¹⁴¹ *ibid* [21-23], [26], [72].

¹⁴² *ibid* [77-78].

¹⁴³ *Association of Academics* (n 124), another recent decision in which the application of the union was deemed manifestly ill-founded, is on the other hand notable for the absence of reference to international materials – see T Novitz, ‘To Protect the Right to Strike or Not? The Question Before the European Court of Human Rights in app no 2451/16 *Association of Academics v Iceland* and app no 44873/09 *Ognevenko v Russia*’, *Comparative Labour Law & Policy Journal Dispatch No 15* (29 March 2019).

¹⁴⁴ *RMT* (n 110) [98]. This and some further inconsistencies are highlighted in the strongly worded Dissenting Opinion of Judge Dedov in *Ognevenko* (n 137).

¹⁴⁵ *Ognevenko* (n 137) [76].

law stands at the moment, in particular in light of *RMT*, it is possible that the right to strike is protected to a lesser extent under Article 11 than ILO and ESC.¹⁴⁶

v. Positive obligations: possible differences in scope

The Convention imposes negative as well as positive obligations ‘to secure the effective enjoyment’ of Convention rights.¹⁴⁷ As there is no general definition of positive obligations in the case-law, however, there may be some uncertainty over how far these extend:¹⁴⁸ positive obligations require states parties to undertake some action, but it is not always clear what kind of action this might be.¹⁴⁹ In the present context, it is questionable in particular whether Article 11 gives rise to ‘duties to promote or fulfil’ the rights included therein—for example by establishing machinery for collective bargaining—which ILO and ESC provisions impose on states parties.

Many Article 11 cases involve breaches of positive obligations, but these have always involved duties to protect.¹⁵⁰ It was argued in *UNITE* that positive obligations under Article 11 ‘required State action to restore both the machinery of collective bargaining on an industry-wide scale and machinery to enforce collective agreements.’¹⁵¹

¹⁴⁶ The more recent *Association of Academics* (n 124) [24] reminds that the Court has not so far found that ‘the taking of industrial action should be accorded the status of an essential element of the Article 11 guarantee.’

¹⁴⁷ Eg see *Wilson* (n 84) [41].

¹⁴⁸ The ECtHR has refused to develop a general theory of the positive obligations that flow from the Convention, *Plattform ‘Ärzte für das Leben’ v Austria* (1991) 13 EHRR 204 [31].

¹⁴⁹ See JF Akandji-Kombé, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe 2007) 7; for analysis of the different types of positive obligations in the Court’s case-law, A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights* (Bloomsbury 2004).

¹⁵⁰ Eg amongst others discussed here, *Wilson* (n 84), *Sørensen* (n 95) and *Ognevenko* (n 137).

¹⁵¹ *UNITE* (n 116) [50].

The argument referred to ILO Conventions, in particular Convention 98, and placed particular emphasis on the provisions of Article 6(2) ESC.¹⁵² This argument was not accepted by the Chamber. It made clear that obligations under Article 6 ‘cannot be considered synonymous with the positive obligations which arise under the Convention.’¹⁵³ It specifically distinguished the ESC as a counterpart to the ECHR intended to guarantee social and economic rights largely omitted from the Convention.¹⁵⁴ It also deployed other arguments to support a finding that there is no international consensus on whether the right to freedom of association entails an obligation of this type, explored in Chapter III.¹⁵⁵ The decision suggests that the rights guaranteed under Article 11 might differ from ILO and ESC norms not only in the extent to which they protect specific collective labour rights, discussed at *ii-iv*, but also in the extent of state obligations to secure these rights. It also explicitly states that the obligations under the Convention are not equivalent to parallel ESC provisions, leaving the question open of precisely when and why it is that these guarantees should be interpreted differently.

vi. Conclusion

Whilst the collective dimension of Article 11 has significantly expanded in the period beginning with *Wilson*, there are a number of (possible) differences between Article 11

¹⁵² *ibid.*

¹⁵³ *ibid* [61].

¹⁵⁴ *ibid.*

¹⁵⁵ *UNITE* (n 116) [61].

and ILO and/or ESC norms.¹⁵⁶ First, it is possible that the negative aspect of the right to freedom of association might be accorded greater weight than the positive aspect; second, it is possible that the substance of the right to collective bargaining might be more circumscribed than under international standards; third, it would appear that the right to strike—which has been recognised as ‘protected’ by Article 11, but has not yet been recognised as an ‘essential’ element of Article 11—does not extend as far as parallel ILO and ESC guarantees, or at least it did not provide the same degree of protection in the *RMT* case; fourth, Article 11 does not recognise positive obligations to establish machinery for collective bargaining, unlike Convention 98 and Article 6 ESC. To this should be added also the fact that the scope for restrictions provided for under Article 11(2) is formulated in terms broader than, at the very least, ILO Conventions. Why these differences might be problematic is discussed at (c).

b. Interaction with ILO and ESC mechanisms

Notable in the evolution described above is the use of ILO and ESC materials as sources of authority.¹⁵⁷ These have made a valuable contribution to the development of labour rights under Article 11, but the precise relationship between ECHR norms and these instruments remains unclear. The Court has referred to international materials for, broadly, three different purposes: in developing general principles as to the scope and content of the right (*Sigurjonsson, Wilson, ASLEF, Demir, RMT*); in assessing whether a restriction is justified under Article 11(2) (*Sørensen and Rasmussen, Demir, RMT,*

¹⁵⁶ I say possible, because there is remaining uncertainty over the scope of that provision.

¹⁵⁷ Reference has also been made to EU or EC materials.

Ognevenko); and in defining particular categories of workers mentioned in Article 11(2) and other technical terms (*Demir, Junta Rectora, UNITE*).¹⁵⁸ These materials have provided the Court with a certain source of legitimacy when building on—or reversing—its previous case-law and expertise on more technical questions concerning industrial relations. The Court has expressed much regard for ILO Conventions and the ESC and their interpretive organs (*Demir, RMT, Junta Rectora, UNITE*).

It has also explicitly *distanced* itself from ILO and ESC norms on at least two occasions, emphasising that the interpretive bodies of these instruments are different in nature to the Court (*RMT*) and that obligations under the ECHR do not necessarily correspond to those under the ESC (*UNITE*) and presumably ILO Conventions. In *Adefdromil v France*¹⁵⁹ and *Matelly v France*,¹⁶⁰ it was stated that the Court would only have recourse to international materials where more conventional means of interpretation have not enabled it to establish the scope of a Convention provision with a sufficient degree of certainty. There is variation in how much weight the Court attaches to international instruments: there are cases in which the Court effectively adopts these standards,¹⁶¹ cases in which it refers to international instruments as evidence of common ground¹⁶² and cases in which it merely ‘notes’ or ‘recalls’ them in passing.¹⁶³ In many

¹⁵⁸ ‘Members ... of the administration of the state’ in *Demir* (n 107) [98-107]; *Junta Rectora del Ertzainen Nazional Elkartasuna v Spain* App No 45829/09 (21 April 2015) [40] on application of the right to strike to police forces; *UNITE* (n 116) [58] on determining whether the AWB was a forum for collective bargaining.

¹⁵⁹ App No 32191/09 (2 January 2015) [59] – in French.

¹⁶⁰ App No 10609/10 (2 January 2015) [74] – in French.

¹⁶¹ Eg *Tüm Haber Sen and Çınar v Turkey* (2008) 46 EHRR 19 [39].

¹⁶² *Sigurjonsson* (n 90), *Demir* (n 107), *RMT* (n 110).

¹⁶³ Eg *Gustafsson* (n 84), *Wilson* (n 84), *ASLEF* (n 106), *Enerji* (n 123), *Ólafsson* (n **Error! Bookmark not defined.**).

cases, even post-*Demir*, there is no mention of international materials at all.¹⁶⁴ This suggests that the starting point of the Court is to develop its own autonomous interpretation of Article 11 rights, as will be argued in Chapter III. International materials may be helpful to various degrees, but it is not compelled to interpret and apply the Convention in line with these instruments.

c. Issues arising from fragmentation

The fact that the ECtHR provides or may provide a different degree of protection for collective labour rights is not necessarily objectionable in principle and is to be expected from an autonomous legal order. However, the above gives rise to at least two practical problems. The first is that the current state of the case-law gives rise to uncertainty. As the Court has not explicitly set out a systematic approach to using international materials in adjudication, it remains difficult to predict when it will interpret and apply the Convention to reflect other international norms or develop its own, different, approach. It is not always clear why and to what extent international standards have been relied on in one case, but not another. This question was crucial in both *RMT* and *UNITE* and it is arguable that these applications would not have been lodged if the approach of the Court in these cases to ILO and ESC standards had been anticipated. The lack of predictability might discourage applicants from embarking on costly and lengthy litigation to push the boundaries of Article 11, thus halting the progress that the Court has made to date. Furthermore, in a case of conflict between norms it is, technically, not

¹⁶⁴ *Sisman and others v Turkey* App No 1305/05 (8 March 2012), *Veniamin Tymoshenko* (n 126), *Hrvatski Liječnicki Sindikat* (n 126), *Association of Academics* (n 124).

clear which norms should be followed, since these systems do not stand in a hierarchical relationship to each other.¹⁶⁵

Second, there is a danger that where Article 11 diverges or conflicts with ILO and/or ESC norms, these instruments might be ‘undermined and superseded by norms promulgated by the Court.’¹⁶⁶ This is because of the stronger enforcement mechanisms, and greater prominence, respect for and implementation of the ECHR vis-à-vis ILO Conventions and the ESC. It is not unrealistic to expect that states parties to all instruments would prioritise compliance with the ECHR—despite the fact that there is no hierarchy between the instruments—which would be problematic if ECHR principles conflict with ILO or ESC standards. This could be the case if the negative aspect of freedom of association is accorded greater weight than its positive aspect, for example. In cases in which the ECHR provides a lesser degree of protection, states might be tempted to refer to compliance with the ECHR to downplay the fact that they are non-compliant with ILO and ESC norms. That is, states could use the fact that there are divergent norms in this field as an ‘escape route’ either not to increase protection in order to comply with international social standards, or even to level down protection.¹⁶⁷

In other words, the fact that the ECHR—a better-known instrument which is on the whole much better integrated into domestic legal systems and practice—now protects the same rights might have the effect of displacing specialist instruments, but

¹⁶⁵ C Kilpatrick, ‘Has Polycentric Strike Law Arrived in the UK? After Laval, After Viking, After Demir?’ (2014) 3 *The International Journal of Comparative Labour Law and Industrial Relations* 293.

¹⁶⁶ Novitz, ‘Negative Freedom of Association’ (n 84) 82.

¹⁶⁷ Schlachter (n 7).

without providing equivalent guarantees. This would mean that protection of collective labour rights in Europe is strengthened *in so far as the ECHR protects these rights*, but weakened beyond this as compliance with more extensive state obligations under the ILO and ESC move down the priority list or are disregarded. For example, during the consideration of the Trade Union Bill (now Act) 2016, the UK Government referred to *RMT* to argue that the Bill was a measure within the margin of appreciation of the state, and downplay the relevance of ILO norms of which it was found to be in violation.¹⁶⁸

Perhaps anticipating arguments such as this, the ECSR has noted that the finding in *RMT* does not mean that the UK complies with Article 6(4) ESC: ‘while the rights at stake may overlap, the obligations on the State under the Charter extend further in their protection of the right to strike.’¹⁶⁹ This statement is in principle to be welcomed, as an affirmation that states do not escape their obligations in international law by merely complying with the ECHR. It also avoids another issue which could potentially arise, namely that the ECSR might seek to align its case-law with that of the Court, and thus potentially diminish the level of protection currently guaranteed under the ESC.¹⁷⁰ However, this kind of statement also gives rise to a dilemma. Emphasising the differences between the two instruments makes it more difficult to see why and when it is that the Court can legitimately draw on ESC materials in adjudicating Article 11 cases;

¹⁶⁸ See K Ewing and J Hendy, ‘The Trade Union Act 2016 and the Failure of Human Rights’ (2016) 45 *ILJ* 391-394, 400; CEACR, *Observations on Freedom of Association and Protection of the Right to Organise Convention 1948* (2016) – United Kingdom.

¹⁶⁹ Conclusions XX-3 – United Kingdom – Article 6(4).

¹⁷⁰ Indeed, the ECSR and CEACR have held their ground also with respect to the *Viking* and *Laval* rulings in the EU law context, discussed in Section 3. For this reason, and due to space constraints, the possibility of levelling-down of ESC and ILO standards to align with ECHR and/or EU norms is not further considered in this thesis.

the counterpart to the ECSR conclusions is the statement in *UNITE* that the Charter is to be distinguished from the ECHR. Isolating or distinguishing one legal order from the other(s) is beneficial when it protects it from the limitations of these systems, such as political sensitivities, or the institutional competence of the Court. But it also shuts off avenues for fruitful exchange, which has been so crucial to the development of Article 11 jurisprudence.

There may of course be legitimate reasons for the Court to cast the scope of Article 11 more narrowly than norms set by specialist bodies under labour rights instruments; it is a body of different nature and mandate to ILO and ESC bodies, subject to its own institutional limitations and challenges. The difficulty is that there is little convincing, explicit justification offered in cases in which the Court departs from international materials, the only reason advanced being that these are different instruments which protect social rights (in *UNITE*) or function in a different way (in *RMT*)—which in turn raises the question of why the Court draws on ILO and ESC norms freely in other cases. There is a need for deeper reflection on the role of these instruments as sources of authority in the development of Article 11 jurisprudence, and, more broadly, the extent to which the ECHR should protect collective labour rights, in order to ensure that any differences are well-justified.

3. The Right to Freedom of Association and the EU

The EU is a *sui generis* supra-national legal order, very different to both the ILO and the Council of Europe. Whereas ILO and Council of Europe instruments are binding on

ratifying states in international law, which normally requires their implementation by national legislation,¹⁷¹ EU law is supreme (takes precedence over national law) and can have direct effect (creates legal rights enforceable in national courts without the need for implementing national provisions).¹⁷² In other words, EU law has ‘real teeth’. The EU is not specifically concerned with labour rights or human rights, but is a much more comprehensive enterprise. The original task of the European Economic Community was to establish a common market between Member States, which would guarantee the free movement of goods, people, services and capital.¹⁷³ These economic aims and the fundamental economic freedoms remain central to the EU order but its objectives and competences have expanded.¹⁷⁴ In particular, the EU has extended its (legislative and other) activities to the sphere of social protection.¹⁷⁵ The social aspect of the EU is, however, still less developed than—some might say subordinate to—its economic aspect, a matter which has been incredibly controversial in the aftermath of the financial crisis.¹⁷⁶

¹⁷¹ Although this varies as between states parties.

¹⁷² C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585; C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

¹⁷³ Treaty establishing the European Economic Community (Treaty of Rome) 1957, Articles 2 and 3; Titles I and III.

¹⁷⁴ Found in Article 3 Treaty on European Union (TEU).

¹⁷⁵ Eg the Treaty on the Functioning of the European Union (TFEU) now includes an employment title (Title IX) and social policy title (Title X); C Barnard, ‘EU Social Policy: From Employment Law to Labour Market Reform’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 641. In 2017 the European Commission launched the European Pillar of Social Rights initiative: Proclamation of the European Pillar of Social Rights (Gothenburg, 17 November 2017), full text of the 20 principles available at <https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf> accessed 4 May 2019.

¹⁷⁶ See eg C Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 *Current Legal Problems* 199.

The relevance of the EU to the protection of the right to freedom of association in Europe extends in two dimensions. First, that right is protected in EU law itself. The right to freedom of association and other collective labour rights have been recognised as general principles of EU law; that right is now set out in Article 12 CFREU, whereas Article 28 CFREU contains a right to collective bargaining and action. Second, certain EU measures have the potential to restrict freedom of association. As the *Viking* and *Laval* judgments demonstrate, compliance with EU provisions by Member States might result in a limitation of freedom of association and related rights which conflicts with freedom of association guarantees under other instruments.¹⁷⁷ As Member States are bound to comply with EU law, these developments have led to tensions between the EU and the ILO and ECSR, and may potentially conflict with Article 11 ECHR. Post-crisis bailout conditions imposed on certain Member States have also contained restrictions on freedom of association contrary to international standards.

This section explores the implications of both of these dimensions on the existing mechanisms for the protection of that right in the European legal space discussed in Section 1. I set out the relevant freedom of association guarantees in EU law, focusing on Articles 12 and 28 CFREU (a). These are currently undeveloped in comparison to ILO, ESC and even ECHR guarantees, and their ambit is still to a large extent uncertain. Where these norms are interpreted in a thin, divergent manner there are similar—though potentially deeper—concerns that the resulting fragmentation would have a negative impact on specialist labour rights instruments as in the ECHR context. I then

¹⁷⁷ C-438/05 *International Transport Workers Federation v Viking Line ABP* [2007] ECR I-10779; C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

discuss EU measures which have been found to restrict freedom of association and to be contrary to international standards (b). These create a different type of institutional concern, namely that conflict between EU measures (rather than EU freedom of association norms) and specialist instruments is likely to undermine the authority and effectiveness of the latter.

a. EU law as a source of protection of freedom of association

i. EU freedom of association guarantees

Fundamental rights—including freedom of association—were first recognised as general principles of EU law by the CJEU,¹⁷⁸ and are now enshrined in the CFREU which enjoys the same status as the EU Treaties.¹⁷⁹ The CFREU contains a list of rights which could be categorized as civil and political and social and economic; it is an integrated instrument unlike the ECHR and ESC. The ECHR is a particularly important source of general principles and occupies a special position in the CFREU: Article 52(3) stipulates that, in so far as the CFREU contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope shall be the same.¹⁸⁰ By contrast, the ESC is not

¹⁷⁸ C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 [4].

¹⁷⁹ Article 6(1) TEU.

¹⁸⁰ Though the CFREU may provide for more extensive guarantees. Furthermore, Article 6(2) TEU provides that the EU 'shall accede' to the ECHR, though this process is still in progress.

mentioned in the text of the CFREU despite obvious correspondence between some provisions.¹⁸¹ There is no mention of the ILO, either.

Freedom of association guarantees are found in both general principles of EU law and the CFREU.¹⁸² For the sake of simplicity, I focus primarily on CFREU provisions, assuming that with the increasing use of the Charter these are more likely to form the basis of CJEU jurisprudence in this field. I draw on some of the Court's general principles jurisprudence before the Charter became binding, however, since this is likely to be relevant to the interpretation of Charter provisions. Article 12(1) CFREU provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

The text is slightly different to Article 11 ECHR but its meaning is the same.¹⁸³ The right thus entails, for example, a right not to join an association.¹⁸⁴ The Charter was adopted before the developments in *Demir*, *Enerji* and *RMT*, in which the ECtHR recognised a right to collective bargaining and a right to strike as, respectively, essential and protected by Article 11 ECHR. Following Article 52(3), these rights should now also be incorporated into Article 12(1) – a somewhat awkward situation given that Article 28 protects these rights separately:

¹⁸¹ Although reference to ESC provisions is often made in the Explanations to the CFREU.

¹⁸² Freedom of association was recognised as a general principle in *C-415/93 Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR 463 though its scope and content was not precisely defined, see *Novitz* (n 14) 252; *Viking* (n 177) recognised that the right to collective action is a general principle of EU law, [44]; and *C-271/08 Commission v Germany* [2010] ECR I-7091 appears to recognise the right to collective bargaining as a general principle of EU law, [37].

¹⁸³ *C 303/17 Explanations Relating to the Charter of Fundamental Rights*, Article 12.

¹⁸⁴ *C-499/04 Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] ECR I-2397, [33].

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.

The explanatory notes state that Article 28 is based on Article 6 ESC and points 12 to 14 of the Community Charter of the Fundamental Social Rights of Workers (CCFSRW).¹⁸⁵ They mention that the right of collective action—but not collective bargaining—was recognised by the ECtHR ‘as one of the elements of trade union rights laid down by Article 11.’ It is not entirely clear from this how the ambit of Article 28 is to be determined. In particular, it is not clear whether, given that the ECHR now protects collective bargaining and action, Article 28 is to be treated as corresponding to these aspects of Article 11 ECHR for the purposes of Article 52(3). The explanatory notes to Article 52(3) do not list these provisions as corresponding, even after the mention of collective action under Article 11 ECHR was inserted into the explanatory notes to Article 28. It is possible that Article 28 allows for a broader interpretation than Article 11 ECHR, a matter which will be discussed in Chapter V.

The Charter—and thus Articles 12 and 28—like general principles of EU law, is limited in its scope of application. It applies ‘to the institutions and bodies of the Union, with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union *law*’ (Article 51(1)). What this covers is discussed in Chapter VI.1; suffice it to say that whilst this provision has been interpreted broadly, situations which fall wholly outside the scope of EU law—such as cases like *Wilson*,

¹⁸⁵ Explanatory notes (n 183).

ASLEF, *RMT* and so on—are not covered by the Charter. Within its field of application, however, the CFREU has the potential to provide a stronger foothold of the rights contained therein amongst its Member States than the other international instruments, given that it enjoys the same status as the EU Treaties.¹⁸⁶ Despite initial doubts over whether the CFREU would make a difference, experience to date shows that it is having an effect and is increasingly used in arguments brought before the Court, AG Opinions, the reasoning of the CJEU, and by national courts.¹⁸⁷

The CFREU should in theory be good news for the protection of the right to freedom of association. At least to the extent protected by Article 11 ECHR, that right is now anchored in EU law and should have much more significant and immediate legal effects in Member States, where the Charter applies, and with respect to EU institutions. There are two potential issues here, however. First, the special position of the ECHR in the CFREU effectively imports—and might even exacerbate, given the supremacy of EU law—the concerns expressed above with respect to situations where Article 11 conflicts with or provides narrower protection than ILO and ESC guarantees. Second, there is very little case-law to date which sheds light over the substance of these provisions, but this case-law—as well as other CJEU case-law touching on collective labour rights—suggest that the Court might be inclined to construe this substance narrowly.

¹⁸⁶ Article 6(1) TEU.

¹⁸⁷ See K Lenaerts and JA Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 1559; S Peers, 'The Rebirth of the EU's Charter of Fundamental Rights' (2010–11) 13 *Cambridge Yearbook of European Legal Studies* 283, 291; G De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 *Maastricht Journal of European and Comparative Law* 168; European Union Agency for Fundamental Rights, *Fundamental Rights Report 2017* (Publications Office of the European Union 2017) Ch 1.

Viking and *Laval*, which recognised that the right to take collective action is a general principle of EU law shortly before the Charter became binding, are perhaps the best indication so far as to how the Court might go about interpreting these provisions. In taking this step, the CJEU acknowledged that the right was recognised by the ESC, ILO Convention 87, CFREU and CCFSRW. It was held that as a general principle of EU law, the right to take collective action could be invoked to justify a restriction of the employers' freedom of establishment and to provide services respectively.¹⁸⁸ Collective action had to be shown to be a proportionate means to the attainment of the objectives at hand.¹⁸⁹ In conducting the proportionality analysis, or providing guidance on how this should be done by the national court, both cases appear to adopt a very narrow understanding of, in particular, the legitimate purpose of collective action, which suggest a narrow understanding of the scope and purpose of the right. The judgments have been heavily and extensively criticized.¹⁹⁰ These issues are discussed in Chapter VII. Suffice it to say that although the precise ambit of the right to collective action remains unclear even after these judgments, they indicate that the Court is inclined to give that right a restrictive interpretation. The result of these cases has subsequently been held to conflict with with ILO and ESC protection of the right to strike, as discussed below.

¹⁸⁸ *Viking* (n 177) [44, 76-7]; *Laval* (n 177) [91]. See *Commission v Germany* (n 182) on the right to collective bargaining.

¹⁸⁹ *Viking* (n 177).

¹⁹⁰ Amongst others: ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 ILJ 126, 142-5; S Weatherill, '*Viking* and *Laval*: The EU Internal Market Perspective' in M Freedland and J Prassl (eds) *Viking, Laval and Beyond* (Hart 2014) 23; A Bogg, '*Viking* and *Laval*: The International Labour Law Perspective' in the same volume, 41. These arguments are discussed in more detail in Chapter VII.2.

In *Viking* and *Laval*, this narrow conception of the right to collective action was, effectively, held to be subordinate to EU fundamental economic freedoms. Similarly, the Court held in *Commission v Germany* that protection of the right to collective bargaining did not suffice to justify restrictions on the freedom of establishment and to provide services.¹⁹¹ The Court can, furthermore, be criticised for subordinating collective labour rights to other individual rights, such as the employer's right not to associate (*Werhof*)¹⁹², the principle of non-discrimination (*Prigge*)¹⁹³, or the employer's freedom to conduct business (*Alemo-Herron*).¹⁹⁴ This might raise legitimate concerns that the Court, perhaps 'imbued with a sense of organised labour's transgressive quality',¹⁹⁵ is less eager to protect collective labour rights vis-à-vis rights that it has long protected and promoted, such as the principle of non-discrimination and the economic freedoms. At the very least, the Court might be criticised for its poor understanding of the industrial relations context.¹⁹⁶

¹⁹¹ *Commission v Germany* (n 182).

¹⁹² *Werhof* (n 184).

¹⁹³ C-447/09 *Prigge v Deutsche Lufthansa AG* [2011] ECR I-8003, [47].

¹⁹⁴ C-426/11 *Alemo-Herron and others v Parkwood Leisure* ECLI:EU:C:2013:521. However, the Court has now retreated from the strong emphasis placed on the freedom to conduct a business in the more recent C-201/15 *AGET Iraklis v Ergasias and others* ECLI:EU:C:2016:972, in particular [85-88]. Joined Cases C-680/15 and C-681/15 *Asklepios Kliniken Langen-Seligenstadt GmbH v Ivan Felja and Asklepios Dienstleistungsgesellschaft mbH v Vittoria Graf* ECLI:EU:C:2017:317 held, unlike *Alemo-Herron*, that a transferee is bound by a 'dynamic' clause.

¹⁹⁵ Bogg, '*Viking and Laval*' (n 190) 71.

¹⁹⁶ Davies, '*One Step Forward*' (n 190) 144. It should be noted that the Court has shown greater sensitivity to this context in cases such as C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751. The *Albany* judgment held that collective agreements are not subject to Article 101(1) TFEU, since to apply that provision would undermine the social policy objectives pursued by such agreements, para 59.

ii. Issues arising from fragmentation

Thus, whilst it is technically open to the Court to give collective labour rights under the Charter a generous interpretation—one which goes beyond the minimum level set by Article 11 ECHR via Article 12 CFREU, and perhaps more closely aligns with specialist labour rights standards—this seems unlikely in light of some of its case-law to date.¹⁹⁷ In other words, the current approach of the Court suggests a development of EU freedom of association guarantees which diverges from ILO and ESC norms, providing a lower level of protection.¹⁹⁸ To this should be added the fact that Article 52(1) provides broader scope for restrictions of the rights, where these ‘are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’ As will be discussed in more detail in Chapter VII, this implies that restrictions on Articles 12 and 28 can pursue a broader range of objectives than recognised under the ILO, ESC and, possibly, ECHR.

This raises a first set of institutional concerns. Some of these are similar to those highlighted in the ECHR context, namely that lower Charter standards could create escape routes for levelling down protection, as Member States seek to comply only with the Charter and not with their broader international law obligations (‘indirect levelling-down’). This effect might arise within the scope of application of the Charter but also beyond that: there is evidence to suggest that the Charter has spill-over effects, in that national courts sometimes refer to it even where it does not apply.¹⁹⁹ The Charter is a

¹⁹⁷ Cf *Albany* (n 196).

¹⁹⁸ Though this cannot fall beyond the level of protection of Article 11 ECHR.

¹⁹⁹ *Fundamental Rights Report 2017* (n 187) 42.

document which has the same value as the EU Treaties, and it can be expected that it would have a role as a normative reference point within EU Member States.

The Charter could also have more direct levelling-down effects. It was held in *Melloni* that:

[I]n a situation where action of the Member States is not entirely determined by EU law ... national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.²⁰⁰

That is, national provisions which confer a *higher* degree of protection than the Charter cannot be applied if this affects the primacy, unity and effectiveness of EU law – terms which may themselves be interpreted broadly.²⁰¹ It follows, for example, that higher national standards cannot be applied when EU law harmonises an area entirely, as this would compromise the unity of EU law.²⁰² In the present context, this means that more generous national constitutional freedom of association guarantees may have to be disapplied; and national provisions guaranteeing a higher level of protection so as to conform with ILO and/or ESC freedom of association norms may have to be disapplied.²⁰³ EU freedom of association guarantees which diverge from or conflict with

²⁰⁰ C-399/11 *Melloni v Ministero Fiscal* ECLI:EU:C:2013:107 [60].

²⁰¹ N Lazzarini, 'The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice' in G Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (Brill 2015) 45.

²⁰² SA De Vries, 'The Charter of Fundamental Rights and the EU's "creeping" competences: does the Charter have a centrifugal effect for fundamental rights in the EU?' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Elgar 2017) 58, 80, 96.

²⁰³ It is true that Article 53 CFREU provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... international law and international agreements to which the Union or all the Member States are part...and by the Member States' constitutions.' However, this provision was invoked in *Melloni* (n 200) to argue that Member States remain free to provide a higher level of fundamental rights protection even where the Charter applies, an argument rejected at paras 56-7. It would follow that the logic in *Melloni* would also apply to international law and

ILO and ESC norms could therefore have even greater displacing effects on these specialist mechanisms. To this can be added, again, the uncertainty caused by the existence of multiple freedom of association guarantees of different scope.

b. EU measures as restrictions on freedom of association

There is an additional concern that the EU can undermine the authority and effectiveness of ILO and ESC mechanisms in its capacity as an actor capable of restricting the right to freedom of association—unique amongst the legal orders considered here—where the norms conflict with EU acts or measures. This is because EU norms must take precedence over norms which are ‘merely’ binding in international law, and because, in addition, the EU is a powerful actor which can exert significant political and economic pressure on its Member States.

Both ILO organs and the ECSR have considered the consequences of *Viking* and *Laval*. The ILO CEACR has stated that it ‘considers that the doctrine that is being articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to’ Convention 87.²⁰⁴ In particular, it noted that when elaborating on permissible restrictions on the right to strike it has never considered the proportionality of interests ‘bearing in mind a notion of freedom of establishment or freedom to provide services.’²⁰⁵ These economic freedoms

agreements: namely that compliance with obligations flowing from these must not compromise the primacy, unity and effectiveness of EU law.

²⁰⁴ CEACR Observations (2009) – United Kingdom: in response to submissions by the British Airline Pilots’ Association (BALPA).

²⁰⁵ *ibid.*

are not elements of normative significance in the ILO legal order. It also expressed concern over the legislative reforms in Sweden to implement *Laval (Lex Laval)*.²⁰⁶ The ECSR almost unanimously held that *Lex Laval* is a breach of Article 6(2) and 6(4) ESC.²⁰⁷ The decision similarly distinguished the importance of economic freedoms as a specific feature of the EU, but not ESC legal order, and in a powerful statement held that these freedoms ‘cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights.’²⁰⁸ In its latest follow-up report the Committee found that Sweden was still not in conformity with the ESC in this regard.²⁰⁹

This decision, together with ECSR decisions relating to Eurozone governance-related austerity measures in Greece, has led to tensions between the ECSR and the EU.²¹⁰ The ECSR has found a series of violations of the Charter in response to complaints (though not under Articles 5 and 6) relating to measures pursuant to the Memoranda of Understanding. These are agreements which laid down conditions for obtaining financial help during the recession under the supervision of the European Commission, European Central Bank and the IMF.²¹¹ The CFA, and later CEACR, has expressed serious concern about the impact of the numerous changes to the collective bargaining

²⁰⁶ CEACR Observations (2013) – Sweden.

²⁰⁷ *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No 85/201.

²⁰⁸ ECSR Complaint No 85/201 (n 207) para 122.

²⁰⁹ Assessment of the follow-up, Complaint No 85/201 (7 July 2016).

²¹⁰ O De Schutter ‘The European Social Charter as the Social Constitution of Europe’ in Bruun et al (n 47) 31-4; M Rocca, ‘Enemy at the (Flood) Gates’ (2016) 7 *European Labour Law Journal* 52.

²¹¹ De Schutter (n 210) 36; Rocca (n 210) 61.

system of the country made under the austerity packages.²¹² These criticisms were, of course, directed at Greece, but the pressure exerted on the country by the Troika and the involvement of the European Commission are undeniable. These conclusions were initially met with silence on part of the EU.²¹³

The failed legislative attempt to address the problems raised by *Viking* and *Laval* (Monti II Regulation) itself continued to refer to the principle of proportionality and a 'balance between fundamental rights and fundamental [economic] freedoms.'²¹⁴ This is despite CEACR statements that it does not consider the proportionality of interests and CEACR and ECSR statements that the economic freedoms do not have the same normative significance under the respective instruments. The proportionality analysis conducted in *Laval* has been applied in subsequent judgments such as *Rüffert v Land Niedersachsen*²¹⁵ and *Commission v Germany*²¹⁶ and confirmed in *Fonnship*.²¹⁷ Thus, little has been done to address the direct conflict between these aspect of EU measures and

²¹² CFA, Conclusions on case No 2820 (Greece), 365th Report of the Committee on Freedom of Association (1-16 November 2012): considering them to be 'important and significant interventions in the voluntary nature of collective bargaining and in the principle of the inviolability of freely concluded collective agreements,' para 995; CEACR Report, International Labour Conference, 103rd Session (2014) 111-2. See I Katsaroumpas, 'De-Constitutionalising Collective Labour Rights: The Case of Greece' (2018) 47 ILJ 465, 490-2.

²¹³ Rocca (n 210) 74; see *European Parliament resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI))*; the Employment and Social Affairs Committee of the European Parliament organized an exchange of views on labour market reforms in Greece in which an ILO representative participated: ILO, Labour Market Reforms in Greece' (7 June 2017) <http://www.ilo.org/europe/whatsnew/WCMS_557029/lang--en/index.htm> accessed 20 December 2018.

²¹⁴ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services COM(2012) 130 final - see Preamble paras 11-13 and Article 2.

²¹⁵ C-346/06, [2008] ECR I-1989.

²¹⁶ *Commission v Germany* (n 188); the Court also refers to Article 28 CFREU.

²¹⁷ C-83/13 *Fonnship A/S v Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO)* ECLI:EU:C:2014:2053 [41].

ILO and ESC norms. There was some hope that the stalemate caused by *Viking* and *Laval* could be resolved indirectly through the ECHR.²¹⁸ Given the regard shown in *Demir* for ILO and ESC norms, it was hoped that, in so far as these were incorporated into Article 11 jurisprudence, they would exert influence on the EU or EU Member States via the back door: either after accession of the EU to the ECHR or through Article 52(3) CFREU. However, the accession process has been halted for the time being by Opinion 2/13,²¹⁹ and it was argued in Section 2 that the ambit of Article 11 is possibly narrower than ILO and ESC guarantees.

This is a problematic state of affairs for ILO and ESC bodies. It is very positive that they have in these circumstances acted, indirectly, as a ‘check’ on EU law and EU activities and have not hesitated to express criticism—especially the ECSR—in a sensitive political and economic situation.²²⁰ As Rocca puts it, it is a political embarrassment for the EU that Member States must choose between complying with EU law or Memoranda negotiated with EU institutions and respecting minimum international social rights standards.²²¹ This may well have been a factor contributing to the European Pillar of Social Rights initiative.²²² But the fact that the EU is such a powerful actor, itself not bound by ILO or ESC standards, puts significant pressure on these systems in cases of conflict. Given the ‘disproportion in the arsenal of

²¹⁸ Bogg, ‘Viking and Laval’ (n 190) 67; V Velyvyte, ‘The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence’ (2015) 15 HRLR 73; Kilpatrick (n 165).

²¹⁹ Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

²²⁰ See eg Parliament Resolution (213); Chapter V.

²²¹ Rocca (n 210) 80.

²²² European Pillar of Social Rights (n 175).

sanctions'²²³—legal, political or economic—between the EU and ILO and ESC, there is a risk here that open conflict would undermine the authority of these instruments generally and their effectiveness in the Member State(s) affected. This is a second aspect of the institutional concern as it relates to the EU, in addition to the risk of displacement of specialist norms by less protective EU freedom of association guarantees discussed at (a) above.

Both of these dimensions of the EU—as a source of protection of freedom of association guarantees and as a source of restrictions on freedom of association—are liable to place specialist labour and social rights mechanisms under pressure, with potential negative consequences for the latter. This might not be the case if EU freedom of association guarantees are interpreted in a way which more closely aligns with specialist norms, or indeed if Article 11 ECHR is interpreted in a more expansive way, since Article 12 CFREU must have the same meaning and scope. In that case, concerns about levelling-down and displacement would be less acute, and it would mean that internal EU guarantees could potentially be relied on to ensure that EU measures restrict freedom of association to a lesser extent. Not only this, but it would be a real opportunity to ensure that collective labour rights are accorded robust protection within the scope of application EU human rights law, in line with minimum international social standards.

4. Conclusion

²²³ Rocca (n 210) 78.

This chapter explored how the right to freedom of association of workers and their organisations is protected under the ECHR and EU law, in comparison to the relevant ILO and ESC social and labour rights instruments. It was argued that the guarantees set out in specialist instruments are relatively broad and the level of protection high, although that the effectiveness of these guarantees is generally more limited due to the weaker enforcement mechanisms of these instruments. By contrast, although there is remaining uncertainty over the scope of collective labour rights under the ECHR and CFREU, the case-law of the ECHR and CJEU so far suggests that protection under parallel guarantees under these instruments might be more circumscribed; and that aspects of ECHR and EU law possibly conflict with ILO and ESC norms.

It is to be expected that norms emanating from legal orders with a different history, membership, constitutional aims and mandate, institutional structure, interpretive bodies, methods of enforcement and so on will not have exactly the same scope and content.²²⁴ However, it was argued that the fact that norms diverge is particularly problematic in this field because of the (uniquely, amongst supra-national bodies) prominent position of the ECHR and EU: the ECHR because of its unusual success as a supra-national human rights instrument and the EU because of its doctrine of supremacy and significant political and economic power as an actor as well as as a source of legal norms. Disparity and conflict between norms therefore has the potential to be particularly detrimental to the specialist international mechanisms. Furthermore, the relevant ECHR and EU guarantees have in various ways been inspired by ILO and

²²⁴ For analysis of the sources of difference in the protection of the right to strike, Novitz (n 14) 334-9.

ESC norms; there are trends of ‘integration’ and links between the various systems. The fact that there are differences between them gives rise to a degree of uncertainty and invites the questions of whether and why ‘integration’ is legitimate in some circumstances but not others, or, conversely, when divergence is justified.

It is important that the issues described in this chapter—which I call collectively the institutional concern—are addressed. They come at a time of economic and social change, in which the instruments discussed here should act as a buffer, or at least a check, against the dismantlement of social protection and ‘de-constitutionalisation of collective labour rights.’²²⁵ There is much scope for productive partnership and interaction between the ILO, ESC, ECHR and EU legal orders in order to ensure the effective protection of labour, social and human rights in Europe in such a time. The fact that there are instruments and bodies of a different nature, operation and expertise opens up opportunities for learning and mutual support. In particular, non-specialist Courts developing their jurisprudence can usefully learn from the experience and expertise of specialist bodies; specialist instruments can gain in relevance and standing where they are referred to as a source of authority by these more prominent Courts. That is, the various systems can complement each other. Friction between them is not necessarily undesirable and problematic – on the contrary, it is useful where it acts as a check on the others and as a driver of reflection, deliberation and reform. However, to ensure that these systems co-exist in harmony and to tap into this potential for productive interaction, it is important to strike the right balance between leaving space

²²⁵ As Katsaroumpas (n 212) puts it.

for divergence between norms that is based on institutional differences, and ensuring a degree of consistency; otherwise, because of the asymmetries in (legal) authority and prominence of the ECHR and EU, such divergence can lead to the problems described in this chapter. As matters stand at the moment, there would appear to be too much divergence and a need for greater coherence.

I propose a framework for addressing the institutional concern through *convergence* of ECHR and EU freedom of association guarantees with ILO and ESC norms, achieved through the interpretation of these norms by the ECtHR and CJEU. I argue that the ECtHR and CJEU should interpret freedom of association-related norms by reference to the more specialist instruments, but also acknowledge that there are institutional differences between the ECHR and EU, and ILO and ESC which may justify a divergent approach in some circumstances.

One argument in favour of convergence is to say that the ECtHR and CJEU should develop their jurisprudence in line with ILO and ESC norms *simply because* to do otherwise gives rise to fragmentation resulting in ‘conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law’²²⁶ and the issues discussed above. Such an argument—which I call the anti-fragmentation rationale for convergence—identifies the mere fact that there are differences between norms covering the same subject-matter as the problem to be

²²⁶ Koskenniemi (n 6) para 8.

addressed, and therefore the reduction of such differences to a minimum as the solution.

This argument is, however, of limited assistance in this context for two reasons.

First, it is open to assertions that divergence between norms in this field are justified because the instruments and norms in question are different in nature and purpose. Articles 11 ECHR and 12 CFREU are general guarantees of freedom of association as a 'civil and political' right; whereas the much more detailed, specific norms contained in ILO Conventions 87 and 98 and Articles 5 and 6 ESC are concerned with 'labour' and 'social and economic' rights. The ECtHR has made arguments of this type in the early trilogy of cases, and recently in *UNITE*. Of course, the ILO and ESC themselves consider the norms discussed here to be protecting human rights, but the ECtHR does not appear to have paid much heed to this in *UNITE*, for example. The anti-fragmentation rationale does not *by itself* explain why convergence should take place across these 'types' of rights and instruments.

Second, it is far from obvious that the ECtHR and CJEU in general see it as their task to pursue anti-fragmentation objectives and ensure the coherence of international law.²²⁷ As explained more fully in Chapter III, the case-law of the ECtHR suggest that the Court mainly uses international materials where this assists it to achieve its primary purpose, to ensure the effective protection of human rights, rather than because it seeks to ensure coherence between the ECHR and international law *per se*.²²⁸ The CJEU, as the

²²⁷ As might be the case of the ICJ.

²²⁸ Tzevelekos (n 9).

guardian of the EU treaties, has zealously defended the autonomy of EU law;²²⁹ and, in the sphere of human rights at least, has made little reference to international instruments other than the ECHR.²³⁰ This suggests that the anti-fragmentation rationale might be, at most, of secondary importance in the reasoning of the Courts, and even disregarded if a (possibly divergent) interpretation of the norm can be achieved by reference to reasons internal to these systems.²³¹

The framework I propose therefore provides a further justification for convergence between norms which overcomes these two issues. In the next chapter, I argue that there is a *moral* justification for closer alignment of ECHR and EU freedom of association norms with norms under the two specialist mechanisms. This is because collective labour rights should be considered to be fundamental human rights, morally speaking; and that therefore these rights should be specifically protected under general human rights instruments, including through a range of positive state obligations. Such a justification is notably absent from both ECtHR and CJEU jurisprudence; where these Courts have recognised collective labour rights, this has largely been done by reference to other international law. What I seek to show is that there is an independent, internal reason for ECHR and EU freedom of association guarantees to be extended in a way which more closely aligns with ILO and ESC norms, and that these specialist norms can act as important sources of authority in doing so. In other words, I seek to provide a

²²⁹ Opinion 2/13 (n 219).

²³⁰ O De Schutter and I de Jesús Butler, 'Binding the EU to International Human Rights Law' (2008) 27 YBEL 277.

²³¹ Whereby interpretation of the CFREU by reference to the ECHR constitutes such an internal reason in light of Article 6(3) TEU and Article 52(3) CFREU.

deeper normative justification for the development of ECHR and EU freedom of association guarantees in line with and by reference to ILO and ESC norms.

Part B: A Normative Justification for Convergence

II. Collective Labour Rights as Fundamental Human Rights

This chapter is concerned with the following question: why should general human rights instruments reflect a 'labour law' understanding of the right to freedom of association, as expressed in ILO and ESC norms? In other words, why should they protect the broader range of collective labour rights, ie including right to collective bargaining and action, and why should they impose positive duties on states to promote the rights of trade unions and their members? The fragmentation sketched out in Chapter I is in large part underpinned by the fact that the legal space is populated by specialist and general instruments; by labour rights, social rights, human rights. The development of Article 11 ECHR case-law in particular shows that these 'categories' of rights are not completely separate but overlap. However, the extent to which they overlap is not entirely clear from that case-law. An attempt to determine the relationship between the ECHR and EU human rights norms on one hand, and ILO and ESC labour rights norms on the other, and to reduce problematic differences between them, needs to engage with this problem. Therefore, in this chapter I explore the connections between a 'human rights law' and a 'labour law' conception of freedom of association in order to shed some light on this area of overlap and make the normative case for convergence between various freedom of association legal norms.

What I mean by a 'human rights law' and 'labour law' conceptions of freedom of association is perhaps best understood by reference to the following statement by Kahn-Freund:

Freedom of organisation has two social and therefore two legal functions. It is a civil liberty, a human right, an aspect of freedom of association... its existence and adequate guarantees are, however, also indispensable conditions for the operation of collective labour relations.²³²

Writing in the 1980s, Lord Wedderburn mapped ECHR freedom of association norms onto the first aspect, arguing that the function of the ECHR is 'largely to protect rights as they inhere in the individual.'²³³ The second, 'collective end of the problem is filled out by the [ESC].'²³⁴ The ILO 'is concerned also with the elaboration of *collective* rights.'²³⁵ Lord Wedderburn recognises a connection between the two aspects: that the 'collective freedom cannot function without the individual freedom,' and that, where trade unions are concerned, the individual freedom is meaningless without the collective.²³⁶ This characterisation of the link between the two implies that the 'human rights' dimension is an essential aspect of the 'labour law' dimension of the right to freedom of association. It also implies a distinction between 'individual' and 'collective' rights which allegedly explains why some elements of freedom of association are protected by the ECHR and some—at least until more recently—are not.

This chapter is structured around the converse question: (why) is the 'labour law' dimension also an important aspect of the human right to freedom of association? That there is a nexus between the two 'aspects' is recognised in the text of both Article 11

²³² O Kahn-Freund 'Labour Relations and International Standards: Some Reflections on the European Social Charter' in *Miscellanea* WJ Ganshof van der Meersch (Brussels: Librairie Générale de Droit et Jurisprudence, Paris/Etablissements Emile Bruylant 1972) 131, 134.

²³³ Wedderburn (n 92) 247; Kahn-Freund himself also links the ECHR to this first aspect and the ESC to the second (n 232) 134.

²³⁴ Wedderburn (n 92).

²³⁵ *ibid* 246.

²³⁶ *ibid* 247.

ECHR and Article 12 CFREU, which specifically mention the ‘right to form and join trade unions for the protection of his [or her] interests.’ The development of Article 11 has integrated the two further, often by reference to labour rights instruments. Judgments such as *RMT* and *UNITE* cast a shadow over the trends of integration and normative absorption, however, and the coherent development of future case-law requires deeper engagement with the question of why, and to what extent, these provisions should protect and promote *collective labour rights*. Of course, under the CFREU these rights are specifically recognised in a separate provision, Article 28. However, the discussion in this chapter is relevant to that provision too, because the normative justification for the protection of specific collective labour rights as fundamental human rights, and the extent of that protection, could equally serve as a guiding rationale to its interpretation.

The chapter explores this question by reference to the normative foundations of the right to freedom of association, quite apart from its legal form and institutional context. My aim is to show that the ‘human rights’ and ‘labour law’ understanding of freedom of association are continuous and not separable into categories like ‘individual’ and ‘collective,’ ‘human rights’ and ‘labour rights’, or ‘civil and political’ and ‘social and economic’ rights. That is, such labels have insufficient normative significance which justifies the confinement of the broader set of collective labour rights to specialist instruments and they should not *in themselves* be applied to delimit the ambit of general freedom of association norms. What matters instead is what theoretical account of freedom of association we take to underpin the right to freedom of association, and what more specific rights and duties flow from that right according to this account. There are many possible such accounts and the Courts have never articulated and committed to

one. Since it is not possible to consider all of them, I discuss only three possible models of freedom of association and what a fundamental right to freedom of association might entail according to each one. The purpose of this discussion is to show how the shape of what we consider to be the fundamental right to freedom of association varies as between different accounts, to argue that some theoretical accounts of freedom of association provide a justification for extending the ambit of ECHR and EU guarantees to more closely reflect ILO and ESC guarantees, and to defend one account in particular as the best guiding rationale for the future development of these guarantees.

The chapter is divided in two sections. Section 1 considers, in the abstract, why we have *a right to* freedom of association as opposed to having a mere freedom to associate. That is, what *interests* are sufficient to justify that a duty be imposed on another to do or not to do something in order to guarantee our freedom of associate.²³⁷ It shows that the right to freedom of association is a complex right underpinned by several different interests, which may be reflected differently in legal instruments but which are not clearly separable from each other nor appropriately divided into categories like ‘individual’ and ‘collective.’

Section 2 builds on this by considering what a right to freedom of association, ‘a shorthand expression for a bundle of rights and freedoms relating to the membership of

²³⁷ This inquiry is based on the general definition of a ‘right’ formulated by J Raz, *The Morality of Freedom* (Clarendon Press 1986) 166: “‘X has a right’ if and only if X can have rights and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.’

associations,²³⁸ entails in terms of specific rights and duties according to three different normative accounts. It discusses the notion of freedom of association as a ‘parallel liberty’ as formulated by Brian Langille and Benjamin Oliphant;²³⁹ it develops a possible account of freedom of association based on Amartya Sen and Martha Nussbaum’s work on the ‘capability approach’; and it proposes an account based on the notion of freedom of association as a means to empowerment of individuals formulated by Dickson CJ’s dissent in the *Alberta Reference* judgment in the Supreme Court of Canada, supplemented by Alan Bogg’s work on the connection between freedom of association and the principle of subsidiarity. The section argues that the latter account best reflects all of the interests identified in Section 1, and is therefore the best guiding rationale, of the three, for the development of ECHR and EU freedom of association guarantees. According to this account, there is a moral argument as to why obligations under ECHR and EU freedom of association norms should more closely resemble the general shape of parallel ILO and ESC guarantees.

This chapter does not provide a comprehensive theoretical account of freedom of association in the labour law context or in general.²⁴⁰ This would be a much more ambitious enterprise, beyond the scope of this thesis. Instead, my intention is to sketch out some potential theoretical justifications for the right and the implications they might have for the scope of obligations under the ECHR and EU human rights law and their

²³⁸ F von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell Publishing 1987) 13.

²³⁹ Which is in some ways derivative from Leader (n 31).

²⁴⁰ The most comprehensive (liberal) account of freedom of association in the labour law field to date being Leader (n 31).

future development. Furthermore, I am not concerned, at this stage, with the question of whether the duties that flow from a particular normative account should be *justiciable*. I am concerned with the more abstract prior question of moral duties rather than legal duties which flow from a right to freedom of association in accordance with different normative accounts. This provides only one argument as to what the *legal* obligations on states under the ECHR and EU human rights law should look like.²⁴¹ Questions about the legal shape and enforceability of these guarantees under the respective instruments are discussed in Parts C and D.

The discussion proceeds on the premise that whether a right is categorised as a ‘civil and political’ or ‘social and economic’ in some legal instrument does not in itself have implications for the question of whether it is a fundamental right and the type of duties which arise from it. That the ‘type of right’ distinction is of no normative significance in this regard has been persuasively argued by several scholars.²⁴² The discussion does not attempt to define what a human right is or confine itself to a particular theory of human rights, of which there are many.²⁴³ This would be an impossible task given space constraints, but is also not essential here given that ECHR and EU human rights norms are not definitively committed to a particular conception of human rights. Unless otherwise specified, I assume that the ECHR and EU constitutional systems *could* in principle accept all three as viable models for respective freedom of association guarantees. Finally, it should be noted that the discussion seeks

²⁴¹ Assuming that these should reflect morality in so far as possible.

²⁴² Eg Fredman, *Human Rights Transformed* (n 43); J King, *Judging Social Rights* (CUP 2012); Nickel (n 76) Ch 8 and 9; J Griffin, *On Human Rights* (OUP 2010) Ch 10.

²⁴³ For of various accounts, see King (n 242) 27-8.

to explain why these *particular* labour rights should be regarded as fundamental human rights. It does not, therefore, engage in detail with debates on whether and to what extent labour rights *in general* should be considered to be human rights.²⁴⁴

1. Pluralistic Foundations and Problematic Dichotomies

a. Interests underpinning the right to freedom of association

The *right to* freedom of association is underpinned by a number of different interests that an individual has in their freedom to associate, or freedom of association. It is because it has pluralistic foundations that it is a composite, ‘molecular’ right:²⁴⁵ it can be understood as a *set* or ‘bundle’ of rights which protect these various interests. The freedom to associate *simpliciter*—meaning simply that A is free, or able, to associate with others—is valuable to the individual for several reasons. At a very basic, abstract level, it is valuable in so far as it relates to the ability of individuals ‘to do together what each of them is at liberty to do alone.’²⁴⁶ It is just an aspect of what it means to be free.²⁴⁷ Oliphant refers to this as the ‘parallel liberty standard’,²⁴⁸ and it is a broad and very

²⁴⁴ There is now a wealth of literature on this topic, eg Alston (ed) (n 61); J Fudge, ‘The New Discourse of Labour Rights: From Social to Fundamental Rights’ (2007) 29 *Comparative Law & Policy Journal* 29; V Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 *European Labour Law Journal* 151; J Atkinson, ‘Human Rights as Foundations for Labour Law’ in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 122.

²⁴⁵ To borrow the metaphor used by A Bogg and K Ewing, ‘A (Muted) Voice at Work - Collective Bargaining in the Supreme Court of Canada’ (2012) 22 *Comparative Labour Law and Policy Journal* 379, 397.

²⁴⁶ Leader (n 31) 23; assuming that in principle being at liberty to do whatever one wishes is intrinsically valuable.

²⁴⁷ G Kateb, ‘The Value of Association’ in A Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 36.

²⁴⁸ B Oliphant, ‘Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under 2(d) & Saving the Freedom to Strike’ (2012) 70 *University of Toronto Faculty of Law Review* 36; though note that he understands ‘liberty’ in a particular way, discussed in Section 2.a.

general way of understanding what the right to freedom of association protects. However, there are more specific reasons to value the freedom to associate, ie more specific interests in our freedom to associate which justify more specific rights.

First, there is value in the fact of being in an association itself, which I call the *intrinsic* value. Gutmann argues that freedom of association is ‘necessary to create and maintain intimate relationships of love and friendship’ and ‘valuable for the many qualities of human life that diverse activities of association routinely entail’, such as ‘comraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity and the kinds of self-expression and self-sacrifice that are possible only in association with others’.²⁴⁹ As social beings, ‘people find in association a value in itself’ because it provides them with sources of pleasure and opportunities for experiences quite apart from the aims that a particular association might be pursuing.²⁵⁰ People join book clubs not just to read books, but because they might find pleasure and fulfilment in reading and discussing books *with others* or just meeting people.

Second, freedom of association is valuable as a means to pursuing certain goals, ie it has a *means-to-end* value. People join associations so that they can *do things* with others, which presupposes the pursuit of at least some common ends: ‘the need for shared purposes and coordinated activities is a fundamental requirement of *any* association’s existence.’²⁵¹ Freedom of association can provide a means for people to

²⁴⁹ A Gutmann, ‘An Introductory Essay’ in Gutmann (n 247) 4.

²⁵⁰ Kateb (n 247) 37-8.

²⁵¹ A Bogg, ‘Subsidiarity or Freedom of Association? A Perspective From Labour Law’ (2016) 61 *American Journal of Jurisprudence* 143, 163.

pursue goals that they might not be able to pursue individually or would be less effective in pursuing individually.²⁵² It can be a means to a whole range of ends, some of which may be more valuable than others.²⁵³ Apart from enabling people to read books together, freedom of association can be a means to exercise other rights and liberties such as freedom of expression.²⁵⁴ It can also be an important means for citizens to create new valuable options:²⁵⁵ collective action through associations concerned with pursuing certain public goals—such as pressure groups—is likely to be more effective than individuals in securing the availability and access to collective goods such as education, healthcare, housing et cetera.²⁵⁶ This is in large part due to the fact that individuals alone are usually not powerful enough to exert the pressure necessary to achieve those ends.

This is crucial to understanding why freedom of association is ‘indispensable’ to industrial relations: in the context of unequal power relations between employer and individual workers, the ability to act together enables workers to face the employer on more equal terms in order to improve their social and economic position by securing better conditions. The primary goal of trade unions is to secure particular substantive benefits for their members; they are concerned with advancing the welfare and social and economic interests of workers,²⁵⁷ and activities such as collective bargaining and action are means to achieving those goals.

²⁵² Leader (n 31) describes the ‘dynamic’ conception’ of freedom of association as one which ‘sees association as a method of coordinating interests for their more effective advancement against the outside world’, 27.

²⁵³ Gutmann (n 249) 4.

²⁵⁴ *ibid* 1; Novitz (n 14) 87.

²⁵⁵ Gutmann (n 249) 27-8; on having an adequate range of options as an aspect of autonomy, Raz (n 237) 408-9.

²⁵⁶ Gutmann (n 249) 28.

²⁵⁷ K Ewing, ‘The Function of Trade Unions’ (2005) 34 *ILJ* 1.

Third, there is additional value in individuals' direct participation in securing those substantive benefits through associational activity. According to Finnis

Human good requires not only that one receive and experience benefits or desirable states; it requires that one do certain things, that one should act, with integrity and authenticity; if one can obtain the desirable objects and experiences through one's own action, so much the better ... one who is never more than a cog in big wheels turned by others is denied participation in one important aspect of human well-being.²⁵⁸

Drawing on these ideas, Bogg argues that 'it is only where individuals participate in shaping their own lives through initiative and self-help, often in collaboration with others, that a human life is led fully.'²⁵⁹ The ability to act together with others is valuable because it enables individuals themselves to determine the conditions which have a significant impact on their lives; he considers this to be 'the functional value of freedom of association in assisting workers to help themselves.'²⁶⁰ This applies, of course, beyond the labour law context. This aspect, which I call the *self-determination* value of freedom of association, should be recognised alongside the *means-to-end* value, because it is not only concerned with the end-result but also with the process of obtaining substantive benefits; it is the process itself which constitutes an important aspect of human well-being.

Fourth, freedom of association has what Gutmann calls a *civic* value: 'the viability and vibrancy of liberal democracy depend on many morally important ways on the

²⁵⁸ J Finnis, *Natural Law and Natural Rights* (2nd ed, OUP 2011) 147.

²⁵⁹ Bogg, 'Subsidiarity' (n 251) 149.

²⁶⁰ *ibid* 171.

associational activities of its citizens.²⁶¹ Tamir argues that (civic) associations are essential for a healthy democratic system because they ‘reinforce the ability of isolated individuals to acquire influence in the political sphere, thus balancing the power of the government.’²⁶² Furthermore, freedom of association is ‘a necessary guarantee against the tyranny of the majority’ because ‘the interplay of a multiplicity of groups defending their diverse interests prevents the consolidation of a permanent center of power.’²⁶³ Associational activity further contributes to a healthy democracy by cultivating civic virtues like ‘the ability to question authority and the willingness to engage in public discourse.’²⁶⁴ Again, these comments relate to the value of freedom of association in general, especially vis-à-vis the state, rather than specifically in the industrial relations context. However, in light of the growing power and authority of capital and its ability to dominate public discourse, as well as the ‘hollowing out’ of the state,²⁶⁵ it is at least arguable that the civic value of workers’ freedom of association is of increasing significance. O’Neill and White argue, for example, that trade unions contribute to political equality in the context of present-day politics, in which ‘policy-making is strongly influenced ... by business corporations and the very wealthy.’²⁶⁶

There are a few points to make about these various ‘values,’ ‘functions’ or ‘interests’ sufficient to ground a right to freedom of association. To start with, they are

²⁶¹ Gutmann (n 249) 18.

²⁶² Y Tamir, ‘Revisiting the Civic Sphere’ in Gutmann (ed) (n 247) 214, 223.

²⁶³ *ibid*, citing Madison in L Guinier, *The Tyranny of the Majority* (Free Press 1994) 4.

²⁶⁴ W Kymlicka, ‘Ethnic Associations’ in Gutmann (ed) (n 247) 177, 187.

²⁶⁵ Fredman, *Human Rights Transformed* (n 43) 47.

²⁶⁶ M O’Neill and S White, ‘Trade Unions and Political Equality’ in Collins, Lester and Mantouvalou (n 244) 252.

not to be understood as completely separate facets but as different 'layers' of the freedom to associate. More than one of them can be at play in the context of a particular association and the significance attached to each may vary as between associations. Whereas the intrinsic function is arguably the most important in the case of family associations, support groups or even book clubs, the means-to-end and self-determination functions are most prominent in the case of trade unions. That does not mean that the other functions are not applicable or valuable in this context as well, especially the civic function. Furthermore, these functions are often interconnected. There is an inextricable link between the means-to-end and self-determination function, an overlap between the self-determination and civic function, and means-to-end and civic function. The intrinsic function cuts across all of these to some extent, and is never actually in play on its own; as Bogg argues, the existence of all groups is 'constituted by coordinated actions directed at shared purposes.'²⁶⁷ Third, even where they concern *collective* action, these various interests ultimately all relate to *individual* well-being: whether that is well-being which stems from the enjoyment of being with others, access to substantive benefits, self-determination or general value which the individual derives from a healthy liberal democracy.

Finally, none of these functions are specifically confined to trade unions; trade unions are not unique in that they require that individuals are able to come together and act in concert in the pursuit of important goals. However, trade unions are identifiable as a distinct type of association of particular historical, political, social and economic

²⁶⁷ Bogg, 'Subsidiarity' (n 251) 163. In this sense, all forms of associations are 'dynamic' in the way that term is used by Leader (n 31).

significance in most societies, which is associated with particular processes and activities like collective bargaining and action. 'Work' is a hugely important aspect of most individuals' lives, is a primary source of material well-being and a particularly important source of self-realisation and fulfilment. 'Workers', taken together, are a large and powerful group of individuals. It is not surprising that trade unions and their activities are accorded special attention in freedom of association discourse and in general freedom of association legal guarantees such as Article 11 ECHR and Article 12 CFREU.²⁶⁸ Indeed, the fact that special legal rights are accorded to them is itself a reflection of their influence in the constitution of organisations such as the ILO and drafting of all of the instruments considered here. These rights are, however, an aspect of the *broader* narrative of what we consider to be the value of the freedom to associate.

b. Challenging dichotomies and categories

The two 'aspects' identified by Kahn-Freund are therefore not strictly separable functions of the right to freedom of association (in an abstract sense). They relate to two aspects of the same bundle of interests that we want to protect, between which there is a certain continuity. It is the case that the *legal* rights expressed in ILO Conventions and the ESC are specifically concerned with the role of employers' and workers' organisations and their members in the overall narrative. It does not follow, however, that the ECHR system cannot share this concern as part of a broader aim to protect our freedom to associate. A 'human rights law' and 'labour law' understanding of the right to freedom of association are not separate and mutually exclusive but can overlap to the

²⁶⁸ Though Article 12 CFREU emphasises the importance of freedom of association in political and civic matters too.

extent that they are both concerned with protecting at least *some* of those interests to *some* extent. Overlap may exist between them, at the very least, where the same activity is of more than one type of value, as trade union activities often are (spanning over the means-to-end, self-determination and even civic value). For the same reason, elements of the right of freedom of association are not neatly separated into ‘civil and political’ and ‘social and economic.’ Associational activity which pursues social and economic goals can at the same time engage interests which we might more closely associate with ‘civil and political’ rights, such as the civic or self-determination value.

The labels ‘individual’ and ‘collective,’ where they imply a dichotomy, are therefore not only unhelpful but potentially harmful in instilling a sense that we are dealing with rights of different nature and purpose.²⁶⁹ A right to freedom of association in a positive sense, whether related to trade unions or not, is concerned with the ability to be or do something *in a group*, even if it is a right held by an individual. That a right is held by a group does not make it, at core, any more concerned with this ability nor any less concerned with the individual interest. Whilst collective bargaining and action are inherently collective activities, they are means to protect and further interests in individual well-being. This does not mean that participants are ‘in it for themselves,’ but that the benefit of the activity ultimately accrues on individuals (which may not be these participants). It therefore seems inappropriate to determine the domain of each of these instruments by reference to an individual/collective dichotomy: there is no reason for collective labour rights not to ‘inhere in the individual’ as in the group.

²⁶⁹ For a critique of use of the terms ‘individual’ and ‘collective’ in labour law, A Bogg, “‘Individualism’ and ‘Collectivism’ in Collective Labour Law” (2017) 46 ILJ 72.

Article 11 ECHR, for example, cuts across these categories already. However, it is important to appreciate *why* this is the case, by reference to these fundamental links between it and ILO and ESC norms, in order to understand the process of integration which is taking place between them and reflect on its future direction. These latter instruments give the right to freedom of association a different legal shape, more narrow, detailed and complex as we go from general to specific rights. We can only speculate on the reasons behind the precise contours of the legal right in each system but these will reflect the aims of the particular institution, political compromise, the relative power of various interest groups in the drafting process et cetera. However, although that legal ‘molecule’ varies, at its core are some general elements and some common constitutive particles, that set of interests in our freedom to associate. The difficult task is to determine the area of overlap—what elements are common to the ‘human rights’ and ‘labour law’ molecule—as the contours of that area might vary according to different normative accounts of what the fundamental human right to freedom of association entails. The obligations under Article 11 ECHR—and for that matter Article 12 and 28 CFREU—will therefore in part be determined by the particular conception of freedom of association adopted, and in part by contextual institutional and political factors.

2. Three Models of the Right to Freedom of Association

This section explores three ways of understanding the fundamental right to freedom of association as a moral right, and how the shape of legal freedom of association guarantees might vary according to each one, in terms of their scope and duties (negative

or positive) which correspond to the right. These three models are presented in order of their 'thickness,' to borrow Bogg and Ewing's terminology.²⁷⁰ A 'thin' conception of the right to freedom of association is relatively abstract, recognises only few fundamental elements, envisages only negative state duties and, at most, a limited duty to protect. A 'thick' conception of freedom of association, on the other hand, is more concrete and recognises that there is a broader range of minimal entitlements—such as a right to collective bargaining—which should also be considered as fundamental rights.²⁷¹ A 'thick' conception demands the positive involvement of the state, that is, it justifies positive state duties including duties of fulfilment. The notion of freedom of association as a 'parallel liberty' as elaborated by Langille and Oliphant tends towards the thin end of the spectrum (a); a possible account on freedom of association based on 'capabilities' theory is 'thicker' (b); and a third conception that I propose, which I call the 'empowerment' rationale or model, is the most concrete and 'thickest' account (c).

These three models have been selected for different reasons. Langille and Oliphant's work on this topic is discussed because it has been influential in shaping the debate on the recognition of specific collective labour rights under the Canadian Charter of Rights and Freedoms, but also because it is reflected in some of the early ECtHR case-law. The capabilities approach is discussed because it has gained attention as a normative justification for labour rights,²⁷² including as a normative justification for the

²⁷⁰ Bogg and Ewing, 'Muted Voice at Work' (n 245) 389, fn 55. They themselves borrow the terminology of 'thick' and 'thin' from E Tucker, 'Labour's Many Constitutions (and Capital's Too)' (2012) 33 *Comparative Labour Law and Policy Journal* 355.

²⁷¹ Bogg and Ewing, 'Muted Voice at Work' (n 245) prefer a thick conception of freedom of association, 390.

²⁷² See in particular B Langille (ed), *The Capability Approach to Labour Law* (OUP 2019).

integration of elements of social and economic rights into ECHR rights.²⁷³ The empowerment model is based on a theoretical understanding of the (moral) right to freedom of association which has been highly influential in recent landmark Canadian Supreme Court judgments, taken together with recent work on the nexus between the principle of subsidiarity and freedom of association.

I should clarify at the outset why my discussion of the theoretical underpinnings of the right to freedom of association in part draws on Canadian case-law interpreting the Canadian Charter of Rights and Freedoms, a national instrument which exists in a different constitutional setting to the instruments discussed in Chapter I.²⁷⁴ Article 2(d) of the Charter provides simply that everyone has the freedom of association.²⁷⁵ It makes no mention of specific labour rights, unlike Article 11 ECHR and Article 12 CFREU which at least mention the right to form and join trade unions. Yet, Canadian courts have interpreted this very general guarantee as including specific labour rights to collective bargaining and strike. Unlike the ECtHR, which has mainly referred to international materials in its justification for expanding the scope of Article 11, the Canadian Supreme Court has reflected on and explained more fully why it is that these rights are essential to the realisation of values such as human dignity and autonomy which are said to underpin fundamental human rights. The judgments of the Canadian Supreme Court are lengthier and explicitly draw on theoretical arguments; and the reasoning in these

²⁷³ V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRLR 529.

²⁷⁴ And in which context none of these instruments, apart from the ILO Conventions, apply. Furthermore, Convention 98 was ratified by Canada in 2017, after the cases discussed here were decided.

²⁷⁵ Which can be limited in accordance with Article 1.

particular cases elaborates on the moral significance and value of collective bargaining and action generally, and is therefore not confined to the Canadian context.²⁷⁶ In other words, what I am interested in is the normative rationale behind the Court's interpretation of Article 2(d), which is independent from legal and constitutional context. At the same time, the fact that Article 2(d) is a *general* freedom of association guarantee—as Article 11 ECHR and Article 12 CFREU—which a court not specialist in labour law—as the ECtHR and CJEU—has interpreted as including specific collective labour rights makes it easier to see how such a normative rationale could be applied also to the development of general human rights guarantees in the ECHR and EU context.

a. Freedom of association as a parallel liberty

A 'thin' account of freedom of association and related duties is found in the work of Brian Langille and Benjamin Oliphant.²⁷⁷ Their starting point is that freedom of association is 'the freedom to do in combination with others what one is free to do alone',²⁷⁸ ie the 'parallel liberty standard'.²⁷⁹ This seems to have been a conception of freedom of association endorsed by the earlier Canadian Supreme Court judgment in *Reference re Public Service Employee Relations Act (Alta)*,²⁸⁰ one of the so-called *Labour*

²⁷⁶ Although there are aspects of the relevant judgments which draw on the Canadian context specifically too, but these can be seen as separate arguments.

²⁷⁷ B Langille, 'The Freedom of Association Mess: How We Got into It and How We Can Get out of It' (2009) 54 McGill LJ 177; B Langille, 'Why the Right-Freedom Distinction Matters to Labour Lawyers-And to All Canadians' (2011) 34 Dal LJ 143; Oliphant (n 248); B Langille and B Oliphant, 'The Legal Structure of Freedom of Association' (2014) 40 Queen's LJ 249. This account has been described as 'thin' by Bogg and Ewing, 'Muted Voice at Work' (n 245) and A Bogg, 'The Constitution of Capabilities: The Case of Freedom of Association' in Langille, *The Capability Approach* (n 272).

²⁷⁸ Langille, 'Freedom of Association Mess' (n 277) 183.

²⁷⁹ Oliphant (n 248) 40. 'Parallel liberty' is used by Leader (n 31) to describe the freedom to do with others what one is free to do alone in his much more comprehensive theoretical account of freedom of association.

²⁸⁰ [1987] 1 SCR 313 (*Alberta Reference*), see [175] per McIntyre J.

Trilogy cases, in which it was held that a right to collective bargaining and to strike were *not* accorded special protection under the Canadian Charter.²⁸¹ Accordingly, these authors consider that collective bargaining and strike action are not to be protected in any *special* way as facets of freedom of association; rather, our freedom to bargain collectively and to strike are protected only because we have an individual freedom to bargain for a contract of employment and the freedom not to work which we are also free to exercise in combination with others.²⁸²

Whilst Langille and Oliphant do not aim to develop a free-standing theoretical account of freedom of association in their work, they do appear to adopt a particular conception of freedom of association in order to criticise a series of more recent Canadian judgments on Article 2(d). These are *Dunmore*,²⁸³ *BC Health*,²⁸⁴ and *Fraser*,²⁸⁵ and their criticism applies also to the more recent *Saskatchewan Federation of Labour*.²⁸⁶ It was held in *Dunmore* that the exclusion of agricultural workers from legislation providing for certain trade union and collective bargaining rights for other workers was incompatible with Article 2(d), or, put differently, the state had a positive obligation to extend this legislation to the excluded category. *BC Health* concerned legislation invalidating certain existing collective agreement provisions, effectively precluding meaningful collective

²⁸¹ *Alberta Reference* (n 280); *PSAC v Canada* [1987] 1 SCR 424 (PSAC); *RWDSU v Saskatchewan* [1987] 1 SCR 460. There is no space to set out the facts of these cases here; suffice it to say that they exemplify an approach to interpreting the guarantee of freedom of association as not including any specific collective labour rights. For a summary of the judgments, Oliphant (n 248) 43-6.

²⁸² Langille, 'Freedom of Association Mess' (n 277) 187.

²⁸³ *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016.

²⁸⁴ *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391.

²⁸⁵ *Fraser v Ontario (AG)* 2008 ONCA 760.

²⁸⁶ *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245.

bargaining on a number of issues. The Court recognised that Article 2(d) includes a right to bargain collectively, overruling previous case-law.²⁸⁷ *Fraser* involved a challenge to the government's response to the ruling in *Dunmore*, namely to enact legislation which still excluded agricultural workers from protections available to other workers but provided certain new protections for organising. In the Court of Appeal of Ontario, in light of *BC Health*, Winkler CJO concluded that this violated Article 2(d) because it failed to provide sufficient statutory protections to enable the applicants to exercise their right to organise and to collective bargaining.²⁸⁸ This decision was heavily criticised by Langille in particular, and was reversed by the Supreme Court, which held that the legislation was constitutional.²⁸⁹

From the criticism of these judgments advanced by Langille and Oliphant it is possible to construct a model of (the right to) freedom of association which has three main defining features. The first is that collective bargaining and action are not 'essential elements' of freedom of association which deserve particular protection. Consequently, according to the authors, the Supreme Court was incorrect to find that the Charter legal guarantee of freedom of association includes a specific right to collective bargaining in *BC Health*. The same criticism would apply now also to *Saskatchewan Federation of Labour v Saskatchewan*, in which the Supreme Court found that Article 2(d) includes a right to

²⁸⁷ *BC Health* (n 284) [87] per McLachlin CJ and LeBel J.

²⁸⁸ *Fraser CA* (n 285) [11].

²⁸⁹ *Ontario (AG) v Fraser* [2011] 2 SCR 3. However, notably the Court also held that the legislation included by implication a requirement that employers consider employee representations in good faith. For a criticism of the judgment, see Bogg and Ewing, 'Muted Voice at Work' (n 245).

strike.²⁹⁰ That these rights should not be accorded any special protection was, of course, also the view taken by the ECtHR before *Demir*.

A second feature is that the obligations imposed on the state should be *primarily negative*. The authors' starting point is a distinction between 'freedoms' and 'rights': freedom 'describes a legal state where an individual is at liberty to act or not to act, placing no duties on others to act or not to act';²⁹¹ a right 'places duties on others to do or not do something.'²⁹² In the constitutional context a 'freedom' is understood as a Hohfeldian immunity against the government intended to prevent the state from interfering with the individual's freedom.²⁹³ That is, it imposes duties of *restraint* on the state.

Langille explains that freedom of association is protected against interference by private parties by a perimeter of rights and correlative duties at common law and statute ('derivative' rights).²⁹⁴ Cases which require the state to create 'derivative' rights involve positive duties to protect and not merely a duty of restraint.²⁹⁵ The authors argue that such cases are of a different order to 'restraint' cases,²⁹⁶ and such duties should only be found in very exceptional circumstances where it would otherwise be impossible to

²⁹⁰ *Saskatchewan* (n 286) [3] per Abella J: 'The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.' Langille and Oliphant discuss the *Saskatchewan* Court of Appeal judgment in Langille and Oliphant (n 277).

²⁹¹ Langille and Oliphant (n 277) 256.

²⁹² *ibid.*

²⁹³ Oliphant (n 248) 70 fn 164; Langille and Oliphant (n 277) 285 fn 114; in response to Bogg and Ewing, 'Muted Voice at Work' (n 245) 394.

²⁹⁴ Langille, 'Right-Freedom Distinction' (n 277) 153.

²⁹⁵ *ibid.* 158; see also Langille and Oliphant (n 277) 271-2.

²⁹⁶ Langille and Oliphant (n 277) 272.

exercise the freedom.²⁹⁷ They stress that the ‘parallel liberty’ standard is largely a negative entitlement against state interference and cite with approval judgments which reject positive government duties to act in furtherance of Charter freedoms.²⁹⁸ The authors do not clearly distinguish between positive duties to protect and to fulfil but presumably the same objection applies to both; indeed, Bogg and Ewing argue that the *Fraser* litigations concerned a duty of fulfilment.²⁹⁹ Effectively, Langille and Oliphant reject the imposition of positive duties on the state bar exceptional circumstances in which a positive duty to protect might be recognised.

It should be noted that Langille and Oliphant’s main objection appears to be to the *judicial* formulation of positive duties under the Canadian Charter. Their ultimate argument is that it is inappropriate for judges to require the government to create particular ‘derivative’ rights—that it is inappropriate for judges to be drafting ‘labour codes’³⁰⁰—as this would be beyond their institutional competence and instantiate a particular model of labour relations.³⁰¹ In particular, they criticise the finding of a constitutional ‘duty to bargain’ in *BC Health*.³⁰² In other words, their objection is

²⁹⁷ Oliphant (n 248) 72; Langille and Oliphant (n 277) 291.

²⁹⁸ Oliphant (n 248) 67; Langille and Oliphant (n 277) 291; eg *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989.

²⁹⁹ Bogg and Ewing, ‘Muted Voice at Work’ (n 245) 399.

³⁰⁰ To use Langille’s phrase in B Langille, ‘Why Are Canadian Judges Drafting Labour Codes and Constitutionalizing the Wagner Act Model?’ (2009–10) 15 CLELJ 101.

³⁰¹ Which the judgment in *BC Health* says it is not doing (n 284) [91]; Langille, ‘Freedom of Association Mess’ (n 277) 199; for a critique of these arguments, J Fudge, ‘Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case’ (2012) 41 ILJ 1; Bogg and Ewing, ‘Muted Voice at Work’ (n 245).

³⁰² Langille and Oliphant (n 277) 272-7, 284.

primarily directed at the justiciability or constitutionalisation of positive duties, not *directly* at the existence of moral positive duties.

However, as Bogg and Ewing point out, the question of which freedoms and rights *should* be accorded will be underpinned by certain ethical and political judgments.³⁰³ Therefore, implicit in the arguments made by Langille and Oliphant must be a particular understanding of ‘freedom’ which informs their conception of freedom of association. Bogg and Ewing suggest that, perhaps unintentionally, Langille’s earlier pieces on the topic imply a libertarian notion of negative freedom,³⁰⁴ a conception of freedom as non-interference. This is consistent with suggestions in subsequent work that freedom ‘denotes the absence of government restraint,’³⁰⁵ and the focus on protection of that freedom *from* interference (by the state and others).³⁰⁶ This is to be contrasted with positive accounts of freedom according to which a failure of the state to take positive steps can limit freedom as much as action by the state.³⁰⁷

Langille and Oliphant’s account of freedom of association is also a particularly abstract one, which fails to fully appreciate the dynamics and value of associational activity. As noted in Section 1, a definition of freedom of association as a ‘parallel liberty’ is a very general way of understanding what it is that a right to freedom of association

³⁰³ Bogg and Ewing, ‘Muted Voice at Work’ (n 245) 395.

³⁰⁴ *ibid* 395.

³⁰⁵ Oliphant (n 248) 70;

³⁰⁶ Langille, ‘Right-Freedom Distinction’ (n 277) 153, 156.

³⁰⁷ See eg Fredman, *Human Rights Transformed* (n 43) 25; the ‘parallel liberty’ model is an account which sits at odds with Langille’s reliance on Sen’s ‘capabilities’ theory as a normative theory of labour law elsewhere: B Langille, ‘Labour Law’s Theory of Justice’ in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011); B Langille, ‘What is International Labour Law For?’ (2009) 3 *Law & Ethics of Human Rights* 47, 73-5.

protects. Defined in this way, the right protects our *general* interest in being free to do what we wish, which also underpins other fundamental rights such as freedom of expression, with the additional interest in being able to do this in combination with others. As Section 1 explained, there are more specific interests linked to our ability to associate with others, which are not incompatible with a ‘parallel liberty’ view but add additional layers of complexity to it. Accordingly, they justify a more complex, composite right to freedom of association which protects not only our ability to do with others what we are free to do alone, but also to pursue the more *particular* valuable goals associated with these four interests. Even if the ‘parallel liberty’ standard does not itself imply a right to collective bargaining, such a right may be based on the more specific interest in, for example, the self-determination value of freedom of association. Indeed, this is suggested by the judgment in *BC Health*:

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.³⁰⁸

Langille and Oliphant’s account of freedom of association appears not to recognise these more concrete interests associated with action through associations. Their criticism of the court’s formulation of a constitutional right to collective bargaining in *BC Health* assumes that the right is derived *directly* from the abstract ‘parallel liberty’ conception of freedom of association, when in fact the judgment makes a more complex argument which draws on a broader range of values that the right seeks to protect. It is also

³⁰⁸ *BC Health* (n 284) [82] per McLachlin CJ and LeBel J; though note that Bogg and Ewing, ‘Muted Voice at Work’ (n 245) criticize the subsequent judgment in *Fraser*, SC (n 289) for taking too restricted a view of what collective bargaining entails.

arguable that, in their preoccupation with the recognition by the court of a ‘duty to bargain in good faith’ and a judicial ‘labour code’, the authors conflate their criticism of the instantiation of a particular model of labour relations—the Wagner model—with a criticism of a more abstract judicially recognised right to collective bargaining based on this range of values that leaves a margin of discretion in the creation of ‘derivative’ rights by the state.³⁰⁹ Thus, they—rightly or wrongly—criticise the jump from the (very) abstract to (very) concrete right to freedom of association by the court, but do not explicitly consider whether there are values and interests at play which give rise to rights that lie between these two extremes.

What flows from this abstract conception of freedom of association—and this is the third important feature of this model—is also the view that trade unions, or any other associations, should not be accorded special protection. This view is expressed by Langille,³¹⁰ and Rothstein J’s dissent in the Fraser judgment, who asserts that a freedom of association guarantee should be ‘content-neutral’ as between different associations.³¹¹ To do otherwise would be to hold that the goals of one association are more valuable than that of another.³¹² Oliphant similarly argues that the ‘parallel liberty standard’ is a content-neutral standard.³¹³ This is consistent with the proposition that their argument

³⁰⁹ See Bogg and Ewing, ‘Muted Voice at Work’ (n 245) 398-9.

³¹⁰ Langille, ‘Freedom of Association Mess’ (n 277) 185.

³¹¹ *Fraser*, SC (n 289) [208]; Bogg and Ewing (n 245) 389 argue that Rothstein J’s position in this case is ‘practically indistinguishable’ from Langille’s position in ‘Freedom of Association Mess’ (n 277).

³¹² *Fraser*, SC (n 289) [209-215] and [74] in the majority judgment, summarising Rothstein J’s argument.

³¹³ Oliphant (n 248) 72-3.

is underpinned by a libertarian notion of negative freedom, which is often accompanied by a commitment to state neutrality.³¹⁴

On the basis of the ‘parallel liberty’ conception of freedom of association alone it is difficult to see why trade unions deserve special treatment. However, if we were to acknowledge the more concrete values of the freedom to associate, in particular the means-to-end, self-determination and civic value, then it is arguable that trade unions are a special type of organisation, as I have argued above. Furthermore, White argues that in adopting a policy of restraint under conditions in which there are certain background inequalities between the parties—in his example, employers and individual ‘sellers of labor power’—the state is not being neutral but effectively favouring employers.³¹⁵ He argues that, in fact, a liberal state should promote trade unions in so far as they, as ‘essentially instrumental’ associations—associations which aim to secure improved access to strategic goods but do not necessarily express a commitment to a particular conception of the good life³¹⁶—promote liberal ends.³¹⁷ More recently, O’Neill and White have argued in favour of a promotive stance towards trade unionism and collective bargaining by the state, in the context of growing economic and political

³¹⁴ Eg in this respect, Fredman, *Human Rights Transformed* (n 43) 20-1 discusses the views of I Berlin, *Four Essays of Liberty* (Clarendon Press 1969); Raz (n 237) 100 discusses the views of R Nozick, *Anarchy, State and Utopia* (Basic Books 1977).

³¹⁵ S White, ‘Trade Unionism in a Liberal State’ in Gutmann (ed) (n 249) 337.

³¹⁶ *ibid* 331, 335.

³¹⁷ *ibid* 340.

inequality.³¹⁸ There are, of course, also political theories which criticise or reject the commitment to state neutrality itself.³¹⁹

It should be noted that Oliphant asserts that his argument for a content-neutral standard relates to the neutrality of the *courts* and not of the state.³²⁰ This would imply that a promotive stance by the *state* is permitted but not required. It also deflects the main objection, again, to the institutional competence of the courts in this context and the justiciability of certain state duties. It is not clear why, however, if there are some moral obligations on the state to promote trade unions, the courts (as organs of the state) must *always* take a content-neutral approach. It is also a matter of controversy whether such duties should never be justiciable, a matter explored in Chapter IV.

To sum up, a model of the right to freedom of association based on the arguments advanced by Langille and Oliphant envisages a sphere of protection *from* interference for associational activity but no requirement for positive involvement on part of the state unless that sphere is effectively reduced to nil by a third party. This implies at least a right to join and form associations, or not to join associations as an aspect of personal liberty, the very minimum required to give this freedom any substance. It creates space for collective bargaining and strike action as associational activities but does not require

³¹⁸ O'Neill and White (n 266) 252.

³¹⁹ Eg Raz argues that political action should be concerned with 'providing individuals with the means by which they can develop, which enable them to choose and attempt to realize their own conception of the good' although, notably, it must encourage the pursuit of 'valid conception of the good and discourage evil or empty ones' (n 237) 133; see discussion in Fredman, *Human Rights Transformed* (n 43) 21.

³²⁰ Oliphant (n 248) 73.

any special protection or facilitation by the state; and it does not require that any special protection be accorded to trade unions.

The development of Article 11 ECHR jurisprudence in particular can be analysed by reference to this model. Article 11 has never reflected this model in its entirety, given the explicit mention of trade unions, and certainly does not appear to reflect it now in light of *Wilson*, *Demir* and cases on the right to strike.³²¹ However, aspects of the ‘parallel liberty’ rationale can be noted in *National Union of Belgian Police*,³²² *Swedish Engine Drivers’ Union*³²³ and *Schmidt and Dahlström*,³²⁴ and subsequent judgments which reaffirmed that the right to collective bargaining and action are not specifically protected by Article 11. The ambit of the right was ‘thin’ at the time, with subsequent ‘thickening’ in *Wilson* and *Demir* in particular. However, *RMT* and *UNITE* cast some doubt over how far the Court has come from this early approach, with *UNITE* in particular signalling a reluctance to recognise a more substantial right to collective bargaining.³²⁵ The ‘parallel liberty’ rationale can perhaps be placed at one end of the ‘thickness’ spectrum, with some judgments steering away from it and others back towards it. A restrictive interpretation of Article 11 will tend back towards this thin model and away from a more concrete formulation of specific collective labour rights and positive duties.

³²¹ If we understand the ECHR as a liberal egalitarian ‘bill of rights,’ as Mantouvalou (n 102) argues, such a ‘thin’ interpretation of freedom of association which is underpinned solely by a conception of freedom as non-interference might be ‘incompatible with the Convention’s normative basis’ in any case, Bogg and Ewing, ‘Muted Voice at Work’ (n 245) 414.

³²² *National Union of Belgian Police* (n 80) [39].

³²³ *Swedish Engine Drivers’ Union* (n 83) [39-40].

³²⁴ *Schmidt and Dahlström* (n 85) [34], [36].

³²⁵ See Chapter I.

b. Freedom of association and the capabilities approach

Amartya Sen's work on 'capabilities' and freedom has received much attention by labour law scholars, including as a potential basis for a 'new normativity' for rights-based understanding of labour law.³²⁶ It also forms the basis of Mantouvalou's justification of the 'integrated approach' to the interpretation of the ECHR, that is, a normative justification for the integration of elements of social and economic rights—including collective labour rights—into Convention rights.³²⁷ Mantouvalou draws on the Court's Article 11 jurisprudence, especially *Demir*, as examples of the Court applying what she calls 'the integrated approach' to interpretation of the ECHR.³²⁸ Here I consider what a model of the right to freedom of association based on the capabilities approach might look like.³²⁹

Sen's starting point in developing his capabilities theory is the search for the appropriate metric of 'equality' in a just society.³³⁰ The contention is that both welfare or utility and primary goods are an inappropriate metric for equality.³³¹ Instead we should be concerned with equality of 'basic capabilities:' that all people should *actually* be able

³²⁶ See Langille, 'Labour Law's Theory of Justice' and other pieces at (n 307), as well as Langille, *The Capability Approach* (n 272).

³²⁷ Mantouvalou (n 273).

³²⁸ *ibid* 537-8.

³²⁹ The capabilities approach, as well as the attempt to provide a normative account of labour law based on capabilities theory has been criticized from various corners. For a general criticism, see eg GA Cohen, 'Equality of What? On Welfare, Goods and Capabilities' (1990) 56 *Louvain Economic Review* 357; in the labour law context, see eg A Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A Bogg, C Costello ACL Davies and J Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 73. There is no space to consider all of these criticisms here, and I limit myself only to critiques of the 'capabilities approach' as a rationale for the right to freedom of association.

³³⁰ A Sen, 'Equality of What?', *The Tanner Lecture on Human Values* (Delivered at Stanford University, 1979) 197.

³³¹ Sen (n 330); see also Cohen (n 329).

to do certain basic things.³³² In other words, the focus is not on the equal distribution of resources, but on the ability of the individual to do or to be these basic things – to achieve certain ‘functionings’ – where one individual might require more resources than another to do so.³³³ ‘Functionings’ are states of being and doing, such as being well-nourished or having shelter; and ‘capability’ is the *opportunity* to achieve valuable combinations of human functionings. Capabilities, he argues, ‘can be seen, broadly, as freedoms of particular kinds.’³³⁴ Thus:

[F]reedom, in the form of capability, concentrates on the opportunity to achieve combinations of functionings (including, inter alia, the opportunity to be well-nourished or in good health ...): the person is free to use this opportunity or not. A capability reflects the alternative combinations of functionings over which the person has freedom of effective choice.³³⁵

This is a positive notion of freedom which requires not only that there is a space within which the individual can act free of interference by others, but that the opportunity is actually open to them to pursue valuable states of being or doing.³³⁶

Capability theory has informed the work of scholars in both the human rights and labour law field. According to the capability approach, as further developed by Martha Nussbaum, it is the obligation of the state to guarantee the basic capabilities of

³³² Sen (n 330) 218.

³³³ A Sen, ‘Human Rights and Capabilities’ (2005) 6 *Journal of Human Development* 151, 154.

³³⁴ *ibid* 152.

³³⁵ A Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315, 334.

³³⁶ Notably, Sen distinguishes between an ‘opportunity’ and ‘process’ aspect of freedom, arguing that only the former belongs to the same territory as capabilities. There would therefore seem that there is an aspect of freedom not covered by the capabilities approach, A Sen, *The Idea of Justice* (Penguin Books 2009) 228; Sen, ‘Human Rights and Capabilities’ (n 332) 152.

its citizens, including through positive steps.³³⁷ This theory is attractive to human rights scholars such as Sandra Fredman, arguing that human rights can give rise to positive state duties³³⁸— though, as Sen himself notes, capabilities do not overlap exactly with human rights because they are concerned with *substantive* opportunity and not the process aspect of freedom, thus failing to account for human rights which are concerned with fair processes.³³⁹ Sen’s capabilities approach has also been influential in theorizing the normative basis of labour law.³⁴⁰ Langille has drawn on Sen to provide a positive rationale for ILO standards and core rights—of which freedom of association is one—as means to helping countries to strive towards our ‘true ends’, human freedom.³⁴¹ This perhaps contrasts with his views on freedom of association implicit in his work related to the Canadian Charter.³⁴²

Langille suggests that, if capabilities theory justifies particular substantive rights in the sphere of work such as wages or working hours, then the protection of freedom of association and collective bargaining—which he calls process rights—is also

³³⁷ Eg M Nussbaum, ‘Capabilities and Social Entitlements: Sen and Social Justice’ (2003) 9 *Feminist Economics* 33, 38-9; M Nussbaum, ‘Capabilities, Entitlements, Rights: Supplementation and Critique’ (2011) 12 *Journal of Human Development and Capabilities* 23, 26; not only states are responsible for securing capabilities, but Nussbaum argues that it is one of the key purposes of the state to secure people their most central entitlements.

³³⁸ Fredman, *Human Rights Transformed* (n 43).

³³⁹ Sen, ‘Human Rights and Capabilities’ (n 332) 155-7; Nussbaum explores the connection between human rights and capabilities in ‘Capabilities, Entitlements, Rights’ (n 337).

³⁴⁰ Bogg, ‘Autonomy and Betrayal’ (n 329) 86; he discusses in particular some of Langille’s work cited at (n 307) as well as aspects of S Deakin and F Wilkinson, *The Law of the Labour Market* (OUP 2005) and S Deakin and J Browne, ‘Social Rights and Market Order’, in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003) 27. See now also Langille, *The Capability Approach* (n 272).

³⁴¹ Langille, ‘What is International Labour Law For’ (n 307); B Langille, ‘Core Labour Rights – The True Story (Reply to Alston)’ (2005) 16 *EJIL* 409.

³⁴² For a discussion, Bogg, ‘The Constitution of Capabilities’ (n 277) Section II.

necessary as they are ‘the most effective way to enforce substantive rights.’³⁴³ In other words, if capability is the opportunity to achieve states of being or doing which the individual has reason to value, then freedom of association is one way to guarantee this opportunity by securing conditions which enable the individual to achieve a particular functioning. This is a means-to-end rationale for the protection (and promotion) of freedom of association, collective bargaining and, presumably, action.³⁴⁴ In addition, Langille appears to recognize also a value in process rights by asserting that collective bargaining gives workers to opportunity to ‘participate, to create workplace processes and norms *themselves*.’³⁴⁵ He does not specify how this relates to the capabilities approach, but one possibility is that the capacity for self-determination and participation in workplace governance is itself a valuable functioning – a view which would accord with the self-determination function discussed in Section 1.

These general assertions point towards a conception of the right to freedom of association which differs from the first model. It could justify more comprehensive positive state duties to promote the right, including specific rights with respect to collective bargaining and action; from this flows also a recognition that trade unions have a special role in securing opportunities to achieve valuable functionings. However, there are some issues in converting these general assertions into a workable model of the right freedom of association. As Bogg argues, Sen’s capabilities theory is vague and

³⁴³ Langille, ‘Core Labour Rights’ (n 341) 435.

³⁴⁴ Note the potential inconsistency with Langille’s work discussed in Section 2.a.

³⁴⁵ Langille, ‘Core Labour Rights’ (n 341) 430; my emphasis.

underspecified as a normative theory and therefore not helpful in the elaboration of *particular* fundamental rights.³⁴⁶ Sen himself writes that:

[T]he capability approach points to an informational focus in judging and comparing overall individual advantages, and does not, on its own, propose any specific formula about how that information may be used... [it] is a general approach, focusing on information on individual advantages, judged in terms of opportunity rather than a specific 'design' for how a society should be organized.³⁴⁷

The approach is concerned with providing a metric for individual advantage which focuses on the actual opportunities people have, but it does not prescribe *which* opportunities a society should seek to guarantee. Although he has discussed capabilities that he considers important, such as freedom to be well-nourished or to be educated, Sen has refused to formulate a list of basic capabilities which could provide the normative basis for fundamental human rights.³⁴⁸ He argues that these should be specified in the particular context through social discussion or public reasoning, not pure theory.³⁴⁹ So, his theory does not provide us with enough to go on when elaborating the more precise contours of the right to freedom of association. It does not propose that the opportunity for self-determination and workplace participation is a basic capability that must be guaranteed; and, because there is no fixed list of other basic capabilities, we do not know whether and to what extent freedom of association can be instrumental in securing them.

³⁴⁶ Bogg, 'Autonomy and Betrayal' (n 329) 88.

³⁴⁷ Sen, *The Idea of Justice* (n 336) 232.

³⁴⁸ Sen, 'Human Rights and Capabilities' (n 333) 157-8.

³⁴⁹ *ibid* 158.

Nussbaum, on the other hand, has developed the capabilities approach by formulating a list of ten central human capabilities.³⁵⁰ These are *minimal* entitlements which a society must guarantee in order to be a just one, and which can form the moral basis for central constitutional guarantees.³⁵¹ Though not a full theory of justice, this account gives us a somewhat more concrete basis for formulating fundamental rights, including a right to freedom of association. Aspects of the freedom to associate are mentioned as central capabilities *themselves*. The capability of ‘affiliation’ covers very similar, if not identical ground to the intrinsic value of freedom of association identified in Section 1:

A. Being able to *live with and toward others*, to recognize and show concern for other human beings, *to engage in various forms of social interaction*; to be able to imagine the situation of another. (Protecting this capability means *protecting institutions that constitute and nourish such forms of affiliation*, and also protecting the freedom of assembly and political speech.)³⁵²

This would suggest that, in a just society, the state should (positively) guarantee the ability of individuals to form and join, or not join, associations and provide some basic protection for the proper functioning of these associations themselves. Further aspects of freedom of association and the valuable interests in having this freedom are recognised in the ‘capability of control over one’s environment:’

10. Control Over One’s Environment.

A. Political. Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.

³⁵⁰ Nussbaum, *Women and Human Development* (CUP 2000) Chapter 1.

³⁵¹ Nussbaum, ‘Capabilities and Social Entitlements’ (n 337) 40; Nussbaum, *Women and Human Development* (n 350) 74.

³⁵² Nussbaum, ‘Capabilities and Social Entitlements’ (n 337) 41-2; my emphasis.

B. Material. ... In work, being able to to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.³⁵³

The capability of 'control over one's political environment' provides a basis for the protection of freedom of association in its civic aspect, which would entail the protection and promotion of associations such as interest groups and political parties and, potentially, trade unions in so far as their activities relate to political decisions which affect their members (a line which might be incredibly hard to draw). It also supports an argument for the protection of protest and strike action against political decisions where this enables more effective political participation.

It is perhaps arguable that the capability of 'control over one's material environment,' as it relates to the work context, includes the ability to conduct collective bargaining and action.³⁵⁴ Of course, these are activities intended to control one's material environment, but the definition of that capability given by Nussbaum—which does not specifically mention the ability of workers to control their work environment per se³⁵⁵—does not *necessarily* include them. 'Entering into meaningful relationships of mutual recognition with other workers' would, on a plain reading at least, imply a more limited capability related to the intrinsic value—that of forming relationships—of freedom of association at work. Without further elaboration, it is difficult to see how this can be taken to extend as far as organised action intended to further the social and economic

³⁵³ Nussbaum, 'Capabilities and Social Entitlements' (n 337) 42; M Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) 34.

³⁵⁴ Suggested by Bogg, 'The Constitution of Capabilities' (n 277) Section III.

³⁵⁵ Nussbaum's list is not intended to be fixed and control over work environment could be added as another element: Nussbaum, 'Capabilities and Social Entitlements' (n 337) 42. This would, however, require further argument to this effect.

interests of workers. The same could be said of 'exercising practical reason,' or 'being able to work as a human being' - because these terms are very vague it is not immediately obvious that they include activities such as collective bargaining and action. This is not to say that they *do not* include such activities and an argument to that effect might be possible. However, this would require further definition of these terms and elaboration on how collective bargaining and action are a manifestation thereof, which is not currently found in Nussbaum's work.

It is possible to argue also that the 'capabilities approach' as elaborated by Nussbaum provides a normative justification for a fundamental right to collective bargaining and action as a particularly important *means* to securing other central capabilities. Collective bargaining could be instrumental to a number of these capabilities—bodily health, being treated as a dignified being, being able to work as a human being et cetera—in so far as it is a means to ensuring decent working conditions. From this could be derived also a right to take collective action if it is a necessary or a more effective way to achieve these goals. However, this argument runs into the same issue of further defining some of the terms used by Nussbaum in formulating the central capabilities; it is essential to define, for example, what 'bodily health' or 'dignified being' means in order to determine the extent to which collective bargaining and action might be instrumental in achieving those. Nussbaum intentionally leaves these terms open in order to 'leave room for the activities of specifying and deliberating by citizens and their legislatures and courts.'³⁵⁶ Thus, the ambit of the right to freedom of association cannot

³⁵⁶ Nussbaum, 'Capabilities and Social Entitlements' (n 337) 42.

be fixed until these terms are determined, a task which an international court is unlikely to undertake.

In any event, this second argument would justify protection of collective bargaining and action only in so far as these activities secure a particular substantive opportunity and no further. Collective bargaining and action would be specifically protected only where the issues in dispute with the employer involve relatively basic conditions at work, such as health and safety standards or a minimally acceptable pay and working time conditions, but not attempts to improve their position through securing more favourable terms generally. This is an inevitable consequence of viewing the value of collective bargaining and strike action in purely instrumental terms, rather than as processes which are valuable in themselves. Another consequence is that these activities would merit special protection only *if* they are, as Langille says, the *most effective* way to securing or enforcing substantive rights. As Sen explains, the capabilities approach is concerned with *substantive opportunity* and not with process, that is, with an outcome (in terms of available opportunity) and not the means of getting there.³⁵⁷ If the substantive opportunity is effectively guaranteed by legislation—in terms of substantive standards and their enforcement—then there is no reason to protect or promote collective bargaining processes unless there are situations in which they will be more effective in securing the same outcome. This deflects the question to complicated assessment and comparison of effectiveness.

³⁵⁷ Sen, 'Human Rights and Capabilities' (333) 152-3.

Nussbaum's more developed version of capabilities theory takes us further on the 'thickness' spectrum than Langille and Oliphant at least in that it recognises the specific value of particular aspects of associational activity which could provide a moral justification for specific freedom of association-related rights. It also recognises that states have duties to *secure* the fundamental entitlements of individuals,³⁵⁸ which implies positive duties requiring the active involvement of the state rather than mere absence of interference. However, her account still leaves open the question of whether, and to what extent, a right to collective bargaining and action might be considered as deserving of fundamental status. In so far as an argument could be made that they should be protected as fundamental rights because they are instrumental to securing other central capabilities, the ambit of protection remains fluid, subject to the determination of a number of complex questions of what these capabilities entail. Even if these variables were to be fixed, the capabilities approach would only provide a justification for a right which reflects the intrinsic, means-to-end and civic values of freedom of association. Whilst Nussbaum's account of the capability approach could capture the self-determination aspect of the freedom to associate—as an aspect of the capability to control over one's environment—it is necessary to further elaborate on how collective bargaining and action are included within the definition of that capability.³⁵⁹

³⁵⁸ Nussbaum, 'Capabilities, Entitlements, Rights' (n 337) 26.

³⁵⁹ It is possible to view the third model proposed here as such an explanation; however, I have chosen to discuss it separately here as it provides a more specific, self-standing justification for according collective labour rights fundamental status.

c. Freedom of association, empowerment and subsidiarity

The third model which I propose is broader and more specific. It is a model which specifically emphasises the fact that collective action gives individuals the ability to influence and oppose decisions which affect their lives taken by those in a position of greater power. I take as a starting point the words of Dickson CJ, dissenting in *Alberta*

Reference:

As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. ...

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. . .³⁶⁰

There are three important points to note about this extract. First, it identifies the special value of associational activity as an aspect of community life. Second, it acknowledges its importance as a means to addressing power inequality, vis-à-vis both the state and the employer, and a means for groups to attain their purposes. Third, it recognizes that collective action enables individuals to participate in controlling their environment, that is, it enables a degree of self-determination. It is an approach to understanding associational activity which encapsulates all of the interests identified in Section 1. It is

³⁶⁰ *Alberta Reference* (n 280) 365-6.

a more elaborate account of the normative significance of freedom of association than the parallel liberty standard (though Dickson CJ recognises this as a starting point); and one which identifies more explicitly and comprehensively the value in this *particular* means to achieving an outcome than the capabilities approach. It is a view which has been very influential in the development of the right to collective bargaining in both *BC Health* and the subsequent *Mounted Police* case.³⁶¹

Mounted Police is helpful in determining the ‘thickness’ of this understanding of freedom of association and the value of collective bargaining as a particular type of activity. It concerned a challenge to a labour regime which prevented members of the Royal Mounted Police from being represented by an independent union, and instead provided for a staff representation program through which employees could raise issues (excluding wages). The Supreme Court held that whereas the fact that a staff representation programme was available meant that the right to freedom of association was not completely denied, it nevertheless constituted ‘substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control.’³⁶² A meaningful process of collective bargaining is ‘a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.’³⁶³ That is, it is not sufficient that workers and trade unions

³⁶¹ *BC Health* (n 284) [82-84]; *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 SCR 3 [35].

³⁶² *Mounted Police* (n 361) [105]; the Court here refers to the understanding of the right to collective bargaining by Dickson CJ in *Alberta Reference*.

³⁶³ *Mounted Police* (n 361) [81]; the Court goes on to explain the meaning of ‘choice’ and ‘independence’ and how they are inherent to the purpose of collective bargaining [84-91].

'be heard' in some way—which is what the earlier Article 11 ECHR judgments suggest³⁶⁴—but that a more defined process must take place for workers to be able to actually have a say in matters which affect them in a *meaningful* way. This approach can be contrasted with that of the Chamber in *UNITE*, which held that the right to collective bargaining was not violated despite the fact that meaningful collective bargaining was practically impossible in the agriculture sector.

The conception of freedom of association formulated in this line of case-law is supplemented and better understood by reference to Alan Bogg's work on the connections between freedom of association and the principle of subsidiarity.³⁶⁵ Bogg argues that Dickson CJ's view strongly aligns with the understanding of associational activity in Finnis' theory of subsidiarity.³⁶⁶ This theory conceives subsidiarity as a 'fundamental aspect of general justice that common enterprises should be regarded, and practically conducted, not as ends in themselves but as a means of assistance, as ways of helping individuals to "help themselves"'.³⁶⁷ According to Finnis, the principle of subsidiarity:

... affirms that the proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves through the individual initiatives of choosing commitments (including commitments to friendship and other forms of association) and of realizing these commitments through personal inventiveness and effort in projects.³⁶⁸

³⁶⁴ Eg *National Union of Belgian Police* (n 78) [39]; see Chapter I.2.a.i.

³⁶⁵ Bogg, 'Subsidiarity' (n 251).

³⁶⁶ *ibid* 170.

³⁶⁷ Finnis (n 258) 169.

³⁶⁸ *ibid* 146, as cited in Bogg, 'Autonomy and Betrayal' (n 329) 97.

Both Finnis and Bogg consider that self-help and self-constituting action are essential to human good. On Dickson CJ's account, freedom of association enables groups to participate in determining their circumstances in life, that is, to engage in self-constituting action.³⁶⁹ Thus, freedom to associate and to act through associations is essential to human good and to lead 'a fully authentic and dignified human life', as opposed to a 'a life blighted by the corrosive effects of passive dependence on benign governments or benign employers.'³⁷⁰ This emphasises, in powerful terms, why it is that the self-determination value of freedom of association is of fundamental significance. Thus, a model of the fundamental right to freedom of association which does not reflect this interest is missing a very important element.

Dickson CJ's account should not be conflated with the principle of subsidiarity. An important aspect of his account is the emphasis placed on the value of associational activity in balancing unequal power relations, which is of primary significance in the context of labour law. This is the 'empowerment' aspect of associational activity. The subsidiarity principle is not specifically concerned with this but with the importance of self-constituting action more broadly, even if no power imbalance exists. Taken on its own, the latter is perhaps too general as a normative justification of specific Article 11 rights. Dickson CJ's account brings into sharper focus the circumstances in which freedom of association is 'most essential,' ie where the individual is liable to be prejudiced by the actions of a more powerful entity, providing an additional justification

³⁶⁹ See *Mounted Police* (n 361) [58]: 'guarantee of freedom of association *empowers* vulnerable groups and helps them work to right imbalances in society', my emphasis.

³⁷⁰ Bogg, 'Autonomy and Betrayal' (n 329) 97.

for *particular* rights to protect associational activity in those circumstances. This third model of the right to freedom of association I propose is therefore best seen as taking Dickson CJ's account as a basis, with the subsidiarity principle performing a structuring and supplementary function in fleshing out some aspects of that model. As a shorthand, however, I call this the *empowerment* model.

The following elements of my third model follow from this combined account. First, the model includes positive duties to protect and, crucially, to fulfil. If subsidiarity is understood as a perfectionist principle rather than a principle of restraint—and Bogg compellingly argues that it should be—then it requires the state not just to refrain from interfering with the formation and direction of associations but also to actively assist individuals in helping themselves through associations.³⁷¹ As Carozza argues, subsidiarity is a principle which both limits the state and empowers it, requiring intervention where this would enable others to perform their own functions better.³⁷² That is not to say that the state should take over the activities of association, but, for example, to assist the association and its members to become self-supporting in the long term through a short-term intervention.³⁷³ This would include, for example, establishing collective bargaining machinery. Second, this account recognises that all associations are *prima facie* deserving of protection and assistance but it provides a coherent justification for additional protection and assistance for some associations.³⁷⁴ For example, civic

³⁷¹ Bogg, 'Subsidiarity' (n 251) 153-9.

³⁷² P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 44.

³⁷³ Bogg, 'Subsidiarity' (n 251) 155.

³⁷⁴ Note however *Mounted Police* (n 361) [59]. The Court explains that, on this account, not all associational activity will be protected – for example, activity that incites violence will not be protected.

associations and trade unions often facilitate self-help and self-constituting action to a greater extent than, say, book clubs; are more resource-demanding than, say, family and friend associations; and often face more opposition than both of these types of associations. They might therefore require more protection, from the state itself and third parties, and assistance in order to achieve their purposes.

Third, this account explains why trade unions particularly (though not exclusively) are associations which merit special protection, and why a right to collective bargaining and action should be considered fundamental without the need to define minimum substantive goals they should seek to achieve. Power imbalance is a prominent general feature of worker-employer relations; given the key role of work in human well-being and its 'potential to either uplift or destroy the human spirit', self-determination at the workplace is of special importance.³⁷⁵ Trade unions are associations which mediate the interaction between the individual and employer, with collective bargaining being an essential process through which self-help is pursued and through which individual workers can meet the employer on more equal terms. It is deserving of special protection as a fundamental right in itself and not merely where it is the most effective means to a substantive goal. This is the rationale underpinning the result in *BC Health*.³⁷⁶

It follows that the right to take collective action should be recognised as a fundamental aspect of freedom of association, as an avenue for workers to exert pressure

³⁷⁵ Bogg, 'Subsidiarity' (n 251) 143.

³⁷⁶ *BC Health* (n 284) [82], cited in Section 2.a above.

on the employer within the collective bargaining process in order to be able to 'influence the establishment of workplace rules.' This logic led the Supreme Court of Canada to recognise a constitutional right to strike as an indispensable component of the right to collective bargaining (echoing the stance of the ILO CFA):

The right to strike is *essential* to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together *to participate directly* in the process of determining their wages, working conditions and the rules that will govern their working lives...³⁷⁷

According to this account, the right to collective bargaining and action are themselves minimal entitlements and their denial regarded as 'a serious injustice...for [it] disrupts the dignified efforts of workers to shape their own working lives.'³⁷⁸ This is in stark contrast to Langille and Oliphant's argument that these never merit special protection, and the capabilities approach which is too open-ended to explain why these particular activities in the sphere of work relations merit special protection. Furthermore, whilst the comments of the Court in *Saskatchewan* deal with collective action in the context of collective bargaining, it would follow from the general rationale underpinning these judgments, as expressed by Dickson CJ above, that collective action by workers beyond the context of collective bargaining should also be protected there their interests as workers is liable to be 'prejudiced by ... some more powerful entity.'³⁷⁹

³⁷⁷ *Saskatchewan Federation* (n 286) [54]; my emphasis.

³⁷⁸ Bogg, 'Subsidiarity' (n 251) 169.

³⁷⁹ *Alberta Reference* (n 280) 366.

It is worth here to revisit one of Langille and Oliphant's main objections to the finding of a right to collective bargaining by the Canadian Supreme Court, namely that such a right would lead to the instantiation of a particular model of labour relations. It would indeed be problematic if the right was so formulated as to 'set in stone' a particular model of collective bargaining. It would also be problematic if an international norm on collective bargaining were so concrete that it required states to implement a particular model of collective bargaining within widely differing industrial relations systems. For example, the duty to bargain in good faith—which Langille and Oliphant discuss in the Canadian context—currently varies significantly even where it exists within jurisdictions; and what might work well for one system might make no sense at all in another.³⁸⁰ It could be unhelpful and even counter-productive, therefore, if a fundamental right to collective bargaining were to require a good faith duty in the same form in every jurisdiction.

However, the empowerment model does not require a particular model of collective bargaining. It implies a right to collective bargaining which is sufficiently abstract to accommodate variation between systems without being devoid of content.³⁸¹ This is because, if its underlying purpose is 'empowerment' in the sense described by Dickson LJ, the right allows for a number of different *ways* in which individuals could be empowered that are tailored to the particular context and power relations. In some contexts a good faith duty might not be necessary in order to facilitate empowerment of

³⁸⁰ See eg A Forsyth and S Slinn, 'Promoting Worker Voice through Good Faith Bargaining Laws: The Canadian and Australian Experience' in A Bogg and T Novitz, *Voices at Work* (OUP 2014) 163.

³⁸¹ As envisaged by Bogg and Ewing (n 245) 399-400.

workers and unions; some systems might require that the bargaining parties conclude a collective agreement unless there is a good reason not to.³⁸² As long as a minimum condition of ‘empowerment’ is achieved then all of these solutions will fulfil the duties required by this model. By the same token, it is not enough that the employer merely consult or hear out the workers or their union; there must be a genuine opportunity for workers to *participate* in the determination of their conditions through a process of negotiation *on more equal terms* supported by collective action if necessary. That is, for example, a right to collective bargaining according to this model protects trade union activity on the ‘stronger end of the spectrum’ – a right to negotiate *with* the employer that is stronger than a right to representation or consultation.³⁸³ This is reflected in the outcome in *Mounted Police*, which defines a number of essential features of a ‘meaningful collective bargaining’ but is careful to emphasise that ‘what is required ... to permit meaningful collective bargaining varies with the industry culture and workplace in question;’³⁸⁴ different models of labour relations are permitted as long as they do not erode these essential features.³⁸⁵

Inevitably, this account leaves some questions unanswered. It is clear that a right to collective bargaining must guarantee something more than representation and consultation—subject to further definition themselves—but not an ‘an outcome or access to a particular model of labour relations.’³⁸⁶ However, it is incredibly difficult to pick a

³⁸² Such as in New Zealand, Forsyth and Slinn (n 380) 164.

³⁸³ Bogg and Ewing (n 245) 385.

³⁸⁴ *Mounted Police* (n 361) [93].

³⁸⁵ *ibid* [97].

³⁸⁶ *ibid* [67].

precise point on the spectrum of trade union activity as a threshold for the minimum features of a collective bargaining process, precisely because there are so many possibilities and variables which will have different effects in different industrial relations arrangements. The same goes for a right to collective action. Workers should be able to strike and take other forms industrial action; they should be able to do this in support of collective bargaining but also, on basis of the empowerment rationale, with respect to political decisions which affect them; and on the same basis the right should protect secondary strike action and picketing because they also have an empowering function. Beyond this it can be difficult to plot the precise contours of the right through the empowerment model alone, though this also means that a number of possibilities as to the legal shape of the right to freedom of association will be compatible with this model.

Furthermore, the guiding principle of empowerment is itself indeterminate to an extent. According to the judgment in *Mounted Police*, freedom of association:

... functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. ... Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can [individual employees] meaningfully pursue their workplace goals.³⁸⁷

This suggests that 'empowerment' is not just about being able to exert some minimal resistance against an abusive employer, but that workers should be empowered in the active and meaningful pursuit of workplace goals. But *to what extent* they should be

³⁸⁷ *Mounted Police* (n 361) [70].

empowered vis-à-vis their employer, and in the pursuit of *which* workplace goals, is not entirely clear without further elaboration. The principle of subsidiarity weighs in favour of a broad conception of ‘empowerment’ but even then there remains a grey area in which, as far as the elaboration of legal norms is concerned, there may be a number of permissible possibilities.

Therefore, this account of freedom of association justifies a broader set of moral rights and correlative duties at a level of abstraction which leaves scope for further judicial and legislative interpretation and development of legal obligations.³⁸⁸ This further elaboration might involve recourse to other moral principles and values, or indeed reference to other legal sources, and depend on the level (international, national et cetera) and institutional structure and constraints of the norm-creating body. This is not unlike other fundamental rights, and has the virtue of allowing for some contextualisation and ‘wide creative leeway’ for governments in deciding how to fulfil their duties.³⁸⁹ Furthermore, even if the contours of these rights remain fluid to some extent, it is clear that they lie well beyond the minimum entitlements derived from the ‘parallel liberty standard’ and are much less fluid than a justification based on the capabilities approach. This is to be expected: an account which explains most fully what is special about freedom of association gives the most specific shape to a right to freedom of association.³⁹⁰

³⁸⁸ Again, with varying degrees of abstraction.

³⁸⁹ Bogg and Ewing, ‘Muted Voice at Work’ (n 245) 400.

³⁹⁰ Some other theoretical justifications for freedom of association found in labour law literature cover similar, though not identical ground. Eg Bogg and Estlund develop a thick conception of freedom of association underpinned by a right to contest employer power, based on the notion of ‘freedom as non-domination’ as developed by Phillip Pettit: A Bogg and C Estlund, ‘Freedom of Association and the Right to Contest: Getting back to Basics’ in Bogg and Novitz (n 380) 141; P Pettit, *Republicanism: A Theory of Freedom*

I consider the empowerment rationale to be the best account of the three of the right to freedom of association as a moral right. This is because it best reflects the plurality of interest in the freedom to associate—that is all four values in the freedom to associate I identify in Section 1—and in particular explains why it is that we would want protect associational activity without necessarily linking it to some minimum substantive outcomes. It is an account which transcends the ‘civil and political’ and ‘social and economic’ rights distinction, and bridges a ‘human rights’ and ‘labour law’ understanding of freedom of association. It explains how associational activity *at work* is closely linked to values which are understood to underpin human rights, such as dignity, liberty and personal autonomy, and why it is *essential* to protecting those values. Consequently, it justifies why a general human rights instrument should be concerned with providing robust protection for such activity. Whilst the model does not give us all the answers as to what *legal* freedom of association guarantees (whether at national or international level) should look like, it gives us a guiding normative rationale for their future development which indicates an expansion into the realm of positive obligations and more robust protection of collective labour rights.

One thing which this normative model does not in itself explain is the scope for permissible restrictions, ie what kind of reasons justify restriction of the relevant rights

and Government (OUP 1997); P Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012). However, Pettit makes clear that this conception of freedom requires the absence of domination and not the presence of self-mastery in *Republicanism*, 51. As a rationale for freedom of association, it therefore recognises only its role as a shield against powerful entities—the first function identified in *Mounted Police*—but not as a means to self-help and self-determination. It would, to this extent, justify a somewhat thinner fundamental right to freedom of association than the empowerment rationale.

and when and to what extent can these rights be restricted. Since the model seeks to protect certain valuable interests, it would follow that the relevant rights could be restricted where other valuable interests are at stake, such as the security of third parties affected by collective action et cetera. There is no space here to explore in detail the kinds of interests which might justify such a restriction or how they may be weighed against the interests in protecting the right to freedom to associate; suffice it to say that the empowerment model allows for some such restrictions. A right not to join an association is also compatible with the empowerment model, since it also seeks to protect an individual's interest in personal autonomy. However, the empowerment model does require that in balancing competing rights against each other, all *four* interests in the freedom of associate set out above are taken into account (where relevant) – that is, including the valuable interest of workers in participating in decisions which affect them and being able to face the employer on equal terms.³⁹¹ This might imply a different balance between the positive right to freedom of association and its the negative aspect or other fundamental rights to that struck in some of the ECtHR and CJEU case-law discussed in Chapter I.

3. Conclusion

This chapter considered three models of the fundamental human right to freedom of association as a moral right: the 'parallel liberty', 'capabilities' and 'empowerment' models. It argued that the third model is the best of the three, because it best encapsulates

³⁹¹ An interest which was arguably not properly taken into account in *RMT* (n 110) which considered secondary strike action to be an 'accessory' aspect of freedom of association, although in this case it was the only effective way for workers to defend their interests.

the plurality of valuable interests in the freedom to associate. It is the fullest account of the right to freedom of association, and one which establishes a continuity between Kahn-Freund's two aspects of freedom of association as a 'human right' and as a 'labour right.' It justifies why collective labour rights should be considered to be fundamental human rights.³⁹² In that it also provides a moral justification for the specific protection of collective labour rights as essential elements of the right to freedom of association under the ECHR and in EU law, including through a range of positive duties. As noted in Chapter I, this type of justification has so far been absent from the reasoning of the two Courts when interpreting respective freedom of association guarantees. Adopting the empowerment model as the guiding normative (moral) rationale for the development of these guarantees would fill this gap.

Doing so would justify deepening and expanding the protection of collective labour rights under these instruments. The substance of the right to freedom of association would be 'thicker,' in that the provisions would seek to guarantee not only that trade unions and their members be heard, but that they can meaningfully participate in decisions which affect them and meet the employer (or in some circumstances government) on more equal terms. This would suggest, for example, that more robust protection for particular activities which enable such *meaningful* participation—eg secondary strike action—is required;³⁹³ that intrusion into the 'very core' of the right is not limited to completely denying the possibility to undertake collective bargaining or

³⁹² At a certain level of abstraction which leaves scope for different possibilities as to the legal shape of those rights.

³⁹³ Eg this would imply greater protection of secondary strike action than recognised in *RMT* (n 110).

action,³⁹⁴ but to limiting it to an extent which prevents meaningful participation; and that positive obligations to promote collective bargaining should be recognised.³⁹⁵

The empowerment rationale is a moral justification for such a development independent from the question of whether ECHR and EU freedom of association norms should be interpreted *by reference to* ILO and/or ESC norms and other relevant norms such as the CFREU. It primarily addresses what I described in the introduction as substantive questions, that is, what level of protection the ECHR and EU human rights law should accord to collective labour rights regardless of the provisions of other international instruments. However, what I am interested in here are the implications of adopting the empowerment model for the institutional concern identified in Chapter I. Interpreting ECHR and EU freedom of association guarantees in a more expansive manner than has been the case until now, as the empowerment model would imply, would at the very least narrow the gap between the level of protection under these systems and parallel ILO and ESC guarantees. This would go some way to addressing the institutional concern, given that one of the elements of that concern is the disparity in the level of protection between instruments and the danger of levelling-down of standards.

However, adopting the empowerment model has further implications in this regard. Because it breaks down the divide between a ‘human rights’ and ‘labour law’

³⁹⁴ By contrast to *UNITE* (n 116), which appears to suggest that only circumstances as extreme as those in *Demir* intrude into the very core of the right.

³⁹⁵ Again by contrast to *UNITE* (n 116), where the recognition of such duties was denied.

aspect of freedom of association, it establishes a connection between ‘human rights’ and ‘labour law’ norms in this field. It explains that there is overlap between these norms not only in terms of subject-matter, but concern for protecting valuable interests in the freedom to associate, that is overlap in normative foundations: both the general human rights instruments and specialist labour and social rights instruments discussed here are concerned with protecting the ability of workers to advance their interests through particular collective activities. This ‘connection’ justifies reference to specialist labour and social rights instruments in the interpretation of general human rights instruments. The Courts have not thus far explicitly engaged with this connection; on the contrary, the ECtHR has only referred to the differences between the ECHR and ESC as a social rights instrument as a reason not to align standards. This chapter has sought to show that this is, by itself, not a good argument against according the same level of protection if to do so is normatively desirable from a moral standpoint.

Furthermore, as argued above, the empowerment model is formulated at a level of abstraction which leaves a number of legitimate possibilities as to the shape of the *legal* guarantees of the right to freedom of association. The Courts might therefore usefully refer to ILO Conventions 87 and 98 and Articles 5 and 6 ESC—as specialist and more detailed legal norms which reflect the empowerment rationale—as key sources of authority in ‘crafting’ the legal shape of Article 11 ECHR and Articles 12 and 28 CFREU. This crafting process would, if the empowerment rationale were adopted, be driven not merely by anti-fragmentation objectives—ie seeking a convergent interpretation *simply because* differences between these guarantees lead to uncertainty, conflict and confusion—but a moral concern with protecting collective labour rights as basic human

rights through appropriate legal guarantees. It is in this sense that the empowerment rationale provides a *deeper* justification for the interpretation of ECHR and EU freedom of association guarantees by reference to ILO and ESC norms than the anti-fragmentation rationale. The anti-fragmentation rationale is an additional argument in favour of convergence.

However, neither the empowerment nor the anti-fragmentation rationale implies that there must be complete convergence between various provisions. Precisely because the empowerment model allows for differences, there is space to justify divergences between norms which arise from the fact that these were drafted and are interpreted and applied in a different institutional context. An anti-fragmentation rationale for seeking convergence would also allow space for differences where these can be justified, since issues of uncertainty and confusion would then be less acute. However, taken together the empowerment and anti-fragmentation rationales suggest that the Courts should in general seek a convergent interpretation and look to these instruments as important sources of authority, and advance good reasons for departing from them or treating them as of lesser persuasive weight in determining the legal shape of ECHR and EU freedom of association guarantees.

Such an approach would address the institutional concern not only because the *level* of protection would converge with ILO and ESC norms, but also because these specialist instruments would play a key role in shaping legal freedom of association guarantees under the ECHR and EU legal regimes. It would address the concerns expressed in Chapter I, namely a levelling-down of protection, displacement and

marginalisation of specialist instruments by more prominent human rights instruments, and uncertainty created by the lack of a systematic approach to using specialist norms in the interpretation of ECHR and EU freedom of association guarantees. In the remainder of this thesis I explore how this approach can be implemented in practice. I proceed on the premise that the empowerment model should be adopted as the guiding normative rationale for the development of the substance of ECHR and EU freedom of association guarantees. On this basis I consider the interpretive tools available to the ECtHR and CJEU to develop respective freedom of association guarantees in accordance with this model and by reference to ILO and ESC norms; and features of these legal orders which justify a divergent approach to interpreting and enforcing these guarantees.

Part C: The Right to Freedom of Association under Article 11

ECHR

This part considers how Article 11 ECHR can be interpreted in closer alignment with ILO and ESC norms, which the previous chapter argued is desirable from a normative standpoint, as well as in light of anti-fragmentation objectives. For the sake of clarity, I make the following distinction between different aspects of the interpretation of Article 11: definition of general principles and application. The former refers to the determination of general principles pertaining to the meaning of Article 11, such as, for example, what collective activities are protected, which rights are ‘essential,’ how specific categories of workers are defined, defining (the types of) duties which arise from Article 11 etc. By ‘application’ I mean the application of these principles to the *particular* case, that is in assessing whether the measure in question is a restriction on Article 11(1) rights and whether such a restriction can be justified under Article 11(2).³⁹⁶ What is considered a restriction and how much scope there is for states to justify such restrictions has implications for the substantive scope of protection of Article 11, as well as questions of general principle. Discrepancies in the scope of protection as between Article 11 and parallel ILO and ESC norms can arise both in the definition of general principles and their application. For example, until *Demir* the fact that Article 11 did not specifically protect a right to collective bargaining was a difference in interpretation which related to the definition of general principles; whereas the discrepancy in *RMT*—that the UK ban on secondary strikes was held to comply with Article 11 whereas it has been held to

³⁹⁶ The Court itself often makes this distinction in its judgments, eg in *Demir* (n 107), *RMT*(n 110).

breach the ESC—was a question of application, since Article 11 was in that case held, as a matter of general principle, to protect secondary strike action.

Chapter III asks how greater convergence in interpretation can occur in accordance with the interpretive principles applicable to the Convention and interpretive practice of the Court. It argues that, apart from as evidence of ‘international consensus’, ILO and ESC materials have and should continue to play a key role as sources of authority, or ‘aids’ to the development of Article 11. Where the Court considers these materials to be of less persuasive weight and chooses to adopt an approach which diverges from these international standards, it should justify this decision by reference to good reasons, such as relevant differences between the systems or instruments. I set out a non-exhaustive list of such reasons. Chapter IV then engages in more detail with one such reason, namely the fact that the ECtHR is an international court and not an expert committee, and thus subject to different institutional limitations. It argues that whereas this should not be a reason against convergence in interpretation where general principles are concerned, there may be good reasons for the Court to show greater restraint than ILO and ESC Committees in the application of these principles. It proposes how the Court should take various reasons to exercise judicial restraint into account in the determination of the margin of appreciation left to the state when assessing compliance with Article 11.

III. Convergence in Interpretation

The interpretive principles applicable to the Convention can be summarised as follows. As established in *Golder v United Kingdom*, the interpretive principles laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) are relevant to the interpretation of the ECHR.³⁹⁷ This was confirmed in *Demir*, which stated that ‘in order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in arts 31–33’ of the VCLT.³⁹⁸ The starting point for the Court is therefore the general rule of interpretation in Article 31(1) VCLT, according to which ‘the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn.’³⁹⁹ Article 31(2) and (3) further specify, respectively, what ‘context’ means and factors to be taken into account together with the context in the application of the general rule. Article 32 specifies when regard can be had to supplementary means of interpretation.

However, given the special character of the Convention as a ‘a treaty for the collective enforcement of human rights and fundamental freedoms,’⁴⁰⁰ the Court has developed additional specific interpretive tools.⁴⁰¹ Letsas notes that ‘close as its methods

³⁹⁷ (1979-80) 1 EHRR 524 [29].

³⁹⁸ *Demir* (n 107) [65]; restated in *RMT* (n 110) [76].

³⁹⁹ *ibid.*

⁴⁰⁰ *Soering v United Kingdom* (1989) 11 EHRR 439 [87].

⁴⁰¹ A Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 HRLR 57; J Gerards, ‘The European Court of Human Rights’ in A Jákab, A Dyevre and G Itzcovich (eds), *Comparative Constitutional Reasoning* (CUP 2017) 237, 255-258; G Letsas, *A Theory of the Interpretation of the European Convention on Human Rights* (OUP 2007) 59.

are to the general rule of purposive interpretation under Art 31 VCLT, the European Court has created its own labels for the interpretative techniques that it uses.⁴⁰² The most prominent of these techniques applied to its Article 11 case-law, highlighted in Chapter I, is the Court's 'living instrument' or 'dynamic' or 'evolutive' interpretation, that is the idea that the Convention must be interpreted in light of present-day conditions.⁴⁰³ Another important principle is that the Court must interpret the Convention in a way which 'renders its rights practical and effective, not theoretical and illusory.'⁴⁰⁴ These two interpretive methods can perhaps be understood as a facet of interpretation in light of 'the object and purpose' of the treaty specific to the ECHR as a (regional) human rights instrument.⁴⁰⁵

This chapter explores the role which international materials—here ILO and ESC materials—have played in the application of these interpretive principles, with a specific focus on the Article 11 case-law discussed in Chapter I. On this basis, it suggests how these materials can be invoked to achieve greater convergence between Article 11 and freedom of association guarantees in the specialist labour and social rights instruments. I distinguish between two main ways in which the Court has referred to international instruments in the relevant line of case-law. Section 1 discusses the role of international materials as evidence of 'emerging common ground' or 'international consensus'. I

⁴⁰² Letsas (n 401) 59.

⁴⁰³ First developed in *Tyrrer* (n 91). For current purposes, these terms are treated without distinction. In the Court's jurisprudence, the 'living instrument' doctrine and interpretation of present-day conditions is used synonymously with 'evolutive' interpretation, Letsas (n 401) 65.

⁴⁰⁴ See eg *Demir* (n 107) [67]; identified as an interpretive method by Mowbray (n 401) 72, Gerards (n 401) 256 and Letsas 59.

⁴⁰⁵ See Rainey et al (n 89) 72. Letsas (n 401) discusses the idea of 'autonomous concepts' as another interpretive technique, which is not discussed here because it does not feature in the relevant Article 11 jurisprudence.

argue that whilst the role of international materials in this respect has been very important in the development of Article 11, the potential to use this tool to achieve convergence between Article 11 and ILO and ESC norms is limited.

Second, the Court has made use of international materials other than as evidence of consensus, but more generally as ‘aids to interpretation’ of variable degree of prominence in its reasoning. However, it has rarely made its reasons for doing so explicit. In Section 2 I advance a hypothesis for the Court’s approach in this regard. I argue that, on the basis of the case-law to date, the Court has primarily had regard to specialist instruments where it has not been able to resolve a question of interpretation by reference to Convention alone, and where this has enabled it to further its ‘object and purpose’ of ensuring effective human rights protection. That is, the Court has looked to specialist labour and social rights instruments to supplement a teleological interpretation of the ‘incomplete’ and open-ended text of Article 11. The ‘principle of systemic integration’ expressed in Article 31(1)(c)—that is the pursuit of anti-fragmentation objectives—might be invoked as an additional interpretive principle which justifies reference to international materials as aids to interpretation.

I argue that in light of these conclusions, the Court can use ILO and ESC materials as aids to interpretation as well as evidence of consensus in expanding the scope of Article 11 as suggested in Chapter II. However, I acknowledge that the Court has shown different degrees of receptivity to international materials as aids to interpretation. I therefore consider factors which affect the degree of ‘usefulness’ of ILO and ESC materials as aids to interpretation, that is how much weight they are accorded as sources

of authority in the interpretation of Article 11. These factors affect the degree of convergence which can be achieved through the application of the interpretive principles considered; where factors indicate that these materials are of less persuasive weight, the Court has more scope to develop a divergent approach.

The analysis in this chapter draws on a comprehensive study of the Court's Article 11 case-law with a view to ascertaining the role that international materials have played in the development of the rights of trade unions and their members under the Convention.⁴⁰⁶ One conclusion of this study, which should be mentioned at the outset, is that *Demir* does not seem to have established a new, 'integrated' or 'consolidated' interpretive methodology requiring the ECtHR to interpret the Convention in line with other international instruments.⁴⁰⁷ The Court does not directly integrate or 'embed' external norms into its jurisprudence. In many of the judgments following *Demir*, the Court makes no reference to international materials at all,⁴⁰⁸ a number of them explicitly reject the usefulness of such materials to a given case⁴⁰⁹ or choose to adopt a different interpretation of Article 11.⁴¹⁰ In only one pre-*Demir* case does the Chamber 'subscribe' to the interpretation of the ECSR;⁴¹¹ in one post-*Demir* case the Chamber saw 'no reason

⁴⁰⁶ This is a study undertaken as part of my MPhil thesis submitted in 2016, 'The Integrated Approach to Interpretation of the European Convention on Human Rights,' plus an additional analysis of more recent cases. The study encompasses all Article 11 judgments on the right to freedom of association of trade unions and/or their members which I could find through a search in the ECHR HUDOC database until June 2019.

⁴⁰⁷ As claimed by K Lörcher, 'The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): the "Demir and Baykara" Judgment, its Methodology and Follow-up' in F Dorsemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart 2013) 3; and K Ewing and J Hendy 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 ILJ 2.

⁴⁰⁸ Eg *Sisman* (n 64), *Veniamin Tymoshenko* (n 126), *Hrvatski Lijecnicki Sindikat* (n 126).

⁴⁰⁹ Eg *RMT* (n 110) [98], on the finding of violation; *UNITE* (n 116) [61] on positive obligations.

⁴¹⁰ *Matelly* (n 160); *Adefdromil* (n 159).

⁴¹¹ *Tüm Haber Sen* (n 161) [38-39].

to depart from' from the views expressed in Recommendation (2001) 10 of the Committee of Ministers on a particular point;⁴¹² and in another it saw no reason 'to reject the existing international approach to the definition of an essential service.'⁴¹³ However, in general my study revealed that post-*Demir*, as pre-*Demir*, the Court incorporates international materials in its reasoning only in some cases and appears to accord different weight to them in a way which, at least on its face, can appear inconsistent.⁴¹⁴ This trend is confirmed by broader analyses of the Court's case-law from this perspective.⁴¹⁵ This chapter attempts to identify and explain how some of the patterns of reference to international materials in this case-law map onto established interpretive techniques.

1. International Materials as Evidence of Consensus

The concept of 'consensus' can be described as a tool of interpretation which the ECtHR uses in its decision-making.⁴¹⁶ 'Consensus' is not defined in ECtHR jurisprudence and the Court has often used different terms to indicate what is effectively the presence or

⁴¹² *Junta Rectora* (n 158) [40].

⁴¹³ *Ognevenko* (n 137) [72].

⁴¹⁴ Eg the use of international instruments is more prominent in *Sigurjonsson* (n 90) and *Demir* (n 107) than cases such as *Wilson* (n 84), *ASLEF* (n 106), *Enerji* (n 123), *Ólafsson* (n **Error! Bookmark not defined.**) which only 'recall' or 'note' international standards; the Court in *RMT* (n 110) pays heed to ILO and ESC materials with respect to the recognition of a right to strike but not on the question of violation.

⁴¹⁵ On Article 8, A Mowbray, 'The European Court of Human Rights' Recourse to External Legal Materials When Interpreting and Applying the Right to Private Life' in C Buckley, A Donald and P Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Nottingham Studies on Human Rights, 2016) 131; more broadly, R Nordeide, 'The ECHR and its Normative Environment: Difficulties Arising from a Regional Human Rights Court's Approach to Systemic Integration' in O K Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 117; and M Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010).

⁴¹⁶ K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 1.

absence of ‘common ground’ between Member States.⁴¹⁷ It has referred to, amongst other formulations, ‘a growing measure of common ground,’⁴¹⁸ ‘a growing measure of agreement,’⁴¹⁹ as well as evolving ‘consensus.’⁴²⁰ It has looked at the emergence of common ground at domestic level (between the laws and practices of states parties) and at the international level (between various international legal instruments).⁴²¹ I consider only the role of the latter, ‘international consensus’, in Article 11 jurisprudence (a), and its usefulness to achieving a convergent interpretation (b).

a. The role of international consensus in Article 11 jurisprudence

In this line of case-law, the Court has used the concept of ‘international consensus’ in its application of the ‘living instrument’ doctrine, and in determining the breadth of the margin of appreciation of the state, that is the leeway left to the state in assessing whether it has complied with its Convention obligations. The concept has played a role in the application of the ‘living instrument’ doctrine expressly on two occasions. In *Sigurjonsson*, the Court found that international materials denoted the emergence of a ‘growing measure of common ground’ indicating that the right to freedom of association includes a negative aspect.⁴²² It referred to a very broad range of materials, in particular to the interpretation of Article 5 ESC by the ECSR, its conclusions against Iceland, Recommendation 1168 (1991) of the Council of Europe as well as Article 11(2) of the

⁴¹⁷ See eg *Dzehtsiarou* (n 416) 11.

⁴¹⁸ *Sigurjonsson* (n 90) [35].

⁴¹⁹ *Demir* (n 107) [77].

⁴²⁰ *Demir* (n 107) [85].

⁴²¹ See eg *Sigurjonsson* (n 90) [35]. For a more detailed typology of ‘consensus’, *Dzehtsiarou* (n 416) Ch 3.

⁴²² *Sigurjonsson* (n 90) [35].

Community Charter of the Fundamental Rights of Workers 1989, a European Community non-binding instrument.⁴²³ This position is not shared by the ILO,⁴²⁴ but the Court in *Sigurjonsson* got around this point by referring to CFA decisions that union security clauses imposed (rather than allowed) by law are contrary to the principles of freedom of association.⁴²⁵ Thus, despite the fact that a negative right to association had been omitted from the *travaux préparatoires* of the Convention, the Court developed its case-law to reflect the position of (some) other international instruments.

As explained in Chapter I, international consensus played a significant role in the recognition of the right to collective bargaining as an essential element of Article 11. It is stated in §§ 85-86 of *Demir* (extracted in Chapter I) that the Court ‘can and must take into account elements of international law’ and that the ‘consensus emerging from specialised international instruments...may constitute a relevant consideration for the Court.’ The Court examined ILO Conventions 98 and 151 and pronouncements of the CEACR, Article 6 (2) ESC (which Turkey had not ratified) and its interpretation by the ECSR, Article 28 CFREU and European practice to come to the conclusion that the right to collective bargaining had *become* one of the essential elements of Article 11.⁴²⁶ The language of ‘consensus’, ‘evolution’ and ‘common ground’ suggests that it is through the application of its living instrument doctrine that the Court decided to reverse its previous case-law;⁴²⁷ it states also that ‘a failure by the Court to maintain a dynamic and

⁴²³ *Sigurjonsson* (n 90) [35].

⁴²⁴ See Chapter I.

⁴²⁵ *Sigurjonsson* (n 90) [35]; see Compilation of CFA decisions (n 22) [552].

⁴²⁶ *Demir* (n 107) [147-154].

⁴²⁷ *ibid* [153].

evolutive approach would risk rendering it a bar to reform or improvement.⁴²⁸ It appears, therefore, that it was the presence of *consensus* which was of normative significance in the case, and not merely the *existence* of specialised international instruments in this area.

It is not entirely clear whether the recognition that the right to strike is protected by the ECtHR is also the result of consensus-based reasoning. *Enerji* accepts that the right to strike is protected by the Article 11 but refers to *Demir* as far as the role of international instruments in ECHR interpretation is concerned.⁴²⁹ *RMT* states that it would be inconsistent with the method set out in *Demir* 'to adopt in relation to art 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.'⁴³⁰ In that paragraph it only mentions ILO Convention 87 and ESC as instruments which protect secondary strike action, rather than to the broad range of sources referred to in *Demir* and *Sigurjonsson*. A similar reference to *Demir* can be seen in *Sindicatul 'Pastorul Cel Bun' v Romania*, which states that it 'will apply the criteria laid down in the relevant international instruments,' these being only ILO Employment Relationship Recommendation No 198, Article 2 of ILO Convention 87 and Directive 78/2000/EC.⁴³¹ It is possible to read *RMT* and *Sindicatul Pastorul* as referring to these sources as an aid to interpretation other than evidence of consensus. As will be explained in the next sections, these are different lines of reasoning

⁴²⁸ *Demir* (n 107) [153-154].

⁴²⁹ *Enerji* (n 123) [24].

⁴³⁰ *RMT* (n 110) [76].

⁴³¹ (2014) 58 EHRR 10 [142]; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

and the Court would do well to provide further clarification of its rationale when referring to international materials.

In any event, on at least two significant occasions, international consensus has been the driving force behind the convergence of Article 11 with other international norms. Conversely, the *lack* of international consensus has been cited as a reason not to adopt an interpretation of ‘members of administration of the state’ which would align with ILO norms in the GCHQ case.⁴³² This case emphasises the normative importance attached to the presence of ‘consensus’, though it is an older case which can be contrasted with the more recent judgment in *Tüm Haber Sen and Çınar v Turkey*.⁴³³

International consensus has also been relevant to determining the margin of appreciation of the state, which is reduced—ie the state has less discretion in implementing Convention rights—where such consensus is present.⁴³⁴ In *Sørensen and Rasmussen* the Court took account of the ‘changing perceptions’ in the relevance of closed-shop agreements in determining whether the state had acted within its margin of appreciation.⁴³⁵ It referred to conclusions of the ECSR regarding an infringement of Article 5 ESC by Denmark, as well as Article 12 CFREU and the CCFSRW.⁴³⁶ It did not

⁴³² *Council Of Civil Service Unions And Others v United Kingdom* (Admissibility) (1988) 10 EHRR CD269; held that differences in phrasing indicated that ‘there can be no settled view under international law as to the position of members of the ‘administration of the State’ in respect of trade union rights, and that these instruments cannot therefore be of assistance to the Commission in the present case,’ 288.

⁴³³ *Tüm Haber Sen* (n 161) [38-39]. ILO Convention 87 and the interpretation of Article 5 ESC by the ECSR were given significant—determinative—weight in interpreting the meaning of ‘members of the administration of the state’.

⁴³⁴ *RMT* (n 110) [86]. The margin of appreciation doctrine is discussed in more detail in Chapter IV.

⁴³⁵ *Sørensen* (n 95) [58].

⁴³⁶ *ibid* [72-76]. It concluded that these instruments indicated that the use of closed-shop agreements in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms, [75].

mention the fact that the ILO regards closed-shop agreements to be a matter for regulation at national level.⁴³⁷ In *RMT*, the Chamber considered the negative assessments of both the ECSR and the CEACR of the UK ban on secondary strike action, but concluded that these were ‘not of such persuasive weight’ for determining whether the ban on secondary strikes fell within the margin of appreciation of the state.⁴³⁸ The reason advanced seems to be that these bodies review domestic legislation in the abstract whereas the ECtHR determines whether the manner in which it is applied infringes the rights of the particular applicant.⁴³⁹ In other words, although international consensus at some level was present, it was not determinative of the margin of appreciation in this case.

A range of instruments were invoked in *UNITE* to support the claim that ‘international consensus’ on the point considered should reduce the state’s margin of appreciation. The Chamber concluded that the international consensus denoted by ILO Conventions of a ‘more technical nature’ was of lesser significance when determining the breadth of the margin.⁴⁴⁰ It is unclear what exactly the Chamber meant by Conventions of a ‘more technical nature,’⁴⁴¹ but it used this designation to refer to Conventions 99,⁴⁴² 101⁴⁴³ and 154.⁴⁴⁴ It also referred to the rates of ratification of

⁴³⁷ Although this information was presented before the Court, *Sørensen* (n 95) [38].

⁴³⁸ *ibid* [98].

⁴³⁹ *ibid*.

⁴⁴⁰ *UNITE* (n 116) [63].

⁴⁴¹ Possible explanations of this term are discussed in Section 2.c.iv.

⁴⁴² Minimum Wage Fixing (Agriculture) Convention 1951 (No 99).

⁴⁴³ Holidays with Pay (Agriculture) Convention 1952 (No 101).

⁴⁴⁴ Collective Bargaining Convention 1981 (No 154).

Conventions 99 and 101 as ‘clearly insufficient to show anything approaching a “consensus”’.⁴⁴⁵ The Chamber refused to hold that the margin was reduced in light of Article 6 ESC and ILO Convention 98, stating that Article 6 ‘does not require states to put in place mandatory collective bargaining bodies’ and that Convention 98 ‘leaves much discretion as to which measures are appropriate to national conditions.’⁴⁴⁶ This implies that it was looking for consensus on a more *specific* obligation on states to promote collective bargaining in a *particular* way. It referred also to the fact that Article 28 CFREU does not require that the rights contained therein be promoted – a questionable conclusion given that Article 51(1) CFREU obliges Member States to ‘respect the rights, observe the principles and *promote* the application thereof.’

There is a marked difference in the way in which international consensus is examined in *RMT* and *UNITE* vis-à-vis the earlier cases. The Chamber in both cases appears to set a higher threshold of what is considered relevant to the finding of consensus, and distinguish between the relative weight of different types of materials—something notably absent from *Sigurjonsson*, *Demir* and *Sørensen and Rasmussen*. One explanation is that, because the assessment is undertaken at the stage of considering whether a *particular* measure violates the right to freedom of association in these particular circumstances, the consensus sought must be on a more specific—less abstract and open-ended—question of whether such a measure is incompatible with the right to freedom of association. This makes some sense, but it does limit the circumstances in which international consensus will reduce the margin of appreciation. This is because

⁴⁴⁵ *UNITE* (n 116) [63].

⁴⁴⁶ *ibid* [61], [63].

these international instruments are generally not very prescriptive on particular points but assess the individual case against the yardstick of vague standards. Whilst this reading of the cases is not incompatible with *Sørensen and Rasmussen*, that case conducts a much looser assessment of international materials and does not assess relative weight or level of detail. A less generous reading would be that the Chamber applied a narrower conception of consensus to avoid a politically contentious result.⁴⁴⁷

b. Convergence through ‘consensus’

This case-law shows that ‘international consensus’ has been a driver of convergence as far as more abstract general principles are concerned: that the right not to join a trade union and the right to bargain collectively are essential elements of Article 11 and, possibly, that the right to strike is protected. Its usefulness beyond this general level is unclear. If anything, the cases relating to the margin of appreciation suggest that the more *specific* the alleged obligation of the state to do or not to do something, the more specific—and therefore less likely—the point of consensus needs to be. This is consistent with the findings made by Dzehtsiarou that the ‘choice of the level of abstraction’ of the concept of consensus has an impact on the outcome of a case: the more specific the rule under consideration, the more difficult it is to establish consensus⁴⁴⁸ This means that, as the Court moves beyond these general principles to elaborate on the content of Article 11 with greater precisions, it will become more difficult to find the necessary

⁴⁴⁷ For an argument that *RMT* and *UNITE* are politically motivated decisions because of the animosity in the UK towards the ECHR, Ewing and Hendy, ‘The Trade Union Act’ (n 168). On the difficult relationship between the UK and ECtHR generally, E Bates, ‘The UK and Strasbourg: A Strained Relationship - The Long View’ in K Ziegler, E Wicks and L Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 39.

⁴⁴⁸ Dzehtsiarou (n 416) 15-16.

‘international consensus’ as between different freedom of association-related norms found in other international law.

There are two further practical limitations to using this concept to achieve convergence between norms. The first is that there are methodological difficulties and uncertainty over how the presence of ‘international consensus’ is to be determined. The Court has not explicitly defined the term ‘consensus,’ but it is clear that it does not mean ‘unanimity.’⁴⁴⁹ Dzehtsiarou argues that ‘the Court is not looking for identical legal rules but rather tracing a convergence among States.’⁴⁵⁰ In *Sørensen and Rasmussen* the Court refers to ‘changing perceptions’; in *Demir* to ‘continuous evolution.’ An applicant invoking the living instrument doctrine will not have to show that international documents are in agreement—here on freedom of association-related norms—but merely that they are developing in the same direction.

However, it is unclear, as the case-law of the Court stands at the moment, to what range of materials the Court must have regard when establishing international consensus in this field (eg can it only look at ILO and ESC materials or also EU materials and UN Covenants), what types of materials are admissible as evidence of consensus and whether there is a hierarchy between them (eg text of international instruments, binding or non-binding interpretation, recommendations), and *how much* agreement there must be between them. It is also unclear whether there is a hierarchy between

⁴⁴⁹ Eg A Kovler, ‘The Role of Consensus in the System of the European Court of Human Rights’ in *Dialogues between Judges* (Council of Europe, Strasbourg 2008) 27; Dzehtsiarou (n 416) 10-12.

⁴⁵⁰ Dzehtsiarou (n 416) 12.

international consensus and consensus derived from the laws of Member States.⁴⁵¹ As argued above, the ‘level’ or subject matter of consensus—ie agreement *as to what*—appears also to be a significant question on which there is no specific guidance. *Sigurjonsson* and *Demir* take a broad and loose approach to these questions, whereas *Sorensen and Rasmussen* and *RMT* look at a narrower range of instruments and *UNITE* for the first time makes distinctions between different types of sources. Even if there is some logical explanation for this, it is not explicit and so there is no reliable guidance for future cases.

This is not a problem confined to Article 11 or the establishment of ‘international’ consensus. The lack of transparency in the Court’s methodology in identifying consensus across the board has been criticized and identified as a threat to the legitimacy of the Court.⁴⁵² Dzehtsiarou argues that there are still a number of challenges it needs to address when it applies comparative legal analysis.⁴⁵³ The concept of international consensus can only be meaningful and legitimate if the Court improves the consistency and predictability of its judgment in this regard.⁴⁵⁴ At the moment, a strategy which aims to achieve convergence between Article 11 and other international norms on this basis seems uncertain and unreliable, at the very least. It is difficult, at times, to dispel the impression that the Court is cherry-picking its sources to support either an expansive or

⁴⁵¹ Dzehtsiarou (n 416) 57-59.

⁴⁵² See in particular Dzehtsiarou (n 416) 78-81; PG Carozza, ‘Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights’ (1997-1998) 73 *Notre Dame Law Review* 1217, 1225; L Wildhaber, A Hjartarson and S Donnelly, ‘No Consensus on Consensus? The Practice of the European Court of Human Rights’ (2013) 33 *HRLR* 248.

⁴⁵³ Dzehtsiarou (n 416) 101.

⁴⁵⁴ See *ibid* Ch 5.

restrictive interpretation depending on the prevailing currents in judicial thinking at the time. That may well not be the case, but the lack of an explicit methodology makes it impossible to convincingly show otherwise.

Second, even assuming that it is sufficient to look only at ILO and ESC norms in establishing 'international consensus,' the concept is only helpful in so far as these norms are in agreement in some loose sense of that word, or developing in the same direction. This is the case, for example, with respect to the importance of the right to strike as an element of freedom of association and that secondary strike action is protected;⁴⁵⁵ but the ESC protects only strike action in the context of conflict of interests, not in the broader sense as a form of political protest against government policy. Article 31 ESC /Article G RESC allows broader scope for restrictions of the right to strike than those permitted by the ILO.⁴⁵⁶ The ESC recognizes positive obligations to establish collective bargaining machinery only, whereas Article 3 of Convention 98 which refers to machinery for ensuring respect for the right to organise more broadly. CFA case-law recognises a principle of bargaining in good faith,⁴⁵⁷ whereas this does not feature in ESCR Article 6 jurisprudence.⁴⁵⁸ Both instruments consider compulsory arbitration to be a *prima facie*

⁴⁵⁵ Importantly, secondary strike action appears to be protected to a greater degree under these instruments than under the ECHR, as discussed in Chapter I.

⁴⁵⁶ Though the ECSR has also developed a concept of 'essential services', Digest of ECSR case-law (n 23) 105; Conclusions I - Statement of interpretation - Article 6(4).

⁴⁵⁷ Compilation of CFA decisions (n 22) [1327-1341]. This does not imply that state parties must necessarily enact a legislative duty to bargain in good faith.

⁴⁵⁸ Digest of ECSR case-law (n 23) 98-107.

violation of the right to collective bargaining,⁴⁵⁹ but they diverge on the permissible scope of so-called 'peace obligations.'⁴⁶⁰

These are only a few randomly selected differences and similarities. Norms under the two instruments will diverge due to textual differences, asymmetries in the case-law (the case-law of each body might be more or less developed with respect to a particular point), or differences in opinion (eg on the protection of the right not to join a trade union). Where the two overlap but the ILO provides broader protection, perhaps an argument can be made that there is consensus to the extent of ESC protection. Where one instrument protects a certain aspect of the right and the other is silent, the concept of international consensus is not helpful without at least looking at other international instruments. Other international norms in the field are, however, likely to relate only to more abstract, general principles since there are no other bodies with such an extensive body of case-law on the subject. Where ILO and ESC norms show a clear difference, given that they are the most specialist instruments in the field, it is unlikely that the Court will consider there to be 'consensus'. In these latter two cases the fact that ILO and ESC standards on the topic exist is, without support in other international or domestic law, meaningless to the Court for the purposes of the 'living instrument' or 'margin of appreciation' doctrine. Indeed, particularly where the two show clear differences, the absence of consensus could be a justification for the Court *not to* develop its

⁴⁵⁹ Compilation of CFA decisions (n 22) [1415-6]; Digest of ECSR case-law (n 23) 101, 105.

⁴⁶⁰ In conformity with Article 6(4) ESC, Digest of ECSR case-law (n 23) 106; but not permitted with respect to protest against government social and economic policy according to the CEACR, *General Survey on Freedom of Association and Collective Bargaining* (1994). Novitz (n 14) argues that this is due to the fact that the right to strike under Article 6(4) ESC relates to collective bargaining only, 283-4.

jurisprudence in a certain way.⁴⁶¹ In particular, the absence of ‘consensus’ can be invoked as a reason not to develop Article 11 to reflect *either* ESC *or* ILO norms, even if to do so would expand protection under the ECHR.

Thus, there is only limited scope for convergence to take place by reference to the concept of international consensus, even on a broad reading of that concept. Consensus is more likely to be found in relation to more general questions such as, for example, whether the right to strike is an essential element of the right to freedom of association; a finding of consensus is less likely the more specific the question becomes, either because there is no agreement between the two systems, or because there are no pronouncements on the issue under one of the systems. This does not mean that ILO and ESC materials cannot inform the development of ECHR principles in other ways. Close analysis of the case-law demonstrates that these have been used as sources of authority, to differing degrees, in the interpretation—both in the definition of general principles and their application—of Article 11 quite apart from constituting evidence of consensus.

2. International Materials as an Aid to Interpretation

The use of international materials in the Court’s case-law apart from as evidence of consensus is, at first glance, not straightforward or systematic. As has already been mentioned,⁴⁶² the Court does not always refer to external materials, even if those have been presented to it;⁴⁶³ it has also explicitly said that it is not bound by and will not follow

⁴⁶¹ Eg GCHQ case (n 432).

⁴⁶² See discussion above and fn 408 - 414; Chapter I.2.b.

⁴⁶³ Eg *Veniamin Tymoshenko* (n 126).

the approach of other bodies.⁴⁶⁴ It has, albeit rarely, effectively endorsed the interpretation of particular terms by other bodies;⁴⁶⁵ it has acknowledged that ILO and ESC bodies are a 'point of reference and guidance';⁴⁶⁶ and it has looked to ILO and ESC materials for confirmation of its conclusions after employing Convention-based arguments first, by 'noting' or 'recalling' the relevant standards.⁴⁶⁷ In many cases it is impossible to deduce how much weight is attached to international materials due to the sparse reasoning of the Court or Chamber, as in the 'consensus' cases.⁴⁶⁸ To use Forowicz's terms, the Court swings between a 'closed' and 'open paradigm', with varying degrees of 'openness' and without much transparency.⁴⁶⁹

This section considers two hypotheses as to why the Court refers to international materials, apart from as evidence of consensus, and whether these go some way to explaining the patterns of use of international documents in the case-law: that the Court refers to international materials in the pursuit of 'systemic integration'; or that it only draws on such materials where it is difficult or impossible to give meaning to the provisions of the Convention on the basis of other interpretive principles. I argue that the Court has recourse to external materials primarily in the latter case, as a supplement

⁴⁶⁴ *RMT* (n 110) [98]; *UNITE* (n 116) [61]; *Adefromil* (n 159); *Matelly* (n 160).

⁴⁶⁵ *Tüm Haber Sen* (n 161), *Junta Rectora* (n 158), *Sindicatul Pastorul* (n 431); *Demir* on 'members ... of the administration of the state' (n 107) [98-107]; *Ogvenenko* (n 137).

⁴⁶⁶ *RMT* (n 110) [97]; *UNITE* (n 116) [61] acknowledges that the ESC can provide 'some guidance.'

⁴⁶⁷ Eg *Wilson* (n 84) [48]; *Gustafsson* (n 84) [53]; *Enerji* (n 123) [24]; see also *Ólafsson* (n **Error! Bookmark not defined.**) [53] which states that it has 'also had regard to' ESCR and CFA jurisprudence.

⁴⁶⁸ Eg *Cheall v United Kingdom* (1986) 8 EHRR CD74 [4] only states that Articles 3 and 5 of Convention 87 'must be taken into account in the present context'; *ASLEF* (n 106) [38] acknowledges that these Articles have been taken into account in previous cases, referring to *Wilson* (n 84) and *Cheall*.

⁴⁶⁹ Forowicz (n 415) 4-5; 'open paradigm' is 'characterised by a high level of judicial activism and unhindered references to international law, whereas 'closer paradigm' is 'marked by judicial restraint and few references to international law.'

to a teleological interpretation, although systemic integration objectives might play an additional role. I then set out a number of variables which might influence the receptivity of the Court towards ILO and ESC materials in this regard.

a. Systemic integration

A possible explanation for the increasing reference to international materials is that the ECtHR is pursuing anti-fragmentation or ‘systemic integration’ objectives. In his report on fragmentation in international law, Koskenniemi refers to ‘systemic integration’ as ‘the process...whereby international obligations are interpreted by reference to their normative environment (“system”).’⁴⁷⁰ Article 31(3)(c) VCLT— which provides that ‘any relevant rules of international law applicable to the relations between the parties’ shall be taken into account in interpreting international treaties (together with the context of these treaties)—is said to express the ‘principle of systemic integration.’⁴⁷¹ McLachlan has argued that this principle could be a possible response to some of the issues arising from fragmentation in international law, although ‘certainly not a universal panacea’ in this regard.⁴⁷²

One hypothesis for the Court’s increased interest in international materials is that it is seeking to apply the principle of systemic integration and thereby to ensure that ECHR norms do not develop in a vacuum and conflict with other international law. After

⁴⁷⁰ Koskenniemi (n 6) para 413.

⁴⁷¹ *ibid*; for more detailed analysis, C McLachlan, ‘The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention’ (2005) 54 *International & Comparative Law Quarterly* 279.

⁴⁷² McLachlan (n 471) 318-319.

recalling VCLT principles, including Article 31(3)(c), the Court in *Al-Adsani v United Kingdom* stated that:

The Convention, in including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account.⁴⁷³ The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part ...⁴⁷⁴

This suggests that the Court, whilst bearing in mind the special character of the Convention, recognises that harmonious interpretation is *in itself* a desirable objective. The starting point here appears to be that, all other things being equal, interpretation should be consistent with other international law. Other things are not equal where there are good reasons against interpretation in line with other international law—some of these reasons are discussed below in Section 2.c, such as textual differences, and Chapter IV—but systemic integration nevertheless constitutes a *prima facie* reason in favour of consistent interpretation.

VCLT principles are mentioned in *Rantsev v Cyprus and Russia* on forced labour.⁴⁷⁵ Article 31(3)(c) specifically features also in a number of other cases on Article 6,⁴⁷⁶ state immunity,⁴⁷⁷ the compulsory nature of interim measures,⁴⁷⁸ amongst others.⁴⁷⁹ It has been

⁴⁷³ Reference made to *Loizidou v Turkey* (1997) 23 EHRR 513 [43].

⁴⁷⁴ (2002) 34 EHRR 11 [55].

⁴⁷⁵ (2010) 51 EHRR 1.

⁴⁷⁶ Eg *Golder* (n 397).

⁴⁷⁷ *McElhinney v Ireland* (2000) 29 EHRR CD214; *Fogarty v United Kingdom* (2002) 34 EHRR 12.

⁴⁷⁸ *Mamatkulov v Turkey* (2005) 41 EHRR 25.

⁴⁷⁹ Also *Bankovic and others v Belgium* (2007) 44 EHRR SE5, *Saadi v United Kingdom* (2008) 47 EHRR 17. See Forowicz (n 415) 47-58.

suggested that the Court has resorted to this provision indirectly where it has incorporated international law into its reasoning, even where it has not mentioned this provision explicitly.⁴⁸⁰ *Demir* and *RMT* also highlight Article 31(3)(c), although it is not clear what role this plays in the cases. In particular, it is unclear how Article 31(3)(c) is applied in *Demir* and how it relates to the living instrument doctrine. Nordeide has suggested that the mention of that provision in *Demir* signals the Court's 'willingness to engage in the debate on the interaction between different treaty regimes in international law',⁴⁸¹ but whilst maintaining 'a certain distance to the express wording of Article 31(3)(c) and preserving the special characteristics of the Convention as a regional human rights treaty.'⁴⁸² That is, *Demir* makes a reference to the wording of Article 31(3)(c) to highlight the relevance of international materials to the interpretation of the Convention, but ultimately decides the case on the application of the living instrument doctrine derived from its specific object and purpose as a human rights treaty.

The case for convergence of Article 11 with ILO and ESC norms could be more easily made out if the Court saw itself as pursuing a systemic integration (or, as I call it in other chapters, anti-fragmentation) objective. This has been doubted by a number of commentators, however. Nordeide criticises the lack of detailed engagement with the elements of Article 31(3)(c) where it is mentioned.⁴⁸³ He argues that:

Related to the ILC's study on fragmentation, the Court's approach might therefore be described as an openness to the ILC's articulation of the rationale of systemic integration, but a reticence towards

⁴⁸⁰ Mowbray, 'The Creativity of the ECHR' (n 401) 59; Forowicz (n 415) 47.

⁴⁸¹ R Nordeide, 'Demir & Baykara v Turkey' (2009) 103 *The American Journal of International Law* 567, 573.

⁴⁸² Nordeide, 'The ECHR and its Normative Environment' (n 415) 123.

⁴⁸³ *ibid* 122-123.

engaging in the finer details of the legal technique the ILC identified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.⁴⁸⁴

That is, the Court shows openness to anti-fragmentation objectives, in some cases more than others,⁴⁸⁵ but ultimately bases 'the substance of its approach on its own developed methods of interpretation.'⁴⁸⁶ Forowicz concludes that the Court has used Article 31(3)(c) as a 'gateway to international instruments and as a means to support an expansive or restrictive reading of ECHR provisions.'⁴⁸⁷ She goes so far as to suggest that 'in some cases, it appears that the Court needed Article 31(3)(c) as a rubber stamp legitimating its use of international law.'⁴⁸⁸ Tzevelekos argues that systemic integration is not the objective per se even when Article 31(3)(c) is invoked, but that it is a *collateral benefit* when the Court refers to international instruments to 'reinforce the humanistic *telos* of the Convention.'⁴⁸⁹ This would explain why, as in *Demir*, it is often invoked in combination with other ECHR interpretive principles.⁴⁹⁰

The overall findings of Forowicz's comprehensive study are evaluated by McNerney-Lankford as follows:

[Forowicz's] analysis reveals a varied, sometimes inconsistent case law generated by a selective and pragmatic Court whose default remains

⁴⁸⁴ *ibid* 136.

⁴⁸⁵ Nordeide, 'The ECHR and its Normative Environment' (n 415) 123-130.

⁴⁸⁶ *ibid* 137.

⁴⁸⁷ Forowicz (n 415) 58.

⁴⁸⁸ *ibid*.

⁴⁸⁹ Tzevelekos (n 9) 649.

⁴⁹⁰ *ibid*.

a 'closed paradigm' punctuated by episodes of receptivity towards international law.⁴⁹¹

Although more critical than Nordeide's conclusions that the Court at least takes an 'integrationist starting point,' this view is not inconsistent with what can be observed in some of the Article 11 case-law. Rather than systemic integration being the starting point, with justifications necessary to depart from this, in some of the cases it appears that good justifications are necessary to depart from the 'closed paradigm.'⁴⁹² In view of this, systemic integration cannot *per se* be the goal which the Court is pursuing when it refers to international materials and there must be other reasons behind 'episodes of receptivity.' Anti-fragmentation objectives will therefore not by themselves constitute a complete justification for convergence of norms in the field of freedom of association.

b. Supplementing a teleological interpretation

In *Matelly*, the Chamber was presented with a range of international instruments for consideration, including Article 5 ESC and ECSR conclusions to the effect that total restriction of the right to freedom of association of the armed forces was compatible with the ESC.⁴⁹³ The Government used the latter in support of its argument that such restrictions were not incompatible with the ECHR.⁴⁹⁴ The Chamber cited § 76 of *Demir*, which states that:

The Court ... when it considers the object and purpose of the Convention provisions, it also takes into account the international law

⁴⁹¹ S McNerney-Lankford, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32 OJLS 609, 612.

⁴⁹² Eg *RMT* (n 110) on justifications; *UNITE* (n 116); *GCHQ* case (n 432).

⁴⁹³ *Matelly* (n 160) [31-33].

⁴⁹⁴ *ibid* [50].

background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of states, the common international or domestic law standards of European states reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision *that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty*.⁴⁹⁵

The Chamber held that there was no uncertainty here on the basis of ECtHR case-law and that the request to disband an association formed by members of the armed forces violated Article 11.⁴⁹⁶ The same reasoning was applied in the related *Adefdromil* judgment.⁴⁹⁷ It is unclear what is meant by ‘more conventional means of interpretation,’ but it seems plausible to assume that it means that the Court will first look to the Convention itself and apply ‘internal’ reasoning by reference to its object and purpose. This would presumably include the ‘practical and effective’ doctrine derived from this object and purpose, and possibly the ‘living instrument’ doctrine, although this also involves looking to external standards delineating an evolving consensus. Where these do not clarify the scope of the Convention with a sufficient degree of certainty, only then will the Court have regard to relevant external sources.

A preference by the Court to base its reasoning on the Convention itself rather than external materials can be gleaned from cases in which either would have provided a justification for the final outcome. For example, the Court was presented with a wealth of international materials in *Wilson* which supported its conclusion, but it primarily bases this conclusion on an argument about effectiveness, ie that otherwise the right

⁴⁹⁵ *Matelly* (n 160) [74]- my translation from French; my emphasis.

⁴⁹⁶ *ibid.*

⁴⁹⁷ *Adefdromil* (n 159) [59].

would be illusory.⁴⁹⁸ In *Ólafsson*, the Court was presented with ILO and ESC materials to support the argument that the imposition of a levy by legislation to be paid by the Treasury to the Federation of Icelandic Industries violated the positive aspect of freedom of association, alongside arguments that it violated its negative aspect.⁴⁹⁹ The Court, however, focused on the negative aspect of the Article 11 right and reasoned along the lines of *Young, James and Webster*, emphasising freedom of choice and personal autonomy which it considered to be 'an important principle underlying the interpretation of the Convention guarantees.'⁵⁰⁰ Only then did it mention that it has 'also had regard' to the jurisprudence ECSR and CFA.⁵⁰¹

An approach whereby the Court only refers to international materials if an answer cannot be derived from a purely Convention-based teleological interpretation is a better fit with the pattern of case-law than an anti-fragmentation rationale. It would explain why in some cases it does not mention international materials at all, even where those have been presented to it and support its conclusions.⁵⁰² It is consistent with the view that the default position of the Court is a 'closed paradigm,' and that it does not seem to be pursuing anti-fragmentation objectives for their own sake – *Matelly* and *Adefdromil* explicitly take a more protective approach than the ECSR and are not concerned about the resulting disparity. At the same time, given the vague formulation

⁴⁹⁸ *Wilson* (n 84) [46].

⁴⁹⁹ *Ólafsson* (n **Error! Bookmark not defined.**) [22], [30-31].

⁵⁰⁰ *ibid* [46].

⁵⁰¹ *ibid* [53].

⁵⁰² Eg *Kaya and Seyhan* (n 126), *Sezer* (n 126), *Veniamin Tymoshenko* (n 126).

of Article 11, it might explain why ILO and ESC materials have often played a prominent role in giving meaning to that provision as more specialist instruments.

This supposition is supported by Tzevelekos' conclusion that where the Court has invoked Article 31(3)(c), it has done so as a 'supplement to the teleology of the Convention'⁵⁰³ and to 'expand the semantic field of the Convention's provisions.'⁵⁰⁴ It has been used to open up the Convention to international law such that:

... the former benefits from the latter through absorption of normative elements which, although absent from its 'imperfect' text, are both complementary and necessary for the effective promotion of its special scopes.⁵⁰⁵

In other words, the Court has been receptive to elements of international law where these complement its 'incomplete,' open-textured provisions in order to ensure effective human rights protection.⁵⁰⁶ McNerney-Lankford argues that this approach is more consistent with the ECHR's nature as a special, regional regime the aim of which is to secure the rights set out therein.⁵⁰⁷ She recognizes that 'the effectiveness of special regimes ... depends, in some instances, on their engagement with the general law to draw on more detailed guidance and ensure that the highest possible standard of protection prevails within the special system.'⁵⁰⁸ But she also argues that what Forowicz criticizes as a 'self-centered' approach might equally help to advance the protection of

⁵⁰³ Tzevelekos (n 9) 650.

⁵⁰⁴ *ibid* 651.

⁵⁰⁵ *ibid* 650.

⁵⁰⁶ *ibid* 648; confirmed by Forowicz's broader case-law study (n 415) 362.

⁵⁰⁷ McNerney-Lankford (n 491).

⁵⁰⁸ *ibid* 628.

human rights.⁵⁰⁹ Thus, criticism of the fact that Court does not always adopt an ‘open paradigm’ and is selective in its reference to international law, ‘often to advance the aims and objectives of the ECHR,’⁵¹⁰ is misplaced if the principal goal of the Court in making this reference is pursuit of the *Convention’s* objectives.⁵¹¹

That the Court uses international materials to expand the semantic field of Article 11 where this allows it to further the goal of protecting human rights can be seen clearly in the case-law. The Court has shown the greatest ‘deference’ to other international instruments where it has used them to answer specific questions or define specific terms. *Tüm Haber Sen* had close regard to the position of the ECSR with respect to the protection of civil servants under Article 5 ESC.⁵¹² In *Demir*, the Grand Chamber extensively referred to international sources when considering the position of civil servants and when they are considered to be ‘members ... of the administration of the state.’⁵¹³ *Junta Rectora* adhered to the view of Recommendation (2001) 10 of the Committee of Ministers that a prohibition of the right to strike of members of the police force is not contrary to the ESC.⁵¹⁴ The Grand Chamber in *Sindicatul Pastorul* looked, in particular, to ILO Recommendation No 198 on the employment relationship when determining whether the duties of the clergymen in the case could be described as such a relationship.⁵¹⁵

⁵⁰⁹ *ibid* 626; Forowicz (n 415) 377.

⁵¹⁰ Forowicz (n 415) 383.

⁵¹¹ McInerney-Lankford (n 491) 626.

⁵¹² *Tüm Haber Sen* (n 161) 39.

⁵¹³ And ultimately deciding that the municipal civil servants in the case were not members of the administration of the state, *Demir* (n 107) [98-107].

⁵¹⁴ *Junta Rectora* (n 158) [40].

⁵¹⁵ *Sindicatul Pastorul* (n 431) [142]. The court said that it ‘will apply the criteria laid down in the relevant international instruments’ citing *Demir* (n 107) [85].

Despite distancing itself from the ESC in other respects, *UNITE* appears to subscribe (at least for the purposes of argument) to the view of the ECSR on what constitutes a ‘forum for collective bargaining.’⁵¹⁶

Furthermore, the Court has derived two of the essential elements of Article 11 (right not to join a trade union and right to bargain collectively) on the basis of external materials, though using ‘living instrument’ and ‘consensus’ reasoning. It would make sense that the higher threshold of consensus is applied where the implications of the principle are more significant (ie it is an essential, not merely protected, element). If we characterize the Court’s reference to international materials in non-consensus based cases to be as aspect of interpretation in light of the object and purpose of the Convention (and not systemic integration *per se*), we can establish a certain continuity between those cases and judgments which invoke the living instrument doctrine, as a doctrine itself developed on the basis of this object and purpose. This could explain why in *Enerji* and *RMT* the Court does not consider it necessary to characterise the recognition of the right to strike as protected as based on ‘consensus’ for the time being, but may do so if it determines that it is also an essential element of Article 11. It might also explain why the Court has mentioned Article 31(3)(c) alongside other interpretive methods without specifically distinguishing it from them and why it appears to have applied it loosely.⁵¹⁷

Another way of putting the same proposition is to say that the Court has used international materials as ‘distancing devices’ which give legitimacy to its interpretation

⁵¹⁶ *UNITE* (n 116) [58].

⁵¹⁷ Tzevelekos (n 9) 649.

of vague human rights norms in a way which maximizes protection of those rights.⁵¹⁸ In its deliberative process, the Court will consider a range of arguments and sources of authority to justify its decisions. The persuasive value of these sources can vary, as will be discussed below. However, external materials, especially where they contain more detailed and more rigorous standards, provide a justificatory basis for the Court to continue pursuing the Convention goals of furthering human rights and to uphold the highest standards of human rights protection. That is, such materials give the Court *a reason to confer or extend* protection in a particular case. Where, as in *Matelly* and *Adefrdomil*, these sources do not provide a level of protection which does not conform with the object and purpose of the Convention, they do not provide a reason for a more restrictive approach. That is, the Court will use international materials as aids to interpretation where these support expansion of the scope of Convention rights, but not where they indicate a more restrictive interpretation which would be inconsistent with the purpose of protecting human rights effectively.

The difficulty in this approach lies in determining the ‘object and purpose’ of the Convention. The Court has established that the Convention is ‘designed to safeguard the individual in a real and practical way as regards those areas with which it deals,’⁵¹⁹ but that does not of itself give much specific guidance. According to Gerards, the Court has for the most part applied a ‘meta-teleological interpretation,’ that is, it has referred not

⁵¹⁸ J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 152, referred to by C McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499, 524; S Fredman, ‘Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law’ (2015) 64 *International and Comparative Law Quarterly* 499, 502 in the context of national human rights adjudication. The point is also made by Mantouvalou, ‘Right Not to Be a Trade Union Member?’ (n 102) 444.

⁵¹⁹ *Airey v Ireland* (1979-80) 2 EHRR 305 [26].

so much to the concrete aims of certain Convention provisions as to the overall objectives underlying the Convention.⁵²⁰ It has referred to the fundamental principles underlying the Convention, such as the rule of law, democracy, pluralism, human dignity and personal autonomy.⁵²¹ The Court has not provided clear definitions to these vague terms,⁵²² which creates significant space for debate on their meaning. However, it also leaves the Convention more open to ‘absorption of normative elements’ aimed at furthering these values from other normative systems. As argued in Chapter II, human dignity and autonomy are values which underpin the empowerment model and the features of that model (eg specific protection of collective labour rights, positive duties) which are reflected in both ILO and ESC freedom of association guarantees.⁵²³ It was also argued that the fact that collective labour rights protect collective activities does not mean that they are not, ultimately, underpinned by individual interests such as human dignity, personal autonomy and liberty – on the contrary. Thus, although the ILO and ESC protect the right to freedom of association as a right of groups, this protection furthers at least some of the values underlying the ECHR.

An interpretive approach which takes into account international materials as a supplement to a (meta-)teleological interpretation without necessarily looking for consensus could have very far-reaching implications and, here, potential to drive an expansive interpretation of Article 11 by reference to specialist instruments.⁵²⁴ However,

⁵²⁰ Gerards, ‘The ECHR’ (n 401) 256.

⁵²¹ *ibid* 270-71; she derives these conclusions on the basis of a study of 40 cases.

⁵²² *ibid* 271.

⁵²³ See Chapter II.2.c.

⁵²⁴ Unlike Article 31(3)(c), it is not limited to ‘rules’ that are ‘applicable between the parties.’

it should be remembered that such an approach does not treat such materials as *binding*. Rather, these materials could be treated as of greater or lesser relevance to the interpretation of the Convention. That is, the Court might choose to adopt a more conservative interpretation than these materials suggest. The next section sets out a number of factors to be taken into account when determining the persuasive weight of ILO and ESC materials.

This conclusion—that the Court primarily refers to international materials as aids to interpretation where to do so would ensure the effective protection of human rights, in pursuit of the Convention’s objectives—implies, of course, that it is necessary to ascertain what the effective protection of a right requires *in the first place*. It is for this reason that adopting a particular normative understanding of what the (fundamental human) right to freedom of association entails, as that proposed in Chapter II, is essential to my analysis. According to the empowerment model of the right to freedom of association, effective protection of that right includes the specific protection—including through positive duties—of certain collective activities such that workers are able to advance their interests and meet the employer on more equal terms. In other words, ensuring effective human rights protection would require the more detailed elaboration of specific rights and obligations relating to organised labour by the Court.

The open, general formulation of Article 11 leaves a gap in this respect which the Court cannot obviously fill through more conventional methods of interpretation, apart from potentially the ‘living instrument’ doctrine in the limited circumstances discussed above. In crafting the legal shape of Article 11, then, the Court can look to specialist

instruments to 'expand the semantic field' of that provision, which would then enable it to ensure that the right to freedom of association—as conceived in accordance with the empowerment model—is protected effectively. In other words, the central argument in favour of using ILO and ESC norms as aids to interpretation is that they are more detailed norms on specific aspects of freedom of association relating to collective labour rights, which assist the Court in expanding the scope of Article 11 in the sphere of collective labour rights in order to ensure a level of protection which is normatively desirable in light of the *Convention's* objectives.

This is not to say that the Court does not or cannot also have regard to anti-fragmentation objectives. The Court is aware of wider fragmentation concerns and, given increasing references to Article 31(3)(c) and the statement of the Court in *Al Adsani* (above), appears to be attempting to respond to them. Thus, although it seems more likely and appropriate for a specialist human rights court to refer to external materials primarily where that makes the special regime more effective, anti-fragmentation objectives are not irrelevant provided they do not conflict with this primary purpose. Indeed, they are very relevant where the uncertainty caused due to fragmentation could undermine the system for the protection of the particular right as a whole. Systemic integration, ie anti-fragmentation objectives, could be considered as an additional, *subsidiary* reason for the Court to pay close regard to the standards of other international regimes.

c. Variables affecting receptivity

The conclusions of the previous section provide support for the development of Article 11 by reference to ILO and ESC materials, without the need to establish ‘consensus’ or invoke the ‘living instrument’ doctrine, provided that the Court is committed to an empowerment notion of freedom of association. Forowicz’s analysis confirms that the Court has generally been receptive to materials stemming from specialist regimes, not only because they have a more specific focus on a particular issue but also because the relevant bodies have greater experience and expertise in the relevant subject.⁵²⁵ As a human rights court and not a labour court or expert body, the Court has certainly looked to the expertise of ILO Committees and the ECSR in adjudicating Article 11 cases, especially in its more recent case law,⁵²⁶ and particularly where it has considered the meaning of more technical questions.⁵²⁷

These two factors—specialist focus and expertise—speak strongly in favour of receptivity of ILO and ESC materials by the Court in general in the context of freedom of association and related collective labour rights. It therefore makes sense for the Court to take such materials as a starting point when adjudicating questions touching on collective labour rights, where an issue cannot be clearly resolved by reference to

⁵²⁵ See Forowicz (n 415) 361-2.

⁵²⁶ Eg in *Tüm Haber Sen* (n 161) the Chamber referred to the ECSR as a ‘particularly well-qualified Committee, [39]; in *RMT* (n 110) the Chamber defended the position of ESC and ILO ‘competent bodies’ as a point of reference in interpreting the Convention, [98].

⁵²⁷ Such as what is considered to be a collective bargaining forum in *UNITE* (n 116) [58], where the Chamber also stated that the ESC may provide guidance on how terms in the area of social rights are to be understood, [61]. In *Ognevenko* (n 137) the Chamber considered the view of ILO and ECSR on whether railway transport is an ‘essential service’ and saw no reason to depart from it, [72].

established principle.⁵²⁸ However, from her broader study of ECtHR case-law, Forowicz concludes that there are a range of further factors that have a bearing on the receptivity of the Court towards other international law.⁵²⁹ Article 11 case-law also shows that the Court, even where it has looked to specialist instruments as aids to interpretation, has treated these as of lesser or greater persuasive weight, and has certainly not regarded them as binding authority. I therefore consider possible further factors which may affect the persuasive weight attached to ILO and/or ESC materials in a given case. They constitute, in addition to the two factors already mentioned, what Fredman calls 'persuasive deliberative reasons' for the Court 'to choose what [it regards] as the most persuasive authority' when resorting to external materials.⁵³⁰ These are reasons which the Court could invoke to interpret the scope and content of Article 11 in a more or less similar way to ILO and/or ESC provisions. Taken together, such reasons may point towards greater or lesser convergence in the interpretation of Article 11 with ILO and/or ESC norms. This is not intended to be an exhaustive list of such reasons, but due to space constraints it is limited to a set of factors primarily derived from Forowicz's conclusions and Article 11 case-law.⁵³¹

⁵²⁸ Or where there is reason for the Court to revise its current case-law to bring Article 11 in closer alignment with these norms.

⁵²⁹ Forowicz (n 415) 353-370.

⁵³⁰ Fredman, 'Foreign Fads or Fashions' (n 518) 642. Fredman's 'deliberative approach' to the use of comparative law in human rights adjudication entails the use of foreign materials as a 'valuable and sometimes essential part of judicial decision-making, but not as binding authority, 641. See also S Fredman, *Comparative Human Rights Law* (OUP 2018) Ch 1.

⁵³¹ Fredman, 'Foreign Fads or Fashions' (n 518) identifies three sets of constraints on the use of comparative law: text, institutional and doctrinal differences, and differences in social, economic, historical and political context, 642. There is no space to explore how all of these factors might affect the use of ILO and ESC materials by the ECtHR. The present discussion is limited primarily to factors identified by Forowicz (n 415) or considered by the Court which can be broadly mapped onto the first two sets of reasons.

i. Textual Similarities and Differences

Forowicz's study reveals that the ECtHR's willingness to refer to external sources has been influenced by textual similarities between Convention rights and other international instruments.⁵³² This factor gives rise to some difficulty here, given that Article 11(1) in particular is drafted in much briefer and more general terms than Articles 5 and 6 ESC and the rights set out in Conventions 87 and 98.⁵³³ In particular, it is not formulated as a specific 'right to organise' of workers and their employers. However, argued above, the fact that Article 11(1) is open-ended is in itself a reason for the Court to look to specialist norms to 'expand its semantic field.' It would be odd therefore to consider the lack of textual similarities as a reason *against* taking these to be of persuasive weight. In light of this it might make more sense to ask, instead, whether anything in the text of Article 11(1) precludes the Court from considering ILO and ESC norms as persuasive sources of authority. A relevant difference in this regard might be the fact that the text of Article 11 specifically mentions only the right to form and join trade unions—but not employers' organisations—for the protection of one's interests.⁵³⁴

Matters are different with regard to Article 11(2). As discussed in Chapter I.1, the first sentence of that provision is similar to Article 31 ESC/Article G RESC, which

⁵³² Forowicz (n 415) 361. This is in-keeping with Fredman's argument that textual similarities have a significant role in the 'use of comparative law as a deliberative resource': Fredman, 'Foreign Fads or Fashions' (n 518) 642. For example, *Siliadin v France* (2006) 43 EHRR 16 [116] specifically draws on the textual similarities between Article 4 ECHR and ILO Convention 29.

⁵³³ Article 12 CFREU, on the other hand, is modelled on Article 11 and therefore textually very similar. There would be a strong case for the Court to pay close regard to developments of that Article by the CJEU which provide for a higher standard of protection than the ECHR.

⁵³⁴ Employers' right to form and join associations would of course be protected as the right of any individual to join any organisations, but the ability to act through these organisations in furtherance of their interests may not be.

provides for restrictions of ESC rights. This is an additional reason to have regard to the interpretation and application of Article 31 ESC/Article G RESC where restrictions of Articles 5 and 6 ESC are concerned, since the ECSR would have considered questions such as what is 'necessary in a democratic society' and what is considered to constitute 'rights and freedoms of others', 'public interest' and so on. As will be argued below, the persuasive weight of the Committee's pronouncements will be greater where it has considered the compatibility with the ESC of the *same* measure, since these questions will have been considered in the same context. As restrictions to rights under Conventions 87 and 98 are not subject to this kind of structured assessment, the same argument does not apply with respect to ILO materials. This does not mean, however, that these are not still useful sources of authority in the application of Article 11(2) – for example, in *Ognevenko* the Court nevertheless had regard to ILO materials in considering whether the restrictions in question were legitimate.

There are textual similarities between the various instruments in respect of the specific categories of workers identified. Article 11(2), Article 5 ESC and Conventions 87 and 98 refer to the police and armed forces as special categories of workers which can be subject to lawful restrictions of their rights. Convention 98 further identifies public servants engaged in the administration of the state as a category to which the special provisions in Convention 151 apply, whereas Article 11(2) identifies a category of 'members of the administration of the state'.⁵³⁵ This might in part explain the close regard

⁵³⁵ In the GCHQ case (n 432), in which this provision was at issue, the argument was made that ECHR provisions must be understood against the background of Conventions 87 and 98. The extent to which these instruments were used in the drafting of Article 11 is unclear. However, the Court was not sympathetic to these arguments.

paid to ILO and/or ESC materials in this regard in *Tüm Haber Sen, Demir, Junta Rectora*, although this might also be explicable on the basis that when defining such terms the Court has looked to the expertise of specialist bodies—as it has done in determining what constitutes a forum for collective bargaining (*UNITE*) or essential services (*Ognevenko*)—rather than the mere fact that there *are* textual similarities.

ii. Ratification of relevant instruments

Forowicz argues that ratification record is something which the Court has taken into account, whether it related to the state in question or ratification by other states parties in general.⁵³⁶ The Court has made clear that it does not distinguish ‘between sources of law according to whether or not they have been signed or ratified by the respondent State’ when searching for common ground.⁵³⁷ The exception here is *UNITE*, where the Court considered that the low rates of ratification of Conventions 99 and 154 diminished their value as evidence of consensus. Even where it is not searching for common ground, the Court in this line of case-law has generally not discussed the ratification record of the instruments cited.

However, it should be noted that *Matelly* (extracted above) refers to ‘rules and principles that are accepted by the vast majority of states’ and ‘common international’ law standards. Whilst this evidently does not require that standards are accepted by *all* states, or the state *in question*, it does suggest that there must be wide acceptance by states

⁵³⁶ Forowicz (n 415) 367.

⁵³⁷ *Demir* (n 107) [78].

in general.⁵³⁸ The reason why the question of ratification has not been raised until *UNITE* might be because the instruments discussed in previous cases enjoy wide ratification. All 47 Council of Europe members have ratified either the ESC or RESC, although ratification rates of individual ESC articles vary. Conventions 87 and 98 also enjoy wide ratification.⁵³⁹ The fact that an instrument is ratified by a high number of contracting states, Forowicz argues, could only provide greater legitimacy and authority to the Court's reasoning where it would otherwise be hesitant to impose additional obligations contained in external documents and not approved by contracting states.⁵⁴⁰ Conversely, it is possible that the Court might refer to rates of ratification to argue that certain ILO Conventions might be of lesser persuasive weight because they do not constitute common standards amongst a vast majority of states, if these rates are indeed low. Even so, the problem remains that *UNITE* is inconsistent with *Demir* in this regard. Conventions 99 and 154 enjoy ratification rates of 54 and 48 respectively, compared to 55 ratifications of Convention 151 which was invoked in *Demir*.⁵⁴¹

iii. Purpose of instrument

The Court has used the fact that the purpose of the ECHR is the protection of fundamental human rights, whereas the ESC is 'intended to guarantee social and

⁵³⁸ It is not entirely clear whether this means Council of Europe member states or states in general, but one might reasonably assume the former.

⁵³⁹ And, furthermore, all members of the ILO are obliged by virtue of their membership to respect and promote the principles therein as per the 1998 Declaration. Out of all Council of Europe member states, only Andorra, Lichtenstein and Monaco are not ILO members.

⁵⁴⁰ Forowicz (n 415) 367.

⁵⁴¹ *Demir* (n 107) [148].

economic rights'⁵⁴² as an argument not to develop the scope of Article 11 in closer alignment with ESC standards. I argued in the previous chapter that this fact is not by itself sufficient to justify divergent standards, provided that the normative justification for convergence I advance applies. Similarly, divergence is not justified by the mere fact that ILO Conventions seek to protect labour and social standards. However, there is in principle space for the Court to argue that certain ESC and/or ILO standards go beyond what is required by the empowerment model to protect the fundamental human right to freedom of association, because they are pursuing the broader objectives of 'social well being',⁵⁴³ 'solidarity'⁵⁴⁴ or 'social justice'.⁵⁴⁵ That is, the Court could argue that it is justified in departing from ESC and ILO jurisprudence where to do so would go beyond the object and purpose of the Convention. Such an argument might only be relevant in a narrow set of circumstances, where the rights guaranteed are so extensive as to go beyond what is necessary to enable workers to meet the employer on more equal terms and participate in decisions which affect them,⁵⁴⁶ guaranteeing instead a more substantial ability of workers to assert their interests.⁵⁴⁷

That the ECHR has as its purpose the protection of human rights could potentially justify normative divergence in cases of conflict between the negative and

⁵⁴² This is the argument made in *UNITE* (n 116) [61].

⁵⁴³ Preamble to 1961 ESC.

⁵⁴⁴ Identified by the ECSR as values underpinning the ESC, *International Federation of Human Rights*, Complaint No 14/2004, Decision on the merits of 8 September 2004 [27].

⁵⁴⁵ Preamble to ILO Constitution.

⁵⁴⁶ Although it might be difficult to determine exactly when this threshold is crossed, as acknowledged in Chapter II.

⁵⁴⁷ This might be the case, for example, if workers' ability to take collective action were subject to no or very few restrictions, which is of course not currently the case under ILO and ESC provisions.

positive aspect of the right to freedom of association. The ECHR protects the right not to join an association because freedom of choice and personal autonomy are important principles underlying the Convention as a human rights instrument.⁵⁴⁸ Chapter II argued that the right to freedom of association under the empowerment model protects individual interests—ie it is also a right of the individual—including personal autonomy.⁵⁴⁹ It follows that the ECHR should be concerned with protecting the positive aspect of the right on an equal footing with the negative aspect; the two should be of equal normative significance where balanced against each other.⁵⁵⁰ The ESCR has identified autonomy as one of the values underpinning the ESC;⁵⁵¹ and has stressed that the exercise of Article 5 ESC rights ‘must be the result of a choice.’⁵⁵² It is arguable that the two aspects would also be accorded equal normative weight under the ESC. On the other hand, whilst ILO rights undoubtedly protect certain aspects of personal autonomy, it is not specifically identified as a value pursued by Conventions 87 and 98, nor the ILO Constitution; and the fact that the ILO does not protect a right not to join a trade union suggests that individual choice and autonomy might not play as important a role in that legal order. This opens up space for differences in the way in which the negative and positive aspect are balanced against each other by ILO Committees and the ECSR and ECtHR. The same argument might apply in cases of conflict between freedom of association and other fundamental human rights which are not specifically protected by the ILO and/or ESC.

⁵⁴⁸ *Sørensen* (n 95) [54].

⁵⁴⁹ Chapter II.2.c.

⁵⁵⁰ Which would resolve the question, so far left open by the Court, of whether the negative aspect takes precedence, see *Sørensen* (n 95) and Chapter I.2.a.ii.

⁵⁵¹ Complaint No 14/2004 (n 544) [27].

⁵⁵² Conclusions 2014 (n 25).

iv. Cyclical reports v individual petition

The fact that CEACR and ECSR make pronouncements on the general state of the law in a member state in their cyclical reports, rather than with respect to individual applicants, was a reason for the Court to treat them as ‘not of such persuasive weight’ in *RMT*.⁵⁵³ I argued in Section 1 that this might be due to the fact that the instruments were invoked at the stage of application rather than at the stage of defining general Convention principles. In this context it is arguable that what other bodies have said in general terms with respect to the state of the law in a member state (which may be the state in question before the ECtHR) might not necessarily help the Court to decide how the principles apply in the particular case before it, to this particular applicant. By contrast, where the Court is defining the ambit of protection of Article 11 in the abstract—such as whether secondary strike action is *protected*—the Court did not make such a distinction.

Nevertheless, this should not mean that the pronouncements of these bodies are of *no* persuasive weight at the stage of application and determination of the margin of appreciation. Where these conclusions relate to the state in question before the ECtHR—as in *RMT* and *Ognevenko*—the Court should *prima facie* have due regard to the jurisprudence of ILO and ESC interpretive bodies not only for the sake of consistency, but also because these expert committees may have faced similar questions and, in the case of the ECSR, considered the proportionality of a restriction. It should then be up to

⁵⁵³ This can be contrasted with the treatment of such reports in *Ognevenko* (n 137), in which case the Chamber treated pronouncements on the general state of the law as authoritative, see Chapter I.2.

the Court to explain why the outcome in an individual case could diverge from the view taken as to the general state of the law – for example, because the margin of appreciation of the state was broader or narrower in accordance to the framework proposed in Chapter IV, or because there were other individual circumstances which mitigated or increased the restrictive effect of the measure in question.⁵⁵⁴ That does not mean that regard should not be had to conclusions of these Committees with respect to other states at all – but it would be justifiable to accord these less weight, relatively speaking. Of course, where the conclusions of ILO and ESC Committees define general principles— that is define obligations under the respective instruments, rather than solely assess the compliance of a state with these obligations—there is no reason why the fact that the conclusions relate to the general state of the law should detract from their persuasive weight.

There are potentially greater parallels between the ECHR individual petition and the ILO and ESC complaint mechanisms, since in this case the relevant bodies consider whether restrictions are legitimate in a particular case. However, the fact that a complaint was lodged before the CFA in the *POA* case resulted in that application being deemed inadmissible before the ECtHR.⁵⁵⁵ The decision suggests that the Court might not consider complaints involving the same applicants as an ILO or ESC complaint, and therefore would not be able to draw on that as a source of authority in the application of

⁵⁵⁴ In any event, *Ognevenko* (n 137) shows that whether ILO and ESC Committee conclusions on the general state of the law are regarded as of 'less persuasive weight' might depend on how the Court conceptualises the point of comparison, ie whether it considers if the law in general restricts the right in an unjustifiable manner, or whether it looks only at the particular circumstances of the case.

⁵⁵⁵ *Professional Trades Union for Prison, Correctional and Secure Psychiatric Workers (POA) v United Kingdom* App No 59253/11 (21 May 2013).

Article 11. However, even if this is the case, the Court could find useful guidance in complaints against the same measure by other applicants, according more or less persuasive weight to such materials depending on how similar the position of the applicant before is to that of the applicant in the CFA/ECSR proceedings.

v. 'Nature' of the ILO Convention

It is worth considering also the argument made in *UNITE* that Conventions of a 'more technical nature' are of less weight in determining consensus (referring here to Conventions 99, 101 and 154). It is reasonable to assume that this would imply that such Conventions are also of less persuasive weight as aids to interpretation. There might be a number of reasons as to why the nature of the Convention might matter. It is arguable, for example, that ILO Conventions 87 and 98, and their interpretation should in general be accorded more persuasive weight as ILO core conventions, said to express fundamental human rights. Conventions 99 and 101, on the other hand, establish a framework for determining wages and holiday pay in the agricultural sector, which the Court might reasonably consider to be less relevant to its interpretation of Article 11 collective labour rights. This argument does not apply to the same extent to Convention 154, however, which, although not a core convention, concerns the promotion of collective bargaining.

Furthermore, the provisions Convention 87 and 98 and principles developed by the ILO Committees when interpreting the Conventions are relatively general in nature. That is, they apply across the board and are formulated at a level of abstraction which leaves much room for concrete legal implementation by the member states: eg that (some

form of) collective bargaining machinery should be established, that negotiations should be free and voluntary, that workers should be able to choose their representatives in full freedom etcetera. It is arguable that the Court ought to accord greater persuasive weight to principles formulated at a greater level of abstraction than norms which provide for a *specific* legal form which the implementation of these principles should take (and are in this sense ‘more technical’). That is, where certain ILO Conventions provide for a greater level of detail as to the concrete form of legal norms concerning labour relations, the Court might be inclined to accord them less persuasive weight, and allow greater scope for alternative legal solutions.⁵⁵⁶ This is because the empowerment model leaves scope for a number of legitimate possibilities in its concrete legal implementation, and the solution provided by a particular ILO Convention might be only one such possibility.

vi. The ESC as a ‘sister’ instrument

Finally, it is arguable that the Court should pay particular regard to the (R)ESC as its sister Council of Europe instrument. The Court has not taken such a line so far and has not established a preference for the ESC over ILO materials. It has made it clear that obligations under Article 6 ESC ‘cannot be considered synonymous’ with Article 11 obligations.⁵⁵⁷ However, an approach to interpreting Convention rights which rejects the ‘type of right’ distinction—as the one proposed here—opens up avenues for closer collaboration and exchange between these ‘sister’ instruments. The two documents

⁵⁵⁶ Nevertheless, it should be noted that, for example, Convention 154 is not prescriptive on the form which collective bargaining should take or what measures must be taken by states to promote it, but makes some more general provisions on the aims which such measures should pursue (Article 5) and defines the scope of the term collective bargaining (Article 3). It is therefore perhaps difficult to see in what sense this Convention is ‘more technical.’

⁵⁵⁷ *UNITE* (n 116) [61].

emanate from the same normative environment, cover the same membership, there is overlap in the bodies responsible for their enforcement and are intended to be complementary. The case for consistency—and conversely the case against fragmentation which may result in the ECHR undermining the ESC mechanism—is therefore particularly strong. This does not mean that the ECtHR must adopt ESC standards or ECSR conclusions, but that they should be a particularly significant source of authority within the decision-making framework suggested here. It also does not mean also that ESC standards are the *limit* of the development of Article 11, nor that they must necessarily prevail over ILO standards if the two conflict.⁵⁵⁸ I suggest only that ESC norms and their interpretation and application should be a very important consideration in the overall assessment of various factors.

These are some of the reasons which the Court can invoke to justify greater or lesser adherence to ILO and/or ESC standards and their application by the respective committees when crafting the legal shape of the right to freedom of association under Article 11.⁵⁵⁹ Where there are reasons for the Court to treat ILO and/or ESC materials as of less persuasive weight, there is greater scope for it to take a divergent approach. That is, there is space for the Court to depart from specialist norms where it considers that there are relevant differences between the Convention and these norms in terms of text

⁵⁵⁸ The question of how the Court should approach situations in which ILO and ESC materials indicate different or conflicting solutions, where it is referring to these instruments as aids to interpretation and not as evidence of consensus, is beyond the scope of this thesis.

⁵⁵⁹ Further reasons may include, for example, the fact that the style of the conclusions of the CEACR, CFA and ESC is very different to the adjudicative style of the Court, not least because the Committees have a wider range of responses at their disposal (such as request of further information or expressing concern rather than finding a violation) and supervision is on-going. The implications of this difference are explored in the next chapter.

(i), purpose (iii), operation of supervisory machinery (iv), nature of the instruments considered (v) or other factors pertaining to interpretive practice (ii).

3. Conclusion

This chapter considered how the Court can use ILO and ESC materials to develop the scope of Article 11 in closer alignment with freedom of association guarantees under those systems. I argued that the use of these instruments as evidence of consensus—even setting aside the lack of a clear and consistent methodology in establishing consensus—is likely to lead to convergence only in limited circumstances, with respect to more abstract general principles on which the ILO and ESC are broadly in agreement. Thus, whilst ‘consensus’ as an interpretive tool might continue to be useful to the development of general aspects of the legal shape of Article 11 in line with international standards, it is likely to be of little assistance when it comes to the finer detail. However, I argued in Section 2 that ILO and ESC materials can otherwise be used as ‘aids to interpretation.’ As the text of Article 11 is so open-ended, especially as regards its application to industrial relations, there is reason for the Court to look to specialist instruments when determining the meaning of that provision. I argued that the ILO and ESC materials have been and can be used by the Court to supplement a teleological interpretation, ie to enable it to achieve its purpose of protecting fundamental rights effectively. Anti-fragmentation objectives, although by themselves unlikely to drive convergent interpretation, provide an additional reason to have regard to ILO and ESC norms when interpreting Article 11. How *much* regard the Court should have to these materials depends on further variables, some of which I have sketched out above.

What this means is that unless the Court can resolve a dispute by reference to established principles,⁵⁶⁰ and unless (international or national) ‘consensus’ is found which assists in interpretation,⁵⁶¹ the Court’s starting point should be to consider ILO and ESC norms and the position of their interpretive organs. Where it chooses to depart from this position,⁵⁶² it should justify this clearly by reference to the set of reasons above, or other ‘persuasive deliberative reasons’ pertaining to relevant differences between the mechanisms, such as those considered in the next chapter.⁵⁶³ This approach envisages a key, though not determinative, role for ILO and/or ESC norms as sources of authority in the interpretation of Article 11, whilst leaving space for the Court to preserve the autonomy and special character of the Convention. It provides a framework within which a Court committed to an empowerment model of the right to freedom of association could make use of specialist norms to develop the ambit of Article 11 accordingly, addressing at once substantive and institutional concerns. To the extent that any fragmentation remains, it is justified by the specific characteristics of the Convention system.

Whether and how quickly convergence takes place is contingent on the opportunities presented to the ECtHR to address questions about the scope and

⁵⁶⁰ Such as, most recently, in *Tek Gıda İş Sendikası* (n 120), where the Chamber reasoned entirely by reference to principles established in previous case-law.

⁵⁶¹ Which, of course, could entail consideration of ILO and ESC norms.

⁵⁶² Or, where these are different, chooses the position under one of the systems.

⁵⁶³ As Fredman argues, good reasons are required for divergence as much as for convergence: Fredman, ‘Foreign Fads or Fashions’ (n 518) 642. Such an approach can be discerned in *Tüm Haber Sen* (n 161) and *Ognevenko* (n 137), which both see ‘no reason to depart from’ the position of the relevant Committees.

substance of Article 11, which would depend on the number and nature of applications brought before it. Furthermore, the Court has generally taken an incremental approach to the development of Article 11, with its most radical move being the recognition of a right to collective bargaining in *Demir*. For example, it decided *Young, James and Webster* on a narrow ground, arguing that the interference with the right in that case was particularly serious but refusing, at that point, to recognise a right not to associate. This came later in *Sigurjonsson* where the Court recognised such a right on the basis of emerging consensus on the point. In *Enerji*, the Court ruled that the right to strike is protected by Article 11 as a corollary of the right to collective bargaining, but has so far left open the question of whether it is an essential element. It has been cautious not to make radical moves and to give answers to questions about the scope of the right only where strictly necessary, showing appropriate caution when entering the still relatively unfamiliar and sensitive terrain of collective labour rights. Thus, the process of convergence suggested here is likely to occur only gradually.

It should also be acknowledged that there are factors which affect the interpretation of the ECHR, and which might play a role in the process proposed here, that are difficult to discern on the basis of the case-law alone and have therefore not been discussed in this chapter. For example, one reason behind the variation in the Court's treatment of international materials in its case-law could be the adherence of individual judges to an open or closed paradigm and the aggregation of such preferences in each case. That this is a relevant factor can be concluded from a number of dissenting

Opinions,⁵⁶⁴ but it is not easily verifiable or predictable when it comes to the individual case. It is clear also that the Court is subject to strong political pressure in this sensitive area of law and policy. Just because it is legitimate for the Court to give the Convention an expansive reading as a matter of interpretive methodology does not necessarily mean that it is politically feasible for it to do so, in light of its concern for maintaining the stability and effectiveness of the ECHR.⁵⁶⁵ The foregoing analysis does not attempt to ignore these factors or diminish their significance, but simply to suggest that a convergent interpretation is certainly possible in light of the interpretive approach which the Court has taken in case-law to date.

⁵⁶⁴ See Dissenting Opinions in eg *Sibson v United Kingdom* (1994) 17 EHRR 193; *Gustafsson* (n 84); *Hrvatski Liječnicki Sindikat* (n 126); *Ognevenko* (n 137).

⁵⁶⁵ For example, Bogg and Ewing, 'RMT' (n 130) argue that the *RMT* was 'concerned with self-preservation the political appeasement of the hostile forces ranged against it', 251. Ewing and Hendy, 'The Trade Union Act' (n 168) suggest that the cautious approach of the ECtHR in some of the UK cases due to fear of backlash is 'easily understood. If the UK were routinely to disregard judgments of the Court or denounce the ECHR, other serially offending States would be likely to follow and the edifice would be under threat of collapse', 415.

IV. Judicial Enforcement of the Right to Freedom of Association

This chapter considers a particularly important institutional difference between the ECHR and ILO and ESC systems which could justify divergence in the scope of protection. A central feature of the ECHR is that its interpretive body is a court and not an expert committee. As such, it is subject to certain institutional limitations relating to the democratic legitimacy and competency of unelected judges who are not specialist in the field of industrial relations. A commitment to an empowerment model of the right to freedom of association as a normative concept does not in itself justify that all elements of it should be recognised as judicially enforceable legal rights. The empowerment model itself tells us nothing about the particular steps that must be taken to ensure that our moral rights are respected and realised in a given context, nor which institution should be taking those steps. There may be numerous legitimate ways of achieving the required result. It is not inconsistent with such a commitment to hold the view that the moral right to freedom of association, or at least certain aspects thereof, are best realised through political means rather than judicially enforceable legal rights. This would be the case if courts were considered inappropriate or ineffective fora for securing these rights, relative to political discourse and democratically elected institutions.

This chapter discusses whether and to what extent the fact that the ECtHR is a judicial body—and ECHR norms consequently judicially enforceable rights—rather than an expert committee justifies differences in the scope of protection under Article 11 and ILO and ESC guarantees. Section 1 highlights the concern that it is not appropriate for courts, here the ECtHR, to engage with the *kinds* of issues which the realisation of an

empowerment model might involve, in light of their institutional limitations.⁵⁶⁶ These can be complex, polycentric, politically contentious and have broad social and economic repercussions. It considers how this concern could affect the receptivity of ILO and ESC freedom of association guarantees in ECtHR adjudication and the case for developing Article 11 in closer alignment with these guarantees. It argues that differences in the nature of the interpretive body should not preclude the Court from defining general principles pertaining to the meaning of Article 11 expansively by reference to these international standards.⁵⁶⁷ However, it might be appropriate for the ECtHR to accord greater deference to states—that is to show greater judicial restraint—in assessing whether a particular measure violates Article 11 obligations.

Section 2 explores a number of reasons for showing judicial restraint which stem from the fact that the ECtHR is an international court. These are reasons which the Court should consider when determining the degree of deference to the state. Where these considerations are weighty, the state will have more leeway in choosing how to comply with its Convention obligations, that is, it will have a wide margin of appreciation. Where this margin is wide, it is possible that state (in)action will comply with the ECHR even where it does not comply with ILO and ESC standards. This would be a difference in the level of protection as between these instruments. The boundaries of the

⁵⁶⁶ There is another set of concerns related to the judicial enforcement of collective labour rights, namely that placing collective labour rights into the judicial arena enables involvement in industrial relations by courts which have shown themselves to be hostile, or at least unsympathetic, to the interests of workers and trade unions (for scepticism on the contribution of the ECHR to collective labour rights, see Lord Wedderburn, n 92). It would therefore be better if these matters were left to the political arena and resolved through democratic discourse. This concern is not discussed here, since collective labour rights are already within the domain of the ECtHR, and costly ECHR litigation is being undertaken by trade unions at least in part because they feel unable to vindicate their rights through the domestic political process.

⁵⁶⁷ Where these norms would otherwise be considered to be of significant authority in accordance with the framework developed in Chapter III.

appropriate judicial role in this area can therefore act as a limiting factor to the alignment of ECHR and ILO and ESC standards, in particular with respect to positive obligations and cases involving the most sensitive political, social and economic issues.

1. Concerns about the Judicial Enforcement of an Empowerment Notion of the Right to Freedom of Association

In this section I explore general objections to the judicial enforcement of duties arising from a thicker—empowerment— notion of freedom of association (a), as opposed to the enforcement of such duties by international committees (b). I consider how this difference in the nature of the enforcement body might affect the case for convergence between norms (c).

a. Objections to judicial enforcement

As discussed in Chapter II, the move from a ‘thin’ to a ‘thicker,’ empowerment notion of freedom of association as a fundamental human right entails expansion in various directions: the recognition that the right to collective bargaining and the right to strike are essential aspects of this fundamental right; that the substance of these rights might itself be ‘thicker’ to reflect the goal of enabling workers to meet the employer on more equal terms and participate in decisions which affect them; and that there might be a broader range of positive state duties to guarantee the enjoyment of that right. Judicial enforcement of these rights and associated duties would entail greater judicial involvement in the industrial relations context, which gives rise to two issues.

First, when assessing whether states have complied with their positive (legal) obligations, courts would review whether the state has taken adequate steps to protect or fulfil the right and require that such steps are taken where necessary. The concern is that judges would have *too much control* over the legislative framework which is intended to ensure protection of the right in the particular state—the prospect of ‘judges drafting labour codes.’ This is a particular issue with respect to the right to collective bargaining, if it is taken to require the state to set up collective bargaining machinery, and both to the right to collective bargaining and to strike where these require measures to protect employees from disadvantage by the employer. Second, even where negative duties are concerned, scrutiny of state action might involve assessment of complex and politically controversial issues and a finding of a violation might interfere with a decision by a democratically elected body which attempts to strike a balance between various competing interests—this is particularly relevant to the right to strike.⁵⁶⁸ In both cases, unelected judges who generally do not possess any special expertise in the field could be required to make a series of decisions on sensitive matters with potentially significant, diffuse effects.

These are concerns familiar to the field of social and economic rights, to which the right to collective bargaining and to strike have traditionally been assigned. There are, broadly speaking, two main objections advanced against the judicial enforcement, or justiciability, of such rights. The first is that courts, unlike a representative legislature, lack the *democratic legitimacy* to decide on matters with significant resource implications

⁵⁶⁸ As seen in *RMT* (n 110) [86].

and which entail a number of choices and value judgments.⁵⁶⁹ The second is that courts often lack the kind of expertise necessary to engage with the implications of changes in social policy and legislation, which are often also polycentric and ‘require the comprehension of a vast number of interconnected variables.’⁵⁷⁰ In other words, there is a concern about the *competency* of courts. To this must be added the fact that a decision by a constitutional court can be difficult to revisit and overturn, depending on the jurisdiction, whereas the realisation of positive duties might require on-going monitoring⁵⁷¹ and a certain degree of flexibility to adapt to ‘unforeseen information and developments.’⁵⁷² The costs of a mistake or inflexibility could be significant. Therefore, even if we subscribe to an empowerment understanding of the right to freedom of association as a fundamental right and accept that states have a moral obligation to protect and promote the right to collective bargaining and to strike, there is an argument for saying that these rights, or at least certain duties arising from these rights, should be realised through political and not judicial means. As discussed in Chapter I, the enforcement mechanisms of the ILO and ESC—drafted to cover rights excluded from the ECHR—reflect this concern.

b. Comparison to international committees

ILO Committees and the ECSR are not subject to the above concerns, or at least not to the same extent. For one, they are expert bodies more familiar with the industrial

⁵⁶⁹ King (n 242) 5; Fredman, *Human Rights Transformed* (n 43) 92.

⁵⁷⁰ King (n 242) 5.

⁵⁷¹ Fredman, *Human Rights Transformed* (n 43) 92.

⁵⁷² King (n 242) 6.

relations context. The cyclical reports mechanism is intentionally designed to allow for gradual, programmatic realisation of state duties and on-going monitoring; it is a process aimed at on-going dialogue rather than immediate and final resolution of a dispute. The complaints-based mechanisms of both instruments also allow states to achieve conformity gradually, relying on different follow-up routes and fora for further discussion.⁵⁷³

In fact, the way in which state obligations are formulated by these committees is often vague and non-precise because the appropriateness of the measures taken in response can be examined at subsequent meetings. An example from a CEACR report regarding a duty to fulfil is an invitation to the Albanian government 'to pursue its efforts to promote voluntary collective bargaining at all levels.'⁵⁷⁴ The CFA has found, in response to a complaint by the Prison Officers' Association (POA), that the UK was not in conformity with Convention 87 because it had not established mechanisms to compensate for the restriction of the right to strike of workers in essential services. It requested 'the Government to take the *necessary* measures so as to establish *appropriate* mechanisms in respect of prisoner custody officers ... to compensate them for the limitation of their right to strike.'⁵⁷⁵ In the same complaint, it requested 'the Government to initiate consultations with the complainant and the prison service with a view to improving the current mechanism for the determination of prison officers' pay.'⁵⁷⁶ While

⁵⁷³ See Chapter I.

⁵⁷⁴ International Labour Conference, 106th Session, 2017 *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 41.

⁵⁷⁵ CFA Case No 2383 (United Kingdom), *Report in which the committee requests to be kept informed of development* (Report No 336, March 2005) [769]; my emphasis. See related ECtHR case, *POA* (n 555).

⁵⁷⁶ CFA POA Complaint (n 575) para 773.

in both cases the Committees clearly call for some action, the terms of the request are broad and leave much discretion to the government.

Committee conclusions are, of course, not always so open-textured and do impose clearer and more focused demands. For example, in the Transport and General Workers' Union complaint, the CFA requested that a rule in the relevant UK legislation, the effect of which was to leave workers engaged in strikes in support of recognition of a union unprotected where the employer employs fewer than 21 people, be removed as 'clearly in violation of the principles of freedom of association'.⁵⁷⁷ There are also other cases which fall somewhere between such a specific request and the examples of vague formulations above. However, the point is that in complex cases involving systematic changes and sensitive domestic issues, the overall institutional structure of these instruments permits their supervisory committees to make a broadly framed request to governments and then monitor how they fill in the details.

Given the general absence of hard sanctions, the effect of these legal mechanisms is essentially to *prompt* the realization of state duties through political means, that is, the adoption of measures is the result of political and not legal pressures. Ultimately, states can decide not to comply with their obligations in international law, or at least not immediately.⁵⁷⁸ Thus, these committees can be more ambitious in their demands than courts because states have the space and time to design appropriate solutions

⁵⁷⁷ CFA Case No 2743 (United Kingdom), *Report in which the committee requests to be kept informed of development* (Report No 346, June 2007) [1537].

⁵⁷⁸ Although this is also true to an extent of the ECHR, as discussed below in Section 2.a.iv.

themselves, or even to do nothing at all – though of course they would be wary of making demands that are too ambitious so as to maintain a good rate of compliance. They can take as the benchmark a state of affairs which is desirable and one to aspire to; whereas courts must restrict themselves to what is currently possible within the boundaries of their competence and competency.

c. Justiciability as an objection to interpreting Article 11 in line with ILO and ESC norms

Clearly collective labour rights—and corresponding duties, including some positive duties—have already been recognised as justiciable rights under the ECHR. Here I consider whether the objections discussed in Section 1.a provide a reason for the Court not to develop the scope of Article 11 in closer alignment with ILO and/or ESC standards because they consider that the obligations which would arise from such an interpretation should not be subject to judicial enforcement. For example, the Court might consider it inappropriate to recognise that there are positive duties to promote the right to freedom of association, such as through establishing collective bargaining machinery.

The objections set out in Section 1.a are strong if we assume that, in enforcing duties arising from collective labour rights, courts were to request that legislation in the field have a *particular* form and content or otherwise had very significant control over state action. This is the worst-case-scenario which Langille seems to envisage where he object to ‘judges drafting labour codes’ or ‘instantiating’ the Wagner model.⁵⁷⁹ However,

⁵⁷⁹ See Chapter II.2.a; Langille, ‘Drafting Labour Codes’ (n 300).

this is not what courts will necessarily do (or actually do). According to King, the role of courts foreseen in contemporary social rights adjudication is:

... that it focuses on *the process of decision-making* in respect of asserted human rights interest, rather than on the state's achievement of some particular state of affairs. It seeks to test the *adequacy of the justification or reasoning* underlying the public action or omission, the plausibility of its premises, and validity of its inferences, and at times the scope of participation afforded during that process, the availability of effective policy alternatives, and (where applicable) the *compatibility of the resulting decision with the conceptual core* of the asserted right.⁵⁸⁰

In other words, courts do not necessarily 'draft judicial labour codes' but can require the state to justify how a particular action adopted, such as a piece of labour-related legislation, or an omission to adopt any measure fulfils its duty. Courts are not—or in any case should not be—prescriptive as to the particular means through which the duty should be fulfilled but must be satisfied with the reasons underpinning a particular state action or inaction or that the decision is compatible with the conceptual core of the right.⁵⁸¹ The legal obligations under consideration 'are ordinarily vague, and inescapably so in adjudication' – that is, the duty is often formulated at a level of abstraction which allows for it to be realised in different ways.⁵⁸² This is consistent both with the normative model which I propose to underpin the interpretation of Article 11,⁵⁸³ and with the proposed interpretation of Article 11 by reference to ILO and ESC norms, which are themselves generally formulated at a level of abstraction which allows scope for implementation in different ways. As argued in Chapter III, if and where such norms

⁵⁸⁰ King (n 242) 107.

⁵⁸¹ *ibid.*

⁵⁸² *ibid* 117.

⁵⁸³ As discussed in Chapter II, the duties arising from the empowerment are formulated at a level of abstraction which allows scope for different implementation in law.

are prescriptive as to a particular legal form that protection of the right to freedom of association should take, the Court could consider these to be of less persuasive weight. Furthermore, as Fredman points out, judges 'have often been quick to carve out areas for the decision-maker' through standards such as 'reasonableness.'⁵⁸⁴ Where a violation is found, 'judicial remedies can specify to a greater or lesser degree ... what must be done to bring a statute or decision-making process into compliance' in order to leave an appropriate degree of flexibility for the decision-maker in seeking a solution.⁵⁸⁵

Three elements emerge from this as significant factors in the degree of judicial control/intervention in a given case: the formulation of the duty (more or less vague), the range of reasons which a court will deem as an acceptable justification for action or inaction (from any justification to a very narrow set of acceptable reasons) and the remedy required (more or less specific). These are variables which can be adjusted to accommodate justiciability concerns. King develops a more detailed and sophisticated account of how this can be done, discussed in Section 2. For now, suffice it to say that rather than ruling out judicial enforcement of certain duties altogether, the adjudicative process could be conducted in a way which accords a degree of deference to the decision-maker appropriate to the particular circumstances. In other words, the fact that the ECtHR is a judicial body and not a Committee should not be invoked as a reason to *preclude* it from defining general principles pertaining to the meaning of Article 11 by reference to ILO and ESC standards. However, this fact could justify differences in the

⁵⁸⁴ Fredman, *Human Rights Transformed* (n 43) 102, giving the example of the South African constitution, also mentioned by King (n 242) 105.

⁵⁸⁵ King (n 242) 283.

application of those principles, and therefore divergence in the scope of protection under the various instruments.

It would also be inconsistent for the Court to make a sweeping conclusion that it should not take an expansive interpretation of collective labour rights and corresponding duties in light of the concerns set out in Section 1.a, given that many of its judgments already raise such issues. As King points out, our legal systems 'are rife with cases that are polycentric, involve expert judgment, impose inflexibility, or raise an issue about democratic legitimacy,' but that does not exclude them from adjudication.⁵⁸⁶ The more long-established aspects of Article 11 engage these concerns as well, such as the right not to join an association: for example, the prohibition of closed-shop agreements as incompatible with the negative aspect of Article 11 was a politically sensitive decision with significant repercussions to industrial relations and potential economic and social effects.

There are also good positive reasons why the broader set of collective labour rights and corresponding duties should be justiciable. For one, courts might actually offer a *more* effective way of protecting and realising these rights, *relative to* other institutions.⁵⁸⁷ The fact that cases in this field are coming up to the ECHR, given the fact that domestic remedies must first be exhausted, and the expense and time associated with an application to the Court, would suggest that individuals and trade unions consider this route to be worth pursuing, *vis-à-vis* other avenues to defend and realise

⁵⁸⁶ King (n 242) 7.

⁵⁸⁷ See King (n 242) Ch 3.

their rights. More generally, courts can serve ‘to address the inequalities in influence and voice in modern representative democracies;’⁵⁸⁸ that is, they can act as a forum for groups which are less influential in political debate and represented to a lesser degree in the legislature, which might be the case of some groups of workers and their organisations. Furthermore, where rights are justiciable they can act as a platform for constitutional dialogue between the courts and the legislature,⁵⁸⁹ opening up debate on how these rights should be best protected, whereby the two institutions are encouraged to work together on finding a solution.⁵⁹⁰ As a leading human rights court, the ECtHR should not be precluded from at least opening up a conversation with national authorities and encouraging deliberation on how the right to freedom of association should be best protected. The extent to which it can require a *particular* solution can be limited by an appropriate doctrine of deference.

The ECtHR can play a valuable role in securing the broader set of collective labour rights and duties. It is unjustified to exclude its involvement in the more controversial aspects of this field *altogether* by considering aspects of these rights to be non-justiciable, and treating this, by itself, as a reason against developing Article 11 in line with specialist instruments. In other words, the Court should not restrict its interpretation of Article 11 to a ‘thinner’ version of freedom of association—which is

⁵⁸⁸ Fredman, *Human Rights Transformed* (n 43) 109-113.

⁵⁸⁹ P Hogg and A Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps The Charter of Rights Isn’t Such a Bad Thing After All)’ (1997) 35 *Osgoode Hall Law Journal* 75. The relationship is one of dialogue where ‘judicial decision is open to legislative reversal, modification, or avoidance’. In that case, ‘the judicial decision causes public debate in which [Canadian] Charter values play a more prominent role than they would if there had been no judicial decision’, 80. See also A Young, *Democratic Dialogue and the Constitution* (OUP 2017).

⁵⁹⁰ Young, *Democratic Dialogue* (n 589) 8.

arguably what it is doing in, for example, attempting to confine *Demir* to its 'extreme' facts—*merely* because to do so would avoid raising concerns about judicial involvement in the sphere of industrial relations. However, the role of the Court in enforcing a broad range of duties arising from collective labour rights must nevertheless be approached with caution and awareness of its particular institutional limitations: even where courts can adjudicate social rights cases, their approach *must* be different to that of an expert committee for that reason *at least*.⁵⁹¹ The nature of the interpretive body of the international instruments considered here might therefore constitute a reason for divergent application of freedom of association norms. The challenge is to develop a more detailed account of the approach that the Court should take in adjudicating collective labour rights cases which takes into account this institutional difference and justifies divergence *on this basis* only where strictly necessary. The next section suggests one such approach that the ECtHR might take.

2. Judging Collective Labour Rights under the ECHR

Whilst the fact that the ECtHR is a court does not *preclude* it from recognising that states are under (negative and positive) obligations similar in scope to parallel ILO and ESC norms, this fact could be reflected in the degree of scrutiny it applies to state (in)action when assessing whether it meets Convention standards. This section proposes an analytical framework which would enable the Court to develop its Article 11 jurisprudence to reflect an empowerment notion of freedom of association whilst respecting the limitations of its position as an international court. I start from the

⁵⁹¹ This is something which King (n 242) in particular stresses.

assumption that, unless there are other valid reasons for the Court to depart from ESC and/or ILO standards in interpreting Article 11, such as those outlined in Chapter III, it will develop Article 11—in terms of general principles pertaining to the meaning of that provision, that is obligations which arise from that provision—in line with ESC and/or ILO standards.⁵⁹² As explained above, the task of the Court is not to tell states how they should comply with these duties but to assess the domestic measures which have been taken against these benchmarks. The question is then whether there are good reasons for the Court to show more restraint in scrutinizing state measures than ILO bodies or the ECSR, due to the fact that it is an international court and not a committee.

I consider various reasons for the Court to exercise judicial restraint, which can broadly be divided into concerns about democratic legitimacy, polycentricity, expertise, flexibility and subsidiarity (a). The first four categories are loosely based on the four ‘principles of judicial restraint’ which King develops as part of his theory of social rights adjudication in the national constitutional context. These are intended to ‘function as principles to which judges give weight when they decide cases.’⁵⁹³ I do not intend to import King’s theory in all its detail and complexity to the present context, but only to suggest that some of the reasons he advances in formulating his principles of restraint are also valid with respect to ECtHR adjudication. I also discuss further reasons as to why these concerns should be treated as more or less important. To this I add the ECtHR-

⁵⁹² I say ‘and/or’ to acknowledge the fact that there may be reasons for the Court to choose to align the interpretation of Article 11 with only one of these systems if there are disparities between them. As stated in Chapter III, a detailed discussion of how the Court should proceed when there are disparities or conflict between ILO and ESC norms is beyond the scope of this thesis.

⁵⁹³ King (n 242) 8.

specific principle of judicial restraint, the margin of appreciation, as an expression of the principle of subsidiarity.

I propose that these principles of judicial restraint could be integrated into the Court's application of the margin of appreciation doctrine, which is the 'tool' invoked to leave a certain—variable—scope for discretion to the decision-maker (b). I argue that the Court should place more or less weight on the various factors according to the particular circumstances of the case, and accordingly show more or less deference to the decisions of national bodies. Where these are weighty considerations, the Court should exercise more restraint when assessing compliance with Convention obligations than an ILO Committee or the ECSR might do with respect to ILO or ESC obligations. Thus, it might legitimately decide that the state complies with the ECtHR where it has not complied with ILO and/or ESC obligations, even though the *prima facie* duties are the same or similar in scope.

a. Reasons for judicial restraint

i. Democratic Legitimacy

The Court should give weight to the idea of democratic legitimacy when adjudicating questions relating to legal rights in the industrial relations context, because many of these questions have implications for the distribution of power and wealth between capital and labour and for society at large. Such questions concern, for example, the scope of protection from detriment for workers going on strike or those engaged in collective bargaining, the legal effect of collective agreements, the form and level of

collective bargaining machinery, whether there is a duty to bargain on the employer and so on. Changing any of these features of an industrial relations system affects a multiplicity of heterogeneous interests within the polity beyond those of workers and employers. Control over and interference with these features might not be best placed in the hands of unelected judges, but rather left to political dialogue within a democratically elected representative legislature. This is, for one, because 'legislation produced by a democratic representative legislature is adopted under a procedure which seeks to give equal weight to every adult person's view,'⁵⁹⁴ and, at least in theory, to take into account all relevant interests and considerations.

King therefore argues that legislation adopted in a democracy manifesting certain background political conditions 'is entitled, on grounds of political equality, to *great and in some cases nearly final weight* in political decision-making about rights'.⁵⁹⁵ Therefore, the Court should *prima facie* show strong judicial restraint where a rights question has been addressed by the legislature. An example might be the exclusion of secondary strike action from statutory immunities in *RMT*. Democratic legitimacy is of course not an irrelevant consideration in the deliberations of ILO and ESC committees, but it is much less of a concern. This is because of the consequences of their pronouncements and the vague way in which their requests are often formulated, as discussed above, but also because they can comment on domestic legislation and policy without an explicit finding of a violation – for example by 'expressing concern.' This is not open to the Court, which either finds a violation or not. Where it does find a violation

⁵⁹⁴ King (n 242) 153-4.

⁵⁹⁵ King (n 242) 153,

with respect to legislative measures in the sphere of employment relations, or executive conduct with a 'democratic pedigree',⁵⁹⁶ it is interfering with the decision of a body with a much stronger democratic mandate on (often) complex issues with diffuse and polycentric effects.

The argument in favour of strong deference is subject to some qualifications. Most obviously, the case for restraint is weak where legislation is not adopted through a democratic process in any real sense.⁵⁹⁷ Even where this is not in doubt, the case for restraint is also weak where the situation at hand is a 'core case': 'a type of case where what is in issue is a breach of the *very essence* of what the right is.'⁵⁹⁸ *RMT* is a core case in accordance with the empowerment rationale, even if in Court described secondary strike action an 'accessory aspect of trade union freedom'⁵⁹⁹ – an aspect of the judgment heavily criticized by Bogg and Ewing.⁶⁰⁰ The ban on secondary action meant, in *RMT*, that a small number of employees could not call on their former colleagues at another company to strike with them in protest against a significant reduction in their salary; the strike undertaken by only nine employees was completely ineffective. A solidarity strike might have put more pressure on the employer such that the workers in question were able to defend their interests and attempt to meet on more equal terms the power of their employer in way that is actually meaningful. To deny this possibility altogether was, on

⁵⁹⁶ See King (n 242) 169.

⁵⁹⁷ For example, where the process of adopting legislation is flawed and the proposed legislation is not subject to real democratic debate; or secondary legislation, depending on the extent to which it is traceable to a democratic mandate/pedigree.

⁵⁹⁸ King (n 242) 175; my emphasis. What is considered 'core' is a normative question, determined by reference to the normative foundations of that right, here the empowerment model.

⁵⁹⁹ *RMT* (n 110) [77].

⁶⁰⁰ Bogg and Ewing, 'Muted Voice at Work' (n 245) 236.

the facts, to render their right to strike *nugatory*. In such a case, it is legitimate for the Court to subject the state measure to strict scrutiny even if it is the product of democratic debate – otherwise Convention rights would be of very little substance and ineffective against oppressive governments determined to pass legislation restricting the rights of individuals.

A further qualification is required because the idea that legislatures give equal weight to each voter's preference is often illusory. As King points out, policy-making can be 'driven by the priorities of the few at the top of a party which enjoy less than majority support.'⁶⁰¹ Significant is the influence of lobbying groups, in particular well-resourced and organized interest groups such as business. As King writes:

A strong welfare state ... is, unlike most civil and political rights, *diametrically opposed* to the interests of the wealthy and is therefore precisely the target of the well-resourced lobbying interests.⁶⁰²

That is, an imbalance of power and wealth in society can affect the weight accorded to various interests in the legislative process. This is an acute issue in the context of industrial relations where there is *precisely* such an imbalance of power and a clash between the interests of wealthy businesses and workers seeking to improve their conditions and increase scope for self-determination. If the very rationale underpinning collective labour rights is to empower workers to 'to participate in determining and controlling the immediate circumstances of their lives' and 'to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps,

⁶⁰¹ King (n 242) 157.

⁶⁰² *ibid.*

conflict,⁶⁰³ it seems self-defeating to suggest that the protection of these rights is best left to a legislative process where the interests of ‘those’ are disproportionately represented. Paradoxically, in such a case the greater the *need* for ‘empowerment’ rights, the less likely it is that those will be given appropriate protection through legislation.⁶⁰⁴

The Court can act here as an important check on the influence of powerful interests by requiring a more robust justification of legislative measures which show that these have been taken by reference to legitimate reasons and not the interest of particular powerful groups, and that they are the result of proper dialogue and deliberation. Admittedly, it is difficult to make an assessment of power dynamics which is to determine the degree of restraint. Whilst it should generally be sensitive to the issue of imbalance of power, especially in cases involving the right to bargain collectively and to strike, a more precise indicator is required for situations in which the Court should *definitely* show less deference. This could be based on King’s argument that the case for restraint is weak if ‘in respect of the challenged policy, the claimant is from a group that is *particularly vulnerable to majoritarian bias or neglect*.’⁶⁰⁵ ‘Vulnerable’ means at ‘substantial risk of bias or neglect’ and not that they are *actually* suffering bias or neglect.⁶⁰⁶ ‘Majoritarian bias’ means ‘a form of proactive hostility towards the group or ...

⁶⁰³ *Alberta Reference* (n 280) 365-6; see Chapter II.

⁶⁰⁴ A case in point is the passage of the UK Trade Union Act 2016 which imposed further conditions on workers’ ability to take lawful strike action, especially those working in ‘important services,’ at a time when it would have been particularly important for workers in those sectors to oppose public sector cuts through collective action; see T Novitz and M Ford, ‘Legislating for Control: The Trade Union Act 2016’ (2016) 45 ILJ 276, 293-4 and A Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45 ILJ 299.

⁶⁰⁵ King (n 242) 181.

⁶⁰⁶ *ibid* 182.

disadvantage created by unfair preference for the interests of the majority'⁶⁰⁷ which would be 'in no small part susceptible to proof in fact.'⁶⁰⁸

This is a consideration intended to address the fact that legislation might fail to protect—or may even disadvantage—politically marginalised groups.⁶⁰⁹ Whilst we do not generally think of trade unions and their members as 'marginalised groups,' reactions to strike action often reveal hostile attitudes to strikers from the governments and the general public.⁶¹⁰ It is not impossible that a factual inquiry would reveal that, in respect of some policies, these are considered groups particularly vulnerable to majoritarian bias or neglect on King's definition. This could be the case in respect of particular trade unions or workers,⁶¹¹ or trade unions and/or their members generally. Showing less restraint in scrutinizing measures which affect the rights of such groups can act as a corrective to the paradox described above. The case for judicial involvement is stronger the more politically marginalized trade unions and their members are, although, admittedly, the degree of 'marginalisation' might be difficult to determine.

⁶⁰⁷ King (n 242) 182.

⁶⁰⁸ *ibid.*

⁶⁰⁹ *ibid* 165.

⁶¹⁰ One example of this in the UK might be the public reactions to extensive railway strikes starting in 2016: see eg *The Guardian*, D Gayle and R Obordo, 'My life shouldn't be dictated by Southern Rail strikes' (13 December 2016) <<https://www.theguardian.com/uk-news/2016/dec/13/my-life-shouldnt-be-dictated-by-southern-rail-strikes>> accessed 19 March 2019. The UK transport secretary described the strikes as 'nonsense': *The Guardian*, M Taylor and D Gayle, 'Chris Grayling: Southern rail strike is "palpable nonsense"' (13 December 2016) < <https://www.theguardian.com/business/2016/dec/13/chris-grayling-southern-rail-strike-is-palpable-nonsense>> accessed 19 March 2019.

⁶¹¹ For example, certain groups of workers might be considered to be particularly economically and politically marginalised, eg those working in precarious arrangements such as zero-hour contracts.

Two additional points should be noted by way of clarification. First, one can argue that because the ECtHR is an international court, the democratic legitimacy concern is even greater than in the national context. This is true, but the applicable justification for restraint is based on the principle of subsidiarity, discussed below, and not the idea of democratic legitimacy. Second, King points out that sometimes the legislature will not have discussed and voted on a rights issue at all, that is, there is 'an absence of legislative focus'.⁶¹² In such cases, judicial review of state action or inaction does not raise the same democratic legitimacy concerns as a finding of a violation will not interfere with a decision already taken by a democratically elected body. *Wilson and Palmer* is a case in point, where the particular way in which the employer imposed a detriment on the claimants was not anticipated by the relevant legislation. However, to respect the idea of democratic legitimacy it would be important that the Court leaves sufficient flexibility for the state to adopt an appropriate solution in the future.

To sum up, the following guidance for the Court emerges from the above discussion: that a court should show strong judicial restraint where reviewing legislation touching on a collective labour rights issue, *unless* it concerns a core case, it fails to protect the rights of a group particularly vulnerable to majoritarian bias or neglect, or there is an absence of legislative focus. It should, more generally, be aware that the imbalance of power that some of these rights are intended to address can be reflected within national democratic structures and that the argument for restraint based on democratic legitimacy should therefore not be overstated.

⁶¹² King (n 242) 164.

ii. Polycentricity

A second reason for the Court to show restraint arises where it is asked to adjudicate on a *polycentric* problem. According to Fuller, these are problems which comprise ‘a large network or web of interlocking relationships, such that a change to any one relationship causes a series of complex changes to other factors.’⁶¹³ He gives the example of setting prices and wages as being a polycentric task and argues that these should not be left to courts, as they are not well-equipped to assess the complex repercussions of any change in this regard. Any decision by a court on these issues could lead to unintended (negative) consequences.

Many issues arising from the industrial relations context which might come before the Court could be polycentric. The Court should give weight to the idea of polycentricity when determining whether a restriction imposed by the state is justified under Article 11(2).⁶¹⁴ For example, if the Court were to consider whether conditions for the exercise of the right to strike—notice periods, balloting requirements, and so on—are justified, it might need to assess how these conditions will affect the interests of employers, fellow workers, the state, the general public. Yet more complex are cases which concern collective bargaining structures beyond the narrow *Demir* scenario. Whilst the Court is not setting wages itself, interference with the design of collective bargaining machinery could have implications for the bargaining power of trade unions

⁶¹³ King summary of Fuller’s idea of polycentricity, King (n 242) 190; see L Fuller, ‘The Forms and Limits of Adjudication’ (1978-1979) 92 *Harvard Law Review* 353, 394.

⁶¹⁴ King (n 242) 195.

and obligations of employers, which might ultimately have implications for wages and other employment conditions and therefore broad economic repercussions. Polycentricity concerns could loom particularly large in cases like *UNITE*, if it was accepted that the state has positive obligations to *fulfil* the right by establishing appropriate collective bargaining machinery. The complexity and multi-dimensionality of the task would justify a great degree of deference to the state in choosing how to comply with its obligations.

However, as King argues, polycentricity concerns should not be overstated. He argues that polycentricity as defined by Fuller is pervasive in adjudication. It should only be a concern where the particular legal issue at hand is polycentric, according to a refined definition of that word:⁶¹⁵ ‘a problem is polycentric if the best answer demands comprehension of a highly complex range of cause-and-effect relationships entailed by the potential solutions’ and relevant to adjudication ‘when the court is asked to make or should make a finding about the substantial and heterogenous interests of a large number of non-represented persons.’⁶¹⁶ It should be shown in a given case that polycentricity is a *particular* issue which justifies deference, and restraint should not be shown *merely because* the question arises in the sphere of industrial relations where questions are often polycentric. Furthermore, where relevant, the idea of polycentricity can be given more or less weight depending on the circumstances. An important factor is the *degree* of polycentricity, that is the ‘number and diversity of interests implicated,

⁶¹⁵ King (n 242) 194.

⁶¹⁶ *ibid* 193-194.

and the depth and breadth of the impact.⁶¹⁷ The higher this degree, the more leeway the Court ought to leave to the state.

Another consideration is the scope of a judicial mandate to adjudicate polycentric issues accorded by, here, the Convention.⁶¹⁸ King notes that, generally speaking, the judicial mandate of the Court to read social rights into the Convention is limited and disputed and any developments 'will need to be analogous to the organic development of the legal instrument as a whole.'⁶¹⁹ The mandate of the Court is relatively clear with respect to aspects of freedom of association which are generally considered as civil and political rights, such as the right to form and join a trade union is explicitly mentioned in Article 11(1). But the judicial mandate to deal with issues relating to collective bargaining and strike action is not clearly expressed in the text of Article 11 itself (by stark contrast to ILO and ESC texts) and the case-law, as it stands at the moment, is riddled with uncertainty in many respects. It is therefore appropriate for the Court to show greater deference where it encounters polycentric problems in these contexts, and that any developments of the scope of the right in this area should be incremental.⁶²⁰ This provides a reason for the Court to be cautious in a case like *UNITE*, where the enforcement of a positive obligation to establish collective bargaining machinery was not the subject of a clear judicial mandate.

⁶¹⁷ King (n 242) 202.

⁶¹⁸ *ibid* 198.

⁶¹⁹ *ibid* 200.

⁶²⁰ On which see Section II.c below.

Crucially, polycentricity is less of an issue where the judicial remedy leaves room for adaptation, since there is more scope to avoid unintended or unforeseen consequences.⁶²¹ The enforcement mechanisms of the ILO and ESC have the advantage of being premised on on-going monitoring and cooperation which allows scope for adaptation where necessary. The polycentricity concern plays a greater role in the ECtHR context, however, and the weight placed on it will vary in accordance with degree of flexibility which the Court can leave to states in complying with Convention duties. Nevertheless, as argued below, the mechanisms for enforcement of ECtHR judgments bear some resemblance to aspects of ILO and ESC supervisory mechanisms and therefore allow more scope for flexibility than a national court.

iii. Expertise

The lack of specialist expertise in employment and industrial relations is another relevant factor, especially in more complex scenarios. It may be difficult for a non-specialist court to determine the impact of a state policy or measure on individuals or trade unions in practice, such as whether legislation intended to protect employees engaged in collective bargaining or strike action operates effectively in the reality of the workplace or particular sector.⁶²² The same goes for the assessment of whether a restrictive measure is 'necessary' in a given context under Article 11(2), or whether collective bargaining machinery is 'appropriate.' ILO Committees and the ECSR have

⁶²¹ King (n 242) 209.

⁶²² It is important to distinguish the question of expertise from that of subsidiarity, discussed below. The Court should defer on account of an expertise deficit where the *subject-matter* requires special knowledge or experience, here subject-matter in the sphere of employment and industrial relations. The principle of subsidiarity implies that the Court shows deference to national authorities because they have better knowledge and experience of the national context *more generally*.

the benefit of members with experience in industry or in adjudicating many disputes in this sphere. The Court, on the other hand, relies on arguments put forward by the parties to the dispute or intervening parties.

A degree of judicial restraint is appropriate in questions requiring expert judgment primarily because of the error costs involved. However, judges ‘will not treat expertise as a necessary and sufficient condition for showing restraint.’⁶²³ First, it would be odd if the Court were to defer entirely to the expertise of the state where the claimant and other parties present reliable evidence to the contrary; rather, the Court would draw on both to make an informed judgment. Importantly, CEACR and ECSR conclusions are themselves evidence of expert assessment which, it was argued in Chapter III, can fill expertise gaps in the assessment of the ECtHR as a non-specialist court. Where conclusions by these Committees on the issue in question exist, the argument for deference to the state on grounds of expertise—where the opinion of the state differs to that of international bodies—is weaker.

Second, to defer to expertise entirely would be to place expert judgment outside the scope of legal accountability. This is undesirable because expert judgment is subject to a risk of non-expert influence (bias, indifference, patronage, ideology, time constraints et cetera) and expert error.⁶²⁴ The greater these risks and the more fundamental the interest at stake—here the deeper the intrusion into the right—the greater the demand

⁶²³ King (n 242) 229.

⁶²⁴ *ibid.*

for oversight and verification.⁶²⁵ That is, there is an expertise-accountability trade-off, whereby costs of judicial errors are weighed against the cost associated with a lack of accountability.⁶²⁶ This trade-off is something which the Court should recognise and adapt the degree of scrutiny accordingly, such that expertise will be a less weighty consideration where the alleged violation and consequences for the claimant are more serious. Furthermore, the Court should show less restraint where it suspects a failure of expertise, for example where the decision-maker has not investigated a question properly or considered alternatives⁶²⁷ — as is arguably the case in *UNITE*.

iv. Flexibility

Depending on the issue before the Court, there may be a need to leave scope for flexibility to the state to adjust to unforeseen circumstances and mistakes.⁶²⁸ Cases which involve polycentric tasks, complex problems requiring specialist expertise, conditions of uncertainty or rapid change hide the danger that judges may be wrong in assuming the consequences of their decision, or circumstances may change such that this decision has unintended consequences with significant costs.⁶²⁹ Judicial oversight can diminish much-needed flexibility to adapt by restricting the options available to the decision-maker in resolving a problem.⁶³⁰ The solution to this is not to rule out judicial involvement in certain areas altogether, nor even necessarily strong judicial restraint;

⁶²⁵ King (n 242) 229.

⁶²⁶ *ibid.*

⁶²⁷ *ibid* 235.

⁶²⁸ *ibid* 250.

⁶²⁹ *ibid.*

⁶³⁰ *ibid* 251.

rather, there are techniques which courts can apply to give decision-makers the flexibility to choose how to address a problem. Such techniques are, for example, the use of flexible remedies and value legal standards such as 'reasonable', 'necessary' or 'appropriate' and, to an extent, procedural requirements.⁶³¹ A degree of flexibility ensures that concerns about polycentricity and expertise, and to some extent democratic legitimacy, are less acute. This degree should be high enough to accommodate such concerns but not so high as to render a finding that a state has breached its obligations without much practical effect.

The ECHR enforcement machinery gives the ECtHR an advantage over national courts when it comes to leaving scope for flexibility and adaptation. Whilst the judgments of the Court are final (Article 44), they are not (normally) directly effective but are followed by a procedure which seeks to ensure that they are implemented properly. This procedure involves supervision by the Committee of Ministers, which considers whether states have taken the required individual measures (remedies relating to the position of the applicant) and general measures (measures taken to prevent violations in future cases).⁶³² The Committee invites states to explain the measures they have taken to comply with a judgment. If it is not satisfied with them, it re-examines the case at each subsequent meeting for individual measures and every six months for general measures.⁶³³ This procedure is, at a very general level, reminiscent of ILO and ESC supervisory mechanisms. A state in violation must submit an Action Plan with

⁶³¹ King (n 242) 264, 282-3; though note that he argues that procedural requirements are not a panacea to flexibility concerns, 264.

⁶³² *ibid* 56.

⁶³³ *ibid* 57.

intended measures which the Committee reviews; the Committee can make recommendations, request further information to be provided and monitors progress on the implementation of the plan; it also encourages states to use the cooperation activities offered by the Council of Europe to ensure continuing compliance even after measures are enacted.⁶³⁴ It is possible for NGOs and national human rights bodies to provide information and comments.

This procedure is not to be equated to that of the ILO and ESC, but it is *more* like them than initially meets the eye. The requirement for general measures is designed to effect more comprehensive systemic changes, which generally require more time and effort in their implementation. Therefore, even though the system is not primarily aimed at on-going monitoring and dialogue, it allows for progressive realization of duties and adaptation to unforeseen circumstances where necessary. The political process which follows a judgment offers space for conversation and guidance to states in working out the detail of their strategies to bring their domestic systems into compliance.⁶³⁵ This can take some pressure off the Court where polycentricity and expertise are an issue. First, it has more scope to formulate standards in vague terms—a technique often applied by ILO and ESC committees—without being worried that states will then be left fumbling in the dark, because the supervisory process can offer further guidance. By contrast, the lack of on-going supervision by most national courts hides the danger that, where the request of the court is framed in very open-ended terms, state authorities will face

⁶³⁴ For an Article 11 example of the types of measures proposed and response by the Committee, see follow-up to *Veniamin Tymoshenko* (n 126): Action Plan (07/05/2015) DH-DD(2015)558 and Decision of the Committee CM/Del/Dec(2017)1288/H46-36.

⁶³⁵ If the Committee of Ministers considers that, even after this process, a state refuses to abide by a judgment by the ECtHR, it can refer the case back to the Court, Article 46(4) ECHR.

uncertainty or choose to comply in the most minimal way possible, leaving re-visitation of the question to expensive litigation. Second, the Court can potentially afford to be somewhat more ambitious in its requests than a national court—subject to subsidiarity considerations—because states then have more time and space to design solutions appropriate to the national context.

This additional scope for flexibility gives the ECtHR some leeway to go further than national courts in enforcing a thick, empowerment notion of freedom of association, in particular with respect to positive duties. For example, on the facts of *UNITE*, it might have been open to the Court to find that there had been a breach of a positive duty to establish ‘adequate’ collective bargaining machinery. The duty on the state would be relatively open-ended, namely to establish adequate machinery, which leaves it with a wide range of choices. It would need to propose measures which would then be scrutinized by the Committee of Ministers. It is possible that scrutiny in the Committee would be fairly minimal and that it is satisfied with minor changes to the domestic system, in which case the usefulness of the process might be questioned. Still, a finding of a violation itself is of value because it signals that the genuine possibility to engage in collective bargaining *is* a fundamental right and, at the very least, re-opens the debate and prompts reflection and deliberation on how the current domestic system could be improved.⁶³⁶

⁶³⁶ That is, it starts a process akin to Hogg and Bushell’s ‘constitutional dialogue’ (n 589).

It is important to stress that this is a *limited* argument. Whilst the scope for judicial involvement might be somewhat broader than national courts, subject to restraint based on the principle of subsidiarity, it would be inappropriate if the Court were to subject state measures to the same kind and degree of scrutiny as applied by ILO and ESC committees. For example, a finding of a violation of a positive duty (to fulfil) in *UNITE* might be justified if it was found that, in the absence of the AWB, there was no effective collective bargaining machinery in that sector *at all*. If there was such machinery set up by legislation and the assessment of its adequacy required expert judgment, then it would probably be appropriate for the Court to show restraint on grounds of expertise, democratic legitimacy and polycentricity because these would be very significant, even where ILO and ESC committees would scrutinize the measures more closely. Furthermore, the Court is likely to be more cautious, so as not to compromise compliance rates and the rigour of scrutiny in the Committee of Ministers, which depends on pressure to comply exerted from other states. It would also be undesirable that the Court defer too much to the political process. The success of the ECHR system hinges to a great extent on the fact that its interpretive body is a well-regarded and authoritative judicial—and not political—body. Thus, the Court should be careful not to push the boundaries of its appropriate role as a judicial body too much, nor to attempt to assume the role of ILO and ESC processes. However, it should certainly try to take advantage of a small additional room for manoeuvre to reflect the fact that it is a leading human rights court which strives for the continuous improvement of the protection of human rights in Europe.

v. Subsidiarity: the margin of appreciation

A question which the Court will ask when scrutinizing state (in)action is whether the state has acted within its 'margin of appreciation.' The margin of appreciation doctrine is, effectively, another 'principle' of judicial restraint recognised in the ECHR context which reflects the fact that the ECtHR is an *international* court. Broadly speaking, the doctrine can be understood as an expression of the principle of subsidiarity as it applies to the ECHR system: the idea that the responsibility of protecting human rights guaranteed under the Convention falls *primarily* to national authorities and that ECHR machinery is of subsidiary nature. The margin of appreciation, as a 'structural concept' reflecting the principle of subsidiarity, aims to:

... address the limits of intensity of the review of the European Court of Human Rights in view of its status as an international tribunal. It amounts to the claim that the European Court should often *defer* to the judgment of national authorities on the basis that the ECHR is an *international* convention, not a national bill of rights.⁶³⁷

The Court refers to the state's 'margin of appreciation' in implementing Convention rights as the leeway accorded to national authorities in deciding how they will fulfil Convention obligations. The idea is that the Court's power to review decisions taken by national authorities should be more limited than the powers of a national constitutional court.⁶³⁸ The doctrine is intended as a 'tool to define the relations between the domestic authorities and the Court' and 'cannot have the same application to the relations between the organs of State at the domestic level.'⁶³⁹ The discretion/deference accorded

⁶³⁷ Letsas (n 401) 81.

⁶³⁸ *ibid* 90.

⁶³⁹ *A and Others v United Kingdom* (2009) 49 EHRR 29 [184].

through the margin of appreciation is therefore different in nature to that which national courts show in reviewing the actions of decision-makers. It is a reason for restraint *in addition to* the four considerations discussed above.

The margin of appreciation doctrine occupies a prominent place in ECtHR adjudication. It is significant for current purposes because it could be—and has been, in *RMT*—invoked as a reason to show deference to the decision of national authorities and therefore find no violation where a measure is contrary to ILO and ESC norms. The doctrine is a difficult, controversial and, at times, confusing aspect of ECtHR jurisprudence. The application of the doctrine, and in particular the determination of the breadth of the margin, has been heavily criticized for being imprecise, unpredictable, inconsistent or even superfluous in some cases.⁶⁴⁰ For example, *RMT* sparked controversy over the proper application of the doctrine.⁶⁴¹ So, though we know that the principle of subsidiarity in this manifestation is intended to act as a principle of judicial restraint, it is often difficult to predict *what degree of restraint* will be applied based on established principle and previous case-law.

The controversy stems from the fact that the scope of the margin of appreciation—and therefore the range of acceptable state (in)action—varies according

⁶⁴⁰ See R Macdonald, 'The Margin of Appreciation' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 85; J Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 *Columbia Journal of European Law* 113, 125; Letsas (n 401) Ch 4; J Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324, 325.

⁶⁴¹ See Bogg and Ewing, 'RMT' (130).

to the circumstances.⁶⁴² In the context of positive obligations, this affects the stringency of what are considered adequate measures taken by the state.⁶⁴³ Relevant circumstances include the nature and extent of the restriction on the right at issue, the object pursued by the restriction, the competing rights and interests of other individuals, common ground between Member States and any international consensus in relation to the issue.⁶⁴⁴ In cases involving collective labour rights, the Court has held that the margin is generally a wide one, 'since achieving a proper balance between the interests of labour and management involves sensitive social and political issues' and given 'the high degree of divergence ... between the domestic systems in this field.'⁶⁴⁵ However, it has been held that the margin is *reduced* in cases such as *Sørensen and Rasmussen* and *Demir*, which involved, respectively, an 'evolving consensus' on permissible restrictions and a 'far-reaching interference with the right.' In *RMT*, the Court explains that a lesser margin of appreciation is recognised where a restriction strikes at the core of trade union activity, although in that case secondary action was not deemed to be a core aspect of such activity.⁶⁴⁶

A number of pointers as to the approach of the Court to collective labour rights cases emerge from this. Generally speaking, and quite apart from the four reasons for restraint considered above, the Court recognizes a wide margin of appreciation in such cases; in recognition of the fact that such matters are generally sensitive and vary greatly

⁶⁴² See *RMT* (n 110) [86].

⁶⁴³ *Kratochvil* (n 640) 329.

⁶⁴⁴ See *RMT* (n 110) [86].

⁶⁴⁵ *ibid.*

⁶⁴⁶ *ibid* [87].

between states, the starting point of the Court is to show a high degree of deference to national authorities. This is clearly a different starting point to ILO and ESC committees because it is their primary task to engage exactly with these sensitive issues, although the committees can also show different degrees of deference depending on the circumstances for other reasons. There then needs to be a reason which justifies a reduced margin of appreciation.

This can be the case where, contrary to the starting assumption, there is a measure of common ground between Member States or international consensus. The role of ILO and ESC materials as evidence of consensus in this context was discussed in the previous chapter. The margin will also be reduced in accordance with the severity of the interference, and certainly in cases where a restriction strikes at the core of the trade union activity. What is considered as 'core' and how severity is assessed will vary according to the theoretical understanding of freedom of association adopted. If, as is assumed in this chapter, the Court is committed to an empowerment notion of freedom of association, then what are considered 'core' aspects of the right should include workers' (genuine) ability to meet the employer on more equal terms and participate in decisions which affect them, aligning more closely with ILO and ESC guarantees. This would, for example, mean that *RMT* involved a core aspect of a right given that it was the only way for workers to stand up to the employer.

These are only very general indicators of how the breadth of the margin will vary. The application of the doctrine in a particular case is incredibly fact-specific, dependent on the assessment of common ground and consensus and on the prevailing

view on the appropriate role of the Court, and understanding of what the principle of subsidiarity requires. What is more interesting here perhaps is how the considerations of democratic legitimacy, polycentricity, expertise and flexibility might interact with the the margin of appreciation assessment.

b. Incorporating reasons for restraint into the assessment of the breadth of the margin of appreciation

The Court does not have a practice of applying ‘principles of restraint’ *i-iv* and it would be ambitious to argue that it should develop an entirely new practice of doing so. The ‘tool’ used to determine the degree of deference to states in assessing compliance with the Convention in ECtHR adjudication is the margin of appreciation doctrine, and it is clear that this doctrine has a specific function in determining the vertical allocation of power and responsibility for the protection of fundamental rights as between the Court and national authorities. Yet factors relevant to the vertical (national v international) and horizontal (judicial v legislative and executive power) distribution of powers are not wholly unconnected. Where a task is polycentric and requires expertise, the Court might show greater deference for the reasons advanced above in *ii* and *iii and* because the ECtHR is an international court; similarly, where a rights question has been covered by the legislature, democratic legitimacy concerns arise in respect of judicial control generally, *and* control by an international court additionally. In other words, factors *i-iv* are nevertheless factors relevant to determining the extent to which the Court, as an international court, can legitimately exercise control over a state’s room for manoeuvre and choice of how to comply with their obligations.

The four considerations above could therefore be incorporated into the margin of appreciation assessment as *circumstances* relevant to the determination of the breadth of the margin, rather than being applied as separate principles. Where they are weighty factors, they would point to a wide margin of appreciation—subject to the other circumstances relevant to the breadth of the margin, such as severity of interference, common ground and consensus—and vice versa. How much weight should be accorded to them should be determined as discussed in *i-iv*. This would incorporate the analytical framework developed in *i-iv* into the margin of appreciation assessment, adding nuance to the default position that questions in the sphere of employment and industrial relations are subject to a wide margin of appreciation. It would also give the the Court a greater range of reasons on the basis of which it can make fine distinctions between cases and justify departure from or adherence to ILO and ESC norms. In other words, this approach would allow the Court to recognise the duties which arise from an empowerment notion of freedom of association, by reference to ILO and ESC norms, whilst being able to draw the boundaries of substantive legal protection *differently* to ILO and ESC committees to reflect the fact that it is an interpretive body of a different nature.

It should be added that, according to King’s theory of social rights adjudication, the effect of observing the principles of restraint *i-iv* can be described as ‘judicial incrementalism.’⁶⁴⁷ He describes this approach in the following way:

[J]udges should, when adjudicating vague constitutional social rights under conditions of uncertainty, (1) avoid significant, nationwide allocative impact, and either (2) give decisions on narrow, particularized grounds, or (3) when adjudicating a macro-level dispute with significant implications for large numbers of people,

⁶⁴⁷ King (n 242) 289, Ch 10.

decide in a manner that preserves flexibility. Their decision-making should ordinarily proceed in small steps, informed by past steps...⁶⁴⁸

Since my analytical framework draws on many aspects of King's principles of restraint, it would follow that it has a similar effect, and that in the application of Article 11 the Court should ensure that its decision-making proceeds in small steps. That is, the Court should not take expansive steps which radically depart from previous case-law which determines what is an acceptable restriction by the state, or what is required from the state in terms of positive obligations. It should, where required to implement the empowerment model of the right to freedom of association, expand the protective scope of Article 11 gradually and incrementally, showing some caution in light of the risks associated with judicial control explained in Section 1.a. This would be consistent with the Court's incremental approach to determining the meaning of Article 11, discussed in Chapter III. What this means is that the scope for deference accorded to the state in accordance with these principles of restraint might be broad at first but reduced over time, narrowing the gap—if there is one—between what is considered sufficient to comply with the ECHR on one hand, and ILO and/or ESC standards on the other.

3. Conclusion

This chapter argued that the mere fact that the ECtHR is a judicial body does not of itself mean that it cannot recognise the wide range of duties arising from the empowerment model by reference to the two specialist instruments and the conclusions of their interpretive committees. However, whilst the Court can recognise that there *are* such

⁶⁴⁸ King (n 242) 293.

duties under Article 11, when assessing compliance with these duties it should accord a degree of deference to the state to reflect this fact. This degree will vary according to a number of relevant factors to be incorporated in the Court's assessment of the state's margin of appreciation. Where that assessment points to a narrow margin of appreciation, there will be a close alignment between the scope of protection offered by the ILO and/or ESC and ECHR – ie a violation of ILO and/or ESC obligations is likely to be a violation of ECHR obligations too. Where there is a wide margin of appreciation, then the state has greater discretion in how they comply with their Convention obligations and it is possible that relevant measures will fall short of ILO and ESC standards but comply with the ECHR. This discrepancy in the ultimate level of protection would be a justifiable consequence of the difference in the nature of the enforcement mechanisms between the systems.

This part as a whole argued that the ECtHR should develop Article 11 in accordance with the empowerment model of freedom of association, using ILO and ESC materials as very significant sources of authority in doing so. It argued that departure from international standards must be justified by reference to relevant differences between the systems. A non-exhaustive list of such reasons was set out in Chapter III; and another such reason was explored in detail in Chapter IV. As argued in Chapter III, the proposed approach would lead to greater, if not complete, convergence between norms over time as the Court's case-law develops incrementally, reducing the institutional concern set out in Chapter I. It would reduce the risk that ILO and/or ESC standards are displaced by ECHR norms of a lower level of protection, and, conversely, increase the relevance of ILO and ESC standards to states parties to the Convention,

since these would be a key reference point in assessing compliance with Article 11. In other words, the proposed approach seeks to decrease the negative effects of the existence of multiple freedom of association guarantees, and increase opportunities for mutual learning and support.

As it leaves space for divergence, however, the solution proposed here cannot completely eliminate the concerns highlighted in Chapter I. The fact that any departure from ILO and/or ESC norms in the interpretation of Article 11 is well-justified by reference to differences between the systems is likely to reduce uncertainty and might go some way to preventing states from using ECHR standards as an escape route to level down protection and to argue that they comply with all of their international law obligations in this sphere. However, it does not by itself guarantee that states will not attempt to do so, and to continue to accord priority to the authority of the Strasbourg Court and the ECHR as the more prominent instrument. Thus, a degree of displacement and marginalisation of specialist instruments might continue to take place. Indeed, there is a risk that the expansion of protection of collective labour rights under Article 11 might increasingly turn the focus of trade unions and workers to the ECHR, rather than the more traditional mechanisms of the ILO and ESC, as a forum to defend their interests. A more comprehensive solution to the institutional concern would require efforts on further fronts, particularly with respect to the effectiveness of the enforcement of ILO and ESC standards. I return to this question in the concluding chapter.

However, viewed through a different lens, the proposed approach to interpreting Article 11 has significant positive potential to strengthen the protection of

collective labour rights via the ECHR, as these increasingly come under attack by national and EU-level deregulatory agendas. This is not only because of the prominence of the ECHR itself and the authority of its Court, but also because ECHR rights constitute general principles of EU law, and because Article 11 ECHR sets the minimum level of protection under Article 12 CFREU. The implications of this link between the ECHR and CFREU are considered in Part D. Even if the interpretive approach suggested here has its limitations as a solution to the institutional concern and does not lead to complete convergence, it does lead to an expansion of the scope and substance of Article 11. It also increases the range of circumstances in which the ECHR is capable of providing a more effective route for workers and trade unions to defend their rights vis-à-vis the supervisory mechanisms of the ILO and ESC. This is in principle to be welcomed from the perspective of collective labour rights protection, as long as the ECHR does not become the only avenue pursued in this regard, and efforts are made to continue to utilise ILO and ESC machinery, particularly in circumstances in which a remedy under the ECHR seems unlikely.

Part D: The Right to Freedom of Association in EU Law

This part explores how EU freedom of association guarantees can be interpreted in closer alignment with ILO and ESC norms, as well as Article 11 ECHR. I mainly focus on the development of Articles 12 (right to freedom of assembly and association) and 28 (right to collective bargaining and action) CFREU, though I consider the role of general principles of EU law where relevant. The analysis is again built on the premise that the empowerment model of the right to freedom of association should be taken as the guiding normative rationale for the interpretation of freedom of association norms in EU law, with ILO and ESC norms acting as important sources of authority and Article 11 ECHR as the minimum level of protection which must be guaranteed under Article 12 CFREU. I consider the extent to which a convergent interpretation is possible in light of the special characteristics of the EU legal order and, as in the ECHR context, consider reasons which justify divergence—or even conflict—between norms pertaining to textual, institutional and constitutional differences.

As Chapter I discussed, issues stemming from differences and conflict between the EU legal order and other international instruments can potentially arise in two ways. First, EU measures which are restrictive of the right to freedom of association in a way contrary to international social standards can have an undermining effect on specialist instruments. Such conflict has arisen or has the potential to arise in the context of EU economic governance, and where the exercise of fundamental economic freedoms restricts freedom of association and related collective labour rights. Second, concerns about uncertainty, levelling-down and displacement of specialist instruments can arise

where EU freedom of association guarantees are interpreted in a more restrictive manner than specialist norms. This part explores the potential of an interpretation of EU freedom of association guarantees which, in so far as possible, converges with other international norms, to address the institutional concern along both of these axes. As stated in the introduction, it also reflects on the positive potential of such an interpretation to promote respect for the right to freedom of association within EU Member States.

The part is structured as follows. Chapter V explores how ILO, ESC and ECHR norms can be used in the interpretation of EU freedom of association guarantees in accordance with the empowerment model. It highlights the potential implications of such an interpretation, both as a solution to the institutional concern and in terms of the positive potential of Charter provisions to strengthen the protection of collective labour rights in Europe. However, it acknowledges that there are a number of further factors—such as the scope of application of Charter provisions, the standard of review applied to restrictions on the right and so on—which have implications for the ambit and substantive level of protection which EU freedom of association guarantees provide in practice. These factors limit the extent to which the proposed interpretive approach could act as a solution to the institutional concern, and as an opportunity to strengthen the protection of collective rights. They are explored further in Chapters VI and VII.

Chapter VI examines the implications in this regard of some of the limitations of the Charter. It first discusses the field of application of the CFREU as set out in Article 51. It argues that areas of EU-level activity which have significant implications for the right to freedom of association might fall outside the scope of the Charter, but that the

scope of application to Member States might be relatively broad; and considers whether, in light of the recent *Bauer* judgment, there might be some scope for horizontal application of Articles 12 and 28.⁶⁴⁹ It also argues that the scope for imposing positive obligations on EU institutions and Member States under Articles 12 and 28 might be narrow, in light of the principle of conferral and explicit exclusion of the right to freedom of association and right to strike from EU competence. The chapter further considers the extent to which the distinction between rights and principles set out in Article 52(5) CFREU has implications for the enforceability of obligations under Article 28.

Chapter VII considers the scope for permissible restrictions on the right to freedom of association in EU law. It argues that the scope for restrictions of the relevant Charter provisions is broader than under the other instruments because the Charter recognises a wider range of legitimate aims which could be pursued by such restrictions, and because there is reason for the CJEU to exercise a greater degree of restraint than the ECtHR and ILO and ESC Committees. It argues also that the exercise of the right to freedom of association might be limited by the need to respect the so-called EU economic freedoms, which enjoy a fundamental status in the EU legal order, but not under the ILO, ESC or ECHR. Thus, restrictions which are contrary to international standards might nonetheless comply with EU law, and in that sense the protection provided under the Charter can be 'narrower' even where the meaning of the relevant guarantees is similar. This part concludes that the scope for remaining differences and conflict between EU law and specialist norms may be even greater than in the ECHR context.

⁶⁴⁹ Joined Cases C-569/16 and C-570/16 *Bauer v Stadt Wuppertal; Broßonn v Wilmeroth* ECLI:EU:C:2018:871.

However, even so the interpretive approach proposed in Chapter V could significantly contribute to strengthening the protection of collective labour rights in Europe.

Whilst it is relevant to addressing the institutional concern, I do not consider the prospect of EU accession to the ECHR in this part. It has been suggested that after accession—required by Article 6(2) TEU which provides that the EU ‘will accede’ to the ECHR—the CJEU would need to revise some of its problematic case-law concerning collective labour rights (the *Viking* and *Laval* line of cases).⁶⁵⁰ However, the accession process has been halted by CJEU Opinion 2/13, which deserves some attention as a reference point for Chapters V and VII.⁶⁵¹ The Opinion defends the autonomy of the EU legal order; it states that the founding treaties of the EU established a ‘new legal order,’ ‘the nature of which is peculiar to the EU, its own constitutional framework and founding principles’ and which is ‘characterised by its primacy over the laws of Member States.’ It goes on to say that:

169 Also at the heart of that legal structure are the fundamental rights recognised by the [CFREU] ... respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU...

170 The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU ...

172 The pursuit of the EU’s objectives, as set out in art.3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such

⁶⁵⁰ Eg Velyvyte (n 218); Kilpatrick (n 165) 299.

⁶⁵¹ Opinion 2/13 (n 219).

a way as to contribute—each within its specific field and with its own particular characteristics—to the implementation of the process of integration that is the *raison d'être* of the EU itself.

The CJEU makes clear that the protection of fundamental rights within the EU legal order must take place within a framework of principles specific to that order. The Opinion implies that forms of external control which are liable to undermine this are a threat to the autonomy of the EU legal order; and confirms the fundamental significance of the process of integration and the economic freedoms to the EU legal order, principles and aims which are not shared by the Council of Europe and the ILO. This has implications for both the interpretation and enforcement of Charter guarantees, as will be discussed in Chapters V and VII. Furthermore, the Opinion suggests 'that the judges in Luxembourg prefer first to develop an internal system based on the [CFREU] before allowing for a more institutionalized external influence' with respect to fundamental rights protection.⁶⁵² For the time being, therefore, a more realistic prospect to achieving a degree of coherence between EU law and Union acts and ECHR (and ESC and ILO) freedom of association-related norms remains the development of the relevant internal EU guarantees by reference to these standards, which takes into account the special character of the EU legal framework.

⁶⁵² A Łazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 *German Law Journal* 179, 180.

V. Interpreting EU Freedom of Association Guarantees

This chapter considers how the CJEU might use international norms (ECHR, ILO and ESC) in interpreting EU freedom of association guarantees in accordance with the empowerment model. The case-law of the CJEU on the right to freedom of association and related collective labour rights—whether as general principles of EU law or as set out in Articles 12 and 28 CFREU—is less developed than Article 11 ECHR jurisprudence. Furthermore, the approach of the CJEU to interpreting human rights provisions is less explicit and systematic. This leaves much space for speculation on the direction that the Court might take when interpreting the provisions in question in the future. Section 1 therefore analyses different possible approaches to interpreting and developing EU freedom of association guarantees. Section 2 then considers the potential implications of a broad interpretation of these guarantees for the institutional concern and, more generally, the obligations of EU institutions and Member States under EU human rights law.

1. Possible Approaches to Interpreting EU Freedom of Association

Guarantees

There are a number of possible approaches to interpreting EU freedom of association guarantees in accordance with an empowerment conception of the right to freedom of association. Here I explore three routes through which CJEU jurisprudence can be developed by reference to ECHR and/or ESC and/or ILO standards: (a) interpreting Article 12 in line with Article 11 ECHR via Article 52(3) CFREU; (b) referring to ESC and/or ILO norms as sources of general principles of EU law; and (c) using ESC and/or

ILO norms as aids to interpreting Articles 12 and 28. I argue that the CJEU should look to sources of authority other than the ECHR, here ILO and ESC norms, in interpreting Charter freedom of association guarantees, in particular with respect to Article 28. Indeed, as the ECtHR, it should look to these norms as important reference points, and justify departure from them by reference to differences between the Charter and the EU legal order and specialist mechanisms.

I do not explore in detail the possibility that CFREU freedom of association guarantees would be interpreted in accordance with the empowerment model without reference to external sources. This is due to space constraints, and because, as argued in the introduction to this thesis, it seems unlikely that a non-specialist Court would define and apply collective labour rights without any reference at all to specialist instruments. I acknowledge, however, that an independent development of EU freedom of association guarantees is more likely than an independent development of Article 11 ECHR. This is because the Charter is an integrated document which already explicitly protects the right to collective bargaining and action. Its preamble highlights a wider set of values on which the Union is founded—not just of human dignity and freedom, but also equality and solidarity—which are also reflected in the different titles of the Charter. Moreover, the CJEU has long-recognised that the Union has social, as well as economic, objectives’ and that it is ‘intended ... to ensure social progress and seek the constant improvement of the living and working conditions’ of people within the Union.⁶⁵³ Thus, the CJEU has more internal reference points on which it can draw to justify a broad

⁶⁵³ C-43/75 *Defrenne v Sabena (No 2)* [1976] ECR I-455 para 10.

interpretation of the right to freedom of association and related collective labour rights. Of course, as discussed below, these reference points remain relevant even where the Court also looks to external sources.

a. Article 12 CFREU: same ‘meaning and scope’ as Article 11 ECHR

The obvious starting point for the interpretation of the right to freedom of association under EU law is Article 12 CFREU in conjunction with the horizontal provisions contained in Article 52(3) CFREU. Since Article 12 corresponds to Article 11 ECHR, it must be given the same ‘meaning and scope’ as that right.⁶⁵⁴ The Court has not yet focused specifically on how ‘meaning and scope’ is determined, but it has referred to ECHR case-law when interpreting Charter provisions.⁶⁵⁵ Looking only to the text of the Convention for the ‘meaning and scope’ of ECHR rights is almost meaningless given the extensive ECtHR jurisprudence which further defines the content of these rights; it would make sense that CJEU would follow ECHR case-law. The explanatory notes to Article 52(3) clarify that ‘meaning and scope’ also includes authorized limitations of the right.

This nexus between Article 11 ECHR and Article 12 CFREU is key to the framework for convergence proposed here. It means, at least in theory, that the right to freedom of association in EU law must align with ECHR guarantees or confer a higher

⁶⁵⁴ Article 52(3); see explanatory notes (n 183) to Article 12 CFREU.

⁶⁵⁵ P Craig and G De Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 386, fn 30; eg C-291/12 *Schwarz v Stadt Bochum* EU:C:2013:670 [27] (data protection), C-71 and 99/11 *Bundesrepublik Deutschland v Y and C* EU:C:2013:518 (religious freedom).

level of protection. It is for this reason that the analysis in this part builds on the analysis in Part C: if the ECtHR takes the interpretive approach proposed in Part C, that level of protection should be reflected by Article 12 CFREU. There would be some 'indirect' alignment between EU and ILO and ESC norms, with the ECHR acting as a 'bridge' or 'hub' between the various systems.⁶⁵⁶ In this scenario, the Strasbourg Court would continue to drive the expansive development of freedom of association norms, and the CJEU would follow the lead of the human rights court, reflecting ECHR norms rather than independently developing EU internal guarantees. The CJEU might be particularly inclined to look to Strasbourg given that it is not itself a human rights Court. This would be in-keeping with the special position which the ECHR has long enjoyed in CJEU case-law,⁶⁵⁷ and now in the Treaties as a source of general principles of EU law, that is as a source of authority in the development of the EU human rights acquis.

Whilst this is perhaps the most obvious route to convergence between the CFREU and specialist norms in the field, it is not the only one, nor necessarily the best. First, it is possible that the 'integration' of Article 11 ECHR into Article 12 via Article 52(3) would not be completely straightforward. Since there is currently no possibility for direct ECtHR review of CJEU judgments, the CJEU will need to determine the 'meaning and scope' of Article 11 ECHR itself. There is reason to suspect, in light of judgments like *Viking* and *Laval*, that the CJEU would tend to interpret these rights in a more restrictive manner than the ECtHR would do in the same circumstances. That is, Article

⁶⁵⁶ See eg Kilpatrick (n 165); Velyvyte (n 218); Bogg, 'Viking and Laval' (n 190) 66-8. As discussed in Chapter I, some of the ECtHR's recent case-law suggests an inclination in the opposite direction.

⁶⁵⁷ C-36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219 for the first time mentions the ECHR as a source of general principles of EU law, [32].

12 CFREU might not completely align with Article 11 ECHR, and would therefore be less closely aligned with international standards than the ECHR provision.⁶⁵⁸

Second, the development of Article 11 ECHR suggested in Part C is a best-case scenario and one which would occur gradually if at all. The ECtHR may not get the chance to address the relevant issues before these come up before the CJEU; or it may continue to take a cautious approach to the interpretation of Article 11. It would be open to the CJEU to hold that EU law provides a higher level of protection than the ECHR in such a case, and here the Court might usefully refer to ILO and ESC norms. Rather than merely following ECtHR jurisprudence, the CJEU should seek to develop Charter guarantees in line with the empowerment model by reference to instruments other than the ECHR. I consider how the Court might do so below, either through the formulation of general principles of EU law, or by using these instruments as aids to the interpretation of Articles 12 and 28 CFREU. As will be argued, the fact that, unlike the ECHR, the CFREU contains a specific provision on the right to collective bargaining and action could allow the CJEU to take the lead in developing EU freedom of association guarantees in line with international social standards.

b. ESC and ILO norms as general principles of EU law

It is questionable whether the CJEU could draw on ESC and ILO norms to develop the substance of the right to freedom of association, the right to collective bargaining and to

⁶⁵⁸ There are other points of difference which might arise between the level of protection under Article 12 CFREU and Article 11 ECHR, such as the scope for permissible restrictions, which are discussed in Chapter VII.

take collective action as general principles of EU law.⁶⁵⁹ In defining general principles of EU law, the Court:

... draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the ... [ECHR] has special significance.⁶⁶⁰

Article 6(3) TEU only refers to the ECHR and national constitutional traditions as sources of inspiration, though the Court has continued to make reference to other international human rights treaties, and Article 6(3) could be read as an affirmation of the Court's general principles case-law.⁶⁶¹ All EU Member States are members of the ILO and subject to its fundamental Conventions, and nearly all have ratified Articles 5 and 6 ESC.⁶⁶² Many of the Member States will have collaborated on their drafting. In principle, it would seem that the CJEU *could* draw on these international instruments as sources of general principles of EU law.⁶⁶³

The Court draws on both instruments in *Viking* and *Laval* when recognising the right to take collective action as a general principle of EU law.⁶⁶⁴ The relevant passage in both judgments suggests, however, that it is a relevant consideration that the right to take collective action is recognised by both the ESC and ILO Convention 87 *and*

⁶⁵⁹ These are already recognised as general principles of EU law, see Chapter I.3.a.

⁶⁶⁰ Opinion 2/94 *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759 [33], citing C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925 [41].

⁶⁶¹ Craig and De Búrca, *EU Law* (n 655) 385.

⁶⁶² Only Austria has not ratified Article 6(4).

⁶⁶³ Again, only where this is unclear in ECHR jurisprudence or not covered by Article 11 ECHR – since the ECHR is the main international instrument to which the CJEU looks in cases concerning fundamental rights.

⁶⁶⁴ *Viking* (n 177) [43-4]; *Laval* (n 177) [90-1].

instruments developed by Member States at Community level (CCFSRW and CFREU).⁶⁶⁵ That is, there is common ground at international level that the right to take collective action is a fundamental right, supported by Member States which chose to include that right explicitly in the text of the relevant EU instruments. The Court is referring to ILO and ESC norms as evidence of common ground, and it is possible here to draw some parallels with the ECtHR's use of those instruments as evidence of international consensus.⁶⁶⁶ In *Commission v Germany*, the Court refers to the ESC, CCFSRW and CFREU, but, interestingly, not ILO Convention 98.⁶⁶⁷ The more recent *Bauer* case refers to the ESC and ILO Convention 132 alongside the CFREU and CCFSRW as instruments from which the right to paid annual leave—an essential principle of EU social law—is derived.⁶⁶⁸

These cases show that ESC and ILO norms can play a role in determining general principles of EU law. However, they are not the only norms referred to and it is clear that the Court is looking at a broader range of instruments than, for example, some of the ECtHR cases. Thus, any common ground between them is likely to relate to principles formulated at a greater level of abstraction. For example, *Viking* and *Laval* merely recognize that the right to take collective action is a general principle of EU law without elaborating on its content by reference to the aforementioned sources. As Chapter I explained, there are differences in the scope and permissible restrictions of

⁶⁶⁵ *Viking* (n 177) [43-4]; *Laval* (n 177) [90-1].

⁶⁶⁶ This is, of course, not to suggest that this use of international materials is exactly the same.

⁶⁶⁷ *Commission v Germany* (n 188) para 37; this contrasts with AG Jacobs' Opinion in *Albany* (n 196) that there was insufficient convergence between national legal orders and international legal instruments to recognise a specific right to collective bargaining, at [160].

⁶⁶⁸ *Bauer* (n 649) [81].

that right as between the ILO and ESC with which the CJEU does not engage.⁶⁶⁹ What is more, the result in the cases has turned out to conflict with ESC and, potentially, ILO provisions.⁶⁷⁰ As will be discussed in Chapter VII, the cases have been criticized for their circumscribed understanding of the legitimate objectives of collective action, amongst other things.⁶⁷¹ It would seem that what is recognised as a general principle in these cases is an abstract and vague 'shell' of a right.

It is unlikely that the CJEU will regard the ESC and ILO, separately or together, as sources of general principles by themselves, that is not in combination with other instruments. Although it has referred to these sources in some of its case-law in the sphere of labour law,⁶⁷² in terms of its practice in general the Court has rarely made reference to international instruments other than the ECHR, as discussed in the next section.⁶⁷³ These instruments do not currently enjoy the same status as a reference point. To acknowledge that certain ESC or ILO norms constitute general principles would be to bolster significantly the status and influence of these instruments within the EU legal order, vis-à-vis EU institutions and Member States acting within the scope of EU law. This would sit at odds with the institutional links and channels of cooperation that currently exist between the EU and the ESC and ILO, which are much weaker than its

⁶⁶⁹ Davies, 'One Step Forward' (n 190) 139.

⁶⁷⁰ See Chapter I.3.b; see CEACR in BALPA dispute (n 204) or ECSR regarding *Lex Laval* (206).

⁶⁷¹ Bogg, 'Viking and Laval' (n 190) 50; Velyvyte (n 218) 85; Davies, 'One Step Forward' (n 190).

⁶⁷² Including much earlier judgments such as C-149/77 *Defrenne v Sabena (No 3)* [1978] ECR 1365; Craig and De Búrca, *EU Law* (n 655) 386.

⁶⁷³ De Schutter and de Jesús Butler (n 230); Craig and De Búrca, *EU Law* (n 655) 386.

connections to the ECHR (both in theory and practice).⁶⁷⁴ It would potentially also sit at odds with the emphasis placed on the autonomy of the EU legal order by Opinion 2/13.

Furthermore, although the relevant provisions are ratified by almost all EU Member States, rates of compliance and regard for ILO and ESC standards may vary significantly.⁶⁷⁵ Holding that these provisions are general principles of EU law would radically alter the nature of the obligations of Member States attributable to these instruments. Such a move is likely to be regarded as more controversial by Member States than if the Court were to recognise general principles arising from common constitutional traditions,⁶⁷⁶ or from a well-regarded and widely implemented instrument with long-established links with the EU such as the ECHR. This is not to say that the Court will not or should not under any circumstances recognise certain ILO and ESC norms, taken on their own, as sources of general principles of EU law, but to suggest that it is unlikely to do so in the absence of further support in either the ECHR or national constitutional traditions.

Therefore, it is unlikely that convergence between EU freedom of association guarantees and specialist international instruments can take place through the

⁶⁷⁴ These are discussed in more detail in the concluding chapter.

⁶⁷⁵ For example, the laws of only some EU Member States have been subject to comment, with regard to their compliance with Conventions 87 and 98, in the CEACR's latest annual report: *Report of the CEACR*, International Labour Conference, 108th Session, 2019. Differences in compliance with Articles 5 and 6 ESC as between states can also be noted in the latest round of ECSR conclusions, which can be found at < <https://www.coe.int/en/web/portal/-/labour-rights-under-pressure-across-europe-latest-annual-conclusions-from-the-european-committee-of-social-rights>> accessed 8 May 2019. For differences in rates of compliance across various ESC provisions, see 'Infographic: Labour rights under pressure across Europe' < <https://infogram.com/1pz2jg9p669vkya21e0v5pwwvexs121w211y?live>> accessed 8 May 2019.

⁶⁷⁶ Though this could be regarded as controversial depending on how the meaning of 'common' is construed; for some issues which have arisen in this regard, see Craig and De Búrca, *EU Law* (n 655) 389.

formulation of general principles of EU law. Where general principles of EU law relating to collective labour rights have been recognised, this has been done on the basis that there is common ground to this effect amongst a range of sources; and the general principles appear, on the basis of case-law to date, to be limited in substance. This is not entirely surprising. It is to be expected that where the Court looks for generality or commonality it might settle for a shared but more abstract conception of what a particular right means;⁶⁷⁷ it is to be expected also that judicially recognised ‘general principles’ will be more vaguely defined than rights set out in specific instruments. Instead, it might make more sense to look to CFREU provisions as foundations on which to build the EU’s internal freedom of association guarantees.⁶⁷⁸ For this reason, and due to space constraints, the rest of Part D explores issues pertaining to the interpretation and application of Articles 12 and 28 only.

c. Building on Articles 12 and 28 CFREU

i. The relationship between Articles 12 and 28 CFREU

It is as of yet unclear what the relationship between Article 12 and Article 28 might be, given that Article 12 is to have the same ‘meaning and scope’ as Article 11 ECHR, which also protects the right to collective bargaining and action. It is possible that where it is considering a claim which concerns collective bargaining or action, the CJEU will draw on both provisions together without much distinction, ensuring that the standards of

⁶⁷⁷ See discussion in Chapter III.1 on ‘consensus’ and ‘common ground.’

⁶⁷⁸ These would in any event be provisions which the Court will draw on even where it recognises a general principle of EU law, as in *Viking* (n 177).

Article 11 ECHR are taken as the minimum level of protection. It is possible also that it might draw on the fact that there is a separate CFREU provision covering these rights to provide a more generous interpretation of Article 12 than follows from Article 11 ECHR; or to rule that Article 28 itself provides broader protection than Article 12. For example, Article 28 could act as a foundation for positive duties beyond what Article 11 ECHR currently appears to require, as will be discussed below. In any event, which CFREU provision is invoked is an important question only if the rights-principles distinction laid down in Article 52(5) CFREU cuts across these rights. This will be discussed in Chapter VI.3.

ii. ILO and ESC norms as aids to interpreting Article 12 and 28 CFREU

How the Court might use international materials in defining Charter collective labour rights beyond a 'floor' set by Article 11 ECHR and not on the basis of its general principles case-law is a difficult question. Unlike the ECHR, it does not yet have a comprehensive body of human rights jurisprudence from which a specific methodology could be deduced. One possibility is that it could take a similar approach to that suggested in Chapter III, namely to use ESC and ILO norms as aids to interpretation and accord them more or less weight by reference to the considerations set out in that chapter.

There are some difficulties with such a proposition. First, the CJEU has been less open to external materials than the ECtHR, and does not appear to have the same practice of examining international materials as a matter of course – though it is possible

that such material is presented to the Court but not included in the judgment.⁶⁷⁹ De Schutter and De Jesús Butler argue that the Court sometimes acknowledges the relevance of other international instruments but rarely actually draws on them; it has primarily relied on the ECHR, with other treaties generally only 'complementing' its analysis.⁶⁸⁰ It would seem that the Court has relied on such materials sporadically, if at all,⁶⁸¹ by contrast to the systematic manner in which it has looked to the ECHR as a source of authority. Second, the judicial style of the CJEU is less amenable to the methodology suggested in Chapter III, because it 'involves a single collegiate judgment and a formulaic, impersonal and fairly minimalist style of judicial reasoning in most cases.'⁶⁸² This is by contrast to the ECtHR, which has developed a 'more discursive and fuller style of reasoning.'⁶⁸³ The assessment suggested in Chapter III requires discussion and justification of why the Court is referring to another instrument and how much weight it bears in its reasoning, which is perhaps too much to expect of the CJEU.

There are, however, good arguments for the Court to be more open to instruments other than the ECHR in the interpretation of Charter norms. As De Búrca argues, because the CJEU lacks the experience of other human rights courts and treaty-bodies, the use of international and comparative law would not only provide it with information on other relevant standards but demonstrate 'to litigants and others

⁶⁷⁹ De Búrca (n 187) 173-4.

⁶⁸⁰ De Schutter and de Jesús Butler (n 230) 281-4. The use by the Court of ILO and ESC materials was discussed above; certain UN Conventions have been cited by the Court on a number of occasions, Craig and De Búrca, *EU Law* (n 655) 386-7.

⁶⁸¹ De Schutter and de Jesús Butler (n 230) 284.

⁶⁸² De Búrca (n 187) 176.

⁶⁸³ *ibid* 177.

concerned by its rulings that [it] has engaged fully and knowledgably with the relevant arguments.⁶⁸⁴ In other words, reference to international law would not only enrich but also inspire confidence in the CJEU's human rights adjudication. The element of confidence is important given the concern that the adoption of its own human rights instrument was an attempt by the EU to 'preserve its autonomy and exclusive authority' and avoid its objectives being constrained by human rights principles interpreted by an external authority.⁶⁸⁵ It is true that this concern is addressed to some extent by Article 52(3) CFREU and Article 6(2) and (3) TEU, but the CFREU includes many rights which the ECHR does not, especially in the social and economic sphere. Adopting a more 'open paradigm' when interpreting the CFREU would show a genuine commitment to ensuring that all fundamental rights are protected adequately. External points of reference operate as important checks on the Court's decisions and lend them (much needed) legitimacy. Developing a practice of examining and referring to other international instruments seems also the best way to ensure that EU human rights law generally will develop in harmony with, rather than marginalise, the existing international human rights *acquis*.⁶⁸⁶

Furthermore, the argument advanced in Chapter III on the value of specialist labour and social rights instruments and the pronouncements of their interpretive bodies are equally relevant here. Davies points out that some of the Court's case law on

⁶⁸⁴ De Búrca (n 187) 171.

⁶⁸⁵ *ibid* 172 highlights this as a concern expressed by some at the time of adoption of the CFREU.

⁶⁸⁶ That the development of EU human rights law in isolation from the international human rights context would be counter-productive is a fear expressed by De Schutter and de Jesús Butler (n 230) 279 and UN Office of the High Commissioner for Human Rights Report, *The European Union and International Human Rights Law* (Regional Office for Europe 2011).

collective labour rights suggests a lack of understanding of the industrial relations context, which is perhaps not surprising given that the CJEU is a non-specialist court.⁶⁸⁷ The Court could usefully refer to ILO and ESC principles and the case-law of the relevant Committees in defining the meaning of the more vaguely formulated Charter provisions; and benefit from the expertise and experience of these bodies in adjudicating industrial relations questions, both in determining whether a right has been restricted and whether such a restriction is justified.

There are particular ‘deliberative reasons’ which can be invoked to justify reference to ILO, and especially ESC, materials in the interpretation of Article 28.⁶⁸⁸ Since Article 28 is a specific provision on collective labour rights, specialist norms in that field are particularly pertinent sources of authority in interpretation. The fact that it is positioned in the Solidarity chapter of the Charter suggests an even stronger nexus between the values underpinning this provision—and the Charter as a whole, which recognises the values of equality and solidarity—and the aims of the ESC and ILO systems and particular provisions on collective labour rights.⁶⁸⁹ Importantly, the explanatory notes to Article 28 CFREU state that it is based on Article 6 ESC and the CCFSRW. The limitation on the ambit of the right to collective action to conflict of interest mirrors that in Article 6(4) ESC.⁶⁹⁰ The CFREU Preamble refers to the ESC in

⁶⁸⁷ ACL Davies, ‘The Court of Justice as a Labour Court’ (2011-2012) 14 *The Cambridge Yearbook of European Legal Studies* 145, 156-166.

⁶⁸⁸ These are reasons invoked by judges to justify their use of comparative law, Fredman, ‘Foreign Fads and Fashions’ (n 518); see Chapter III.2.c.

⁶⁸⁹ See factor *iii* (purpose) highlighted in Chapter III.2.c. as a factor in favour of referring to other instruments as sources of authority.

⁶⁹⁰ This limitation was already included in point 13 of CCFSRW.

stating that ‘the Charter reaffirms...the rights as they result from...the Social Charters adopted by the Union *and the Council of Europe*.’⁶⁹¹ These factors—use in drafting, reference in Preamble, a degree of textual similarity, position in the Solidarity title—provide substantial reasons for the CJEU to look to the ESC as an important source of authority in the interpretation of Article 28. In other words, the case for interpretation of collective labour rights by reference to the ESC—and to a somewhat lesser extent the ILO as a specialist instrument—is greater in the context of Article 28 than Article 12 or indeed Article 11 ECHR. This provision can be used as a springboard to give the empowerment model of the right to freedom of association its legal expression in EU law, particularly where Article 12—reflecting Article 11 ECHR—requires a lower level of protection.

It is also possible to draw here on some of the factors which speak in favour of using ILO and/or ESC materials set out in Chapter III. All EU Member States are ILO and Council of Europe members, and all of them have ratified Article 5 ESC and most provisions of Article 6 ESC.⁶⁹² The provision determining permissible restrictions to Charter provisions, Article 52(1), also requires a proportionality assessment, ie that restrictions are necessary in a democratic society, as Article 31 ESC/Article G RESC – although notably the range of goals which restrictions may pursue is broader, as will be discussed in Chapter VII.1.a.⁶⁹³ Furthermore, the circumstances in which the CJEU might be called on to determine the ambit of CFREU collective labour rights is not limited to

⁶⁹¹ Para 5, CFREU Preamble.

⁶⁹² See factor *ii* (membership and ratification) discussed in Chapter III.2.c. Only Austria has not ratified Article 6(4) ESC.

⁶⁹³ See factor *i* (textual similarities and differences).

individual petition but might extend to review of the validity of legislation. Therefore, the argument that the pronouncements of ILO Committees and the ESC are of less persuasive weight where they relate to national legislation generally may not apply with equal force in cases where the Court is asked to interpret or review the validity of legislation.⁶⁹⁴

There are also factors which point towards according less persuasive weight to ILO and/or ESC materials in some circumstances. These materials might be less useful where they relate to a Member State different to the one in question;⁶⁹⁵ or if what is at issue in the proceedings before the CJEU is an EU measure or act of an institution, unless it concerns the consequences of that measure in the national context which have been considered by the relevant Committees.⁶⁹⁶ As Article 28 confines the right to collective action to conflicts of interest, ILO standards on the right to strike against government policy are irrelevant here,⁶⁹⁷ although they remain relevant to the interpretation of Article 12. The argument made in Chapter III that ‘more technical’ Conventions which set out more specifically defined standards should be regarded, in general, as of less persuasive weight is also relevant.⁶⁹⁸ Interestingly, neither Article 12 nor Article 28 refer to specific categories or workers to which special provisions might apply, which could be invoked as a reason not to adhere to the approach of ILO and/or ESC bodies in this

⁶⁹⁴ See factor *iv* (cyclical v individual reports), Chapter III.2.c.

⁶⁹⁵ See discussion of factor *iv* (cyclical v individual reports).

⁶⁹⁶ See CEACR in BALPA dispute (n 204) or ECSR regarding *Lex Laval* (206).

⁶⁹⁷ See factor *i* (textual similarities and differences).

⁶⁹⁸ See factor *v* (‘nature’ of the ILO Convention).

regard.⁶⁹⁹ However, given that Article 28 is 'based' on Article 6 ESC, it is unlikely that a radically different view would be taken by the CJEU as regards permissible restrictions of the collective labour rights of members of the police and armed forces. Again, this is not an exclusive list of deliberative reasons which can be advanced in favour or against convergence of Article 12 and/or Article 28 with ILO and/or ESC standards.

As in the ECHR context, the proposition is not that the CJEU should adopt the standards contained in other instruments, but that it should use international materials as aids to interpretation in a way which requires nuanced analysis of the relevance of such materials to particular questions. It should take relevant ESC and ILO (and, of course, ECHR) materials as a starting point in its analysis and justify any departure by reference to the reason above, or by reference to other reasons pertaining to specific features of the EU institutional context. Some such reasons are discussed in Chapter VI and in particular Chapter VII, and include the fact that the Union does not have competence to act in the field of freedom of association and the right to strike; the fact that it recognises a broader range of aims alongside protection of fundamental rights, in particular fundamental economic freedoms; and that, as the ECtHR, it is subject to particular institutional limitations as an international court.

CJEU concerns about preserving the autonomy of EU law can be accommodated in applying this approach, since it allows space for an EU-specific approach to interpreting or applying the relevant rights where necessary. Of course, it would be

⁶⁹⁹ On the basis of factor *i* (textual similarities and differences). For example, it could be held that the permissibility restrictions on the rights of members of the public service, police and armed forces should be determined in the same way as in respect of other workers.

important that ‘autonomy’ is invoked only where there is a good reason for departure from other international standards, and not as a trump card. For such a practice to work well it is essential that the Court takes some time explaining its decision to interpret Charter provisions in a convergent or divergent manner, which, as mentioned above, is not necessarily the CJEU’s current judicial style. This does not mean that the Court cannot or should not attempt to do this in the future in order to lend credibility to its role as a human rights adjudicator – on the contrary.

The proposed approach therefore does not entail the complete alignment of the meaning of EU freedom of association guarantees with international standards. It aims to achieve consistency between them, however, by requiring that international materials be taken into account in CJEU reasoning and that departure from (some of) them is justified by the Court. It leaves space for differences in the way in which an empowerment notion of the right to freedom of association is expressed in EU law, and how protection of that right is situated within the normative structure of the EU legal order, which is based on a broader set of aims extending much beyond the protection of fundamental rights. That is, there is space for difference—even conflict—in the protection of the right to freedom of association in EU law and the other instruments discussed here, and consequently a remaining degree of fragmentation.

d. Conclusion

An impetus for the elaboration of more substantive EU freedom of association guarantees is most likely to come as a response to parallel developments under the ECHR. Still, this section argued that the CJEU should engage in broader supra-national

judicial conversations about human rights, as the ECtHR does, if it is to establish itself as a supra-national court with potentially wide-ranging jurisdiction to decide on disputes involving human rights. The fact that it is not an international human rights court or a labour court is all the more reason for it to look to the expertise of specialist bodies for guidance. This is not inconsistent with the development of an autonomous approach; rather, it would mean that this autonomous approach is well-informed, well-justified and therefore more legitimate. As this section proposed, the Court should look to the other international norms on freedom of association and collective labour rights in interpreting Articles 12 and 28 and ensure that departure from these norms is justified by reference to textual or institutional differences or the structure and aims of the EU legal order as a whole.

The fact that the Charter integrates ‘civil and political’ and ‘social and economic’ rights in some ways gives the CJEU a better platform than the ECtHR to accord robust protection to collective labour rights, in particular via Article 28, reflecting at the very least ESC norms on which some Charter rights are ‘based.’ This is what a genuine commitment to the indivisibility of rights would imply. To have regard to ESC and ILO norms as well as ECHR rights would go some way to ensuring that Charter guarantees provide at least the same level of protection as minimum international social rights standards.⁷⁰⁰ This approach by the Court would be consistent with the commitment in the Charter Preamble to the Union values of equality and solidarity, the claim that the Union pursues ‘social objectives’, and the commitment of the Union to the principles set

⁷⁰⁰ Bearing in mind that it can confer a higher level of protection.

out in the European Pillar of Social Rights. Indeed, the Court could draw further inspiration from the EPSR in strengthening the protection of collective labour rights.⁷⁰¹ In particular, Principle 8 emphasises the need to respect the autonomy of the social partners and promote social dialogue. It provides, amongst other things, that the social partners shall ‘be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action’ and that ‘support for increased capacity of social partners to promote social dialogue shall be encouraged.’ This is in-keeping with the obligations that would be recognised as arising from Charter provisions if these were interpreted broadly, which I discuss below.

2. Implications of the Proposed Approach

The implications of interpreting Articles 12 and/or 28 in accordance with an empowerment notion of freedom of association—by either bringing the former into line with Article 11 ECHR, interpreted as suggested in Part C, or drawing inspiration from more generous ILO and ESC norms—could be significant and manifold. There is no space here to explore these in detail. Here I sketch out only general developments and shifts from the current case-law which could be expected to follow from such an interpretation, and the limitations of the proposed approach as a solution to the institutional concern and as a means to strengthening the protection of collective labour rights in EU Member States.

⁷⁰¹ The EPSR is not a binding document, but neither were the CCFSRW and, initially, the CFREU, and yet these are documents to which the Court has repeatedly referred in its reasoning.

One implication of the proposed interpretive approach is the expansion of the substance of collective labour rights and greater emphasis on the autonomy of trade unions. This could be especially significant where these rights are balanced against other rights, such as the right not to be in an association (as in *Werhof*), the right to non-discrimination (as in *Prigge*), or fundamental economic freedoms (as in *Viking* and *Laval*). Other important implications would be, for example, an expansive interpretation of the activities covered by these rights, such as secondary strike action. At least in principle, in addition to negative obligations to respect, the provisions interpreted in accordance with an empowerment notion of freedom of association would give rise to positive obligations to protect and respect these rights.⁷⁰² As argued in Chapter IV in the ECHR context, the fact that such a development of freedom of association guarantees might mean that the Court must deal with issues of a complex and politically, socially and economically sensitive nature is not in itself a reason *against* such a development. Concerns about the Court's institutional competence can be accommodated by showing an appropriate degree of deference.

Interpreting Article 12 and Article 28 in accordance with the approach proposed here would in theory require that measures taken by the Union institutions must comply with robust internal EU standards which are more closely aligned with external international standards.⁷⁰³ This would be a means of reducing, *a priori*, conflict between these EU-level measures and international social rights standards which, as Chapter I

⁷⁰² I say in principle because this positive dimension is circumscribed by limitations to the field of application of the Charter set out in Article 51 CFREU, discussed in Chapter VI.2.

⁷⁰³ That is, the validity of such measures must be assessed in light of Charter provisions and they must be interpreted in light of such provisions.

argued, has the potential to undermine the ESC and ILO mechanisms. Furthermore, where the standards set by the Charter are aligned in so far as possible with international norms, concerns about levelling-down of standards and displacement of specialist mechanisms—within the scope of application of the Charter—are less acute. In this sense, the proposed approach has the potential to address various aspects of the institutional concern. It also has the positive potential to give collective labour rights a stronger foothold in EU Member States, where the Charter applies and even beyond;⁷⁰⁴ and require that these are promoted at EU and Member State level.⁷⁰⁵ This is at least what Charter freedom of association guarantees, broadly interpreted, could potentially achieve.⁷⁰⁶

However, this potential is limited in important respects by various aspects of the Charter itself and the ‘framework of structure and objectives of the EU.’ EU human rights adjudication takes place within a normative environment defined by the objectives and principles enshrined in the Treaties. These objectives and principles shape the structure and substance of EU law and the reasoning of the Court. The field of EU human rights law is no exception here, as § 170 of Opinion 2/13 confirms.⁷⁰⁷

⁷⁰⁴ The EU Agency for Fundamental Rights reports that national courts sometimes make reference to the Charter when interpreting national law even where cases fall outside its scope: *Fundamental Rights Report 2017* (n 187) 42.

⁷⁰⁵ Since the EU institutions and Member States are obliged under Article 51(1) CFREU to ‘respect the rights, observe the principles, and promote the application thereof.’

⁷⁰⁶ By contrast to the potentially negative implications of the Court’s approach in *Viking* and *Laval*, which is to conceptualise the right to collective action (or at least the legitimate aims thereof) narrowly; or if the Court were to follow the ECtHR’s more restrictive approach to interpreting the right to freedom of association in *RMT* and *UNITE* – see Chapter I.

⁷⁰⁷ Opinion 2/13 (n 219).

First, the EU does not have a general fundamental rights jurisdiction. The field of application of the Charter is limited by Article 51 CFREU which makes clear that the application of the Charter to Member States is limited to situations in which they are 'implementing EU law.' It also makes clear that the Charter does not confer a general competence on the Union to act to protect fundamental rights, so the scope for such action is limited to competences already provided for in the Treaties. Chapter VI.1 and VI.2 discuss how these limitations circumscribe the potential of the Charter in both the solution and opportunity dimensions. Second, the Charter makes a distinction between rights and principles in Article 52(5), with the latter not being judicially cognisable except in certain limited circumstances. Chapter VI.3 argues that there is some reason to think that this distinction might affect some elements of Article 28 CFREU, if this provision is interpreted broadly to include positive duties to promote collective labour rights.

Third, how robustly a right-holder is actually protected by the law depends also on how compliance with these guarantees is determined: when are restrictions potentially legitimate, what degree of interference with the right is permissible, how much discretion is given to a decision-maker in restricting a right et cetera. These are matters I discussed in Chapter IV in the ECHR context. The EU context is yet more complex: in addition to the considerations discussed in Chapter IV regarding the judicial enforcement of fundamental rights, due regard must be paid to the wider array of objectives and principles governing EU law in answering these questions. I consider in Chapter VII how these might be relevant to the justification of restrictions on the right

to freedom of association, and the justification of restrictions to EU economic freedoms the objective of which is to protect the right to freedom of association.

There may be other limitations of structural or of pragmatic nature. For example, how the CJEU might develop its case-law in this field in the future might be constrained by the opportunities it has to address questions referred by national courts and how these questions are formulated. The fact that CJEU judgments are consensus judgments makes it more likely that they will be expressed in cautious terms in a field as sensitive as this one. Not insignificant are also political pressures under which the Court might find itself, especially when it comes to ruling on the compatibility of measures in the sphere of economic governance that may be the result of a controversial political exchange, as the bailout agreements.⁷⁰⁸ All of these are factors which affect the positive potential of EU human rights law. However, I consider the limitations discussed in Chapters VI and VII to be the most obvious and possibly most significant ones.

⁷⁰⁸ If these are considered to fall within the scope of the Charter, see Chapter VI.1.

VI. The Limitations of the Charter

This chapter explores the boundaries of the reach and potential effects of the Charter, which are the first set of limits to the solution and opportunity dimensions of the suggested method of interpretation of EU freedom of association guarantees. Section 1 considers limitations to the scope of application of the Charter, defined in Article 51(1) CFREU. I argue that the potential of robust Charter guarantees to address some aspects of the institutional concern set out in Chapter I is circumscribed by the fact that important spheres of EU activity fall, or possibly fall, outside the scope of the Charter. I then discuss the scope of application of the Charter to Member States, which case-law suggests is relatively broad, although some link to EU law is still required. This, I argue, accentuates the institutional concern where the level of protection under the Charter is lower than international standards; but on the other hand increases the positive potential of Charter guarantees, broadly interpreted, to strengthen the protection of freedom of association. I also argue that this positive potential could be very significant if Article 12 and/or Article 28 are found to have horizontal direct effect.

In Section 2 I examine the extent to which the fact that the Charter does not confer any new powers on the Union, according to Article 51(2) CFREU, restricts the potential of Articles 12 and 28 to act as bases for protecting and promoting collective labour rights in the EU. I argue that because the Union does not have competence to act in the sphere of freedom of association, it has only limited ability to take positive steps in furtherance of these rights. There is also very limited scope for recognising positive duties of Member States under the Charter in this field. This is an inevitable asymmetry between the level

of protection which the Charter is able to guarantee and that required by the ECHR, ILO and ESC. Section 3 argues that the rights-principles distinction made in Article 52(5) CFREU might constitute an additional limitation to the enforceability of positive obligations arising from Article 28 CFREU, although these would add little to the restrictions discussed in Section 2.

1. The Field of Application of the Charter

The first set of limitations to the solution and opportunity dimensions of the interpretation proposed in Chapter V relate to the field of application of the Charter, set out in Article 51 CFREU:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Section 1.a argues that there are two important spheres of EU-level activity (potentially) contrary to international standards which possibly fall outside the scope of the Charter: bailout agreements and economic policy coordination. Section 1.b explores the boundaries of the Charter's applicability to Member States, determined by the meaning of the phrase 'implementing EU law.' Section 1.c considers whether Articles 12 and 28 might confer rights capable of being invoked between private parties.

a. Application of the CFREU to the activities of EU institutions, bodies, offices and agencies: the case of bailout agreements and economic policy coordination

Article 51(1) makes clear that the Charter can be used to challenge the activities of the EU institutions, bodies, offices and agencies when legislating or otherwise acting in the field of EU law.⁷⁰⁹ This means, for example, that the Union is precluded from legislating in a way which might interfere with freedom of association, such as the ability to engage in collective bargaining or action, or to restrict those rights of its own employees.⁷¹⁰ As per Article 153(5) TFEU, the Union may not adopt measures *on* 'the right to associate, the right to strike or to impose lock-outs', but that does not mean that these rights cannot be affected by other measures which do fall within the Union's competences. The Charter can act as a ground to challenge the validity of such measures and other acts of EU institutions. This is in addition to its function as an aid to interpretation where there is 'any ambiguity in either treaty, regulations, directives, and decisions, or in Member State laws that implement EU measures:' these must all be interpreted in a manner consistent with Charter rights.⁷¹¹

However, the most far-reaching implications for collective labour rights in the Member States are likely to arise in the context of EU economic governance, a field in

⁷⁰⁹ C Barnard, 'Article 28' in Peers et al (n 187) 774.

⁷¹⁰ *ibid.*

⁷¹¹ A Ward, 'Article 51' in Peers et al (n 187) 1431; see notably *Alemo-Herron* (n 194) [30]; *C-179/11 Comite inter mouvements aupres des evacues v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* EU:C:2012:594, [42]; *Werhof* (n 184) [32] with respect to this effect of general principles of EU law.

which the reach of the Charter is uncertain and contested. I consider here the application of the Charter to bailout agreements, and its role in economic policy coordination.

i. The application of the Charter to bailout agreements

As discussed in Chapter I, some of the most significant concerns over the compatibility of EU activities with ILO and ESC norms, on freedom of association and otherwise, have arisen in response to bailout agreements concluded in the wake of the Euro crisis.⁷¹² Whether any of these can be challenged on the basis of the CFREU has been a controversial issue. In a number of preliminary references stemming from Charter-based challenges to the validity of national laws pursuant to various financial assistance programmes, the CJEU held that it did not have jurisdiction on the matter.⁷¹³ It is not entirely clear from the brief reasoning of the Court whether this was because the financial assistance programmes were not themselves Union law, or because national laws in question were not ‘implementing’ that law.⁷¹⁴ Thus, it was not clear whether the relevant Memoranda of Understanding could themselves be challenged as acts of EU bodies. However, it was held in *Ledra Advertising* that although the European Stability Mechanism treaty is itself outside the EU legal order—ie not itself capable of being challenged—the European Commission as the guardian of the Treaties must refrain

⁷¹² See Rocca (n 210) 58-62. Another point of conflict have been the *Viking* and *Laval* rulings (n 177).

⁷¹³ C-434/11 *Corpul National al Politistilor v MAI* ECLI:EU:C:2011:830; C-134/12 *MAI et al v Corpul National al Politistilor* ECLI:EU:C:2012:288; C-369/12 *Corpul National al Politistilor v MAI* ECLI:EU:C:2012:725; C-462/11 *Cozman v Teatrul Municipal Targoviste* ECLI:EU:C:2011:831; C-128/12 *Sindicato dos Bancarios do Norte et al v BPN* ECLI:EU:C:2013:149; C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelitate Mundial* ECLI:EU:C:2014:2036; C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa* ECLI:EU:C:2014:2327.

⁷¹⁴ See eg *Sindicato dos Bancarios do Norte* (n 713) [12]; M Markakis and P Dermine, ‘Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*’ (2018) 55 CMLR 643, 650-1, 661-2.

from signing a Memorandum of Understanding (MOU) if it doubts its consistency with EU law.⁷¹⁵

In *Florescu*, on the other hand, the CJEU held that the Memorandum of Understanding relating to balance-of-payments assistance concluded with Romania is an act of an EU institution.⁷¹⁶ This is because a legal basis for this MOU was found in Article 143 TFEU and Regulation 332/2002.⁷¹⁷ Consequently, the Romanian legislation in question, which was ‘implementing Union law,’ was reviewed on the basis of Article 17 CFREU. The CJEU concluded that there was no violation of that right as the national legislation in question was necessary and proportionate to achieve the stated objective.⁷¹⁸ As Markakis and Dermine point out, the judgment leaves a number of questions open.⁷¹⁹ In particular, it is not entirely clear from the judgment whether the validity of the MOU itself could be challenged directly via Article 263 TFEU⁷²⁰—though a challenge via Article 267(b) TFEU should be possible—and to what extent the *ratio* of this judgment could be applied by analogy to other financial assistance contexts.⁷²¹ They argue that the logic should be applicable at least to some such programmes which have a legal basis in EU law.⁷²²

⁷¹⁵ *Ledra Advertising* (n 8) para [59]; see also C-370/12 *Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756 on the status of the ESM.

⁷¹⁶ C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* ECLI:EU:C:2017:448.

⁷¹⁷ *ibid* [31-35]; Council Regulation No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States’ balance of payments [2002] OJ L 53/1, as amended by Council Regulation No 431/2009 of 18 May 2009 [2009] OJ L 128/1.

⁷¹⁸ *Florescu* (n 716) [58-9].

⁷¹⁹ Markakis and Dermine (n 714) 654.

⁷²⁰ *ibid* 656-7. This is because it is not clear whether the MOU would satisfy the requirement of ‘legal effects’ in the first sentence of Article 263 TFEU, as that requirement has been interpreted by the CJEU.

⁷²¹ *ibid* 664-5.

⁷²² *ibid*.

Florescu is an important decision because it shows that at least *some* MOUs and implementing national measures are not beyond the reach of the Charter. They must be interpreted in light of the Charter and may be held invalid or set aside if they conflict with its provisions. *Ledra Advertising* confirms that EU bodies will be held to account where they sign agreements that are incompatible with the Charter. The judgments acknowledge the supranational element of responsibility in 'bailout reality' and show willingness to close 'accountability gaps that the euro crisis left open in the field of economic governance.'⁷²³ This is significant in light of the issues discussed in Chapter I, given that some MOUs included provisions which significantly affected national collective bargaining structures.⁷²⁴ *Ledra Advertising* and *Florescu* imply that Charter rights, including freedom of association and related rights, will now play a role in the conclusion and (at least in some cases) validity and interpretation of current or future agreements of this type.

Where Charter collective labour rights are interpreted in a 'thick' manner and, in so far as possible, consistently with international norms, it might be possible to prevent the type of friction which has now arisen between the EU, recipient Member States, the ILO and ESC.⁷²⁵ Where they apply, Charter provisions should at least *be capable of* acting as a constraint on the kinds of demands which EU institutions can make on recipient Member States, ensuring that conditions in these states are not forced to fall below

⁷²³ Markakis and Dermine (n 714) 662, 670.

⁷²⁴ Writing on Greece in particular, Rocca (n 210) 69.

⁷²⁵ Though even if the relevant guarantees are interpreted consistently there may be divergence in application, discussed in Chapter VII.

minimal standards of social rights protection. I say ‘capable of,’ because the constraining effect of these guarantees depends also on the margin of discretion granted to EU institutions, discussed in Chapter VII.1.

ii. The Charter and EU economic policy coordination

Another important sphere of EU activity which may have an impact on the right to freedom of association in Member States is economic policy coordination in the context of Title VIII TFEU (Economic and Monetary Policy) and the European Semester framework. The latter is an annual cycle of coordination and supervision of the EU’s economic policies, set up in 2010 to intensify economic coordination between Member States and monitoring of this process by the Commission.⁷²⁶ Article 120 TFEU requires Member States to ‘conduct their economic policies with a view to contributing to the achievement of the objectives of the Union’ and in the ‘context of the broad guidelines referred to in Article 121(2).’ The latter provides for a process for the European Council to adopt Recommendations setting out guidelines for the economic policies of the Member States and the Union. Article 148(2) TFEU provides for employment policy guidelines which must be consistent with the economic policy guidelines. These are all soft law, non-binding measures. There is therefore no question of their *validity* being challenged on the basis of the Charter, though the CJEU must still interpret them in light of the Charter if it is called upon to do so.⁷²⁷

⁷²⁶ See European Commission, ‘The EU’s economic governance explained’ <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/eus-economic-governance-explained_en> accessed 17 July 2018.

⁷²⁷ Markakis and Dermine (n 714) 670.

There is legitimate cause for concern over the effect of these guidelines on collective bargaining in the Member States. Bogg and Ewing highlight the fact that the second sentence of Article 120 TFEU states that Member States ‘shall act in accordance with the principle of *an open market economy with free competition*.’⁷²⁸ They describe the guidelines as a ‘charter for the reorientation of economic policy aggressively in the direction of an open market rather than a social market economy.’⁷²⁹ The 2015 Recommendation on economic guidelines is focused on promoting growth and investment, removing barriers to growth and improving the sustainability of public finances, with some mention but certainly very little—or no—direct focus on *social* goals.⁷³⁰ The 2015 Council Decision on employment policy guidelines emphasises job creation and promotion of productivity and employability; Guideline 6 provides that Member States should ‘encourage wage-setting mechanisms allowing for a responsiveness of wages to productivity developments’, the only mention of the role of such mechanisms in the document.⁷³¹ Bogg and Ewing contend that these have a ‘flavour of market liberalism,’ and that the ‘EU economic programmes require high levels of deregulation and liberalisation in equal measure.’⁷³² This may imply dismantling and

⁷²⁸ Markakis and Dermine (n 714), my emphasis.

⁷²⁹ *ibid.*

⁷³⁰ Council Recommendation (EU) 2015/1184 of 14 July 2015 on broad guidelines for the economic policies of the Member States and of the European Union [2015] OJ L192/27.

⁷³¹ Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015 [2015] OJ L268/28, Guideline 6.

⁷³² A Bogg and K Ewing, ‘A Tale of Two Documents: The Eclipse of the Social Democratic Constitution’ in E Nanopoulos and F Vergis (eds), *The Euro-Crisis as a Multi-Dimensional Systemic Crisis of the EU* (CUP 2019 – forthcoming).

decentralisation of collective bargaining structures to reduce their interference with market forces.

The fact that the Charter cannot be used to challenge the guidelines and follow-up recommendations to individual Member States is troublesome against this background. The direction in which guidelines intend to push Member State economic policy and (de)regulatory agendas might be inconsistent with ILO and ESC standards, but also the protection and promotion of collective labour rights contained in the CFREU.⁷³³ It would be a deeply unsatisfactory state of affairs if EU economic policies were inconsistent with its commitment to protecting fundamental rights, especially those guaranteed by the EU legal order itself. Of course, EU institutions involved in economic policy coordination (the Commission and European Council) are bound by the Charter and ought to take it into account in the design of relevant guidelines and coordination/supervision process. A 2016 study by De Schutter, however, concludes that:

At present, scant attention is being paid to the social provisions of the Charter in the tools developed in the new economic governance architecture of the Union. This is a major gap, and it breeds suspicion and hostility towards attempts to improve economic coordination in the Union. Vague references to 'social fairness' are not a substitute for an approach based on social rights.⁷³⁴

He concludes, amongst other things, that 'considerations grounded in fundamental

⁷³³ Bogg and Ewing, 'A Tale of Two Documents' (n 732) discuss the example of reforms in France.

⁷³⁴ O De Schutter, 'The Implementation of the Charter of Fundamental Rights in the EU institutional framework: Study,' requested by the Committee of Constitutional Affairs, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament (2016) 26.

rights are almost entirely absent from' the European Semester process.⁷³⁵ What is needed, he argues, is to ensure that:

... the negotiations of MoUs and macroeconomic reform programmes are guided by a robust fundamental rights impact assessment, informed by the recent normative developments concerning in particular social rights in international human rights law.⁷³⁶

This is a view which can only be endorsed in the present context, since it would seek to ensure that EU economic policy does not run counter to EU fundamental rights but also to corresponding international standards. There is little progress to date on this front, however. Whilst the Commission has proposed changes to the employment policy guidelines to bring those in line with the EPSR, including to the sentence of Guideline 6 cited above, reference to the Charter in the proposal document is notably and regrettably absent.⁷³⁷ However, if the Charter were to play a role in this process in the future as a benchmark for compliance of EU economic policy with fundamental rights, questions about its substance—and the consistency of that substance with other international standards—would be incredibly important given the increasing influence of the Union in this field. In this regard, the approach to interpreting EU freedom of association guarantees suggested in Chapter V could be a way of ensuring such consistency and reducing friction between EU economic policy and international mechanisms which seek to ensure minimum social rights protection.

⁷³⁵ De Schutter, 'The Implementation of the CFREU' (n 734) 27.

⁷³⁶ *ibid* 41.

⁷³⁷ European Commission, Proposal for a Council Decision on Guidelines for the Employment Policies of Member States, COM(2017) 677 final; it is proposed that Guideline 5 should read: 'Member States should, in line with national practices and respecting the autonomy of social partners, encourage transparent and predictable wage-setting mechanisms, allowing for the responsiveness of wages to productivity developments while ensuring fair wages that provide for a decent standard of living.'

b. Application of the Charter to Member States: the meaning of ‘implementing Union law’

The scope of application of the Charter to Member States is determinative of the magnitude of the first set of EU-related institutional concerns discussed in Chapter I where Articles 12 and 28 are interpreted in a ‘thin’ manner: the greater the extent to which the Charter applies to Member States, the greater the concern about levelling-down of protection and displacement and marginalization of mechanisms with a less strong foothold in Member States.⁷³⁸ On the other hand, where Article 12 and/or 28 are more closely aligned with minimum international social standards, the positive potential of the Charter to strengthen the protection of the right to freedom of association increases together with its scope. The effect of both of these possibilities could be accentuated by ‘spill-over’ effects of the Charter.⁷³⁹

The scope of application of the Charter has proven to be a difficult and contentious issue. The starting point is that the EU does not have a general fundamental rights jurisdiction; EU human rights law is applicable only to cases which have some link to EU law. This is in itself a significant limitation to the potential effects of Articles 12 and 28. Many, if not all, of the ECHR cases discussed in Chapter I would fall outside the scope of the Charter. However, so far the CJEU appears to have interpreted the phrase ‘implementing EU law’ broadly. *Åkerberg Fransson* held that Article 51(1)

⁷³⁸ See Chapter I.3.a.

⁷³⁹ *ibid.*

confirms previous case-law on the extent to which Member State actions must comply with the fundamental rights guaranteed in EU law.⁷⁴⁰ That is, the scope of application of Charter rights to Member State action is the same as that of general principles, which apply to Member States 'acting within the scope of EU law'.⁷⁴¹ This includes situations in which Member States derogate from EU provisions;⁷⁴² and when they are exercising discretionary powers conferred to them by EU law.⁷⁴³

Åkerberg Fransson has been subject to much criticism.⁷⁴⁴ It involved a tenuous link between EU provisions and pre-dating national legislation not intended to implement these; it was sufficient that its *effect* was to contribute to the implementation of an obligation on Member States under EU law.⁷⁴⁵ One strand of criticism has focused on the resulting uncertainty over the necessary link between domestic and EU law.⁷⁴⁶ The Court held that the 'applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter,'⁷⁴⁷ but this is not very helpful in practical terms because it does not clarify the relationship which must exist between the national law in question and applicable EU provision.⁷⁴⁸ The judgment could be interpreted as suggesting that

⁷⁴⁰ C-617/10 *Åklagaren v Åkerberg Fransson* ECLI:EU:C:2012:340 [17-19].

⁷⁴¹ *ERT* (n 660) [42].

⁷⁴² C-390/12 *Pfleger and others* ECLI:EU:C:2014:281 [36], as per *ERT* (n 660); see also *AGET Iraklis* (n 194).

⁷⁴³ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* ECLI:EU:C:2011:865, [68].

⁷⁴⁴ Amongst others, Lazzarini (n 201); De Vries (n 202); B Van Bockel and P Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights after *Åklagaren v Åkerberg Fransson*' (2013) 38 *European Law Review* 863; F Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?' (2014) 14 *HRLR* 231.

⁷⁴⁵ *Åkerberg Fransson* (n 740) [28]; Fontanelli (n 744) 287.

⁷⁴⁶ Lazzarini (n 201) 42; Fontanelli (n 744) 264.

⁷⁴⁷ *Åkerberg Fransson* (n 740) [21].

⁷⁴⁸ Lazzarini (n 201) 42; Van Bockel and Wattel (n 744) 875.

any measure that touches on the effectiveness of EU law falls within the scope of the Charter, but the reach of the Charter would be incredibly broad if this were the case.⁷⁴⁹ A second concern is that *Åkerberg Fransson* has cast the scope of application of the Charter widely in a way which may seriously affect the vertical division of powers between EU and Member States, forcing ‘the boundaries of the principle of conferral.’⁷⁵⁰ The wider the scope of the Charter, the more national constitutional courts and standards are sidelined in the adjudication of the compatibility of national measures with fundamental rights, and thus the deeper the intrusion of EU law into the domestic legal order.⁷⁵¹

This case-law give rise to three issues in the present context. First, there might be uncertainty in determining whether the Charter does or does not apply in a given case in which the right to freedom of association and related collective labour rights are affected by national law. This makes it difficult to assess the potential implications of Charter freedom of association guarantees, both in terms of their positive and negative potential. Second, broad applicability of EU rights in this field might sit at odds with the explicit exclusion of the right to associate and right to strike from Union competence (Article 153(5) TFEU). In light of this fact and the degree of uncertainty in determining the scope of the Charter, it is questionable whether the CJEU might not take a more cautious, narrow approach to establishing a link with EU law in this sphere.

⁷⁴⁹ Van Bockel and Wattel (n 744) 875. The subsequent C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126 sets out further factors to be taken into account in the establishment of a link with EU law, [25]. However, these remain relatively vague and open to interpretation, and in any event point towards a broad construction of the scope of the Charter. For example, there need not be any rules in question *on* the matter, but only such *capable of affecting* it.

⁷⁵⁰ Fontanelli (n 744) 233.

⁷⁵¹ Fontanelli (n 744) 263.

Third, a broad interpretation of the scope of the Charter combined with the ruling in *Melloni* amplifies the potential negative effects of a divergent interpretation of Article 12 and/or 28 which confers a lower level of protection than international standards, discussed in Chapter I.⁷⁵² This is particularly problematic where these provisions are interpreted in a 'thin' manner. However, the approach to interpreting Articles 12 and 28 proposed in Chapter V also leaves scope for differences; it does not entail complete convergence. The level of protection required under these provisions might be more limited than international guarantees even where this approach is followed, because there are reasons for departure from international norms such as those set out in Chapter V or Chapter VII. The broader the scope of application of the Charter, the greater the significance of any remaining discrepancies in the level of protection, and the greater the magnitude of remaining institutional concerns.

On the other hand, broad applicability of the Charter increases the positive potential of the interpretive approach proposed in Chapter V. This is because, even where these provisions do not impose obligations of the same scope as international instruments (ie protection is narrower), protection is likely to be more effective because national measures must be interpreted in light of these provisions or disapplied if they conflict with them (ie protection is deeper). ILO and ESC norms do not have this effect. However, scrutiny of national measures is likely to raise some particularly sensitive questions, and it would be important for the Court to develop an appropriate doctrine of restraint. The development of such a doctrine is discussed in Chapter VII.1.

⁷⁵² *Melloni* (n 200); see Chapter I.3.a.i.

c. Application of the Charter to disputes between private parties

The implications of Articles 12 and 28 CFREU could be yet greater if they were capable of conferring rights which an individual can rely on in disputes between private parties, that is if they have horizontal direct effect. Such a finding would mean that the positive potential of the interpretive approach proposed in Chapter V is vast, since it would imply that the Charter imposes obligations on employers vis-à-vis their employees or trade unions which are not provided for in national legislation.⁷⁵³

It was recently held in *Bauer* that Article 31(2)—providing for a ‘right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave’—has horizontal direct effect.⁷⁵⁴ The case confirms that Charter provisions are *capable* of producing horizontal direct effect, a question which has been subject to much academic commentary.⁷⁵⁵ To do so they must fulfil the requirements for direct effect: that the provision should be clear, sufficiently precise and unconditional and not require further implementing measures.⁷⁵⁶ Provided that this is the case, *Bauer* confirms that the Charter can impose obligations on employers which are not contained in—here even specifically excluded by—national law.

⁷⁵³ Since national legislation has to be interpreted, wherever possible, in conformity with EU law, see eg C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, [26]. The question of horizontal direct effect arises only if consistent interpretation is impossible.

⁷⁵⁴ *Bauer* (n 649) [84-85].

⁷⁵⁵ See eg D Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’ (2013) 38 *European Law Review* 479; E Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 *European Law Journal* 657.

⁷⁵⁶ *Van Gend en Loos* (n 172).

Bauer and the earlier *Association de Médiation Sociale (AMS)* suggest that Article 28 might not have horizontal direct effect.⁷⁵⁷ *AMS* held that Article 27 (workers' right to consultation and information), by itself or in conjunction with Directive 2002/14⁷⁵⁸ could not be invoked in a dispute between private individuals. It held that it was clear from the wording of Article 27 that 'to be fully effective, it must be given more specific expression in European Union or national law;⁷⁵⁹ and that it could not be invoked in conjunction with Directive 2002/14 'given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive.'⁷⁶⁰ This is because Article 27 provides that '[w]orkers or their representatives must ... be guaranteed information and consultation in good time *in the cases and under the conditions provided for by Union law and national laws and practices.*'⁷⁶¹

Bauer confirms that the Article 27 proviso renders that provision insufficiently unconditional to have direct effect.⁷⁶² By contrast, Article 31(2) provides that every

⁷⁵⁷ C-176/12 *Association de Médiation Sociale v Union Locale des Syndicates CGT and others* ECLI:EU:C:2014:2, [41].

⁷⁵⁸ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L 80/29.

⁷⁵⁹ *AMS* (n 757) [45].

⁷⁶⁰ *ibid* [49]. This contrasts with the Opinion of AG Cruz Villalón, who considered that Article 27 could be relied upon in a dispute between private parties because it was given 'substantive and direct expression' in Article 3(1) of Directive 2002/14, in line with the *Mangold* and *Küçükdeveci* line of case-law (AG 77-80). The Court distinguished *AMS* from *Küçükdeveci*, arguing that the principle of non-discrimination (now Article 21(1) CFREU) 'is sufficient in itself to confer on individuals an individual right which they may invoke as such,' [47].

⁷⁶¹ My emphasis.

⁷⁶² *Bauer* (n 649) [85].

worker has the right to an annual period of leave without such a condition.⁷⁶³ Article 28 also contains a proviso, namely that workers and employers have the relevant rights ‘in accordance with Union law and national laws and practices.’ It might seem inconsistent with *AMS* to hold that this provision has horizontal direct effect. However, it is possible to argue that the difference in wording (‘in the cases and under the conditions provided for’ and ‘in accordance with’) indicates an important distinction. One argument is to say that ‘in accordance with’ merely seeks to indicate that collective bargaining and action must be undertaken in a way which is *not contrary to* Union and national law. This is how the CJEU in *Viking* appears to understand the proviso.⁷⁶⁴ That is, whereas Union and national law must positively *determine* when and how information and consultation takes place, they may only act as limitations on the ability of workers to undertake collective bargaining and action in the way they choose.⁷⁶⁵ In this sense, Article 28 is not conditional because it means that workers have the right to engage in collective bargaining and action, as long as they observe national and Union law in doing so.

As regards Article 12, it might be plausible to argue that ‘the right to...form and to join trade unions for the protection of his or her interest’ is ‘sufficient in itself to confer...an individual right.’ Whether this includes further collective rights derived from this phrase in the case-law of the ECtHR—which should also be protected under Article 12—is a more challenging question and one which exemplifies some of the difficulties in attributing direct effect to briefly and vaguely formulated human rights

⁷⁶³ *Bauer* (n 649) [84].

⁷⁶⁴ *Viking* (n 180) [44].

⁷⁶⁵ Ie further implementation measures are required, so there is no direct effect, per *Van Gend en Loos* (n 172).

provisions, subject to further determination in case-law.⁷⁶⁶ It would, on the one hand, seem odd not to hold that the wording of Article 12 itself is sufficiently clear, precise and unconditional so as to confer an individual right; but on the other hand the wording of that provision alone does not necessarily imply the further set of rights (of unions to organise their affairs, and in particular right to collective bargaining and action). At the same time, it would seem odd to separate these sub-rights from the 'mere' right to join and form a trade union. Furthermore, a finding that a right to collective bargaining and action could be invoked between private parties would stand at odds with a decision that Article 28 does not have horizontal direct effect, despite being the provision which explicitly mentions these rights; of course, if Article 28 is found to have horizontal direct effect the question does not arise.

Whether Articles 12 and/or 28 have horizontal direct effect is therefore, for the time being, a matter of speculation. If this were the case, the Charter could have far-reaching implications for employer-worker relations in so far as it has the potential to protect workers from employer interference with their freedom to associate even in the absence of national legislation to this effect, or where such legislation is insufficient. Still, even if these provisions do not have direct effect (vertical or horizontal), they are still relevant to the interpretation of national legislation which must be consistent with them in so far as possible. This is provided that a situation falls within the scope of the Charter.

⁷⁶⁶ An issue identified by Leczykiewicz (n 755) 489-490.

d. Conclusion

The capacity to use Articles 12 and 28 CFREU, interpreted in closer alignment with international standards, to address institutional concerns and to strengthen the protection of freedom of association is limited by the fact that the Charter does not apply to Member States acting outside the scope of EU law, and to a range of EU economic governance measures with a significant impact on collective labour rights. Nevertheless, these provisions can have important implications in this regard. They continue to be relevant in the sphere of economic governance since the Commission is accountable for signing agreements contrary to the Charter, and is bound to respect the Charter where drafting policy guidelines. Furthermore, economic policy guidelines must be interpreted in light of the Charter; and, it was argued, there is a case for prior assessment of the implications of these guidelines on Charter rights in order to minimize restriction of those rights a priori. This could in itself be a significant buffer against the tendency in EU economic governance to require the dismantlement of collective bargaining structures in a way contrary to ILO and ESC standards. Furthermore, the reach of EU freedom of association guarantees into national systems—and therefore their positive potential—might still be relatively deep in so far as ‘implementing EU law’ is interpreted broadly and, in particular, if these are found to have horizontal direct effect.

2. The Principle of Conferral and Positive Obligations

This section discusses the extent to which the principle of conferral, set out in Article 5(2) TEU, further limits the solution dimension and positive potential of an interpretation of Articles 12 and/or 28 in closer alignment with international standards. Article 5(2) TEU

provides that the Union ‘shall act only within the limits of the competences conferred upon it by the Member States.’ This is a constitutional principle of great significance because it defines the Union as one which can only act—often as a constraint to domestic legal orders—if its Member States have themselves given it the power to do so. In light of this principle, positive obligations which might flow from Charter freedom of association guarantees (Articles 12 and 28 CFREU)—if the interpretation of these is guided by the empowerment model and informed by ILO, ESC and ECHR norms—are potentially not enforceable against EU institutions and Member States.

The concept of positive obligations is not yet well-developed in EU law, unlike under the ECHR.⁷⁶⁷ Article 51(1) CFREU provides that EU institutions and Member States ‘when implementing EU law’ must ‘respect the rights, observe the principles and *promote* the application thereof.’⁷⁶⁸ The word ‘promote’ suggests that the CFREU contains more than only negative obligations.⁷⁶⁹ Positive obligations have long been recognised as a crucial element of ECHR rights and should in principle form part of corresponding CFREU guarantees. Anything else would go against the text of Article 52(3) CFREU because it would amount to a lower degree of protection.⁷⁷⁰ This suggests that there is scope for positive obligations under the Charter. On the other hand, Article 51(2) CFREU provides that the Charter does not establish any new powers of the Union. It is clear that

⁷⁶⁷ See generally M Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for Development of Positive Obligations* (CUP 2017).

⁷⁶⁸ My emphasis.

⁷⁶⁹ Beijer (n 767) 6; P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 CMLR 945, 980.

⁷⁷⁰ The matter might be even more complicated if the EU accedes to the ECHR. See AW Heringa and L Verhey, ‘The EU Charter: Text and Structure’ (2001) 1 *Maastricht Journal of European and Comparative Law* 8, 17 – they argue that the Explanations to Article 52(3) can be taken to mean that the ECtHR’s positive obligations case-law is relevant to corresponding Charter rights.

the principle of conferral must be respected in the application of Charter rights, and action cannot be taken where there is no legal basis to do so. That is, where no competence to take positive measures exists, positive obligations which arise from Charter guarantees cannot be enforced against EU institutions.

This section argues that the scope for EU institutions to take positive measures is limited due to the lack of an appropriate specific or general competence, which is likely to significantly circumscribe the positive potential of the CFREU to effectively protect the relevant rights through relevant legislative or executive acts (a). However, it also argues that there is room for positive measures to be taken at EU-level within the EU's economic policy coordination framework and potentially where the EU has an 'indirect' power to protect fundamental rights; in addition, there may be some scope for positive obligations on Member States when they are 'implementing EU law' (b). This still leaves scope for positive impact of duties to protect and promote arising from Charter freedom of association guarantees. Furthermore, the fact that there is limited scope to enforce positive duties does not constitute a significant limitation on the solution potential of the interpretive approach. This is because the fact that some duties are unenforceable—rather than that they do not arise in the first place—is unlikely to give rise to institutional concerns such as levelling-down or displacement.

a. Positive obligations and limited competence in the field of freedom of association

Interpreting Article 12 and/or 28 in accordance with the empowerment rationale and in line with international standards would imply positive state duties which can involve

(1) steps to protect the right-holder from interference with that right by others, or (2) steps to ensure that the right-holder is able to fully enjoy that right. In the context of the right to freedom of association (including a right to bargain collectively and take collective action), (1) will usually mean putting measures in place to prevent employers from penalising workers who are trade union members or are engaged in trade union activity, or otherwise undermining trade unions and the collective bargaining process.⁷⁷¹ Category (2) will usually mean steps to put structures in place which enable workers to negotiate terms and conditions with employers *in a meaningful way and on more equal terms*.⁷⁷² These might include setting up collective bargaining fora (at various levels), procedures for recognising trade unions for the purpose of collective bargaining, duty to bargain in good faith or other measures to promote meaningful negotiations.⁷⁷³

That EU institutions and Member States acting within the scope of EU law are subject to (enforceable) positive obligations of the types described above is a challenging and radical proposition, both legally and politically. The potential for EU law to require changes to domestic industrial relations systems directly is likely to be incredibly politically contentious, especially when it comes to type (2) positive obligations. We can infer this from the controversy sparked to date by changes required by the EU in this sphere in a less direct manner in the context of bailout agreements, economic policy coordination, and the Swedish *Lex Laval*. A logically prior problem however is the fact

⁷⁷¹ Eg in the UK, Trade Union and Labour Relations (Consolidation) Act 1992, ss 137, 145A, 145B, 146, 152.

⁷⁷² See Chapter II.3.c.

⁷⁷³ Although as explained in Chapter II, the empowerment model does not demand any *particular* measures to be taken under 1) and 2), as long as the objective of guaranteeing the ability of workers to meaningfully participate in decisions which affect their interests is fulfilled; similarly, ILO, ESC and ECHR are not prescriptive as to the precise measures which must be taken by states.

that there is no obvious competence to act in this field. The EU does not have a general competence to act in furtherance of fundamental rights, and Article 51(2) states that the Charter does not establish 'any new power or task for the Union.' Moreover, Article 153(5) TFEU explicitly excludes the right to associate, the right to strike or to impose lockouts from the competence to act in the employment field conferred by Article 153(2). That is, the principle of conferral precludes the Union from directly enacting (legislative or executive) measures which protect or promote these rights.

Davies considers a number of possible bases for the EU to act to protect collective labour rights. First, she points out that Article 153(5) does not explicitly mention the right to collective bargaining.⁷⁷⁴ It is possible to argue that if Member States had wished to exclude the right to collective bargaining from the Union's competence under Article 153(2), it would have been specifically mentioned therein. However, the argument made here is that the right to collective bargaining is an essential element of the right to freedom of association, and it would seem inconsistent to argue otherwise for the purposes of Article 153(5). In any event, even if it is not excluded by Article 153(5), there is no other specific competence to protect the right to collective bargaining.⁷⁷⁵

She further suggests that it is technically possible for an agreement on measures to protect collective labour rights to be reached by the social partners at EU level and implemented by means of a collective agreement in the Member States, as per Article

⁷⁷⁴ ACL Davies, 'Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?' in Alston (ed) (n 61) 177, 193-5.

⁷⁷⁵ Davies, 'EU Power to Set Minimum Standards' (n 774) 195.

155(2) TFEU.⁷⁷⁶ However, as she herself admits, this may prove difficult to realise in practice.⁷⁷⁷ Agreement on this particular topic is likely to be difficult, and, more generally, the co-legislative role of the social partners has appeared to suffer from a lack of political will to act after a ‘golden age’ in the 1990s.⁷⁷⁸ Another option Davies considers is legislation based on Articles 114 and 115 TFEU on the approximation of laws, regulations or administrative provisions which directly affect the functioning of the internal market.⁷⁷⁹ She concludes that this is an unlikely scenario, since Article 114(2) TFEU excludes provisions relating to the rights and interests of employed persons, and because the CJEU has held that a provision setting minimum standards cannot be regarded as removing obstacles to the functioning of the internal market⁷⁸⁰ – and legislation in the social policy field is likely to set only minimum standards because of the diverse approaches of different Member States.⁷⁸¹ The CJEU is also likely to be ‘alert to attempts to “evade” specific prohibitions in the Treaty by using Articles that grant relatively general legislative competences.’⁷⁸²

The same could be said of the general competence conferred by Article 352 TFEU to act ‘if action by the Union should prove necessary.’ Alston and Weiler have suggested that this provision could be an appropriate basis for the adoption of certain general

⁷⁷⁶ Davies, ‘EU Power to Set Minimum Standards’ (n 774) 195-6. But not by means of a Council Decision, as this must relate to the matters covered by Article 153 TFEU.

⁷⁷⁷ *ibid* 196.

⁷⁷⁸ I Schömann, ‘EU integration and EU initiatives on employee participation and social dialogue’ (2011) 17 *Transfer: European Review of Labour and Research* 239, 242-3.

⁷⁷⁹ Davies, ‘EU Power to Set Minimum Standards’ (n 774) 196-7.

⁷⁸⁰ C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-8419.

⁷⁸¹ Davies, ‘EU Power to Set Minimum Standards’ (n 774) 197. Previously Articles 95 and 94 TEC.

⁷⁸² *ibid*.

measures to protect fundamental rights,⁷⁸³ but as Bejjer points out the use of this provision to do so—especially in light of the explicit exclusion of competence under Article 153 TFEU—is likely to be treated with suspicion by the CJEU.⁷⁸⁴ Opinion 2/94 makes clear that Article 352 cannot be used ‘as a basis for provisions whose effect would, in substance, be to amend the Treaty without following’ the appropriate procedure; it cannot be used to widen the Union’s powers.⁷⁸⁵ The (failed) Monti II Regulation was based on this provision, but this was justified in the case because the consequences of the *Viking* and *Laval* rulings could only be addressed at EU-level. It is difficult to see how this reasoning might apply in the case of positive measures, given that the sphere of industrial relations and protection of collective rights falls in the first instance within the domain of the Member States, and given that according to the principle of subsidiarity the Union should only act where there is some particular added value of action at Union level.⁷⁸⁶

The lack of specific or general competence to act in this field means the Union is not itself able to put in place measures of types (1) and (2), or at least not directly. This inability to act directly to ensure the effective enjoyment of Charter rights reveals a gap in protection, and a tension between the Union objective of protecting human rights and the principle of conferral.⁷⁸⁷ It creates a significant asymmetry between the EU and other

⁷⁸³ P Alston and J Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’ in P Alston (ed), *The EU and Human Rights* (OUP 1999) 3, 26-7.

⁷⁸⁴ Bejjer (n 767) 187.

⁷⁸⁵ Opinion 2/94 (n 660) [29-30].

⁷⁸⁶ Article 5(3) TEU provides that the Union shall only act, in a case of shared competence, where ‘the objectives of the proposed action cannot be sufficiently achieved by the Member States, ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

⁷⁸⁷ See Bejjer (n 767) 197-200.

systems discussed here, since positive obligations can be enforced under those systems. This is an important limitation on the potential of EU law to protect the right to freedom of association and related rights.⁷⁸⁸ However, the principle of conferral does not itself *prevent* a broad interpretation of Articles 12 and 28 which recognises that these provisions give rise to positive duties. That is, it does not require that norms be interpreted differently, but acts only as a limitation on their enforcement, subject to the discussion in (b) below. Whilst this creates an asymmetry, it should not give rise to uncertainty or a danger of levelling-down and displacement, so long as it is clear that this difference is a question of competence and not difference in obligations. Furthermore, as the next section argues, there may be some scope for positive measures to be taken by EU institutions and Member States acting within the scope of EU law, in compliance with their positive obligations under Articles 12 and/or 28, in less direct ways.

b. Any scope for positive measures?

I suggest three ways in which positive duties arising from Articles 12 and 28 could have implications in practice, although these are at this stage purely hypothetical. Two of these relate to EU-level positive measures, and one to Member State-level positive measures.

⁷⁸⁸ For analysis of further issues with the lack of competence of the EU to protect collective labour rights, Davies, 'EU Power to Set Minimum Standards' (n 774).

i. EU-level positive measures

There are two possibilities for EU institutions to take positive measures in this field, highlighted by Davies and Beijer respectively. First, whilst the EU cannot *itself* adopt such measures, it could encourage the adoption of positive measures to promote respect for freedom of association and collective labour rights in the Member States via its economic policy coordination activities, the legal basis for which is Article 156 TFEU. Article 156 explicitly refers to cooperation in matters relating to ‘the right of association and collective bargaining between employers and workers.’ Section 1 discussed how collective labour rights could be and have been negatively affected by the EU’s activity in the sphere of economic policy coordination. It was argued that Charter provisions should be used as a basis for ensuring that the guidelines do not seek to restrict freedom of association. However, EU policy Guidelines could also seek to promote respect for those rights and ensure their effective enjoyment, through setting certain goals towards which Member States can work in the way they choose.⁷⁸⁹ This would follow from the obligations which the Charter imposes in EU institutions under Article 51(1).

This ‘soft law’ route has the advantage of avoiding the (direct) competence issue and overcoming resistance from Member States on that ground, whilst allowing Member States scope for flexibility when it comes to implementing positive measures.⁷⁹⁰ The disadvantages, on the other hand, are that policy guidelines are often framed in general terms which perhaps leaves *too much* room for flexibility and makes the

⁷⁸⁹ Davies, ‘EU Power to Set Minimum Standards’ (n 774) 198.

⁷⁹⁰ *ibid.*

assessment of progress difficult; soft law measures are also generally more easily ignored by Member States and progress is likely to be slower.⁷⁹¹ Despite these limitations, however, this could prove an important mechanism for the promotion of respect for collective labour rights and one which—judging by its effect on economic policy in the Member States to date—may be more successful in driving positive change in domestic legal orders than ILO and ESC mechanisms.

Second, it has been argued that the EU has an *indirect* power to protect fundamental rights where it adopts measures based on a specific competence to act in another field.⁷⁹² That is, the Union has an ‘accessory’ power to ensure that fundamental rights are respected in relation to actions undertaken within the remit of other provisions.⁷⁹³ This, Beijer argues, is because the EU has an obligation to ensure that its actions comply with fundamental rights under Article 6 TEU and the obligations imposed by Article 51(1) of the Charter to respect and promote the application of Charter rights.⁷⁹⁴ This ‘indirect’ power exists largely in academic theories and constitutes a purely hypothetical basis for positive action;⁷⁹⁵ the precise conditions under which it might arise are therefore unclear. However, in the sphere of collective labour rights it is likely to be relevant in very limited circumstances given that these rights are most likely to be affected in the context of disputes over employment conditions. Conceivably, such

⁷⁹¹ Davies, ‘EU Power to Set Minimum Standards’ (n 774) 199.

⁷⁹² Beijer (n 767) 188; she gives the example of EU provisions in the area of asylum law, where there is an accessory power for the Union to ensure that rights are respected in relation to actions undertaken in that field.

⁷⁹³ *ibid* 189.

⁷⁹⁴ *ibid*.

⁷⁹⁵ *ibid*.

a power may be relevant in relation to measures which allow for implementation or derogation via a collective agreement, such as the Working Time Directive⁷⁹⁶ or the Posted Workers Directive.⁷⁹⁷ In this context, it may be arguable that these measures should include at least some provisions intended to protect individuals from interference with their collective labour rights by third parties, where implementation is undertaken via a collective agreement.⁷⁹⁸ It is much more ambitious to suggest, though possibly also arguable, that an ‘indirect’ competence would justify more extensive measures to ensure that negotiations are conducted in a meaningful way and on equal terms. In any event, however, this would not add much to the positive obligations of Member States when ‘implementing EU law’ discussed below.

ii. Member State-level positive measures

An interesting question is whether Member States implementing EU law can be subject to positive obligations under Articles 12 and 28 CFREU. As discussed in Section 1, Member States are implementing EU law whenever they are ‘acting within the scope of EU law’, which includes exercising a discretion conferred on them by EU law or derogating from EU law. It was mentioned above that some Directives can be implemented by collective agreement; and that there are Directives, such as the Posted

⁷⁹⁶ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9, which allows for implementation of aspects of the Directive by collective agreement (eg Article 4, Article 6(a)) and derogation from certain provisions by collective agreement (Article 17(2), Article 18).

⁷⁹⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, which allows Member States to derogate from certain provisions for a limited period of time via collective agreement (Article 3(4)).

⁷⁹⁸ These might include, for example, some minimal provisions to protect employees who are members of the relevant trade union and those involved in negotiations against detriment by the employer or anti-union practices.

Workers Directive or the Working Time Directive, which permit derogation by collective agreement.⁷⁹⁹ It would follow that Charter freedom of association-related norms are applicable here. In these situations, the Charter would, at least in principle, confer rights on workers and employers, such as to conduct negotiations free of government interference (where they choose to begin negotiations with a view to an agreement which will implement the Directive) or, arguably, undertake collective action in connection with this bargaining process.

Where this is so, Charter guarantees act as a *restraint* on Member State action. This puts pressure on the boundaries of the principle of conferral since EU law requires the state to alter its behaviour without itself having a competence to act in the relevant sphere.⁸⁰⁰ However, to require that there be an EU-competence relating to the protection of the relevant right in every instance in which a Member State infringes that right whilst acting within the scope of EU law would be to circumscribe the effectiveness of the Charter very significantly: there are very few areas in which the EU has a specific competence to protect a fundamental right, such as the right to equal treatment. This may be an instance in which the fundamental rights dimension of the EU is indeed putting some pressure on the boundaries of the principle of conferral, but to deny application of the Charter on the basis of the lack of competence would be to compromise the objective of protecting fundamental rights.⁸⁰¹

⁷⁹⁹ See fn 796 and 797.

⁸⁰⁰ E Muir, 'Fundamental Rights: An Unsettling EU Competence' (2014) 15 *Human Rights Review* 25, 29-30.

⁸⁰¹ *ibid* 27.

The question is yet more complex where positive obligations are involved, that is when Member States could be required by EU law to take positive steps to ensure respect for the relevant rights, despite the fact that they have not chosen to confer powers on the Union in this sphere.⁸⁰² This appears to stretch the principle of conferral further because it may in theory require the establishment of or, more likely, changes to an existing framework for the protection of freedom of association. However, it is not necessarily always the case that requiring an action rather than inaction is more intrusive on the autonomy of the Member State. Positive obligations need not imply the enactment of any—much less any particular kind of—general legislation or systemic changes. They may be formulated at a level of abstraction which leaves flexibility when it comes to their implementation,⁸⁰³ and an appropriate degree of deference may be accorded when assessing compliance.⁸⁰⁴ It may only be necessary that these positive obligations are taken into account in applying the existing law, to ensure that the right is protected from (unjustified) interference. Positive obligations may be necessary to ensure that fundamental rights are protected effectively just as much as negative obligations, so it would be undesirable to rule them out altogether: this would amount to the kind of artificial distinction rejected in Chapters II and IV.

A more desirable option would be to ensure that any concept of positive obligations developed by the CJEU leaves room to consider the implications of enforcing these obligations on the vertical division of powers; and that Member States are not held

⁸⁰² In fact, here have deliberately chosen not to confer such powers as per Article 153(5) TFEU.

⁸⁰³ See Chapter IV for discussion.

⁸⁰⁴ See Chapter VII.1.

to be in breach of positive obligations where the only action available to them to comply with these obligations would conflict with the principle of conferral. Developing such a concept is beyond the scope of this discussion, and is likely to be a challenging task. It is likely, however, that positive obligations to promote—rather than protect the right—would be more difficult to enforce given that they generally require the enactment of general/systemic measures. In any event, it is important to bear in mind that the situations in which the Charter applies and which involve potential breaches of positive obligations under Articles 12 and 28 are likely to be limited.

c. Conclusion

The scope to take positive measures in fulfilment of positive obligations under Articles 12 and 28—which follow from the interpretation proposed in Chapter V—is heavily circumscribed. However, it was argued in this section that there may be some ways in which positive measures can be taken at EU-level to promote fundamental rights protection without disturbing the vertical allocation of powers; and that there is room for recognising positive obligations of Member States where the principle of conferral is not applied unduly strictly. In particular, much can be done in the policy sphere, particularly now in light of the European Pillar of Social Rights and its Principle 8 on social dialogue. EU institutions ought to take the positive obligations which flow from a broad interpretation of Article 12 and/or 28 seriously—alongside their obligations under Article 152 TFEU to promote the role of the social partners, facilitate dialogue between them and respect their autonomy—and seek to ensure that these are reflected in the economic and employment policy Guidelines. This would, further, ensure that the policy

goals promoted by the Union align with rather than run contrary to the obligations of Member States under the ILO, ESC and potentially even the ECHR.

3. The Rights-Principles Distinction and Article 28 CFREU

The distinction made in the Charter between rights and principles might constitute an additional limitation to the enforceability of positive obligations arising from Article 28 (interpreted as suggested in Chapter V), where the enforcement of such obligations is otherwise possible in light of the discussion in Section 2.⁸⁰⁵ Article 52(5) of the Charter states that:

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

In essence, the second sentence of this provision means that the justiciability of ‘principles’ is limited:⁸⁰⁶ courts can only invoke them when interpreting or ruling on the validity of legislative or executive acts of the Union, or the Member States when implementing EU law.⁸⁰⁷ They cannot give rise to direct claims for *positive* action.⁸⁰⁸ This provision is fraught with difficulties, both interpretive and conceptual, and it is not yet

⁸⁰⁵ I assume that the status of Article 12 CFREU as a right is not in doubt. It would undermine the purpose of Article 52(3)—to ensure that the Charter provides at least the same level of protection as the ECHR—if Articles which correspond to the ECHR could be considered to the principles.

⁸⁰⁶ S Peers and S Prechal, ‘Article 52’ in Peers et al (n 187) 1509.

⁸⁰⁷ *ibid.*

⁸⁰⁸ Explanations to Article 52, my emphasis.

clear how the distinction between 'rights' and 'principles' is to be made – these are not defined in the Charter.⁸⁰⁹

It is clear from *Viking* and *Laval* that the right to take collective action is a fully justiciable right, since it is recognised as a general principle of EU law. The same logic should apply to the right to collective bargaining following *Commission v Germany*. According to some commentators, it is also clear from these cases that Article 28 is a right.⁸¹⁰ However, according to the Explanations to Article 52(5), a Charter provision can contain elements of a right *and* of a principle, such as Articles 23, 33 and 34. This would seem to suggest that it is possible to split a *single* provision into rights and principles – ie Article 28 could contain elements which are rights (those formulated and applied in *Viking* and *Laval*, for example) and others which are not. How such a provision can be split is unclear, but I will assume for the sake of argument that it is possible to consider that, if Article 28 gives rise to obligations to promote collective labour rights through positive measures, this set of obligations could be considered as separate elements.

The Court has not yet pronounced itself on how the distinction should be determined, but there are some comments in Advocate General opinions in this regard. In light of the indications provided by AG Cruz Villalón in *AMS*, there might be reason

⁸⁰⁹ See eg Peers and Prechal (n 806); J Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 *European Constitutional Law Review* 321, 323-8; C Hilson, 'Rights and Principles in EU Law: A Distinction Without Foundation?' (2008) 15 *Maastricht Journal of European and Comparative Law* 193; D Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction Between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' (2015) 52 *CMLR* 685.

⁸¹⁰ Peers and Prechal (n 806) 1508, fn 231;

to consider these elements of Article 28 to be principles.⁸¹¹ The AG considered whether Article 27 CFREU is a principle. One reason he advanced in favour of this proposition is that the Article does ‘not define any individual legal situations, leaving European Union and national legislatures to give specific expression to the content and objectives determined by the “principle”’; its content is indeterminate, and specifies neither the kind of information and consultation which must take place nor the level at which it must take place.⁸¹² In other words, the provision is open-ended and requires further concretisation by Union or Member State authorities. This would imply that in particular Article 28 positive obligations to promote—such as through the establishment of collective bargaining machinery—are elements of the provision which are principles because they are conceived in general terms and do not call for any particular action.⁸¹³ The AG also argued that there is a strong presumption that provisions in the Solidarity title of the Charter are principles.⁸¹⁴ This, however, sits at odds with the examples of principles mentioned in the Explanations, of which only Article 37 is in the Solidarity title; furthermore, Articles 33 and 34, also in that title, are said to contain elements of rights.

The Opinion of AG Trstenjak in *Dominguez* would indicate that Article 28 is a ‘right’.⁸¹⁵ In her view, the fact that a provision states that an individual has a ‘right’

⁸¹¹ AG Cruz Villalón in *AMS* (n 757).

⁸¹² *ibid* [AG54].

⁸¹³ Ie that collective bargaining is promoted in any particular way or that the relevant machinery takes any particular form.

⁸¹⁴ AG Cruz Villalón in *AMS* (n 757) [AG55].

⁸¹⁵ Opinion of AG Trstenjak in C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique* ECLI:EU:C:2011:559.

distinguishes it from other provisions which merely stipulate that the Union ‘recognises and respects’ certain rights (eg Articles 25, 26, 36); she argues that ‘these differences in wording are evidence of a graduated intensity of protection according to the legal right concerned.’⁸¹⁶ On this view, Article 28 should be considered a ‘right’ in its entirety. By contrast, where a provision does not appear to refer to an individual right-holder and entitlement but includes phrasing such as ‘the Union recognises and respects,’ ‘must be integrated into the policies of the Union’ (Article 37) or ‘Union policies shall ensure’ (Article 38) it is more likely to be a principle.⁸¹⁷ This, on the other hand, sits at odds with the explanatory notes to Article 35 which state that that provision contains principles, despite the fact that it begins with ‘everyone has the right to.’

The above shows that there is no obvious interpretation of the term ‘principle’ and that there is scope for differences in opinion: what seems self-evident to AG Trstenjak is not at all obvious to AG Cruz Villalón, and there are some contradictions between these Opinions and the explanatory notes. Commentators have suggested other approaches to dealing with the concerns underlying the rights-principles distinction. Prechal suggests that the distinction is redundant because these concerns—the ‘fear that positive obligations will be read by courts into provisions which should ... be dealt with by “other branches of the government”’—can be dealt with through the assessment of direct effect.⁸¹⁸ Guðmundsdóttir argues that such concerns are better addressed through an appropriate doctrine of judicial restraint in cases involving social and economic

⁸¹⁶ AG Trstenjak in C-282/10 *Dominguez* (n 816) [AG76], citing J Schwarze, ‘Der Grundrechtsschutz für Unternehmen in der Europäischen Grundrechtecharta’ (2001) *Europäische Zeitschrift für Wirtschaftsrecht* 519.

⁸¹⁷ See also Krommendijk (n 809) 332.

⁸¹⁸ Peers and Prechal (n 806) 1511.

rights.⁸¹⁹ It is unrealistic to expect that the Court would ignore Article 52(5) altogether, but perhaps these arguments speak in favour of adopting a more limited use of the distinction and more restrictive view of ‘principles.’ However, for the time being we have a few non-conclusive indicators as to whether a provision is a right or principle at best, which do not give a definitive answer to whether some—though clearly not all—elements of Article 28 could be principles.⁸²⁰ Without further guidance by the CJEU it is impossible to resolve this question, but there is at least some reason to entertain this possibility. In any event, this would only be a limited additional restriction on the enforceability of positive obligations and, importantly, Article 28 in its entirety would remain relevant to the interpretation of legislation and other acts, and in policy and law-making.

4. Conclusion

This chapter discussed a number of limitations inherent in the CFREU which circumscribe the solution and opportunity dimensions of the interpretive approach proposed in Chapter V. It concluded that the fact that some EU-level activities (potentially) fall outside of the scope of the Charter limits the possibility to address institutional concerns arising from conflict with other international norms through the interpretation of EU internal guarantees in line with those norms. The potential of the Charter to strengthen the protection of collective labour rights within EU Member States is also limited by its field of application, and the fact that the Union has no specific

⁸¹⁹ Guðmundsdóttir (n 809). This resembles the argument I make in Chapter IV with respect to the justiciability of collective labour rights under the ECHR.

⁸²⁰ Peers and Prechal (n 806) 1507, extrapolating from the AG Opinions.

competence to act in the field of freedom of association. Some further limitations to the legal effects of Article 28 might arise in respect of positive obligations to promote the rights contained therein.

However, subject to these caveats, the Charter is nevertheless relevant to a great deal of EU activity which has and could have implications for collective labour rights. Acts of EU institutions which restrict the right to freedom of association will be reviewable under the Charter. EU institutions remain bound to respect and promote Charter rights and principles, in both policy and law-making, including, for example, in signing agreements which entail the implementation of restrictions on these rights. Furthermore, EU measures—including economic policy guidelines—must be interpreted in light of Charter provisions, as must national legislation falling within the scope of EU law. The scope of application of the Charter to Member States has so far been interpreted expansively; the Charter—and EU freedom of association norms—may therefore have implications for domestic legal regimes in a wider range of circumstances than anticipated. More generally, the Charter is becoming an important human rights document in the European legal space which national courts, as well as the ECtHR, increasingly regard as an important reference point. Therefore, interpreting Charter freedom of association guarantees in line with ILO and ESC norms as far as possible remains the starting point for ensuring that the development of EU human rights standards and EU activities do not undermine traditional mechanisms for the protection of collective labour rights.⁸²¹

⁸²¹ Further measures to reduce negative effects on specialist instruments are discussed in the concluding chapter.

VII. Permissible Restrictions on the Right to Freedom of Association

I turn now to factors pertaining to the application of Articles 12 and 28 CFREU which have implications for the substantive level of protection that these provisions confer on right-holders. In Section 1 I discuss the scope for justifying restrictions of the rights contained in Articles 12 and 28. I argue that this scope is greater than under ILO Conventions and the ESC, and possibly the ECHR. This is because the CFREU recognises a broader range of potentially legitimate objectives of such restrictions, and because there is reason for the CJEU to show a greater degree of judicial restraint in certain circumstances when assessing compliance with Articles 12 and 28. This may mean that certain restrictions on collective labour rights by the EU or Member States acting within the scope of EU law are justified as a matter of EU law, but remain contrary to other international norms.

Section 2 considers situations in which collective labour rights conflict with EU fundamental economic freedoms, where the former are invoked as justifying a derogation from the latter. This is the *Viking* and *Laval* scenario. I argue that the proportionality analysis in such derogation scenarios should be adapted in order to show equal regard to fundamental human rights and fundamental economic freedoms. However, although this might reduce the scope for conflict between EU law and the other legal orders, some scope for conflict and divergence will always remain since these orders do not accord the same special status to fundamental economic freedoms as EU law does. Section 3 makes some concluding remarks on Part D as a whole.

1. Justifying Restrictions on Collective Labour Rights

The scope for permissible restrictions on fundamental rights is an important element in determining the level of protection which fundamental rights guarantees provide in practice. The conditions for justifying restrictions on Charter rights are set out in Article 52(1):

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made 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.

This section argues that this provision potentially allows greater scope for restrictions on collective labour rights than ILO and ESC norms, and possibly Article 11(2) ECHR. This is because it recognises a broader range of legitimate objectives of a restriction (a), and because the CJEU may have reason to show greater judicial restraint in the assessment of the proportionality of a given restriction (b).

a. Legitimate objectives

An obvious point of difference between Article 52(1) CFREU and Article 11(2) ECHR is that it recognises ‘objectives of general interest recognised by the Union’ as legitimate reasons to restrict fundamental rights. According to the explanatory notes, these include the central objectives of the Union set out in Article 3 TEU and other interests protected by Treaty provisions.⁸²² The goals set out in Article 3 TEU are vaguely worded and wide-

⁸²² Such as Article 4(1) TEU, Articles 35(3), 36 and 346 TFEU; Explanatory notes (n 183) to Article 52 CFREU.

ranging: ‘to promote peace, [the Union’s] values and the well-being of its peoples’ (Article 3(1)); the establishment of an internal market, ‘sustainable development based on balanced economic growth,’ ‘full employment and social progress,’ ‘economic, social and territorial cohesion’ (Article 3(2)); ‘an economic and monetary union’ (Article 3(3)), to name just a few examples at random. In practice, every act taken by the EU institutions could—or in any event should—in some way relate to these broad goals.

By contrast, the first sentence of Article 11(2) ECHR recognises only national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others as legitimate objectives of a limitation on the rights in Article 11(1).⁸²³ Article 31 ESC/Article G RESC is a broadly similar general provision,⁸²⁴ whereas the scope for permissible restrictions under ILO Conventions 87 and 98 is even more circumscribed.⁸²⁵ Some of the objectives listed in Article 3 TEU could fit within these categories but many might not, especially those relating to the establishment of an internal market or a competitive social market economy. EU or Member State measures restricting freedom of association which pursue objectives not recognised as legitimate by these three legal orders might therefore be at least potentially justifiable under EU law. One example of this might be, for instance, measures requiring changes to collective bargaining structures aimed at increasing the competitiveness of enterprises within Member States (provided that these fall within the scope of the Charter, as discussed in Chapter VI.1).

⁸²³ With the second sentence of Article 11(2) relating to restrictions in the case of certain categories of workers, see Chapter I.

⁸²⁴ Though it also recognises the somewhat more general aim of ‘protection of public interest.’

⁸²⁵ See Chapter I.1.

It is not surprising that EU law recognises a much broader range of legitimate objectives of measures which interfere with fundamental rights. Whereas the ECHR, ILO and ESC regimes' objective is to protect the rights contained in the respective instruments, the EU legal order pursues numerous objectives, of which respect for fundamental rights is only one, and a relatively recent addition to the goals expressly listed in the Treaties.⁸²⁶ Since the Treaties do not give priority to this aim over the others, it would make sense for the Charter to allow space for a balance to be struck between the aim of protecting fundamental rights and these other interests. Albeit justifiable, this is a potentially irreconcilable institutional difference between EU law and the other systems.

It should be noted that the explanatory notes to Article 52(3) state that the requirement that the level of protection is the same under the Charter as corresponding ECHR provisions includes the permissible restrictions. This might mean that at least as far as Article 12 CFREU is concerned, the scope for permissible restrictions should not be broader than the ECHR. That is, a restriction which cannot be construed as having one of the objectives recognised by Article 11(2) ECHR as its aim should not be compatible with Article 12 CFREU either – to allow broader scope for restrictions would mean to guarantee a lower degree of protection. However, the explanatory notes are not binding and it is possible to argue that if the Member States had intended to limit the possibility to justify restrictions under Article 52(1) in this way, this would have been

⁸²⁶ The Treaty of Amsterdam 1997 first affirmed respect for human rights as one of the foundational principles of the EU, now Article 2 TEU.

made more explicit; and that within the EU legal order it should be possible to justify (proportionate) restrictions that pursue objectives which are, within that legal order, of equal normative importance as fundamental rights protection.

Furthermore, it is unclear how the ECtHR itself would deal with restrictions which further ‘objectives of general interest recognised by the Union.’ The current ECtHR approach to dealing with restrictions which stem from EU law, where there is no Member State discretion, is set out in the *Bosphorus* judgment: there is a presumption of compatibility unless protection of Convention rights is ‘manifestly deficient.’⁸²⁷ This could mean that restrictions on freedom of association which further such objectives are compatible with the ECHR unless manifestly deficient; and that this might set a floor for protection under Article 12 CFREU. It would be interesting to see whether in the event of accession—which might see the end of the *Bosphorus* presumption⁸²⁸—provisions would be made to recognise a special set of legitimate objectives and a special ‘margin of appreciation’ in cases involving EU measures.

b. The standard of review

A second point to consider is the standard, or intensity, of review applied when assessing whether the acts of EU organs or Member States constitute an (unjustified) restriction on the right to freedom of association or related collective labour rights,

⁸²⁷ *Bosphorus v Ireland* (2006) 42 EHRR 1 [156].

⁸²⁸ T Lock, ‘The future of the European Union’s accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?’ (2015) 11 *European Constitutional Law Review* 239, 268.

whether under Article 12 or 28.⁸²⁹ This concerns the question of whether a relevant restriction on these rights is ‘necessary’, or ‘proportionate’ to the aim pursued. The intensity of review determines the scope of the discretion which EU organs and Member States have to take (or not take) steps which impinge on the right to freedom of association, and is therefore a significant factor pertaining to the level of protection which EU freedom of association guarantees provide in practice.⁸³⁰

The conditions for justifying restrictions under Article 52(1) CFREU are, at least for current purposes, broadly similar to Article 11(2) ECHR (restrictions shall be ‘such as prescribed by law and necessary in a democratic society’).⁸³¹ As discussed in Chapter IV, when assessing the compatibility of state action with the Convention the Court recognises a certain ‘margin of appreciation,’ but varies the intensity of review by varying the breadth of this margin in accordance with a number of factors. Unlike the ECtHR, the CJEU has not clearly articulated a doctrine of judicial restraint to be applied in fundamental rights (or other) cases such as the ‘margin of appreciation’ concept.⁸³² It nevertheless appears to vary the standard of review when assessing whether the acts of EU organs and Member States comply with EU law, even if it does so in a less explicit

⁸²⁹ Assuming that they pursue a legitimate aim and are in principle appropriate to achieving that aim. As discussed in Chapter VI.2, these acts cannot be measures which directly regulate collective labour rights, since the Union has no competence in this field.

⁸³⁰ See Chapter IV for discussion of this issue in this ECHR context.

⁸³¹ Heringa and Verhey (n 770) 23. The ECtHR often applies a proportionality-type assessment when considering whether restrictions are necessary, although the classic elements of proportionality review are not explicitly mentioned, see J Gerards, ‘How to improve the necessity test of the European Court of Human Right’ (2013) 11 *International Journal of Constitutional Law* 466. Peers and Prechal (n 806) 1461-69 argue that CJEU case-law pre-dating the Charter sometimes appears to have applied the ECHR standard of review of restrictions and sometimes a slightly different Community standard; however, the wording of Article 52(1) is more akin to the ECHR test, now explicitly including the requirement of necessity, 1480.

⁸³² J Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2010) 17 *European Law Journal* 80, 90; M Dawson, *The Governance of EU Fundamental Rights* (CUP 2017) Ch 2, 53.

and systematic way.⁸³³ It also uses other techniques of showing deference, such as leaving some issues to be decided by national courts.

I examine some of the reasons for a higher or lower intensity of review of the compatibility of EU or Member State acts with freedom of association guarantees. My analysis draws on the discussion in Chapter IV of the factors relevant to the degree of judicial restraint which the ECtHR should exercise. I first consider these reasons in the context of 'horizontal' judicial review, ie review of the acts of EU institutions, bodies, offices and agencies. I then consider additional factors which might be relevant to 'vertical' judicial review, that is review of the acts of Member States when implementing EU law. I argue that in both the horizontal and vertical dimensions there are reasons for the CJEU to show more restraint than the ECtHR, and certainly ILO and ESC Committees, might do.

*i. Reviewing acts of EU institutions, bodies, offices and agencies*⁸³⁴

There is reason to suppose that the CJEU will take a cautious approach to assessing compliance with fundamental rights which touch on sensitive and complex issues, such as collective labour rights. In the past it has generally shown restraint when reviewing the acts of EU institutions, particularly legislative acts.⁸³⁵ Furthermore, it is established case-law that:

⁸³³ Gerards (n 832); Dawson (n 832), who both argue that a clearer doctrine of restraint is desirable to manage the limits of the institutional competence of the Court and its relationship with national authorities.

⁸³⁴ Legislative, executive and administrative acts are reviewable on the basis of the Charter. The focus of this discussion is primarily on legislative acts, though other acts could also affect freedom of association.

⁸³⁵ Gerards (n 832) 97.

[W]ith regard to judicial review ... the Community legislature must be allowed a broad discretion in an area ... which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.⁸³⁶

It is therefore likely that the starting point of the CJEU when examining compatibility of an EU (legislative) measure with Articles 12 and 28 would be to recognise that the institutions in question have a broad discretion given that this field usually involves such choices. Measures such as those in question in *Florescu* might be a good example. Parallels can be drawn to the case-law of the ECtHR establishing that the state's margin of appreciation is wide where sensitive political and social issues are involved, which as a default is the case of measures regarding industrial relations.⁸³⁷ It was argued in Chapter IV that apart from concerns about subsidiarity, this case-law reflects concerns about the institutional competence of the Court: the democratic legitimacy, polycentricity and expertise concerns.⁸³⁸

Whilst the general arguments for the CJEU to take these latter three concerns into account are the same as in the ECHR context,⁸³⁹ they might have a slightly different bearing here. Expertise and polycentricity concerns should be given more weight in determining the degree of deference in the EU context, given the additional degree of

⁸³⁶ C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, [123]; C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, [52]; C-558/07 *SPCM and Others* [2009] ECR I-0000, [42]; C-58/08 *Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999, [52].

⁸³⁷ Eg *RMT* (n 110) [86]; see Chapter IV.

⁸³⁸ Which are the terms used by King (n 242), see Chapter IV.

⁸³⁹ Subsidiarity concerns are not relevant to horizontal review.

complexity which regulation across Member States entails. This might depend on the measure in question and the area it seeks to regulate – there are various spheres where EU intervention is possible which might affect collective labour rights. Furthermore, there is more reason for the CJEU to show restraint because it does not have the flexibility which the enforcement mechanisms of the ECHR provide, namely the possibility for gradual implementation subject to on-going review by the Committee of Ministers.⁸⁴⁰ As discussed in Chapter IV, leaving scope for flexibility to the decision-maker in implementing a judgment against them is an important way to accommodate expertise and polycentricity concerns; where there is less flexibility in this regard, there is reason to show greater deference in light of these concerns. Of course, it is still possible for the CJEU to ensure some degree of flexibility by formulating its judgment in vague terms.

The question of democratic legitimacy is more difficult, since EU legislative procedures and the role of the European Parliament are different to national procedures. The European Parliament has a co-decision role, together with the Council of the European Union, in the ordinary legislative procedure (Article 294 TFEU); but it only has a consultative role in special legislative procedure (Article 289(2) TFEU), or can only give consent to but not make amendments to legislation in certain cases.⁸⁴¹ Parliament is effectively bypassed where legislation is adopted as a result of agreement by the social partners.⁸⁴² There are also other legislative acts which do not involve the direct

⁸⁴⁰ See Chapter IV.

⁸⁴¹ See eg Article 19 TFEU conferring power on the Council to take appropriate action to combat discrimination.

⁸⁴² Article 155(2) TFEU provides that the EP should only be ‘informed’ of the agreement, but it has no other formal role in the process.

involvement of Parliament, such as implementing and delegated acts adopted by the Commission. To this might be added also general concerns about the 'democratic deficit' of EU structures.⁸⁴³ These are reasons for the CJEU to take a careful and nuanced approach when taking into account the 'democratic legitimacy' argument in its assessment, in addition to the general reasons for doing so discussed in Chapter IV.⁸⁴⁴

There are additional reasons specific to the EU context in favour of deference. Even where a piece of legislation is not the result of a democratic process as understood in the national context, it is the result of political deliberation, debate and compromise between Council members representing respective Member State interests, particularly where unanimity is required. In the case of legislation adopted under Article 155, it would be the result of negotiations by the social partners.⁸⁴⁵ Often a result is reached only after significant time and effort are expended on debates at EU and national level, and significant resources dedicated to the work of various EU institutions involved in the process. Especially where difficult political, social and economic choices and complex assessments are involved, or where urgent action is required as in the wake of the economic crisis, the Court should be slow to interfere with the delicate political balance struck by the various actors involved. This is, of course, only one factor to be taken into account by the Court and not a decisive reason for low-intensity review.

⁸⁴³ See P Craig, 'Integration, Democracy and Legitimacy' in Craig and De Burca, *Evolution of EU Law* (n 175) 13, 28-31.

⁸⁴⁴ Eg Dawson (n 832) 75 argues that in Joined Cases C-92 and 93/09 *Volker und Markus Schecke und Eifert v Land Hessen* [2010] ECR I-11063 the fact that the act in question was delegated legislation which did not entail the involvement of the European Parliament was an important factor in the (heightened) intensity of review.

⁸⁴⁵ Indeed, to strike down such legislation might itself constitute an interference with the right to freedom of association of the social partners.

There are also reasons to increase the intensity of review of compliance with Article 12 and/or 28. Further parallels can be drawn to ECtHR jurisprudence. *Digital Rights Ireland* sets out some reasons for restricting the discretion of EU legislature:

[W]here interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference: see, by analogy, as regards article 8 of the Human Rights Convention, *S v United Kingdom* (2008) 48 EHRR 1169, para 102.⁸⁴⁶

The reference to *S v United Kingdom* is to a section of that judgment which sets out the factors relevant in the assessment of the breadth of the margin of appreciation, which I discussed in Chapter IV. The CJEU does not use exactly the same phrasing as the usual formulation of these factors found in ECtHR case-law and refers to the margin of appreciation doctrine by analogy only.⁸⁴⁷ But whilst this case does not 'import' the margin of appreciation doctrine, it clearly indicates that it will take many of the same factors into account in determining the degree of deference—or scope of discretion—it leaves to the EU legislature. This would ensure a degree of consistency with the approach of the Strasbourg Court, and between the level of protection under corresponding Charter and ECHR provisions.⁸⁴⁸

⁸⁴⁶ Joined Cases C-293 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others* ECLI:EU:C:2014:238 [47].

⁸⁴⁷ Since that doctrine implies a vertical relationship between a national and supra-national court, see Chapter IV.2.a.v.

⁸⁴⁸ Though it is likely that the CJEU would apply this approach where provisions which do not correspond to ECHR rights are involved for, at the very least, consistency reasons.

Digital Rights Ireland further alludes to a distinction between the ‘essence’ of a right and other elements of that right, by reference to the text of Article 52(1) CFREU.⁸⁴⁹ The ‘essence’ concept is present in the Court’s pre-Charter case-law, and was sometimes referred to as ‘the very substance’ of a right.⁸⁵⁰ This is reminiscent of the distinction between the ‘core’ or ‘very substance’ of a right and other aspects of the right which the ECtHR makes when determining the breadth of the margin of appreciation, as in *RMT*.⁸⁵¹ This would imply that where the ‘essence’ of a right is involved the CJEU will apply the strictest standard of scrutiny. As Dawson points out, however, *Digital Rights Ireland* does not explain the meaning of the ‘essence’ distinction and it is not entirely clear whether it correlates exactly with that the ECtHR might consider the ‘core’ of a right to be.⁸⁵²

Finally, so far the Court has taken the assessment of compliance of EU measures with the Charter seriously and subjected these to thorough proportionality analysis.⁸⁵³ In most cases it has not started its analysis by referring to the ‘wide discretion’ of the legislature, which contrasts with the analysis of the Advocates General in at least a few of the cases,⁸⁵⁴ and with cases not involving fundamental rights.⁸⁵⁵ This suggests that the Court applies a stricter review of EU measures in fundamental rights cases than other

⁸⁴⁹ *Digital Rights Ireland* (n 846) [38-40]; C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 [49] refers to ‘core’ aspects of the right.

⁸⁵⁰ Explanations to Article 52(1), citing C-292/97 *Karlsson and Others* [2000] ECR I-2737, [45].

⁸⁵¹ Dawson (n 832) 63-4. In *RMT*(n 110) [86] the Court considered *Demir* a ‘very far-reaching interference’ intruding into the core of trade union freedom; by contrast, secondary strike action was not a core aspect of the right, [87-9].

⁸⁵² Dawson (n 832) 64.

⁸⁵³ See eg *Sky Österreich* (n 849) [50-66]; *Volker und Markus Schecke* (n 844) [72-88]; *Schwarz* (n 655) [47-63]; *Digital Rights Ireland* (n 846) [45-69].

⁸⁵⁴ AG Bot in *Sky Österreich* (n 849) [AG49-59]; AG Mengozzi in *Schwarz* (n 655) [AG53]; AG Cruz Villalón in *Digital Rights Ireland* (n 846) [AG95-96].

⁸⁵⁵ See eg *Vodafone* (n 836) [52].

cases, with the factors set out in *Digital Rights Ireland* used to vary the intensity of review further. What this means for current purposes is that even in a field where ‘political, social and economic choices’ are involved, as is generally the case in the sphere of freedom of association and collective labour rights, the starting point of the Court will not be as light-touch as the ‘manifestly inappropriate’ standard.

Thus, the logic which the CJEU might apply in determining the intensity of review of restrictions of freedom of association and related rights—either with respect to Article 12 or Article 28—is broadly similar to that applied by the ECtHR: intensity is reduced where complex and sensitive issues are involved, but increases with the nature of the right, seriousness of the interference, whether an ‘essential’ aspect of the right is affected and so on. Some of the relevant factors—polycentricity, expertise, democratic legitimacy, flexibility—do not currently (explicitly) feature as distinct elements in the CJEU’s assessment, and are not currently part of ECtHR reasoning. It was argued in Chapter IV that they should be more explicitly addressed by the ECtHR, in order to add further nuance to the Court’s determination of the breadth of the margin of appreciation. The same argument applies here. The current formula stipulating that the legislature has a broad discretion where making political, social and economic choices and complex assessments is a relatively rough and ready one, and could benefit from further elaboration to ensure that such deference is accorded only where appropriate to accommodate concerns about the institutional limitations of the Court. In practice it is doubtful whether such nuance is achievable given the CJEU’s much more minimalist

adjudicative style,⁸⁵⁶ although cases on restrictions of Charter rights by EU measures to date suggest that the Court is willing to engage in detailed proportionality assessment which could integrate these factors.⁸⁵⁷

Whilst the general logic is similar, there are reasons for the CJEU to exercise greater restraint, generally speaking, given that its judgments have immediate effect,⁸⁵⁸ given that EU legislation and other measures often reflect a delicate political compromise between the Member States, and given the complexity of the task of regulating across (still) 28 states which often requires significant expertise and is bound to have wide-ranging effects. This is likely to be the case for measures which in some way, directly or indirectly, affect collective labour relations and rights, since these are likely to fall within the domain of economic or labour market-related measures. It is understandable if the Court were to exercise caution, for example, before declaring a measure such as that at issue in *Florescu* invalid. This does not mean that the Court should necessarily accord the greatest degree of discretion even in such cases—intensity-increasing factors might be present—but it does suggest that it might adopt a more deferential approach than might be expected of the ECtHR as well as ILO and ESC Committees in their review of national law.

Where this is the case, there would be greater scope for justifying restrictions than under (some of) the other instruments, and for EU measures to impose restrictions

⁸⁵⁶ See Chapter V.

⁸⁵⁷ See fn 853.

⁸⁵⁸ Unlike ECtHR judgments which are usually followed by a lengthier implementation process, see Chapter IV.2.a.iv.

on freedom of association which are compatible with the CFREU, but which require Member States to take measures contrary to (some of) the other instruments.⁸⁵⁹ Aspects of the institutional concern—raised by conflict between EU activities and international norms—therefore might not be fully addressed through the development of internal EU guarantees in closer alignment with international standards. Further efforts would be required to encourage compliance of these measures with external standards, to which I return in the concluding chapter.

ii. Reviewing acts of Member States ‘implementing EU law’

There may be additional reasons for the Court to take a cautious approach when determining compliance with Charter freedom of association guarantees of Member State acts ‘implementing EU law.’⁸⁶⁰ These relate to the position of the CJEU as a supra-national court. The relationship between the CJEU and national authorities is relevantly different to the ECHR context: CJEU judgments are binding on the referring national court and have immediate effect, by contrast to ECtHR judgments which are binding on the state in international law and normally need further national implementation (though national courts may or must take them into account in various ways, depending on the jurisdiction). There is a potential for greater intrusion into the national legal order and conflict between the view taken by the CJEU and national courts and legislatures.⁸⁶¹

⁸⁵⁹ Of course, the EU itself cannot be held in breach of ILO, ESC or ECHR obligations. However, it is again interesting how this type of situation would be dealt with in the event of accession to the ECHR if reference to the ECtHR were possible, and whether the ECtHR would develop a particular EU ‘margin of appreciation.’

⁸⁶⁰ Which, as discussed in Chapter VI.1, is understood broadly.

⁸⁶¹ For example, the CJEU may take the view that the measure in question should be declared invalid as incompatible with the Charter where the national court has deemed it compatible with parallel national constitutional guarantees.

Gerards proposes that the CJEU could learn from the ECtHR's margin of appreciation doctrine in assessing whether Member States are in breach of the Charter.⁸⁶² Apart from the factors already discussed above (eg nature and seriousness of the interference), she points to the ECtHR's use of the 'common ground' and 'better placed' arguments in determining the scope of the margin of appreciation,⁸⁶³ and the similarities between these factors and those which the CJEU already appears to be taking into account in varying the intensity of review.⁸⁶⁴ She argues that it would be desirable for the CJEU to develop a similar—not necessarily identical—systematic and explicit approach to determining the degree of deference to Member States.⁸⁶⁵ Such an approach might function in a broadly similar way to that which I propose in Chapter IV, with modifications to take into account the different institutional context. There would be reason for the Court to exercise greater judicial restraint than the ECtHR—as in the vertical dimension—in light of expertise and polycentricity concerns because its judgments have immediate effect. It could also ensure that the guidance it gives to national courts is framed at a level of abstraction which enables that court, in ruling on the case and appropriate remedy, to ensure a sufficient degree of flexibility for the decision-maker. This would accommodate expertise and polycentricity, as well as subsidiarity concerns. In addition, Gerards points out that central Union interests—such as free movement rights or inter-state trade possibilities—seem to be important factors

⁸⁶² Gerards, 'Margin of Appreciation' (n 832) 82.

⁸⁶³ *ibid* 108-111.

⁸⁶⁴ *ibid* 117. In particular, Gerards argues that the CJEU has looked to the absence of consensus between Member States as a factor relevant to the intensity of review, eg *C-36/02 Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, [31].

⁸⁶⁵ Gerards, 'Margin of Appreciation' (n 832) 117.

in the Court's reasoning, with the intensity of review increasing where the actions of Member States are contrary to such interests.⁸⁶⁶

There are some objections to Gerards' proposition. For example, Young considers that 'deference' and a 'margin of appreciation' fit uneasily with the assertion of supremacy of EU law, the need for uniform application of EU law to achieve some of the Union's objectives, and, not least, the declaratory style of CJEU judgments.⁸⁶⁷ She argues that a *unique* approach to human rights adjudication by the CJEU is necessary,⁸⁶⁸ an approach based on 'dialogue,' which requires only:

... that the CJEU hear the arguments of national courts regarding the application of human rights, weighing up their reasoning when determining the content of the general principle of Union law or the Charter provision applying to a particular rights-issue.⁸⁶⁹

The Court can then leave more or less discretion to the national courts by giving more or less precise legal definitions of what the right in question entails.⁸⁷⁰ There are factors which indicate how much weight should be given to the assessment of the national authority of the rights-issue.⁸⁷¹ It is relevant whether the Member State is acting as an agent of the EU, implementing EU law or derogating from EU law, with more discretion

⁸⁶⁶ Gerards, 'Margin of Appreciation' (n 832) 92-3.

⁸⁶⁷ A Young, 'EU fundamental rights and judicial reasoning: towards a theory of human rights adjudication for the EU' in S Douglas Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 139, 149.

⁸⁶⁸ *ibid* 159.

⁸⁶⁹ *ibid* 150.

⁸⁷⁰ Young, 'Theory of Human Rights Adjudication' (n 867).

⁸⁷¹ Young proposes a theory broadly similar Weiler's theory of EU human rights adjudication, with some important additions: J Weiler, 'Fundamental rights and fundamental boundaries: Common standards and conflicting values in the protection of human rights in European Union space' in R Kastoryano (ed), *An Identity for Europe, the Relevance of Multiculturalism in EU Construction* (Palgrave Macmillan 2009) 73.

generally given to Member State authorities in the latter case.⁸⁷² When implementing EU law, different weight may be attributed to the decision of national authorities depending on whether the case regards a failure to implement EU law (less weight) or an implementation of EU law which goes beyond EU human rights provisions (more weight).⁸⁷³ It is relevant whether the EU or national provision in question complies with the ECHR;⁸⁷⁴ and whether the human rights assessment of the Member State or the EU is the result of democratic deliberation.⁸⁷⁵ Importantly, Young's account recognises that 'the relative importance of the interest protected by EU law and the need for uniformity to achieve this aim' should be taken into account, as should 'the relative importance for the human right protected by the member state.'⁸⁷⁶

These two approaches are structurally and conceptually different. Young's approach is more closely calibrated to the fact that CJEU human rights adjudication takes place within a unique constitutional and institutional framework with specific aims; Gerards proposes an approach broadly similar to that of the ECtHR, with space to take into account the particularities of the EU legal order. There is no space here to assess which of these approaches is more appropriate. Suffice it to say that what they have in common is a recognition that the determination of the degree of discretion accorded to Member State authorities takes into account the structure and objectives of the EU legal order. Thus, there are factors relevant to this assessment which are not taken into

⁸⁷² Young, 'Theory of Human Rights Adjudication' (n 867) 153, citing Weiler (n 867).

⁸⁷³ *ibid* 158-9.

⁸⁷⁴ *ibid* 155.

⁸⁷⁵ *ibid* 143, 154-5, 158.

⁸⁷⁶ *ibid* 154-5.

account by the enforcement mechanisms of the other instruments considered here. This is in addition to the argument that the CJEU should show greater restraint—and thus leave greater discretion to the national court and the decision-maker—than the ECtHR and other bodies because the enforcement of its judgments does not leave the same scope for flexibility as these instruments.

Assessment of compliance of certain restrictions on the right to freedom of association by the CJEU could therefore—all other things being equal—yield different results to this assessment under the ECtHR,⁸⁷⁷ ILO and ESC. That is, there might be disparities in the level of protection in practice, justified by the fact that in the EU context the doctrine of deference developed to manage the relationship between the CJEU and national courts and authorities must be sensitive to the particularities and objectives of EU law and seek to maintain a productive relationship between these courts.

c. Conclusion

The above discussion illustrates that, even assuming that the meaning of Charter freedom of association guarantees is interpreted in line with parallel international norms, the scope for permissible restrictions to freedom of association might be greater under Article 12 and/or 28 than it would be under the other instruments. This is because the Charter recognises a wider range of legitimate objectives of such restrictions, and because the CJEU may show greater restraint in both the horizontal and vertical

⁸⁷⁷ This again raises some issues in light of the explanatory notes (n 183) to Article 52(3), which suggest that the level of protection under Article 12 should correspond to Article 11 ECHR in respect of permissible restrictions.

dimension in order to observe the proper limits of its competence as a judicial body and a supra-national court. This means that the substantive level of protection of the right to freedom of association under the Charter might be lower, in that the relevant Charter provisions might not provide a remedy for restrictions which are contrary to international standards.

It should be borne in mind, however, that this does not necessarily tell us much about the overall capacity of Charter provisions to provide a remedy for right-holders whose freedom of association has been affected. Even if protection under the Charter is ‘narrower’ because there is greater scope for permissible restrictions, it is ‘deeper’ in that a finding of non-compliance results in setting aside the measure in question. This is in stark contrast to the consequences which follow a finding of non-conformity by ILO or ESC Committees, and ECtHR judgments.⁸⁷⁸ Thus, where the Charter does provide a remedy, it is potentially a better, more effective remedy.

2. Derogating from Economic Freedoms to Protect Collective Labour

Rights

Further issues arise where Member States—or, in some cases, private parties—derogate from EU economic freedoms in order to protect, or in the exercise of, collective labour rights.⁸⁷⁹ The ‘economic freedoms’ are provisions of *fundamental* status in the EU legal

⁸⁷⁸ See Chapter I.1 and Chapter IV.2.a.iv.

⁸⁷⁹ These ‘freedoms’ relate to the free movement of goods (Title II TFEU), as well as services, capital and persons (Title IV), which includes the right to establishment (Title IV Chapter 2).

order, the backbone of the EU's original aim of market integration.⁸⁸⁰ They do not have the same significance nor feature as such in the ECHR, ESC or ILO legal framework. In such cases of derogation, conflicts between fundamental economic freedoms and fundamental human rights need to be resolved. This was the scenario in *Viking*, *Laval* and *Commission v Germany*, where the freedom to provide services and freedom of establishment of the employer clashed with the right to strike and right to collective bargaining respectively. As discussed in Chapter I, in these cases EU economic freedoms prevailed over collective labour rights, an outcome which has been held to be contrary to ESC,⁸⁸¹ criticised by the CFA,⁸⁸² and may be contrary to the ECHR.⁸⁸³

These cases have been subject to much commentary and criticism which I will not examine at length here. My aim is to consider only whether normative conflict is inevitable or whether the test applied by the CJEU in assessing whether restrictions on the economic freedoms are justified is sufficiently flexible to avert such conflict. I will argue that despite adaptations to the proportionality assessment which would be in-keeping with some of the Court's case-law to date, at least two crucial points of difference remain: the normative weight accorded to the economic freedoms in the EU legal order, and the structure of the test itself. However, the scope for normative conflict may be reduced through the recognition of a wider margin of discretion of the Member State (or private party), a 'double proportionality test,' and a reconceptualization of the

⁸⁸⁰ Opinion 2/13 (n 219) [172]; SA de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 *Utrecht Law Review* 169, 175-8.

⁸⁸¹ ECSR regarding *Lex Laval* (n 207).

⁸⁸² CEACR in BALPA dispute (n 204), ECSR Observations Sweden 2013 (n 206)

⁸⁸³ Velyvyte (n 218).

legitimate aims and necessity of collective action or bargaining which accords with the empowerment rationale and interpretation of EU norms suggested in Chapter V.

a. Inevitability of (some) conflict between norms

Some commentators have suggested that the outcomes in *Viking* and *Laval* were not inevitable as a matter of EU law. For example, Weatherill argues that *Viking* and *Laval* are inconsistent with some of the Court's earlier judgments dealing with conflicts between economic freedoms and fundamental rights.⁸⁸⁴ According to him, the cases do not recognise the wide margin of discretion given to Member States in complex cases, such as that recognised in *Schmidberger*.⁸⁸⁵ Instead, the Court should have been attentive to the sensitive issues involved, and permitted 'a wide margin of discretion...with a view to ensuring that the promotion of the Community's social purposes is not disproportionately impeded,' and, post-Lisbon, in light of Articles 4(2) TEU, Article 28 CFREU and Article 152 TFEU.⁸⁸⁶

A similar argument that *Viking* and *Laval* are outliers in the Court's case-law is made by de Vries.⁸⁸⁷ He further proposes that in light of the post-Lisbon legal framework, in which fundamental rights occupy a more prominent role than previously,

⁸⁸⁴ Weatherill (n 190) 23.

⁸⁸⁵ *ibid* 36, cf Young, 'Theory of Human Rights Adjudication' (n 867) 157-158, discussed below; C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659. See also on a 'wide margin of appreciation,' C-250/06 *United Pan-Europe Communications Belgium SA v État Belge* [2007] ECR I-11135, [44].

⁸⁸⁶ Weatherill (n 190) 38; Article 4(2) TEU states that the Union shall respect the national identities of Member States, 'inherent in their fundamental structures, political and constitutional.'

⁸⁸⁷ De Vries (n 880) 182.

the Court should apply a ‘double proportionality test.’⁸⁸⁸ This is a test along the lines of that proposed by AG Trstenjak in *Commission v Germany*:

A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.⁸⁸⁹

This kind of ‘double-balancing’ of conflicting rights is familiar to the ECtHR, which generally leaves a wide margin of appreciation to the state in such cases.⁸⁹⁰ Such a test would ensure that equal regard is accorded to economic freedoms and fundamental rights in the EU legal order.⁸⁹¹ The idea that economic freedoms and fundamental rights should be ranked equally underpinned also Article 2 of the failed Monti II Regulation. The Regulation was subject to objections to legislative intervention in this sphere both by employers, trade unions and Member States and was eventually ‘yellow-carded’ on the basis of 12 reasoned opinions by national Parliaments.⁸⁹² Thus, for the time being, it remains down to the Court to change its approach.

Even if these arguments are accepted, the fact remains that fundamental rights—here collective labour rights—must be *balanced* against considerations which do not

⁸⁸⁸ De Vries (n 880) 191.

⁸⁸⁹ AG Opinion, *Commission v Germany* (n 188) [AG191].

⁸⁹⁰ De Vries (n 880) 183; *Chassagou and others v France* (2000) 29 EHRR 615 [113].

⁸⁹¹ Which de Vries argues should be the case (n 880) 178, 191; see AG Opinion, *Commission v Germany* (n 188) [AG183, 195].

⁸⁹² The Adoptive Parents, ‘The Life of a Death Foretold: The Proposal for a Monti II Regulation’ in Freedland and Prassl (n 190) 95, 98.

enjoy the same status under the other legal instruments considered here. ILO Committees do not apply a test of proportionality in assessing restrictions on the right to strike, nor recognise ‘a notion of freedom of establishment of freedom to provide services’ as capable of justifying such restrictions.⁸⁹³ Where a derogation is found to be impermissible, conflict with ILO standards is effectively inevitable.⁸⁹⁴ Assuming that the protection of economic freedoms can be considered a legitimate aim under Article 31 ESC/Article G RESC and Article 11(2) ECHR—and this is far from obvious—both of these provisions would regard measures taken in furtherance of this aim to be intrusions into the fundamental right which must be justified, but not vice versa. These instruments regard the fundamental right in question as being of primary importance and not on an equal footing with—much less subordinate to—economic freedoms; that is, they assess restrictions against a different starting point, or ‘baseline.’⁸⁹⁵ This is not just a difference as regards the burden of proof, but one of normative significance.

This does not mean that a finding that a derogation from an economic freedom with the aim of protecting collective labour rights will *always* be incompatible with the relevant ILO, ESC and ECHR norms. There may be circumstances in which a restriction on collective labour rights might be justifiable according to the usual principles applicable under each of these systems. In the case of the ECHR, special deference might be accorded in light of the origin of the restriction in EU law – it is possible, for example, that the ECtHR will recognise a special margin of appreciation to accommodate the

⁸⁹³ CEACR in BALPA dispute (n 204); Bogg, ‘Viking and Laval’ (n 190).

⁸⁹⁴ Unless the services in question could be considered ‘essential.’

⁸⁹⁵ Whereas the current approach of the CJEU takes the fundamental economic freedom as a starting point, Davies, ‘One Step Forward’ (n 190) 141; Bogg, ‘Viking and Laval’ (n 190) 70.

specificities of the EU legal order, if it could directly review EU law post-accession. However, it does mean that conflict will not always be inevitable.

b. Reducing the scope for conflict

Bogg proposes that the 'only way to ensure respect for fundamental labour rights in EU law is by instituting an *Albany*-style immunity' which would put these rights beyond the reach of internal market law.⁸⁹⁶ This solution was rejected in *Viking* and, since then, neither the Court nor the EU institutions have signalled an intention to take such a step.⁸⁹⁷ But other steps can be taken to reduce, if not to eliminate, the scope for conflict. First, the suggestion that a 'double proportionality test' should be applied is a sound one, in keeping with the EU's general shift towards greater regard for fundamental rights, the Treaty status of the Charter, the prospect of ECHR accession and the goal of working towards a social market economy. As de Vries argues, '*special* account must be taken of fundamental rights' in interpreting free movement provisions for these reasons.'⁸⁹⁸ A 'double proportionality test' would ensure that both types of fundamental rights are placed on an equal footing.

Second, given the sensitive nature of the issues involved and potential for deep intrusion into established national industrial relations models, it would also seem appropriate for the Court to take a wide margin of discretion as a starting point as it has

⁸⁹⁶ Bogg, 'Viking and Laval' (n 190) 42.

⁸⁹⁷ *Viking* (n 177) [48-54].

⁸⁹⁸ De Vries (n 880) 188, my emphasis.

done in *Schmidberger* and other cases.⁸⁹⁹ This would allow more leeway to unions (or Member States, depending on the scenario) in the assessment of necessity and proportionality. It is possible that in certain circumstances—but *not as a rule*—this margin might be reduced. For example, Young argues that the Court in *Viking* and *Laval* applied a more rigorous standard of review for a number of reasons: the conflict with economic freedoms was more direct;⁹⁰⁰ the Court perceived a greater need for uniformity;⁹⁰¹ and *Laval* concerned a democratic legislative solution (the Posted Workers Directive).⁹⁰² These may well be features which distinguish these cases from *Schmidberger*.⁹⁰³ However, these factors will not be present in every case, and if they are, and they constitute good reasons for increasing the intensity of review, then the Court should highlight them explicitly and incorporate them into its reasoning.⁹⁰⁴

It is possible also that the margin was reduced in these cases because the Court considered that trade unions, as private parties, should not have the same discretion as Member States.⁹⁰⁵ This may be because ‘private actors are considered to pursue their own, private, interests first, before considering the “public at large;”⁹⁰⁶ or because the ‘better placed’ and ‘democratic legitimacy’ arguments do not apply to the same extent. However, as de Vries argues, such an approach would not take due account of the

⁸⁹⁹ Eg *Laval* (n 177) cuts across the Swedish model of industrial relations.

⁹⁰⁰ Young, ‘Theory of Human Rights Adjudication’ (n 867) 157; eg in *Viking* the union’s policy was aimed directly against any reflagging of ships.

⁹⁰¹ *ibid.*

⁹⁰² Young argues, ‘Theory of Human Rights Adjudication’ (n 867) 158.

⁹⁰³ As Young argues, *ibid* 157.

⁹⁰⁴ As suggested in Section 2 above.

⁹⁰⁵ De Vries (n 880) 189.

⁹⁰⁶ *ibid* 190.

different regulatory instruments used in Member States to attain public policy objectives; and private actors should at least have the chance to show that their actions pursue public policy objectives rather than self-interest.⁹⁰⁷ Furthermore, as argued in Chapter II, trade unions are a distinct type of organisation which play an important role in liberal democracies.⁹⁰⁸ According to the empowerment rationale of the right to freedom of association and the principle of subsidiarity, as a structuring principle of that right, the autonomy of trade unions to manage their affairs should be recognised and respected.⁹⁰⁹ If empowerment is taken as the guiding rationale of EU freedom of association guarantees, as I advocate here, then trade union autonomy would constitute an important reason to maintain a *prima facie* wide margin of appreciation.

Third, the legitimate aim pursued by collective action or bargaining should be reconceptualised. A number of commentators have expressed the view that this aim was construed very narrowly in both *Viking* and *Laval*.⁹¹⁰ In *Viking*, the Court considered that the action is potentially justifiable if it falls within the objective of protecting workers, previously recognised as an overriding reason of public interest which can justify derogations from fundamental freedoms.⁹¹¹ However, this would only be the case if 'the jobs or conditions of employment of that trade union's members ... were jeopardised or

⁹⁰⁷ De Vries (n 880) 190.

⁹⁰⁸ See Chapter II.1; trade unions are therefore relevantly different to other private bodies to which free movement rules have been held to apply, such as the Union of European Football Associations in *Bosman* (n 182).

⁹⁰⁹ See Chapter II.2.c.

⁹¹⁰ Eg De Vries (n 880) 182, 189; Davies, 'One Step Forward' (n 190) 141-142; Bogg, 'Viking and Laval' (n 190) 50-53.

⁹¹¹ *Viking* (n 177) [79-80].

under *serious* threat.⁹¹² In *Laval* it was considered that the action in question could only pursue a legitimate aim if that aim related to the negotiation of *minimum* rates of pay.⁹¹³ In *Commission v Germany*, the aim pursued by the collective agreement was defined as the ‘enhancement of workers’ retirement pensions;’ consequently, it was the interest in this enhancement which had to be balanced against the attainment of the economic freedoms in question, and *not* the protection of a fundamental right.⁹¹⁴ In other words, the Court took the legitimate aim to be the aim of the collective action or collective agreement, and not respect for a fundamental right.⁹¹⁵ This contrasts with its approach in *Schmidberger*.⁹¹⁶

The aims pursued by collective action or bargaining considered as ‘legitimate’ could be re-defined in the following way. To start with, de Vries argues that respect for fundamental rights should *itself* be recognised as the overriding reason of public interest pursued in these cases, given the role these rights play in the post-Lisbon legal framework and in national constitutions.⁹¹⁷ In this context, this would signal more strongly that collective action and bargaining are activities which fall within the domain not only of worker protection but also the exercise of fundamental rights. Further, and relatedly, the legitimate aim pursued should be defined as the *protection or exercise of the relevant right* and not the end-result pursued by the relevant union or worker activity in

⁹¹² *Viking* (n 177) [83], my emphasis.

⁹¹³ *Laval* (n 177) [111]; Bogg, ‘Viking and Laval’ (n 190) 51.

⁹¹⁴ *Commission v Germany* (n 188) [52].

⁹¹⁵ Davies ‘One Step Forward’ (n 190) 141.

⁹¹⁶ *ibid*; De Vries (n 880) 188.

⁹¹⁷ De Vries (n 880) 187-188.

the particular context.⁹¹⁸ What falls within the ambit of ‘exercise of the relevant right’ should be determined, at minimum,⁹¹⁹ by reference to Article 12 and/or Article 28 CFREU, interpreted as I suggest in Chapter V.⁹²⁰ This would avoid deciding whether the *particular* aim pursued by an activity is ‘legitimate’ and therefore show an appropriate degree of respect for the autonomy of unions in determining their strategic aims.⁹²¹ It would also avoid confining this aim to negotiating minimum standards, or to negotiating or taking action only with regard to a limited range of subject-matter, or to protecting workers against (serious) detriment. This would be consistent with—indeed required by—the empowerment model: apart from emphasising the importance of organisational autonomy, the model requires not only that workers are able to *defend* their interest from detriment or secure certain minimum entitlements, but that they are able to *pursue* their interests and participate in decisions which affect them.⁹²²

What follows from this too is that there would be no need to question whether strike action *itself* is the ‘least restrictive alternative’ – an aspect of *Viking* which has also been subject to stark criticism.⁹²³ If it is accepted that the legitimate aim pursued is the exercise of the right to strike, then it is accepted also that the decision to take strike action

⁹¹⁸ In line with *Schmidberger*, where the Court did not question the legitimacy of the aims pursued by the demonstrators, see Bogg, ‘Viking and Laval’ (n 190) 53.

⁹¹⁹ I say ‘at minimum’ because regard should be paid also to the level of protection accorded at national level, if higher than the Charter.

⁹²⁰ As discussed in Chapter V, there are a number of different ways in which the Court could go about defining Charter freedom of association guarantees, and the ambit of the right might vary somewhat according to each one. For example, if the Court recognises a right to strike as an essential element of Article 12 (whether or not following the ECtHR), that right might not be limited to collective action related to collective bargaining, as it would be according to the text of Article 28.

⁹²¹ Which Bogg argues is contrary to ILO principles, ‘Viking and Laval’ (n 190) 51.

⁹²² See Chapter II.2.c.

⁹²³ Eg Davies ‘One Step Forward’ (n 190) 143; Bogg, ‘Viking and Laval’ (n 190) 57-60.

in some form should not *itself* be questioned. A balance would then need to be struck between the interest in the exercise of that right by right-holders and the pursuit of the economic freedom of the employer. The Court might take into account factors such as the form or duration of the planned action and the seriousness of the implications for the employer in this assessment; relevant might be also procedural considerations, such as whether the employer had notice of the strike, whether there was a pre-strike ballot and so on.⁹²⁴ ILO Committee and ECSR case-law could be particularly useful in this regard. If a 'double proportionality test' is applied, the Court would show *equal regard* for the degree of interference with the economic freedom caused by the exercise of the right, and the degree of interference with the fundamental right in pursuit of the economic freedom in this assessment.

The suggested re-calibration of the test applied to potential justifications of derogations from the economic freedoms aims to ensure that respect for fundamental rights generally, and the right to freedom of association specifically (conceptualised in accordance with the empowerment model) are accommodated more appropriately within the structure of the test. It seeks to ensure that the interest in exercising fundamental rights has greater weight in the proportionality assessment than hitherto and is not subordinate—but on a par with—economic freedoms; that union autonomy is respected to a greater degree; and that the legitimate exercise of a right is not limited to minimum standards or defensive action only. The proposed approach is not equivalent to that of the ECtHR or ILO and ESC Committees, but the fact that it attempts

⁹²⁴ Though these should not be decisive factors as this might completely exclude eg wildcat strikes from protection, even where these are not illegal at national level.

to accommodate regard for fundamental rights and collective labour rights to a greater extent has the potential to reduce the scope for conflict between ECHR, ILO and ESC norms and EU law.

3. Conclusion

This chapter argued that there is greater scope for legitimate restrictions on freedom of association under the CFREU than under the ILO, ESC, and, possibly, the ECHR. This is because the Charter recognises a wider range of legitimate objectives of restrictions of Articles 12 and 28; because the CJEU is likely in some circumstances to show a greater degree of deference to the decision-maker in both the horizontal and vertical dimension; and because EU economic freedoms must be weighed at least equally to the right to freedom of association in a balancing assessment where the two come into conflict, which is not how that assessment is conducted under the other mechanisms. These are differences pertaining to the formulation of the Charter, aims of the EU legal order and structure of EU free movement law, and institutional limitations of the CJEU as an international court, which justify divergence between the level of protection accorded to freedom of association in EU law and under the other international instruments.

These are differences which manifest themselves in the *application* of Charter guarantees to a particular case, additional to differences which might arise in the interpretation of the meaning of Articles 12 and 28 which I discussed in Chapter V. The implications of these two sets of differences is that some restrictions on freedom of association which are contrary to ILO and/or ESC standards will be compatible with EU

law. It is less clear whether restrictions contrary to the ECHR can be compatible with EU law. The discussion in this chapter suggested that this remains a possibility in practice, at least until the EU accedes to the ECHR.

Part D as a whole proposed how EU freedom of association guarantees could be developed in accordance with the empowerment model of the right to freedom of association. It argued that this could occur in parallel with developments in this regard under the ECHR via Article 12; but that the CJEU should also look to ILO and ESC norms as important sources of authority in the interpretation of Charter freedom of association guarantees. There are particularly strong arguments to use these norms—especially Article 6 ESC—as reference points in the development of Article 28, with the onus being on the Court to justify departure from international standards. Article 28 can thus be used as a springboard to develop the collective dimension of workers’ rights under the Charter in a way which aligns more closely with international social standards and seeks to guarantee workers’ genuine ability to meet the employer on more equal terms in order to protect and advance their interests.

This part then analysed the implications of such a development for the institutional concern identified in Chapter I and, more broadly, for the protection of collective labour rights in the European legal space. The conclusion of this analysis is that some institutional concerns persist for the following reasons. Institutional concerns of the first type set out in Chapter I which arise from the existence of EU freedom of association guarantees—uncertainty, the risk of direct and indirect levelling-down of freedom of association guarantees by Member States and displacement of more

protective specialist norms—persist for reasons similar to those advanced in the ECHR context. First, the interpretive approach proposed does not entail complete alignment between the meaning of EU and ILO and/or ESC norms. Divergence remains where it can be justified by reference to differences in the text of the Charter, aims of the Charter and EU law as a whole, institutional operation of the mechanisms and so on. Second, the CJEU might show even greater restraint than the ECHR in assessing compatibility of restrictions with Articles 12 and/or 28 in some circumstances. Both of these factors can lead to a narrower ambit of protection under the Charter than international standards. Institutional concerns persist to the extent that Member States choose to—or must—adhere to this level of protection rather than seeking to comply with ILO and ESC norms. These concerns are amplified where the scope of application of the Charter is cast broadly.

Furthermore, the validity of some EU-level measures in the sphere of economic governance which are (possibly) contrary to international standards cannot be challenged on the basis of the Charter. Even where this is a possibility, such as in a *Florescu*-type scenario, the CJEU might leave a relatively broad margin of discretion to EU institutions in light of the sensitive and complex nature of the issues involved and conclude that the measure does not violate Article 12 and/or Article 28. The result is that EU measures contrary to international standards remain valid and conflict with these standards, such that institutional concerns of the second type set out in Chapter I persist. Concerns of this second type remain also in situations where enjoyment of the right to freedom of association restricts the exercise of fundamental economic freedoms. It was proposed that the adoption of a double-proportionality test in combination with an

empowerment conception of freedom of association would go some way to reducing, but not completely avoiding, the scope for conflict in such cases. These various remaining divergences in the level and scope of protection of freedom of association under the Charter are limitations also to the positive potential of Articles 12 and 28 to strengthen the protection of collective rights in EU Member States, as is the fact that there is limited scope to enforce positive obligations of the EU and the Member States.

This leads to the more general conclusion that the existence of both EU freedom of association guarantees and EU-level measures which conflict with ILO and ESC norms will continue to present challenges for the more traditional mechanisms for the protection of labour and social rights. It is possible also that there is a certain risk of conflict with the ECHR – one of the reasons why accession to the ECHR would be desirable. However, such challenges are, at the very least, likely to be less acute if the Court adopts an approach to interpreting EU freedom of association guarantees which takes international standards as a starting reference point, and which is guided by an empowerment conception of freedom of association. Such an approach would imply a re-orientation of the tendency discernable in the Court's case-law towards adopting a narrow conception of collective labour rights and subordinating these to other individual rights.

Furthermore, the Charter could still make a very significant positive contribution in the field of collective labour rights. To take an expansive approach to the interpretation of Charter provisions protecting collective labour rights is to send a signal that these are very important minimum entitlements which should not be lightly

dispensed with, even in times of economic crisis. It is to oblige both EU institutions and Member States to take these rights seriously, and to promote them, in relevant spheres of activity. Chapter VI argued that such obligations could and should be an incentive to revise economic and employment policy Guidelines, to ensure that these promote measures to support collective bargaining and the ability of workers to promote their interests and have a say in decisions which affect them. This would be a significant departure from current trends in EU economic policy, which Ewing has described as an ‘assault’ on collective bargaining structures.⁹²⁵ CFREU freedom of association guarantees can act as a buffer against these trends and—alongside other social and economic rights in the Charter and the European Pillar of Social Rights—as a basis for developing the social dimension of the Union.

⁹²⁵ K Ewing, ‘The Death of Social Europe’ (2015) 26 *King’s Law Journal* 76.

Conclusion

1. Summary of Thesis

In this thesis I have argued that the development of ECHR and EU norms in the field of freedom of association and collective labour rights could have negative effects on the more traditional, specialist labour and social rights mechanisms for the protection of these rights – the ILO and ESC. This is the case where the level of protection of collective labour rights guarantees under the ECHR and in EU law is lower than under the ILO and ESC, either because the scope of the relevant guarantees is narrower or because the scope for permissible restrictions is broader; and where EU-level measures are contrary to ILO and ESC standards. Since the ECHR and EU legal regimes are underpinned by stronger enforcement mechanisms, it is likely that they will be followed in cases of divergence and conflict, displacing more protective ILO and ESC norms. This, as I argued in Part A, could marginalise the specialist mechanisms and undermine their effectiveness, and, in various ways, lead to a levelling-down of protection of collective labour rights in Council of Europe and EU Member States. I called these issues, collectively, the ‘institutional concern.’

The thesis advanced here is that the institutional concern could be addressed to a significant extent through pursuing justified convergence in the interpretation of ECHR and EU freedom of association guarantees with ILO and/or ESC norms. I first advanced a normative (ie moral) justification for such convergence. In Part B, I proposed a normative rationale for the right to freedom of association as a fundamental human right, which I call the empowerment rationale. A key aspect of this rationale for present

purposes is that it recognises workers' interest in self-determination, and therefore seeks to protect workers' ability to meet on more equal terms the power of entities which affect their interests (ie employer or even government), participate in decisions which affect them and engage meaningfully in the pursuit of workplace goals. The right to freedom of association, modelled according to this rationale, is a molecular right which specifically protects particular collective labour rights, such as a right to collective bargaining and action; and gives rise not only to negative duties to respect these rights, but also to positive duties to protect from interference with these rights by others, and to take positive steps to ensure the enjoyment of these rights in practice.

I argued that ECHR and EU freedom of association guarantees should be interpreted by the ECtHR and CJEU in accordance with this normative model. I argued that, in doing so, the two Courts should look to ILO and ESC specialist norms as sources of authority of significant persuasive weight. This should, in principle, result in a higher level of protection of the right to freedom of association and related collective labour rights and in a broader range of state obligations, bringing those guarantees into closer alignment with ILO and ESC parallel norms and reducing institutional concerns. I examined how such a development could take place in practice in both the ECHR and EU context. Whilst ILO and ESC norms, and the conclusions of respective interpretive bodies, are not binding authority on either Court, I argued that as specialist norms, they should be taken as a starting point in the interpretation of the more generally formulated ECHR and EU freedom of association guarantees. I also argued that any differences should be justified by the Courts by reference to appropriate reasons.

Parts C and D identified a range of reasons justifying differences in the interpretation of the right to freedom of association across different legal orders. Some of these justified differences arise from the text of the various instruments, such as the provisions relating to permissible restrictions. Others relate to the aims pursued by the ECHR and the EU. The purpose of the ECHR is the protection of human rights, which means that it seeks to protect other individual human rights—such as the right not to join an association—on an equal footing with collective labour rights. It does not, on the other hand, recognise broader goals such as solidarity and social justice which are pursued by the ESC and ILO. The EU legal order pursues a much broader range of objectives than the ECHR, ILO and ESC, including the establishment of a single market, on a par with the protection of the fundamental rights. The legal expression of the empowerment model—and therefore the ambit of protection accorded to collective labour rights—within these legal frameworks needs to accord with these aims, and accommodate the fact that these frameworks may treat other interests as being of equivalent or higher normative significance. A very significant difference between the instruments is the fact that the ECHR and CFREU are subject to judicial enforcement. This limits the level of protection to that which can realistically be required by courts within the boundaries of their institutional competence. ILO and ESC Committees can, on the other hand, require a level of protection which is a desirable goal to be progressively achieved through a political process.

In light of these differences, I argued that even after the re-alignment proposed here the ambit of protection of collective labour rights required under the ECHR and in EU law may be narrower than under the ILO and ESC. Protection would possibly be

more circumscribed in EU law than under the ECHR. In other words, in the context of these various mechanisms, protection would still get narrower in scope—though deeper in terms of enforcement—as we move from ‘softer’ to ‘harder’ enforcement mechanisms, and from a specialist labour and social rights protection framework, to a general human rights protection framework, to a more complex legal framework underpinned by multiple aims. In addition, some problematic EU-level measures remain outside the scope of EU internal freedom of association guarantees. Some remaining degree of fragmentation and friction between the various systems is unavoidable. Thus, the development of ECHR and EU norms in line with the empowerment model by reference to ILO and ESC guarantees does not provide a *complete* solution to the institutional concern.

The proposed approach could go some significant distance in this direction, however. It would ensure that the gap between ECHR and EU standards and international social standards—and therefore the magnitude of the levelling-down concern—is reduced. It would shed light on the proper role of specialist norms in the reasoning of the Courts, why differences arise, and why compliance with ECHR and EU freedom of association norms does not necessarily imply compliance with international obligations under the ILO and ESC. That is, it would both reduce fragmentation and dispel some of the uncertainty and confusion to which a fragmented legal landscape gives rise. Furthermore, it would increase the visibility and significance of ILO and ESC norms as important reference points in the interpretation and application of these guarantees, and so go some way towards preventing these from being marginalised or considered less relevant by Member States. It would establish and consolidate links

between these distinct legal frameworks to ensure that these do not develop in isolation, but maintain an 'open paradigm' and a continuous process of dialogue and learning.

2. Application Beyond the Freedom of Association Context

The framework developed here can, with some appropriate modifications, be applied beyond the freedom of association context. Key to this framework is a normative justification for the protection, or integration⁹²⁶ into general human rights instruments of particular rights which have traditionally been considered to be labour and social rights, protected by specialist mechanisms. This justification will vary across different rights which have implications in the sphere of work, where there is overlap in subject-matter as between human rights and labour and social rights instruments.⁹²⁷ In each case the relevant question is how that right, as a *fundamental human right*, should be conceptualised, and to what extent this is reflected in specialist norms. Where, and insofar as, such a normative justification is established, the arguments advanced here regarding the value of ILO and ESC specialist norms as important sources of authority in the interpretation of ECHR and EU norms are equally relevant. The set of reasons for convergence and divergence are relevant as well, although they might carry different weight across different rights. The framework proposed here can, therefore, be viewed

⁹²⁶ To use Mantouvalou's term, 'Labour Rights in the ECHR' (n 5).

⁹²⁷ For example, Mantouvalou has argued that the ECtHR has integrated elements of social and labour rights into ECHR jurisprudence by reference to ESC and ILO materials in the context of Articles 4 (freedom from forced labour) and Article 8 (right to private and family life) as well, 'Labour Rights in the ECHR' (n 5) 536. In this regard she cites *Sidabras and Dziautas v Lithuania* (2006) 42 EHRR 6, an Article 8 case in which the Court 'attached particular weight' to Article 1(2) ESC and ILO Discrimination (Employment and Occupation) Convention 1958 (No 111), [47]; and *Siliadin* (n 532), an Article 4 judgment which had regard to ILO Forced Labour Convention 1930 (No 29), [115].

as a method for explaining overlap and creating connections between human rights and labour and social rights, and the different legal mechanisms which protect them.

3. Beyond Judicial Interpretation

Given the limitations outlined above, the judicial route to addressing the institutional concern must be complemented by efforts on other fronts. First, the risk of displacement and marginalisation in particular can be reduced through further efforts to increase the status and effectiveness of ILO and ESC mechanisms. To this effect, it is necessary to continue attempts to increase awareness of and compliance with ILO and ESC standards by Member States, and to work on improving the operation of their enforcement mechanisms. These mechanisms should continue to be used by trade unions as important fora to defend workers' rights alongside the judicial route; that is, trade unions should continue to submit observations in the cyclical procedure and to bring collective complaints. Doing so would remind states parties that they have obligations in international law which go beyond the ECHR and EU law, and continue to exert pressure on states to progressively realise collective labour rights, through, if necessary, more systemic changes. It is also a way of ensuring that ILO Committees and the ECSR continue to generate case-law on the general state or particular aspects of domestic law, which can then be used as a source of authority before the ECtHR and CJEU. Collective complaints might be particularly helpful in this regard.⁹²⁸

⁹²⁸ As argued in Chapter III.2.c, this might increase the receptivity of CFA or ECSR pronouncements by the Court.

Second, it is necessary to improve co-operation channels between the EU and the ILO and ESC in order to increase external pressure for EU-level activities which fall outside the scope of the CFREU to comply with international social and labour standards. At the moment, neither the ILO nor ESC act as external accountability mechanisms liable to exert significant control over EU institutions. Whilst the EU has various co-operation agreements with the ILO, these generally only concern procedural provisions on consultation and exchange.⁹²⁹ The latest 'exchange of letters' highlights core labour standards and social dialogue as priority areas of co-operation,⁹³⁰ but it would appear that many concrete projects focus on promoting core labour standards in developing countries and not in the EU's own social policy.⁹³¹ Recent ILO-EU cooperation reports outline only cooperation in the EU's development work.⁹³² It would be desirable both that co-operation with the ILO is intensified, and that respect for ILO standards is promoted within EU structures themselves, particularly with respect to EU economic governance and policy co-ordination.

The existing channels of co-operation between the EU and ESC also leave much room for improvement. The 2007 Memorandum of Understanding between the EU and the Council of Europe expresses the commitment of the organisations to develop their

⁹²⁹ Agreement concerning Liaison between the International Labour Organisation and the European Economic Community (International Labour Office, Official Bulletin 1958). For more discussion of channels of interaction between the two systems, Novitz, 'The EU and International Labour Standards' (n 61).

⁹³⁰ *Corrigendum to the exchange of letters between the Commission of the European Communities and the International Labour Organization* [2001] OJ C 165/23.

⁹³¹ A Seifert, 'The Still Complex Relationship between the ILO and the EU: The Example of Anti-Discrimination Law' (2013) 29 *The International Journal of Comparative Labour Law and Industrial Relations* 39, 45.

⁹³² Eg *The European Union ILO Cooperation* (November 2017, Geneva) <http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_607668.pdf> accessed 1 March 2018.

relationship further and base co-operation on the indivisibility and universality of human rights.⁹³³ This includes co-operation with the ESC, though it is mentioned explicitly only once, whereas reference to the ECHR is made repeatedly. There have been calls to establish a closer relationship between the EU and ESC from various corners, particularly in light of the economic crisis.⁹³⁴ The European Parliament has highlighted the need for the EU to accede to the ESC, and that ‘the reference to the ESC in Article 151 TFEU should be used more effectively’ such as by including a social rights test in Commission and Parliament impact assessments.⁹³⁵ The ECSR has suggested that the ESC be taken into account by EU lawmakers; that links between the ECSR and the EU Fundamental Rights Agency are extended; that the EU should encourage its Member States to ratify the Revised Charter and provisions most directly related to EU competences; and that all EU Member States should commit to the collective complaints procedure.⁹³⁶ It has also been suggested that the ESC should be used as a frame of reference for the European Pillar of Social Rights and constitute a common benchmark for EU Member States within that initiative,⁹³⁷ which is not currently the case.⁹³⁸ Measures such as these offer opportunities to reinforce ESC standards; to create

⁹³³ Memorandum of Understanding between the Council of Europe and the European Union (Strasbourg, 23 May 2007) paras 10-12.

⁹³⁴ C O’Cinneide, ‘The European Social Charter and EU labour law’ in A Bogg, C Costello and A Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar 2016) 191, 211; De Schutter (n 210); *European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union* (2013/2078(INI)); European Committee of Social Rights, *The relationship between European Union law and the European Social Charter*, Working Document (15 July 2014).

⁹³⁵ *EP resolution of 27 February 2014* (n 934) paras 8(a) and 81.

⁹³⁶ ECSR Working Document (n 934) paras 83-87.

⁹³⁷ Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights (Strasbourg, 2 December 2016) 4.

⁹³⁸ The only mention of the ESC in the final EPSR document (n 175) is in the Preamble: once as a feature of Article 151 TFEU (para 3), and once in a statement that the Pillar will not prevent Member States from establishing more ambitious social standards or affect rights and principles as recognised in the ESC. The latter implies that the ESC is *not* to be taken as the benchmark for minimum standards under the Pillar.

productive synergies between the EU and the ESC; and to show that the EU is genuinely committed to the indivisibility of rights and to developing its social dimension.

Third, accession of the EU to the ECHR remains an important means of strengthening the relationship between these two legal orders. It would be a means of subjecting EU measures to external control in order to ensure that they observe the level of protection required by the ECHR which, if the approach to interpreting Article 11 ECHR proposed in Part C is followed, closely aligns with international standards. Depending on the nature of the agreement, it would also offer an opportunity for the ECHR to address issues such as those highlighted in Chapter VII⁹³⁹ in order to iron out, or at least identify, remaining differences between these two systems.

4. Constructive Interaction Between Legal Systems

Creating links between the distinct legal frameworks discussed here—via the judicial interpretation of freedom of association guarantees and institutional cooperation beyond this—would ensure that despite their differences they can maintain a constructive relationship. Each mechanism adds value to this relationship precisely because of its particular characteristics. It is a valuable feature of the ILO and ESC systems that their enforcement mechanisms are not judicial in nature. This gives these mechanisms the capacity to set their member states more ambitious goals and allow and assist them to realise these gradually, through continuous supervision and guidance by

⁹³⁹ Namely whether the scope for permissible restrictions under Article 12 CFREU is the same as under Article 11 ECHR, whether a special margin of appreciation should be recognised in respect of the EU, or how conflicts between fundamental economic freedoms and freedom of association should be analysed.

expert committees.⁹⁴⁰ It is an additional valuable feature of the ILO that the structure of some of its bodies is tripartite, involving input by the social partners themselves. On the other hand, because the ECtHR is an established and authoritative court, whose judgments are capable of providing an individual remedy and are followed by a more rigorous supervision process, rights protection under the ECHR is more effective in the immediate run. This is even more so in the case of CJEU rulings, which can result in national legislation being set aside directly following a judgment. In other words, the judicial route is more likely to provide an effective remedy for individuals and trade unions whose rights are presently affected. Nevertheless, the changes which right-holders can hope to achieve through this route are more limited than those which might ensue from a longer-term process aspiring to bring domestic systems in line with more extensive obligations under specialist instruments.

These systems are able to complement each other in important ways where links and interfaces such as those suggested here exist between them. Together they are more than the sum of their parts. Specialist mechanisms elaborate norms in the field in a detailed and comprehensive manner, which a general human rights or generalist Court would have neither the capacity nor the competence to do. The Courts can then draw on these norms, which assist them in fulfilling their task of ensuring that the fundamental rights to freedom of association, and to collective bargaining and action are appropriately protected. In turn, the judicial route to protecting collective labour rights can, even where it does not require an equivalent level of protection, contribute to the

⁹⁴⁰ And, in the case of the CFA, representatives of workers and employers.

desirable goals pursued by specialist mechanisms because it is, generally speaking, more immediately effective. What is achievable under the judicial route would, as Courts develop their case-law incrementally, change and progress in the direction of these desirable goals.⁹⁴¹ Furthermore, the various systems can operate as checks on each other: where friction or conflict between them arises, rather than resulting in the displacement of specialist mechanisms, it should give cause for reflection on whether the right to freedom of association is adequately protected by the other systems. Thus the interaction between the various systems can be a driver of continuous re-evaluation and improvement, ensuring the highest level of protection of the relevant rights which is possible within the limitations of each system.

An important element of this picture which was not discussed at length here is the interaction between the ECHR and EU.⁹⁴² The CJEU must clearly have regard to the ECHR, since the Convention is a source of general principles of EU law and because Charter provisions corresponding to ECHR rights must offer protection at least equivalent to those rights. But the ECtHR can also usefully learn from the development of freedom of association guarantees by the CJEU if the interpretive approach proposed here is adopted. In particular, the interpretation of Article 28 CFREU, as a specific collective labour rights guarantee by the CJEU could offer a useful reference point in the elaboration of the right to collective bargaining and action under the ECHR, either as evidence of consensus or aid to interpretation. There is much scope for judicial dialogue,

⁹⁴¹ As discussed in Chapter IV, this is the implication of observing 'the principles of restraint' in accommodating concerns about the institutional competence of courts, as per King (n 242) 289, Ch 10.

⁹⁴² On the interaction of the Courts post-Lisbon, see Morano-Foadi and Vickers (n 11); on the potential for the two systems to complement each other, C Costello, *Human Rights of Migrants and Refugees in European Law* (OUP 2015), in particular Ch 2, though her focus is on the field of migrant and refugee rights.

mutual learning and exchange between these two systems too, which can further reinforce the protection of collective labour rights in Europe.

The adoption of the empowerment conception of freedom of association as the normative rationale underpinning ECHR and EU freedom of association guarantees, in the context of this framework of productive institutional interactions, has much positive potential. The interpretation of these guarantees in the expansive way proposed here would be of great significance, both symbolic and practical, in times of declining union strength, growing power of employer entities, deregulatory and austerity agendas, rising inequality and falling living standards for many workers across Europe. It would be a statement that the rights of workers to defend their interests collectively vis-à-vis more powerful entities which affect their lives are fundamental human rights; that is, rights of special moral and legal significance. It would broaden opportunities for workers and unions to defend these rights through the legal, as well as political, process. It would increase regard for the collective dimension of workers' rights within the EU legal and political order, which could go as far as a re-orientation of EU economic policy to promote, rather than restrict, these rights. Thus, the emergence of ECHR and EU as sources of protection of collective labour rights could contribute to the creation of a 'social Europe' in which workers are empowered to participate in economic decision-making and to strive for better working conditions and greater equality.

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