

The Dramatic Implications of *Demir and Baykara*

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This paper considers recent decisions by the European Court of Human Rights — decisions which, the authors contend, have major implications for workers, trade unions and governments. In the landmark case of Demir and Baykara, the Court broke with its previous jurisprudence to hold that Article 11(1) of the European Convention on Human Rights and Fundamental Freedoms, respecting freedom of association, protects the right to engage in collective bargaining. In so ruling, the Court made extensive use of international labour standards (particularly those set out in ILO conventions and the European Social Charter) — not only in recognizing the right as an essential one but also in defining its scope and content, and in determining whether state-imposed restrictions on that right can be justified under Article 11(2) as “necessary in a democratic society.” The authors go on to explain how the Court has applied the reasoning in Demir and Baykara to other forms of trade union activity, notably the right to strike, with reference to recent cases on collective action by unions and individual workers. Those cases indicate that the Court is increasingly prepared to invoke Article 11 as well as Article 14 (the Convention’s anti-discrimination provision) to require states to extend meaningful protection to the right to strike, including protection of striking workers from employment-related sanctions. On the basis of their review of the case law, the authors assert that Demir and Baykara and its progeny have transformed the significance of international labour standards and shown how international law litigation can be used to restore trade union rights.

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1. INTRODUCTION

This paper focuses on the landmark 2008 decision of the European Court of Human rights (the ECtHR) in *Demir and Baykara v. Turkey*.¹ It is remarkable that although the ECtHR did not refer to the decision of the Supreme Court of Canada in the *B.C. Health* case,² it reached almost identical conclusions on the basis of a nearly identical process of reasoning based on very similar considerations and materials. The parallel conclusions separately reached by these two eminent courts shows an international convergence in relation to the rights included in freedom of association, and one to which parochial critics must now defer.

Mrs. Vemal Demir and Mr. Vicdan Baykara were, respectively, a member and the president of an Istanbul-based trade union of civil servants called Tüm Bel Sen, formed in 1990 to promote democratic trade unionism. The union negotiated a collective agreement with the Gaziantep Municipal Council to cover all aspects of working conditions, such as salaries, allowances and welfare services, effective for two years from January 1993. However, the employer appears to have failed to comply with some of the agreement's terms, with the result that the president of the union successfully brought civil proceedings against the local authority in the Gaziantep District Court. The Turkish Court of Cassation quashed the District Court decision, holding that although civil servants had the right to join trade unions, their unions had no right to enter into collective agreements or take collective action. Thus, even though there was no legal bar preventing civil servants from forming a union, any union so formed had "no authority to enter into collective agreements as the law stood."³ The matter was re-heard by the District Court, which defiantly stuck to its original position, concluding that the lack of express statutory provisions recognizing a right for trade unions formed by civil servants to enter into collective agreements left a gap that had to be filled by reference to international treaties, such as the International Labour Organization

1 *Demir and Baykara v. Turkey*, Application No. 34503/97, November 12, 2008.

2 *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391.

3 *Demir and Baykara*, *supra*, note 1, at para. 19.

conventions ratified by Turkey. Again the decision of the District Court was overturned on appeal, with the Court of Cassation this time concentrating its attention on questions about the legal status of trade unions, in a way that managed conveniently to ignore the issues of substance. To add to the union's woes, a separate court (the Audit Court) found the negotiation of terms and conditions of employment of civil servants to be improper, and ordered union members to repay the benefits they had secured under the agreement, which was said to be "defunct." The union members were pursued by the local authority's accountants, who themselves faced personal liability for having sanctioned the now unlawful collective agreements in the first place.

It was not until April 1996 that the domestic legal proceedings were finally concluded, with the Court of Cassation rejecting representations from the union for a rectification of the second decision. So, in October 1996, more than three years after the agreement was concluded and almost two years after it had expired, the union applied to the European Court of Human Rights (ECtHR) in Strasbourg, claiming that its rights under Article 11 (freedom of association,⁴ which is expressly stated to include "the right to form and join trade unions for the protection of [one's] interests") and Article 14 (protection against discrimination⁵) of the *European Convention on Human Rights and Fundamental Freedoms* (ECHR) had been violated. By the

4 Article 11, headed "Freedom of assembly and association," 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.

5 Article 14, headed "Prohibition of discrimination," provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

time it was heard by the ECtHR, the case was so old that the European Commission on Human Rights, the body with which it had been lodged, no longer existed. However, following procedural reforms in the ECtHR, the complaint was referred to seven judges of the second section of the Court.⁶ That section held on November 21, 2006 that “there had been a violation of Article 11 of the Convention in so far as the domestic courts had refused to recognise the legal personality of the trade union *Tüm Bel Sen* and had considered null and void the collective agreement between that trade union and [the municipal council], and that there was no need for a separate examination of the complaints under Article 14 of the Convention.”⁷

Clearly alarmed by this decision, the Turkish government referred the matter to the Grand Chamber of the ECtHR. Trade unionists throughout Europe have cause to thank the government of Turkey for what turned out to be, for it, a monumental misjudgement. The Grand Chamber of 17 judges unanimously held on November 12, 2008 that there had been a breach of Article 11 on two narrow grounds: “on account of the interference with the right of the applicants, as municipal civil servants, to form a trade union”; and “on account of the annulment *ex tunc* of the collective agreement entered into by the trade union *Tüm Bel Sen* following collective bargaining with the employing authority.”⁸

These narrow findings conceal a rich seam of jurisprudence, in which the Court: (i) repudiated its earlier decisions on the question of trade union rights; (ii) embraced collective bargaining as an essential right protected by Article 11; and (iii) in doing so, introduced a body of reasoning which applies with equal force to other forms of trade union activity, notably the right to take collective action. In this essay, we consider that dramatic turn of events in the evolution of the Court’s case law, and the equally dramatic decisions that have followed. *Demir and Baykara* has been the midwife for other major developments, in which the ECtHR has recognized the right to strike as the youngest offspring of the maturing *ECHR*, Article 11.

6 Application No. 34503/97, November 21, 2006.

7 *Demir and Baykara*, *supra*, note 1 (Grand Chamber), at para. 8.

8 *Ibid.*, at para. 183.

Such is the speed of events that *Demir and Baykara* and its younger siblings have already been considered three times by the English courts.⁹ As might be predicted, that ECtHR case law has not been well received by institutions steeped in the common law. The English judges have revealed a much more conservative view of human rights than their counterparts in Strasbourg, who come from jurisdictions unfettered by the common law. It appears that the United Kingdom's domestic law is some way off the pace so far as Article 11 is concerned, and unions are now considering how best to get some of these matters before the Strasbourg Court for consideration. It is also clear that the ECtHR is pulling in a different direction from its Luxembourg counterpart — the European Court of Justice (ECJ)¹⁰ — and there is a mouth-watering possibility (though ultimately an unlikely one) of a high-noon conflict between the two.

9 *Metrobus Ltd. v. UNITE the Union*, [2009] I.R.L.R. 851 (C.A.), followed by *EDF Energy Powerlink Ltd. v. National Union of Rail, Maritime and Transport Workers*, [2010] I.R.L.R. 114 (Q.B.); *British Airways plc v. UNITE the Union*, [2009] E.W.H.C. 3541 (Q.B.). For full details see K.D. Ewing & J. Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010), 39 I.L.J. 2.

10 See *ITF v. Viking Line ABP*, [2008] I.R.L.R. 143; and *Laval un Partneri Ltd. v. Byggnadsarbetareförbundet*, [2008] I.R.L.R. 160. These two cases held that the rights to strike and to enforce collective bargains must, subject to tough proportionality tests, submit to the right of a company in an EU state to locate in or to provide services to another EU state. For a discussion see, for example, the late and sadly missed B. Bercusson, "Europe at the Crossroads" (2008), 8(2) *Federation News* 25; R. Eklund, "The *Laval* Case" (2006), 35 I.L.J. 202; A.C.L. Davies, "One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ" (2008), 37 I.L.J. 125; P. Davies "Case Note on *Rüffert*" (2008), 37 I.L.J. 293; C. Barnard, "The UK and Posted Workers: The Effect of *Commission v. Luxembourg* on the Territorial Application of British Labour Law" (2009), 38 I.L.J. 122; C. Barnard, "'British Jobs for British Workers': The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market" (2009), 38 I.L.J. 245. See also B. Bercusson, *European Labour Law*, 2d ed. (Cambridge: Cambridge University Press, 2009), chap. 21. The impact of *Viking* on British labour law was condemned by the ILO Committee of Experts in its 2010 observations relating to ILO Convention 87. See ILO, Report III (1A), *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2010), at pp. 208-209.

2. A FRESH START FOR THE STRASBOURG COURT

In *Demir and Baykara*, the first problem for the applicants was that the ECtHR had addressed these matters in the past. In two famous cases from Sweden and Belgium decided in the 1970s,¹¹ the Court expressed and repeated the mantra that Article 11 simply imposed a duty on Member States of the Council of Europe to have in place mechanisms that enabled trade unions to represent their members but did not guarantee any particular means by which this was to be done. In the *Swedish Engine Drivers* case, the Court said:

The Convention [the *ECHR*] 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. Article 11(1) certainly leaves each State a free choice of the means to be used towards this end. Whilst the concluding of collective agreements is one of these means, there are others.¹²

Thus, the failure of a state to provide a specific mechanism for unions to be heard in order to protect their members' interests would not breach Article 11(1) if other means were permitted by which the union could be heard. Part of the justification for this was the existence of the *European Social Charter* of 1961 (*ESC*),¹³ in relation to which states are free to select which paragraphs of which articles they are prepared to accept. Thus, it is open to a state to refuse to accept, for example, the obligations relating to the right to organize, the right to bargain or the right to strike. According to the tortuous reasoning of the ECtHR, if Article 11 of the *ECHR* was to be read to include these rights, it would mean that in 1961 the Council of Europe had taken a

11 *National Union of Belgian Police v. Belgium* (1975), 1 E.H.R.R. 578; *Swedish Engine Drivers' Union v. Sweden* (1976), 1 E.H.R.R. 617; and *Schmidt and Dahlström v. Sweden* (1976), 1 E.H.R.R. 632. And see M. Forde, "The European Convention on Human Rights and Labor Law" (1983), 31 Am. J. Comp. L. 301.

12 *Swedish Engine Drivers*, *ibid.*, at para. 40. See also *Belgian Police*, *ibid.*, at para. 38 (in relation to the "right" to be consulted); *Schmidt and Dahlström*, *ibid.*, at para. 36 (in relation to the right to strike).

13 The *European Social Charter* (1996) has not been ratified by the U.K. and is not referred to further in this paper.

step backwards by creating a *Charter* in which such rights were optional.¹⁴

The ECtHR in *Demir and Baykara* swept aside this old thinking, although the Court made clear that it did not take that step lightly:

[T]he Court considers that its case law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union . . .* and *Schmidt and Dahlström . . .*) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.¹⁵

In so holding, the Court adopted the “living document” model of construction, in preference to one that looks to the “original intention of the drafters.” Building on earlier path-breaking decisions against the U.K. (notably the *Wilson and Palmer*¹⁶ and *ASLEF*¹⁷ cases), the Court bridged the gap between the broad and formal right to freedom of association, including the right to form and join trade unions for the protection of one’s interests, and the specific right to engage in collective bargaining by referring to international labour standards, notably ILO Conventions 98 and 151; the *ESC*, Article 6(4); the EU *Charter of Fundamental Rights* of 2000, Article 28; and “the practice of European States.”¹⁸ All of this showed, in the Court’s words, that

the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one’s] interests” set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.¹⁹

14 See *Belgian Police*, *supra*, note 11, at para. 38; *Swedish Engine Drivers*, *supra*, note 11, at para. 39; and *Schmidt and Dahlström*, *supra*, note 11, at para. 34.

15 *Demir and Baykara*, *supra*, note 1, at para. 154.

16 *Wilson and Palmer v. United Kingdom*, [2002] I.R.L.R. 568, Application Nos. 30668/96, 30671/96 and 30678/96.

17 *ASLEF v. United Kingdom*, [2007] I.R.L.R. 361, Application No. 11002/05.

18 *Demir and Baykara*, *supra*, note 1, at paras. 98-101, 147-151.

19 *Ibid.*, at para. 154.

Having decided that the right to freedom of association includes the right to bargain collectively, the ECtHR next dealt with the substance and content of the latter right. Significantly, as we have seen, the Court held that although states must remain free to develop their own systems, all such systems must be consistent with the requirements of the ILO²⁰ and the *ESC*.²¹ Indeed, one of the most notable aspects of the decision in *Demir and Baykara* is the importance attached to both ILO and Council of Europe standards in determining the content of the right to trade union membership guaranteed by Article 11.²² The Court has done a complete u-turn; those standards are no longer a barrier to reading up Article 11, but are now a reason for doing so.

The ILO and *ESC* jurisprudence was also held to be relevant to another issue that arises in the context of Article 11 but is not dealt with explicitly in the ILO conventions to which the recent ECtHR decisions have now firmly attached Article 11(1).²³ That issue is the scope of permitted restrictions on convention rights where these can be seen to fall within the ambit of Article 11(2). Here the ECtHR produced another rabbit from its brimming hat.²⁴ While the Court accepted the Turkish government's argument that the restrictions on civil service unions were prescribed by law and had a legitimate

20 *Ibid.*, at paras. 147-148, and see paras. 100-102.

21 *Ibid.*, at para. 149. See also paras. 103-104.

22 The ECtHR also relied on the right to collective bargaining and industrial action set out in Article 28 of the *Charter of Fundamental Rights* of the European Union, adopted in Nice in 2000 and recognized by Article 6 of the *Treaty on European Union* (which subjected the provision to "explanations"). The part of the *Charter* in which that article appears is now subject to the Lisbon Treaty, in consequence of which Article 28 of the *Charter*, though a relevant statement of fundamental principle for most of the EU, has no impact in Poland or the U.K. This is because Protocol 30 to the Lisbon Treaty provides that neither the ECJ nor any domestic court may find that any existing law is inconsistent with Article 28 rights, and that Article 28 creates no justiciable rights beyond those in existing domestic law. In short, the limitations on the right to strike in the U.K. are not to be challenged via the EU *Charter of Fundamental Rights*.

23 Article 31 of the *ESC* is, however, equivalent in terms to Article 11(2) of the *ECHR*.

24 In *Wilson and Palmer*, *supra*, note 16, Article 11(2) was simply brushed aside.

aim,²⁵ it refused to accept that those restrictions were necessary in a democratic society for any of the purposes permitted by Article 11(2).²⁶ In concluding that the restrictions were not proportionate, the Court referred again to international labour standards, to regional labour standards and to the practices of other countries.²⁷ In other words, the same considerations that were used to determine the content of the right were also used to determine whether restrictions on it were necessary and permissible.

This is a remarkable delegation to external standards and an example of their dynamic application, and it effectively renders Article 11(2) a duplicate line of fortification.²⁸ In treating the *ECHR* as a living instrument, the Strasbourg Court is acknowledging that these other treaties are living instruments as well, in the sense that in considering their scope and content it is necessary to look not only to the text of the treaties but also to the jurisprudence of the supervisory bodies.²⁹ In the case of the ILO, this was not confined to observations of the Committee of Experts relating specifically to Turkey, but was also extended to the body of principles drawn from that Committee's earlier decisions as set out in its *General Survey* and in the Freedom of

25 *Demir and Baykara, supra*, note 1, at paras. 159-161.

26 *Ibid.*, at paras. 162-169.

27 *Ibid.*, at para. 165.

28 *Demir and Baykara* highlights an approach to proportionality (and to the use of international standards in that regard) which is very different from that of the ECJ 12 months earlier in *Viking* (*supra*, note 10), where the right to strike in support of collective bargaining was disembowelled. In the latter case, ILO standards were relied on in part to justify the existence of a right to strike as part of the piped music of EC/EU law, but not to define the substance of the right, a task which the ECJ arrogated to itself. In carrying out that task in *Viking*, the ECJ in its own inimitable style succeeded in developing principles that would have been fully recognizable to nineteenth century English common lawyers. The ILO Committee of Experts has since made clear (see *supra*, note 10) that proportionality does not form the basis of a permissible restriction on the right to strike under ILO Convention 87.

29 Reference to these instruments and their jurisprudence had been made in earlier cases, in particular *Sigurjonsson v. Sweden* (1993), 16 E.H.R.R. 462, at para. 35; *Wilson and Palmer, supra*, note 16, at paras. 30, 35-36, 37; *ASLEF, supra*, note 17, at paras. 22 and 25.

Association Committee's *Digest of Decisions*.³⁰ These texts may now assume biblical status, and labour lawyers should become as familiar with them as with their own national statutes and law reports. In highlighting the importance of this jurisprudence, the Court implicitly encourages trade unions to take the ILO processes seriously, by submitting comprehensive briefs in response to government reports to the Committee of Experts under Conventions 87 and 98 (and other union-protective conventions) and by making effective use of complaints to the Freedom of Association Committee. The same is equally true of the ECtHR's reliance on *ESC* jurisprudence in the form of decisions of the European Social Rights Committee³¹ and the Committee of Ministers of the Council of Europe.³² Consequently, labour lawyers will need to be familiar with that body of law as well, and European trade unions will be encouraged to raise issues through the *ESC*'s mechanisms.³³

The ILO and *ESC* forums are thus no longer merely processes for publicizing grievances and causing some mild diplomatic embarrassment to national governments. Rather, their use will be an important step in building up the scope of ILO and *ESC* rights generally (as well as in particular cases), with a view to bringing proceedings in the ECtHR under Article 11. Even more important, however, these standards apply whether or not the Member State has ratified the relevant international instrument. Although it was true that Turkey had ratified

30 ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) ed. (Geneva: ILO, 2006); *General Survey* (properly entitled *Freedom of Association and Collective Bargaining*), 2004.

31 Referred to in para. 149. In *Wilson and Palmer, supra*, note 16, at paras. 30-33, the references to the European Social Rights Committee were yet more extensive.

32 Referred to in para. 104.

33 In a July 2009 circular to its affiliates, the European Trade Union Confederation ("ETUC") has taken up this challenge and has suggested that European unions should submit reports on *Viking* and *Laval* (*supra*, note 10) to the ILO and to the *ESC* machinery. See ETUC circular to affiliates, July 2009.

ILO Conventions 98 and 151, the construction of Article 11 which the ECtHR applied to Turkey was based on a provision of a treaty Turkey had not accepted (the *ESC*, Article 6(2)) and on a treaty by which Turkey could not be bound (the *EU Charter of Fundamental Rights*), as well as on the laws of other countries of the Council of Europe over which Turkey had no control. Needless to say, Turkey took exception to this, and the Court responded as follows:

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 . . .³⁴

...

The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.³⁵

...

The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.³⁶

The ECtHR went on to reiterate that “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.” In the Court’s words, it is sufficient that “the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of a

34 *Demir and Baykara*, *supra*, note 1, at para. 76.

35 *Ibid.*, at para. 78. The Court contemptuously dismissed the argument that because states were not obliged to ratify every article of the *ESC*, it was voluntary and therefore no guide as to what was mandatory in the *European Convention on Human Rights*.

36 *Ibid.*, at para. 85.

majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.”³⁷

3. IMPLICATIONS FOR OTHER TRADE UNION RIGHTS

The Court’s observations in *Demir and Baykara* that there had been a “perceptible evolution” in international law in relation to such rights as collective bargaining,³⁸ and a “continuous evolution in the norms and principles applied in international law,”³⁹ set in train a course of reasoning that requires a re-examination of jurisprudence on trade union rights related to collective bargaining, and specifically to the right to strike. There have been several ECtHR cases on the right to strike, or “collective action,” to use the new sanitized synonym. None of these cases has used the language of “essential right,” but they are nonetheless worthy of consideration in this context.

*Schmidt and Dahlström v. Sweden*⁴⁰ arose from a bitter three-month dispute involving lockouts and strikes by two of four relevant unions. The dispute followed the expiry in December 1970 of a

37 *Ibid.*, at para. 86. The holding is plainly correct. The very fact of membership of the ILO carries with it a constitutional obligation to respect the fundamental principles. Indeed, some authors regard the fundamental principles as having arguably become part of customary international law. C.W. Jenks, *The International Protection of Trade Union Freedom* (London: Stevens, 1957), at pp. 561-562; P. O’Higgins, “International Standards and British Labour Law,” in R. Lewis, ed., *Labour Law in Britain* (Oxford: Blackwell, 1986), at p. 577. The logic adopted by the ECtHR in resting on international law standards is consistent with the common law principle of legality explained by Lord Hoffman in *R. v. Secretary of State for the Home Dept., Ex parte Simms*, [2000] 2 A.C. 115, at p. 131, followed by Gleeson C.J. in *Electrolux v. Australian Workers Union* (2004), 221 C.L.R. 309, at p. 329.

38 *Demir and Baykara, supra*, note 1, at para. 153, and see para. 154. The only development of note would appear to be the adoption in 2000 of the EU *Charter of Fundamental Rights*, which contains the familiar restatement of rights found in ILO conventions and the *European Social Charter*. As the separate (concurring) opinion of Judge Zagrebelsky put it: “I have the feeling that the Court’s departure from precedent represents a correction of its previous case law rather than an adaptation of case law to a real change, at European or domestic level, in the legislative framework” (at para. 2).

39 *Ibid.*, at para. 86.

40 *Supra*, note 11.

previous collective agreement. Eventually, in June 1971, a new collective agreement was reached which gave wage increases across the board. However, it contained a clause that denied the benefit of those increases in respect of the period of the dispute (January to March) to members of the two unions which had taken strike action, whether or not the particular members had gone on strike. Such clauses were common in Sweden. Those two unions signed the agreement with a reservation, and claimed that the clause in question would discourage future strike action and hence was in breach of their Article 11 right to protect the occupational interests of their members. The ECtHR tersely held that “[e]xamination of the file in this case does not disclose that the applicants have been deprived of this capacity.”⁴¹ In other words, the Court held that despite the sanction, the unions retained all of the means to protect members’ interests which the state had made available to them — i.e., the right to collectively bargain and to enter collective agreements, and in particular, the right to strike. There had thus been no breach of Article 11(1), and no need to consider justification under Article 11(2).

In *Schmidt and Dahlström*, the ECtHR also gave a very slightly different rendition of the mantra that each state has a free choice of the means to be used to enable unions to protect the occupational interests of their members. The Court said:

The grant of a right to strike represents without any doubt one of the most important of these means,⁴² but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to “further restrictions” compatible with its Article 31⁴³

The importance of the right to strike was thus recognized, with the implication that restrictions on it should be governed by the

41 *Ibid.*, at para. 36.

42 This language connotes an “upgrade” according to the concurring opinion of Judges Türmen, Fura-Sandström and Popovi in the second section judgment in *Demir*, speaking of the right to collective bargaining prior to the Grand Chamber judgment. See, for example, the second section judgment at para. 40 and before in *Swedish Transport Workers’ Union v. Sweden*, Application No. 53507/99.

43 *Schmidt and Dahlström*, *supra*, note 11, at para. 34.

conditions in Article 6(4) and Article 31 of the *ESC*, the latter being cast in similar terms to Article 11(2) of the *ECHR*. Indeed, all but one of the other pre-*Demir and Baykara* cases on the right to strike found that restrictions on the ability to take strike action did amount to breaches of Article 11(1), though in each case those restrictions were held to be justified under Article 11(2).

The exception is *NATFHE v. U.K.*, which never reached the ECtHR.⁴⁴ In that case, the (now abolished) European Commission on Human Rights (then the gateway to the Court) refused to admit a claim by a union that sought to impugn an injunction prohibiting strike action, because the union had failed to meet a statutory requirement (since repealed) to disclose the names of its members in its pre-ballot (and pre-strike) notice. The Commission held that the obligation to disclose names did not interfere with rights under Article 11(1). In the light of recent ECtHR jurisprudence, it must be doubted whether the same conclusion would be reached today. The trial judge in the U.K. proceedings in *NATFHE* and the members of the Court of Appeal all expressed unease with the implications of the disclosure requirement, and the British government subsequently amended the law to make clear that the requirement no longer existed.⁴⁵ The case may properly be regarded as exceptional.

Among the other post-*Schmidt and Dahlström* and pre-*Demir and Baykara* cases on the right to strike, three stand out. In the first, *Federation of Offshore Workers' Trade Unions (OFS) v. Norway*, the ECtHR held that the right to strike was a “complement to collective bargaining,”⁴⁶ and held that a decree to prevent a strike in the offshore oil industry infringed Article 11(1). However, the Court accepted that in view of the consequences to the nation, a strike in the offshore oil industry would be so disastrous that the restriction was justified under Article 11(2).

The second of the three cases is *UNISON v. U.K.*,⁴⁷ where the ECtHR held that an injunction to prevent a strike aimed at attaining

44 (1998), 25 E.H.R.R.C.D. 122. For the English proceedings, see *NATFHE v. Blackpool & Fylde College*, [1994] I.R.L.R. 227 (C.A.).

45 Now *Trade Union and Labour Relations (Consolidation) Act 1992*, ss. 226A(2G) and 234A(3F).

46 (2002), E.C.H.R. 2002–VI, 301, at p. 320.

47 [2002] I.R.L.R. 497.

better protection for workers after a transfer of the employing business “must be regarded as a restriction on the applicant’s power to protect [its members’] interests and therefore discloses a restriction on the freedom of association guaranteed under the first paragraph [of Article 11].”⁴⁸ But the Court went on to hold that the restriction was justified under Article 11(2) as necessary in a democratic society for the protection of the economic interests of the transferor — even though the consequences, had the strike taken place, were not even suggested to be in the same league as in *OFS*.⁴⁹ In a weak decision, the ECtHR proffered no rationale in support of its inherent thesis (derived from Article 11(2)) that it is necessary in a democratic society that industrial action must be confined to a dispute between existing workers and their existing employer.⁵⁰ In the light of subsequent decisions of the ILO and *ESC* committees condemning this U.K. restriction, and in the light of the ECtHR’s recent jurisprudence, it seems unlikely that the Court would reach the same conclusion again on those facts. At its heart, the logic in *UNISON* could legitimate almost any restriction on strike action, since a strike will invariably interfere with the economic interests of employers.⁵¹ *UNISON* nevertheless supports the view that the right to strike is inherent in Article 11(1), and the Court pointed to the right of the union to take strike action at a later date against the transferee as one of the factors militating in favour of finding the restriction to be legitimate.⁵²

Finally, the third case, *Wilson and Palmer*,⁵³ did not directly concern the right to strike. However, the ECtHR there recognized that freedom to strike was a necessary alternative to a right to compel an employer to bargain collectively. Thus, the absence of such a right of

48 *Ibid.*, at para. 37.

49 *Ibid.*, at paras. 42-43.

50 Note that Article 1 of Protocol No. 1 to the *ECHR* could not be prayed in aid. See the detailed rationale in *Gustafsson v. Sweden* (1996), 22 E.H.R.R. 409, at paras. 59-60, where industrial action blockading supplies delivered pursuant to private contract was held to be outside its scope unless the interference was the “product of governmental authority.”

51 See B. Simpson, “Trade Disputes and Industrial Action Ballots in the Twenty-First Century” (2002), 31 I.L.J. 270.

52 *UNISON*, *supra*, note 47, at para. 41. At para. 31, the Court reiterated the familiar language that the ability to strike is one of the most important means of being heard, but that there are others.

53 See *supra*, note 16.

compulsion did not give rise to breach of Article 11 in the U.K., because the U.K. law had chosen to provide the freedom to take strike action.⁵⁴ The Court also held as follows:

[T]he essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps *including, if necessary, organising industrial action*, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer *or to take action* in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory.⁵⁵

Plainly, the Court recognized both the right to strike and the fact that it is an essential element in collective bargaining. Without the right to strike, the right to bargain collectively is no more than a right to collective begging; the ability to take strike action is necessary to the process of bargaining if persuasion fails. Lord Wright used prescient words when he held in 1942 that the “right of workmen to strike is *an essential element* in the principle of collective bargaining.”⁵⁶ In the *OFS* case, the ECtHR held that the right to strike is a “complement to collective bargaining.”⁵⁷ That correlation was illustrated by the ECtHR again in *Enerji Yapi-Yol Sen v. Turkey*⁵⁸ (discussed below, in Part 4), a case decided five months after *Demir and Baykara*.

In the same vein, the Constitutional Court of South Africa held as follows, in 1996:

Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.⁵⁹

In 2003, the Constitutional Court said: “[I]t is through industrial action that workers are able to assert bargaining power in industrial

54 *Ibid.*, at paras. 44-45.

55 *Ibid.*, at para. 46 [emphasis added].

56 *Crofter Hand Woven Harris Tweed v. Veitch*, [1942] A.C. 43, at p. 463 [emphasis added].

57 *Supra*, note 46, at p. 320.

58 Application No. 68959/01, judgment dated April 21, 2009.

59 *In re Certification of the Constitution of South Africa*, 1996(4) S.A. 744, at para. 66.

relations. The right to strike is an important component of a successful collective bargaining system.”⁶⁰ The inter-relationship between collective bargaining and the right to strike is similarly recognized in the jurisprudence of the ILO and *ESC*. Indeed, the right to strike in Article 6(4) of the *ESC* is expressly “with a view to ensuring the effective exercise of the right to bargain collectively.”

4. THE EVOLUTION OF TRADE UNION RIGHTS AFTER *DEMIR AND BAYKARA*

Perhaps unsurprisingly in light of the reasoning of the ECtHR in *Demir and Baykara*, it did not take very long for that reasoning to be extended from collective bargaining to collective action. Indeed, there is now a significant body of case law that examines the extent to which the right to strike is protected by Article 11 and Article 14, with major implications for workers, trade unions and governments. These cases also reveal the importance of ILO and *ESC* standards for the development of this jurisprudence, and their importance for national labour law systems.

The starting-point is *Enerji Yapi-Yol Sen v. Turkey*,⁶¹ which was concerned with a circular from the Turkish Prime Minister’s Public Service Staff Directorate prohibiting public sector employees from taking part in a national one-day strike organized by the Federation of Public Sector Trade Unions “to secure the right to a collective bargaining agreement.” The first question was whether this conduct by the state violated the rights of the union under the *ECHR*:

The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members’ interests.⁶² Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members’ interests (*Schmidt and Dahlström*, cited above, §36). The Court also observes that the right to strike is recognised by the International Labour Organisation’s (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court’s consideration of elements of international law other than the Convention, see *Demir et Baykara*,

60 *National Union of Metal Workers of South Africa v. Bader BOP (pty) Ltd. and Minister of Labour*, 2003(2) B.C.L.R. 182 (Const. Ct.).

61 See *supra*, note 58.

62 The Court referred here to *Schmidt and Dahlström*, *Belgian Police*, and *Swedish Engine Drivers*; see *supra*, note 11.

cited above). It recalls that the European Social Charter also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining. As such, the Court rejects the Government's preliminary objection [that the trade union was not a victim].⁶³

The Court thus referred to *Demir and Baykara* in support of its reliance on ILO jurisprudence and on the *European Social Charter* to establish that strike action is a corollary to the essential right to collective bargaining protected by Article 11. This strongly suggests that the Court accepted that the right to strike, insofar as it is exercised in furtherance of collective bargaining, is equally "essential."⁶⁴ True, the Court also said that strike action merely constitutes "an important aspect in the protection of trade union members' interests." But the passage cited above, as the last sentence makes clear, was directed to the Turkish government's primary assertion that the union's ability to be heard on behalf of its members (through means other than strike action) was untouched by the ban on strike action and hence there was no breach of Article 11.⁶⁵ The Court's iteration of the importance of strike action indicates that while there is a range of means by which unions can protect members' interests, strike action is one of the most important. The paragraph does not assert that Turkey was free to abridge the right to strike and only allow the union other means to protect its members' interests. Indeed, the ECtHR held to the contrary. Relying on ILO jurisprudence and on the *ESC* in accordance with the ratio in *Demir and Baykara*, the Court found that the ban interfered with the union's right to strike under Article 11(1). It was therefore not necessary for the Court to consider whether the other means by which the union might be heard on behalf of its members were sufficient. Breach of the right to strike alone was a breach of Article 11(1).

Thus, it may be concluded that the ECtHR in *Enerji Yapi-Yol Sen* did regard the right to strike as being essential, as an indissociable corollary of the right to collective bargaining. This was consistent

63 *Enerji Yapi-Yol Sen*, *supra*, note 58, at para. 24 [unofficial translation].

64 Whether Article 11 guarantees a right to strike for wider purposes (as the ILO holds to be the case under Convention 87) was not in issue in *Enerji Yapi-Yol Sen*.

65 *Enerji Yapi-Yol Sen*, *supra*, note 58, at paras. 18 and 20.

with the Court's conclusion in *Wilson and Palmer*⁶⁶ that the freedom to strike was necessary to a voluntary system of collective bargaining. However, this takes us only half the way home, for there is also a legal landmine in the form of Article 11(2), which (sure enough) the Turkish government relied on to justify the restrictions. Although the Court accepted that the restriction was prescribed by law, it found it unnecessary to decide whether the restriction had been imposed for a legitimate end. The main focus of the Court's inquiry was on whether the government's action was necessary in a democratic society. It observed that the "right to strike was not absolute and could be subject to certain conditions and made the object of certain restrictions," so that "certain categories of civil servant could be prohibited from taking strike action" — for example, "civil servants exercising functions of authority on behalf of the State."⁶⁷ The Turkish government had not identified such categories of civil servant, but had instead imposed a blanket ban without consideration of the imperatives enumerated in Article 11(2). Accordingly, it had "not demonstrated the need in a democratic society for the impugned restriction."⁶⁸ So clear was Turkey's failure that the ECtHR did not even have to refer to the ILO or *ESC* sources, which would have supported the proposition that such an indiscriminate ban was impermissible.

As already pointed out, the linkage between collective bargaining and the right to strike has long been recognized, not only in international law but also by the common law, to say nothing of the law of other countries where the right to strike is often associated with the negotiation of collective agreements. The linkage is also reflected to some extent in British legislation, insofar as the U.K. statutory "immunity" (there is no right to strike — only a statutory protection against certain forms of tort action) is confined to trade disputes, defined to mean disputes between workers and employers over terms and conditions of employment and related matters. Whether the

66 See *supra*, note 16.

67 See *Pellegrin v. France*, [GC] N° 28541/95, CEDH 1999-VIII.

68 *Enerji Yapi-Yol Sen, supra*, note 58, at para. 32. See also Case No. 32/2005, *European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" (CL "Podkrepa") v. Bulgaria*.

Strasbourg jurisprudence can be limited in this way is, of course, another matter altogether, given that the ILO conception of the right to strike is not so constrained. The *ESC* conception of that right is indeed rooted in collective bargaining, though in practice it is read much more widely. However, the ILO conception of the right to strike is based on broader human rights considerations, which would include but extend beyond the context of collective bargaining, and would, for example, encompass the right to take part in some kinds of protest strikes directed against the government.⁶⁹

An early indication that the Strasbourg court may be moving toward embracing a “human rights” rather than an “industrial relations” conception of the right to strike is suggested by its decisions in *Karaçay and Kaya and Seyhan*,⁷⁰ discussed below, which concerned disciplinary action for taking part in protest strikes. Although those cases were concerned principally with the issue of the appropriate sanction, that issue could arise only if the strike itself was protected under the *ECHR*.

5. COLLECTIVE ACTION AND THE INDIVIDUAL WORKER

Enerji Yapi-Yol Sen, OFS and *UNISON* were all distinguished by the fact that the victims were trade unions. The other right-to-strike cases have involved individual victims who claimed to have been penalized in various ways because of their involvement in collective action.

The July 2009 judgment of the ECtHR in *Danilenkov v. Russia* concerned 32 dockers,⁷¹ members of a small union at Kaliningrad docks which had taken industrial action. Following the strike, the employer discriminated against the members by assigning them less work, giving them reduced income, and subjecting them to discriminatory selection for redundancy. Domestic legal proceedings failed to

69 See K.D. Ewing, “Laws against Strikes Revisited,” in C. Barnard, S. Deakin & G.S. Morris, eds., *The Future of Labour Law – Liber Amicorum Sir Bob Hepple Q.C.* (Oxford: Hart, 2004) 41, on the implications of regarding the right to strike as a “human right.”

70 *Infra*, notes 81 and 88.

71 Application No. 67336/01, July 30, 2009.

compensate them for the losses, so an application was made to Strasbourg, relying principally on the anti-discrimination provisions of Article 14 of the *Convention*⁷² rather than on Article 11. In upholding the complaint, the Court again relied heavily on the *ESC* (including the jurisprudence of the Social Rights Committee) and on ILO Conventions 87 and 98 (including the *Digest of Decisions of the ILO Freedom of Association Committee*, and a decision involving the Dockers' Union of Russia and the Russian Federation). In doing so, the Court said that "the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership which, according to the Freedom of Association Committee, constitutes one of the most serious violations of freedom of association capable to jeopardize the very existence of a trade union."⁷³ The Court went on to say that it was "crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action to obtain damages and other relief." The Court held that states were therefore "required under Articles 11 and 14 of the *Convention* to set up a judicial system that would ensure real and effective protection against the anti-union discrimination."⁷⁴

In *Danilenkov*, although domestic law rendered discrimination against trade unionists unlawful, it did so only by way of criminal prohibitions, which brought the usual difficulties of having to meet a higher standard of proof, having to prove intention on the part of an artificial person, and removing control of the proceedings from the victims. In contrast, "civil proceedings would [have allowed fulfilment of] the far more delicate task of examining all elements of [the] relationship between the applicants and their employer, including [the] combined effect of various techniques used by the latter to induce dockers to relinquish [union] membership, and granting appropriate redress."⁷⁵ As a result, the ECtHR found that Russia had "failed to fulfil its positive obligations to adopt effective and clear judicial

72 See *supra*, note 5.

73 *Danilenkov*, *supra*, note 71, at para. 123.

74 *Ibid.*, at para. 124.

75 *Ibid.*, at para. 134.

protection against discrimination on the ground of trade union membership,” thereby violating Article 14 taken together with Article 11.⁷⁶

The subsequent decision in *Saime Özcan v. Turkey*⁷⁷ also demonstrates the requirement under Article 11 to protect the right to strike. A secondary school teacher in the public sector had taken part in a national strike day aimed at improving terms and conditions of employment. She was prosecuted for having abandoned her place of work, and was sentenced to three months and ten days’ imprisonment, commuted to a substantial fine. The appeal court suspended the sentence, and also barred her from teaching for over three years. More than five years after her conviction, on an application by the government, the original criminal court set aside the prosecution on the basis that it had had no standing to find her guilty of the charge. The government relied on the setting aside of the charge to assert that she was not a victim. However, the ECtHR held that she was indeed a victim, because for over five years she had a criminal conviction and had been barred from exercising her profession.⁷⁸ In the slightly earlier case of *Urcan v. Turkey*,⁷⁹ which involved very similar facts, the applicant teachers had criminal convictions and a suspended sentence hanging over them, and those convictions had not been set aside as they had been in *Saime Özcan*, so the applicants in *Urcan* were clearly victims. In both *Saime Özcan* and *Urcan*, the ECtHR went on to hold, unsurprisingly, that the imposition of the penalties was a breach of Article 11(1).

But what about lesser sanctions? This was the issue in *Schmidt and Dahlström*,⁸⁰ considered above, where the complainants were concerned about the imposition of pay penalties for having taken part in an industrial action. That too would no longer appear to be acceptable. In *Kaya and Seyhan v. Turkey*,⁸¹ two public servants participated in a strike day, a public protest against a proposed law.⁸² They were

76 *Ibid.*, at para. 136.

77 Application No. 22943/04, September 15 2009 [judgment in French only].

78 *Ibid.*, at para. 17.

79 Application No. 23018/04, July 17, 2008; definitive judgment October 17, 2008 [only in French].

80 See *supra*, note 11.

81 Application 30946/04, September 15, 2009.

82 A day of action organized by their union “pour protester contre le projet de loi relatif à l’organisation de la fonction publique en discussion au parlement national.”

subjected to a disciplinary inquiry (a process governed by law in the public service), and were subsequently disciplined for leaving their workplaces without authority. Each was given a written warning, as provided for in the disciplinary regime, “to be more attentive to the accomplishment of his/her functions and in his/her behaviour.”⁸³ The Court held that this constituted an attenuation of their right of freedom of association under Article 11(1),⁸⁴ emphasizing once again that a restriction on the right to strike will infringe that article. This in itself is a remarkable conclusion with wide implications, given the subject matter of the strike, which does not appear to have been directly related to collective bargaining.⁸⁵ In the Court’s view, such a restriction could be warranted only by reference to Article 11(2). The Turkish government submitted that because the complainants had failed to do their jobs and had absented themselves from work without informing their employer and without justification, the warning was a necessary response to a pressing social need, and was proportionate.⁸⁶ The ECtHR rejected this submission, holding as follows: “The penalty in question, no matter how minimal it may have been, was of a type that would dissuade union members from legitimate participation in strike days or in other actions in defence of the interests of the membership.”⁸⁷ There was no pressing social need for a disciplinary sanction, and so, in the Court’s view, the warning was not necessary in a democratic society.⁸⁸

In *Kaya and Seyhan*, the ECtHR adopted its 2007 judgment in *Karaçay v. Turkey*.⁸⁹ In *Karaçay*, there had been a public demonstration to defend the purchasing power of public servants. For his alleged

83 *Ibid.*, at para. 12. It appears that an amnesty was subsequently granted in respect of certain disciplinary sanctions against public servants, but not, it seems, in respect of warnings. The applicants were thus “victims” (at para. 22).

84 *Ibid.*, at para. 24.

85 This has obvious implications for the U.K., in light of the narrow definition of a trade dispute in *TULRCA 1992*, s. 244.

86 *Kaya and Seyhan*, *supra*, note 81, at para. 27.

87 *Ibid.*, at para. 30 [our translation].

88 *Ibid.*, at para. 31.

89 Application No. 6615/03, March 27, 2007; definitive judgment June 27, 2007 [only in French].

participation in that action, the applicant electrician was subjected to the same disciplinary warning imposed in *Kaya and Seyhan*. He denied participating, and said he was helping colleagues deal with flooding in Istanbul that day. But the Court held that even if he had participated, the imposition of the warning was an interference with his freedom of association,⁹⁰ which could not be justified by reference to Article 11(2).⁹¹ The Court rejected the argument that public servants were not exempt from disciplinary measures for participating in a strike day without permission and for failing to do their work.⁹² As in *Kaya and Seyhan*, although the impugned sanction was minimal, it was held to be calculated to dissuade union members from participating lawfully in strike days or other actions in defence of their interests.⁹³

These cases mark a clean break with the earlier reasoning of the ECtHR on Article 11(2) in the *UNISON* case, and just as importantly with *Schmidt and Dahlström*. They reveal that no sanction designed to “attenuate” the right to strike is consistent with *Convention* rights, whether the sanction takes the form of a criminal penalty at the hands of the state, or the form of being assigned less work by the employer, having one’s income reduced, being selected for redundancy, or receiving a disciplinary warning. This is not to suggest that any and all measures taken by an employer will amount to an infringement of Article 11 — for example, the employer may be allowed to withhold wages for days not worked, or to refuse to accept part performance where the industrial action involves the refusal to undertake certain duties. But in this fast-moving area, it is possible to argue that the balance struck by U.K. law on the latter issue does not meet *Convention* requirements.⁹⁴ What other employer sanctions would constitute a breach of Article 11(1) is open to speculation.

90 *Ibid.*, at para. 28.

91 *Ibid.*, at paras. 33-39.

92 *Ibid.*, at para. 34.

93 *Ibid.*, at para. 37, citing *Ezeliin v. France*, April 26, 1991, Series A, No. 202, §53.

94 Taking strike action is regarded by the common law as a fundamental breach of contract for which dismissal is the sanction. The protections against unfair dismissal are very limited in this sphere. For a suggestion that the common law here is not properly understood (by, amongst others, the judiciary), see P. Elias, “The Strike and Breach of Contract: A Reassessment,” in K.D. Ewing, C.A. Gearty & B.A. Hepple, eds., *Human Rights and Labour Law* (New York: Mansell, 1994), chap. 11.

6. CONCLUSION

From time to time, a decision is handed down by a court which is epoch-making, usually because of the great political consequences that flow from it. *Demir and Baykara v. Turkey* may be such a case. It is a decision of one of the most important courts in the world, and it will in principle have direct implications for the law in at least the 47 countries of the Council of Europe, where 800 million people live. Perhaps even more significantly, it is a decision in which social and economic rights have been fused permanently with civil and political rights, in a process which is potentially nothing less than a socialization of civil and political rights.⁹⁵ And perhaps more important still, it is a decision in which human rights have established their superiority over economic irrationalism and “competitiveness” in the battle for the soul of labour law, and one in which public law has triumphed over private law.⁹⁶

As well as doing all of this, *Demir and Baykara* transforms the nature of international labour standards. Although those standards still bear the humiliating tag of “soft law,” they can now walk with a real swagger, as soft law with a hard edge. That edge ought in time to cut into the neo-liberal legacy in countries such as the United Kingdom, and to provide the best opportunity to clean up the mess left by the European Court of Justice in the *Viking* and *Laval* cases.⁹⁷ It certainly provides a nice opportunity for a measure of legal accountability of the ECJ, of a kind with which that Court is wholly unfamiliar.

Any suggestion that the ECtHR decision in *Demir and Baykara* is somehow a temporary aberration is demolished by the fact that it was a unanimous judgment of the 17 Judges of the Grand Chamber (upholding the unanimous judgment of the seven judges of the second section), by the fact that it was followed unanimously by the seven judges in *Enerji Yapi-Yol Sen*, and by the fact that it is precisely convergent with the landmark decision of the Supreme Court of Canada

95 V. Leary, “The Paradox of Workers’ Rights as Human Rights,” in L. Compa & S.F. Diamond, eds., *Human Rights, Labor Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) 22.

96 For an important analysis and collection of essays along these lines, see C. Fenwick & T. Novitz, eds., *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart, 2010).

97 See *supra*, note 10.

in *B.C. Health*.⁹⁸ Lord Hoffman has argued that the ECtHR should not bother itself with the domestic implementation of the *ECHR*, but this argument is irrelevant in the face of such monumental pronouncements of principle.⁹⁹ Nevertheless, there should be no illusion: these decisions are a symptom of the weakness rather than the strength of trade unions, and it remains to be seen how far the decisions are implemented in practice in such countries as Russia, Turkey and the United Kingdom, which are distinguished by low levels of trade union protection.

In revealing opportunities for litigation as a way to restore trade union rights, *Demir and Baykara* and its fast-growing family suggest to British eyes a curious reversal of the roles of legislatures and courts in relation to trade union rights. But not only that — the ECtHR in *Demir and Baykara* is saying to governments that they must have in place legislation which goes beyond what even labour-friendly governments (sustained by the financial support of affiliated trade unions) have been willing to accept. This is partly because such rights run against the grain of current economic orthodoxy, and partly because governments are fearful of alienating corporate interests, including those with control over large sections of the media.¹⁰⁰ Yet the minimum international standards should be taken as a given, the real political battleground being around the extras. Do *Demir and Baykara* and

98 See *supra*, note 1.

99 Lord Hoffmann, “The Universality of Human Rights,” Judicial Studies Board Annual Lecture, March 19, 2009: “If one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought a suitable body to do so.”

100 The difficult question for trade unions — which members may begin to ask more frequently — is why they continue to support financially a process that so conspicuously delivers so little. In the case of the U.K., its trade union laws fall short of minimum international standards, although (according to the Electoral Commission’s website) trade unions have contributed almost £80 million to its governing party since 2001 (and more than £100 million since 1997, when that party took office). The altruistic will, however, argue that trade union political action is not simply an instrumental transaction, in which power is sought only to obtain favourable laws on specific questions.

its offspring now invite a different kind of political action — one that directs attention in the first instance to the courts rather than the legislature, and that also invites much more active use of international law processes, which now have a very different purpose? Although parliamentary representation may be necessary to ensure that judicial decisions are properly implemented (a problem which should not be underestimated, whether in Russia, Turkey or the United Kingdom), could it be that traditional forms of political representation will assume less importance in relation to trade union rights if governments are in any event subject to ongoing scrutiny in the courts?