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The Death of Social Europe

KD Ewing*

I. INTRODUCTION

We live in counter-revolutionary times. The great social democratic experiment that created Social Europe as a progressive force in global politics appears to be over. The economic crisis has provided an opportunity for a major shift in the balance of economic power between capital and labour, and has created in turn a political crisis for the labour movement throughout Europe and beyond. It has also created a crisis of legality, as the opportunity to drive home neo-liberal counter-revolutionary measures is being exploited in apparent violation of the legal obligations of EU member states, and perhaps also EU institutions. This is despite the bold claims by Hayek – and other authors of neo-liberalism – about the singular importance of the 'great principles known as the Rule of Law'.[1] Legality it seems is a casualty of even the most civilized revolutionaries.

The counter-revolution – the displacement of social democracy by neo-liberalism – has led to major changes in several legal disciplines, and it is in the process of turning labour law upside down. Perhaps the greatest impact for European labour law, however, is the coordinated attack on collective bargaining structures, an attack which is all the greater for the fact that collective bargaining is thought to be fundamental to social democracy – partly because it is a route to engagement and participation in economic decision-making, and partly because it is a principal lever for income redistribution and equality.[2] This article addresses first the steps that were taken carefully to build and support the integration of collective bargaining procedures at multiple

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1 FA Hayek, *The Road to Serfdom* (Routledge 1944) 54. On Hayek's influence on the development of British labour law, see K Ewing, 'Trade Unions and the Constitution: The Impact of the New Conservatives' in C Graham and T Prosser (eds), *Waiving the Rules: The Constitution under Thatcherism* (Open University Press 1988), and Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1. On Hayek and the rule of law, see also FA Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) ch 16.

2 On which see S Hayter, 'Want to Tackle Inequality? Shore up Collective Bargaining' (Accessed 4 September 2014) http://iloblog.org/2015/03/03/want-to-tackle-inequality-shore-up-collective-bargaining/. See also S Tailby and S Moore, 'Collective Bargaining: Building Solidarity through the Fight against Inequalities and Discrimination' (2014) 32 *Cuadernos de Relaciones Laborales* 361.

levels in the European project, and secondly the more recent steps taken to destroy the structures that facilitated that integration in the first place.

II. THE BIRTH OF SOCIAL EUROPE

The starting point for an understanding of Social Europe is a speech by Jacques Delors, then President of the European Commission, to the British Trades Union Congress in September 1988. Delors said:

> It would be unacceptable for Europe to become a source of social regression, while we are trying to rediscover together the road to prosperity and employment. The European Commission has suggested the following principles on which to base the definition and implementation of these rules:
>
> First, measures adopted to complete the large market should not diminish the level of social protection already achieved in the member states.
>
> Second, the internal market should be designed to benefit each and every citizen of the Community. It is therefore necessary to improve worker's living and working conditions, and to provide better protection for health and safety at work.
>
> Third, the measures to be taken will concern the area of collective bargaining and legislation.[3]

From its origins in 1957, the European Economic Community was understood to be a business-oriented venture, in which the social rights of the citizens of the member states appeared very much a secondary concern.[4] It is true that a social dimension emerged in the 1970s;[5] but progress froze soon thereafter, and it was not until Delors' leadership that Social Europe began seriously to grow. Delors had the wisdom to realize that support for the European project was conditional, and that it could be neither commanded nor demanded. So after setting out his vision for a social dimension in what was undoubtedly a multilayered political speech, Delors made what appeared to be a promise, which won over the hitherto sceptical British trade unionists in his audience. Delors promised:

> The establishment of a platform of guaranteed social rights, containing general principles, such as every worker's right to be covered by a collective agreement … [6]

3 TUC, Annual Report 1988. Coincidentally, we were reminded of the importance of this speech by a BBC News item on Sunday 24 August 2014, when parts of the speech were broadcast in a feature edited by Professor Vernon Bogdanor, including in particular the passage dealing with collective bargaining.

4 C Barnard, *EU Employment Law* (Oxford University Press 2012) ch 1.

5 See BA Hepple, 'The Crisis in EEC Labour Law' (1987) 16 *Industrial Law Journal* 77.

6 TUC Annual Report (n 3).

Embedding 'Collective Bargaining' as a Source of Law

Delors' promise was kept for about 20 years thereafter, beginning with the Maastricht Treaty in 1992, with its anticipation of an ambitious framework for the integration of trade unions into the lawmaking processes of the EU on the one hand, and decision-making within corporations operating in the EU on the other.[7] Social dialogue between the representatives of capital and labour was to become a way of making law at the Union level, and also a way of transposing it at national level.[8] So in TFEU, Articles 154 and 155 we have what Julia Lopez Lopez describes as a 'neo-corporatist and coordinated model of capitalism', which 'survives' at EU level, with 'norms and instruments that have an enormous impact back at the national level, setting a minimal floor of rights and principles for both national-level legislation and judges'.[9] These begin with an obligation on the Commission to promote dialogue between management and labour, to consult generally about social policy and to consult also about specific proposals.[10]

But more importantly, this 'neo-corporatist' model not only anticipates agreements between management and labour on a potentially wide range of matters. It also creates procedures for the conversion of these agreements into law, imposing duties on member states affecting all employers and all workers. By virtue of what is now TFEU, Article 155, some of these agreements concluded at EU level could be implemented at the joint request of both sides 'by a Council decision on a proposal from the Commission', with the European Parliament to be 'informed'. For those of us schooled in the traditions of liberal democracy, the bypassing of Parliament in this way was remarkable, and it was perhaps inevitable that the procedure would be challenged on grounds of democratic legitimacy.[11] But the European Court of First Instance dismissed the challenge, taking the view that

> the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.[12]

7 See B Bercusson, 'Maastricht: A Fundamental Change in European Labour Law' (1992) 23 *Industrial Relations Journal* 177.

8 For the origins of this 'Social Dialogue' process, see B Hepple, *European Social Dialogue: Alibi or Opportunity* (Institute of Employment Rights 1993).

9 J Lopez Lopez, 'Solidarity and the Resocialisation of Risk' in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 357.

10 TFEU, Article 154.

11 Case T-135/96, *UEAPME v Council of the European Union* [1998] ECR II–02335. See B Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28 *Industrial Law Journal* 153.

12 *UEAPME* (n 11), para 89.

Questions of democratic legitimacy thus resolved, the social dialogue procedure led to a number of legislative instruments, dealing with parental leave, part-time work and fixed-term work.[13] Although we may quibble about the content of these instruments, the main point for present purposes relates to the process, and to what Lopez Lopez refers to as the 'crucial role' of the European Trade Union Confederation (ETUC) in constructing this group of agreements, providing 'evidence of the governance role played by unions' at the highest level.[14] As a party to these agreements the ETUC effectively performed a primary legislative function, producing instruments that have general application. In doing so the ETUC took part in a procedure that allowed their affiliates to be parties to the implementation of the agreements at national level by a similar process. The preamble to Parental Leave Directive (96/34/EC) provides for example that 'Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as long as such Member States take all the steps necessary to ensure that they can at all times guarantee the results imposed by this Directive'.

Yet although there was thus provision for making law by social dialogue, and at the same time provision for the implementation of law at national level by collective agreement (subject to requirements imposed by the ECJ),[15] no provision was made to ensure that the infrastructure existed at national level to enable collective bargaining to perform this implementation function.[16] This is despite the fact that 'European social dialogue will not succeed if it is not constructed atop strong collective bargaining structures supported by strong trade unions in Member States.'[17] Nevertheless, European labour law presumed the existence of a regulatory framework in national law but did not demand it – for example through a Directive that would require member states to put such a framework in place. With the benefit of hindsight this was a mistake. But at the time, it must have seemed generally unnecessary to address at Community level that for which provision was already made in many member states. Indeed in many of the EU15, the right to bargain collectively was included in the national constitution, perhaps reflecting the economic orthodoxy at the time these constitutions were drafted – usually between the mid-1940s and mid-1970s.[18]

13 But not temporary and agency work on which agreement between the social partners proved impossible, as the preamble to Directive 2008/14/EC makes very clear.

14 Lopez Lopez (n 9) 360.

15 See B Bercusson, 'Collective Bargaining and the Protection of Social Rights in Europe' in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell 1994) ch 5.

16 The closest we got to a right to bargain collectively – whether in the implementation of EU law or otherwise – was the provision in the non-binding Charter of the Fundamental Social Rights of Workers of 1989 that 'Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice'.

17 Alan Bogg and R Dukes, 'The European Social Dialogue – From Autonomy to Here' in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 492.

18 See further, KD Ewing, 'Economic Rights' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) ch 50.

So, if we take the constitutions of Greece, Spain and Portugal we find that

- 'general conditions of work shall be determined by law and supplemented by collective agreements arrived at by free collective bargaining' (Greece, Article 22);
- 'law shall guarantee the right to collective labour negotiations between the representatives of workers and employers, as well as the binding force of agreements' (Spain, Article 37); and
- 'trade union associations have the powers to exercise the right of concluding collective agreements', though 'the rules governing the powers to conclude collective labour agreements and the scope of their provisions are laid down by law' (Portugal, Article 56).[19]

Otherwise, with the exception of the United Kingdom, most member states already had robust collective bargaining procedures, most member states had multi-employer regulatory systems of collective bargaining in place, and according to the OECD in 1994 most member states had high levels of collective bargaining density.[20] In this way, European labour law was built upon national labour law, reflecting Bercusson's important insight that European labour law was a synthesis of laws and practices developed at different levels, being altogether greater than the sum of its parts.

Integrating Collective Bargaining as a Regulatory Process

What we have then is collective bargaining embedded at the highest level as an instrument for making EU law, as well as having an important role in its implementation. But that was by no means the end of what has become a tangled web, in which EU law operates in conjunction with collective bargaining arrangements at national level, recognizing their importance and encouraging their development.[21] In this way, collective bargaining at national level was to be more than a process for simply writing across directives into domestic law. It was (and remains) a procedure that permitted the flexible implementation of these directives, while in different ways EU law also respected and gave effect to collective agreements at national level, as creating obligations under both national law *and* Community law. EU law thus embraced the procedural capacity of collective bargaining at national level, and in some cases endorsed the binding nature of its substantive outcomes.

19 The Portuguese constitution also guarantees trade unions the right to participate in the preparation of labour legislation, the management of social security institutions, the monitoring of the implementation of economic and social plans, and to be represented on bodies engaged in the harmonisation of social questions (Art 56).

20 OECD, *Economic Outlook 1994*, ch 5 – dealing with 'Collective Bargaining Levels and Coverage'. (OECD Paris, 1994) (Accessed 4 September 2014) http://www.oecd.org/els/emp/2409993.pdf.

21 For further discussion of this theme, see B Bercusson, *European Labour Law* (Cambridge University Press, 2nd edn 2009).

The importance of collective bargaining for the flexible transmission of EU law into national law is best illustrated by the Working Time Directive (2003/88/EC), which introduced a maximum working week of 48 hours (subject to an opt-out now enjoyed by a number of member states). It also introduced the right to paid annual leave, the regulation of daily and weekly rest periods, and the provision of rest breaks. So far as rest breaks are concerned, Article 4 provides that

> Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.

For present purposes Article 4 is important not for creating a right to a rest break, but for the means by which the right is to be established. By virtue of Article 4, the Directive provides that quite apart from the means of implementation, the substance of the Community norm is to be created at national level by using collective bargaining rather than legislation as the preferred regulatory tool, a mind-boggling allocation of priorities for the common lawyer.

Yet this interweaving of EU law with national collective bargaining arrangements in the Working Time Directive is to be seen further in the way in which collective bargaining procedures under the national law of member states may be used as instruments for 'derogating' from various (though not all) standards established by the Directive.[22] In this way a different kind of preferred status is given to collective bargaining over legislation, a preferred status enhanced by the possibility that derogating collective agreements may be extended to other workers and employers in accordance with national legislation and/or practice;[23] that is to say extended to workers and employers who are not parties to the collective agreement in question.[24] This means of course that the standard set by Community law may be varied at national level by a private process of collective bargaining, with public law being displaced by private law. This

22 Directive 2003/88/EC, Art 18: 'Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level'. There is however a requirement of equivalent protections being introduced in some cases, or appropriate protection where this is not possible.

23 On the principle of extension, see ILO Recommendation 91 (Collective Agreements Recommendation, 1951), Art 5(1) providing that '(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement'.

24 It is notable that in providing for collective bargaining in these ways, the Working Time Directive reflected a view of collective bargaining being a uniquely regulatory process, the ECJ eschewing a representative role for trade unions in some decisions under the Directive: *Joined Cases 397-01 to 403-01, Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I–08835.

too may seem curious for British lawyers schooled in the principles of liberal democracy. But it is another recognition of what the CFI saw in the *UEAPME* case above,[25] about the democratic base on which Social Europe was constructed, with social democracy requiring different foundations from those normally encountered in common law jurisdictions.

In these ways collective bargaining at national level was thus used to create the substantive law of the EU in a way that met recognized needs for flexible implementation of a directive that was never intended to have uniform application, as its preamble makes clear. But there was another way by which collective bargaining at national level created (and still creates) the substantive law of the EU. This is best illustrated by the Posted Workers Directive (96/71/EC), which addresses the problem of workers being posted by their employer from a low wage country to work for a limited period in a high wage country, the Directive being designed to ensure that the workers in question are not paid low wage rates in the high wage environment. Employers posting workers are thus required to observe wage rates and certain other mandatory terms and conditions of employment at least as good as those operating in the host country. Under Article 3(1) of the Directive, the terms and conditions in question are those laid down by:

- law, regulation or administrative provision, and/or
- collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8.[26]

In other words, employers posting workers from one country to another may be required by EU law to observe the terms and conditions of employment set down by collective agreements in the member state to which workers are posted. This is not a case of collective bargaining being used to carry EU standards into national law, as in the case of the Working Time Directive. Rather it is a case of a process running the other way, that is to say from national law to EU law and back, the EU law imposing obligations to comply with collective agreements already in place at national level. It is true that the Directive does not require posted workers to comply with *all* collective agreements in the host country,[27] but only with those collective agreements 'declared universally applicable', as provided by Article 3(8).[28] But this is the way things are

25 See n 11.

26 There is a qualification in the sense that this indent applies only 'insofar as they concern the activities referred to in the Annex'. The Annex deals mainly with construction and building services.

27 On which see *Case 341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I–11767.

28 This means in turn that 'collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned'. On the problems caused in systems such as the United Kingdom with weak bargaining arrangements in which collective agreement are not declared universally applicable, see 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 *Industrial Law Journal* 245.

done in many member states, the Directive providing another insight into what the common lawyer would regard as the EU's extraordinary respect for the rule-making functions of trade unions in social market economies. Such provisions are all the more extraordinary for the fact that the obligations under the Directive include an obligation to comply with the terms of an agreement (such as rates of pay) on which there is no Community competence to deal with directly.[29]

Entrenching Collective Bargaining as a Fundamental Right

As we focus on (i) lawmaking by collective bargaining, and (ii) the integration into EU law of national collective bargaining procedures, there is one major piece of the jigsaw puzzle missing. This is (iii) the existence of a right to bargain collectively as a fundamental social right at EU level. For all the importance given to collective bargaining practices in European labour law, as we have seen, the burden of making those practices real lay with national law.[30] That, however, changed to some extent when the right to bargain collectively was swept into the EU Charter of Fundamental Rights in 2000, along with other labour rights. The EU Charter is hugely symbolic, not least because it includes social and economic rights in the same document as civil and political rights, and purports to give them the same formal legal status.[31] Although the inclusion of both categories of rights is not unusual in the national constitutions of member states beyond EU's eccentric common law fringe, this is the first time such an inclusion is to be found in a treaty of this nature. It is true of course that Council of Europe instruments – the ECHR and the Social Charter – cover much the same ground. But despite claims in the preamble to the latter about the indivisibility of human rights, it is clear if only from the manner of their enforcement that the latter Charter is subordinate to the Convention.

So far as the right to bargain collectively is concerned, there are two important provisions of the EU Charter. The first and most obvious is Article 28, which provides as follows:

> 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.

29 See TFEU, Art 153(5). There are of course other instruments that deal with pay, notably the Temporary Agency Workers Directive, which introduces the principle of equal treatment for temporary agency workers.

30 As pointed out above (n 16), the right to bargain collectively was recognized by the Charter of the Fundamental Social Rights of Workers in 1989. But this was a programmatic statement of intent rather than a legally binding instrument. See B Bercusson, 'The European Community's Charter of Fundamental Social Rights of Workers' (1990) 53 *Modern Law Review* 624.

31 See CC Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after *Association de Médiation Sociale*' [2014] *European Human Rights Law Review* 170.

Note the substance of the right. It is the right of workers individually and their organizations. It is a right defined by Community law and by national laws and practices. And it is a right which is open as to the levels at which it may be exercised – enterprise, sector or national. But note too that Article 28 does not on its own fill the gap in European labour law described above, to the extent that it does not create a free-standing right. Instead, it is heavily contingent on Community law and national laws being in place to give effect to the right. At the time of the Lisbon treaty giving the Charter legal effect in 2009, there was no Community law guaranteeing the right to bargain collectively, apart from the quite specific forms of engagement explained above. To that extent Article 28 appeared to be rather empty of substance.

Article 28 does not, however, stand alone. Also important for the right to bargain collectively is Article 12, which provides that everyone has a right to freedom of association, said to imply 'the right of everyone to form and to join trade unions for the protection of his or her interests'. The latter has become unexpectedly significant in view of the provisions of Article 52(3), which provides that

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The reason why the latter is important is the decision of the European Court of Human Rights (ECtHR) in *Demir and Baycara v Turkey*,[32] which brought to life the European Convention on Human Rights (ECHR), Article 11. This is significant because the ECHR, Article 11 corresponds to the EU Charter, Article 12, thereby bringing the 'meaning and scope' provisions of Article 52(3) into play. In the *Demir* case, the ECtHR appeared to impose a duty on member states to have in place collective bargaining regimes consistent with ILO Convention 98 (which all member states have ratified).[33] According to the court:

> having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become 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.[34]

One effect of *Demir and Baycara v Turkey* relates to its impact on the relationship between the EU Charter, Articles 12 and 28. The effect of that influence could work in one of two ways. One possibility is that Article 28 of the EU Charter has become redundant because of

32 [2008] ECHR 1345, (2009) 48 EHRR 54.

33 On ILO Convention 98, see B Gernigon, A Odero and H Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *International Labour Review* 33.

34 *Demir and Baycara* (n 32) para 154.

the higher standard of protection that Article 12 of the Charter must now provide, as a result of Article 12 having the same meaning and scope as the ECHR, Article 11. An alternative possibility is that Article 12 informs the meaning of Article 28, so that when Article 28 refers to a right in accordance with Community law, that Community law must include Article 12 of the Charter, which must have the same meaning and scope as ECHR, Article 11. Whichever possibility prevails, the overall effect of *Demir and Baycara v Turkey* is that the EU Charter may now go some way closer to providing the missing piece in the jigsaw puzzle referred to above. Although there may be no direct obligation under EU law to have 'legislation necessary to give effect to the provisions of the international labour conventions already ratified' by the member state in question,[35] such an obligation arises from the EU Charter, Article 12, as informed by the jurisprudence of the ECtHR (albeit through a perhaps unanticipated consequence of the Charter).

By this circuitous and indirect route, ILO Convention 98 is thus indirectly incorporated into EU law, and with it the rich jurisprudence on collective bargaining produced by the ILO supervisory bodies.[36] This determines not only the scope of the right, but also when it may lawfully be qualified.[37] As such, these unanticipated developments address the need to ensure that the regulatory role of collective bargaining in European law has a guaranteed legal base in the domestic law of member states, without which that regulatory role would be impossible to perform. But although perhaps unanticipated, this ought not to be controversial. Almost exactly two years before the Lisbon treaty came into force, the ECJ had already recognized the importance of core international labour conventions as part of the general principles of law of the EU.[38] But following *Demir and Baycara* this can no longer be a token gesture, even if it is the case that ILO minimum standards fall some way below the standards currently operating in many EU member states.[39]

Rowing back on Demir and Baycara?

It is well known that *Demir and Baycara v Turkey* [2008] ECHR 1345 was an important breakthrough for labour rights under the ECHR. It is well known, however, that the ECtHR has been the subject of intense political criticism from those (notably in the British government) unhappy about some of its more liberal decisions. The decision in *National Union of Rail, Maritime and Transport Workers* [2014] ECHR 346 may be

35 *Ibid*, para 157.

36 On which see Gernigon, Odero and Guido (n 33).

37 See *Demir and Baycara* (n 32) para 166.

38 *Laval un Partneri Ltd* (n 27) para 90 – referring there not to ILO Convention 98, but to its sibling Convention 87.

39 But see now *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366, (2015) 60 EHRR 10, where there are suggestions that the *Demir and Baycara* decision may be 'reinterpreted': see esp para 86. For discussion, see Alan Bogg and KD Ewing, 'The Implications of the *RMT* Case' (2014) 43 *Industrial Law Journal* 221.

a signal that the court is listening to that criticism, and that it is unwilling to open up new areas of conflict with national governments.

The case concerned a challenge to two aspects of the United Kingdom's strict anti-strike laws. The first related to the detailed notice requirements that trade unions must give to employers before industrial action may lawfully be taken. The second related to the ban on all forms of solidarity action. The court held – controversially – that the first aspect of the claim was inadmissible, and that there had been no breach of ECHR, Article 11 in relation to the second aspect, even though the effect of the ban was to prevent the union from taking collective action in support of a small group of workers whose pay and conditions were being cut.

The court held that the right to strike fell within Article 11, but declined to say whether it was an 'essential' element of trade union activity. It also held that solidarity action fell within Article 11 but also held that a total ban could be justified under Article 11(2), thereby acknowledging the existence of a right that could never lawfully be exercised. In reaching this conclusion, the court drew a distinction between core and accessory action, suggesting that solidarity action fell within the latter rather than the former category. A wider margin of appreciation would be allowed in respect of conduct deemed accessory.

In an important passage, the court said:

> The applicant relied heavily on the *Demir and Baykara* judgment, in which the Court considered that the respondent State should be allowed only a limited margin (see para 119 of the judgment). The Court would point out, however, that the passage in question appears in the part of the judgment examining a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union. It is not to be understood as narrowing decisively and definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade union freedom within the social and economic framework of the country concerned. (para 86)

THE DEATH OF SOCIAL EUROPE

Jacques Delors kept his promise. We have evidence of a clear trajectory and evidence too of real outcomes. We have (i) an institutionalized process of making law by a form of 'collective bargaining', (ii) a well-developed process of engaging with collective bargaining at national level to implement and adapt EU obligations, and (iii) the entrenchment of the right to bargain collectively as a fundamental right. Collective bargaining is deeply embedded within the institutional structures of the European Union, supporting and exploiting the social democratic inheritance of most member states.

So where did it all go wrong? How has it unravelled so quickly? The starting point for an understanding of the decline is Mario Draghi's by now infamous announcement of

the death of Social Europe in an interview in the *Wall Street Journal* in 2012. According to Draghi, head of the European Central Bank, 'the European Social Model has already gone'.[40] These remarks expressed in the 'bible of global finance',[41] have been hotly disputed and perhaps even deeply resented.[42] But if the trajectory of collective bargaining and the reasons for that trajectory are any guide, he may be right. As a distinguished banker, he is to be taken at his word.

Economic 'Coordination' and Collective Bargaining 'Deregulation'

We do not speak any more about the EU making law by social dialogue or collective bargaining, save only to mourn the passing of an era, it being some time since the social dialogue procedure was successfully engaged. The contemporary focus is on new economic governance arrangements, and the subordination of labour rights generally – and for our purposes collective bargaining specifically – to more closely coordinated national economic policies. These have been presented as part of the Europe 2020 growth strategy, with the scrutiny and surveillance of national economies. This scrutiny and surveillance is conducted under procedures established by TFEU, Articles 119–121,[43] taking the labour lawyer deep into very unfamiliar and at times terrifying territory. Referring to TEU, Article 3, the latter treaty provisions provide for not only the 'close coordination of national economic policies' (TFEU, Article 119), but also an obligation to comply with 'broad guidelines', setting out the economic policies for the member states (TFEU, Article 121). The guidelines are to be found in a Council Recommendation, of which the Parliament is to be 'informed', member states then subject to 'surveillance' to ensure compliance.

So what do the guidelines say and how do they address collective bargaining arrangements in member states? In line with the foregoing, the Council adopted Commission-proposed guidelines for 2010–2014 on 13 July 2010.[44] So far as relevant, Guideline 2 provided:

> Member States should encourage *the right framework conditions for wage bargaining systems* and labour cost developments consistent with price stability, productivity trends over the medium-term and the need to reduce macroeconomic imbalances.

40 *Wall Street Journal* (24 February 2012).

41 P Mabille, 'Draghi Buries European Social Model' *La Tribune* (27 February 2012).

42 See Lord Monks, 'Social Europe Is Far From Dead' *Europe's World* (Spring 2014).

43 Note also the provisions of the Euro-plus Pact: 'Each country will be responsible for the specific policy actions it chooses to foster competitiveness, but the following reforms will be given particular attention: (i) respecting national traditions of social dialogue and industrial relations, measures to ensure costs developments in line with productivity, such as: review the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation mechanisms, while maintaining the autonomy of the social partners in the collective bargaining process': European Council, Conclusions, 24–25 March 2011 (Accessed 4 September 2014) https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

44 Council Recommendation of 13 July 2010 (Broad guidelines for the economic policies of the Member States and of the Union) (2010/410/EU), Guideline 2.

> Where appropriate, adequate wage setting in the public sector should be regarded as an important signal to ensure wage moderation in the private sector in line with the need to improve competitiveness. *Wage setting frameworks, including minimum wages, should allow for wage formation processes that take into account differences in skills and local labour market conditions and respond to large divergences in economic performance across regions, sectors and companies within a country*.

Guideline 2 needs to be read carefully. 'Wage bargaining systems' of course is a reference to collective bargaining. What appears to be suggested here is not that such systems need to be developed and expanded where they do not already exist (in line with the 'social market' and 'social justice' ambitions of TEU, Article 3), but that existing procedures should be made to operate with greater flexibility, notwithstanding the (unacknowledged) potential consequences for the regulatory impact of these systems.

Despite the acknowledgement in TFEU, Article 120 of the objectives of the EU as set out in TEU, Article 3, there is little evidence in the guidelines of a desire to be moved by the commitments found in the TEU, Article 3 such as the commitment to a *social* market rather than a *free* market, or to social *justice* rather than social *injustice*. On the contrary, a major driving force behind the coordination and surveillance of national economies is 'international competitiveness', a point reinforced by Guideline 7. Introduced on 21 October 2010 to complement Guideline 2 above, Guideline 7 refers specifically to 'competiveness' as part of the context for encouraging '*the right framework conditions for wage bargaining*', a term used in Guideline 2 which is repeated in Guideline 7.[45] Whether we like it or not this has become a prescription for collective bargaining deregulation by a technocratic process about which most citizens in most member states are largely unaware. Indeed, the prescription is now being swallowed, the guidelines being used to 'reform' collective bargaining procedures, 'reform' for this purpose meaning deregulation, deregulation for this purpose meaning the decentralization of bargaining activity.[46]

What does this mean for collective bargaining procedures in practice? The main consequence so far has been a premeditated assault on multi-employer, sector-wide collective agreements, which in many member states are then extended to non-participating firms, in the manner discussed above.[47] The assault on these arrangements is all the more remarkable for the fact that it seems to be ideologically inspired rather than evidence led, a Commission document noting that '*it is difficult to find a robust relationship between the centralisation of wage bargaining and economic outcomes*'.[48] But not only is

45 Emphasis added. So far as relevant, Guideline 7 reinforces the message in Guideline 2: 'In order to increase competitiveness and raise participation levels, particularly for the low-skilled, and in line with economic policy guideline 2, Member States should encourage the right framework conditions for wage bargaining and labour cost development consistent with price stability and productivity trends': Council Decision of 21 October 2010 (Guidelines for the employment policies of member states) (2010/707/EU).

46 European Commission, 'Wage Setting Systems and Wage Developments' [nd], (Accessed 4 September 2014) http://ec.europa.eu/europe2020/pdf/themes/26_wage_setting_02.pdf.

47 *Ibid*: 'The existence of a procedure for legal extension of collective agreements, making them binding to non-unionised employees or non-signatory firms, can significantly broaden the coverage of collective agreements'.

48 *Ibid*.

this deregulation by stealth apparently unsupported by evidence, it is being pursued in the knowledge that it will lead to greater inequality between European citizens, in a manner which can hardly be consistent with TEU, Article 3. It is thus openly accepted that '*there is robust evidence that higher levels of bargaining coverage and more centralised or coordinated bargaining, as well as high union density, are associated with a compression of the wage distribution and a reduction of earnings inequality*'.[49] This seems only to add to the enthusiasm of the authors of deregulation.

Since 2010, four countries in particular have been the targets of this deregulatory impulse, in response to Commission concerns that their collective bargaining systems – of a type 'widespread in the EU'[50] – were creating wages that were 'too high'.[51] The first of these countries was Italy, told in 2011 that 'bargaining at firm level can play a significant role, which may also help to address regional labour market disparities', and encouraged to make greater use of opening clauses in collective agreements to derogate from the sectoral wage agreed at national level'.[52] In the same year, concern was expressed that 'the ongoing labour market reform in Spain needs to be complemented by an overhaul of the current unwieldy collective bargaining system', and that the 'predominance of provincial and industry agreements leaves little room for negotiations at firm level'.[53] In the following year, Belgium was told that it too had to 'reform' the system of wage bargaining, in order to facilitate 'the use of opt-out clauses from sectoral collective agreements to better align wage growth and labour productivity developments at local level'.[54] This is only the beginning, Portugal was told much the same in 2014,[55] even if there is welcome evidence of resistance.[56]

49 *Ibid*. Emphasis added.

50 *Ibid*.

51 *Ibid*: 'As a result of extension of collective agreements, wages may not be able to fully adjust to differences in productivity across firms or geographical areas within the same sector. The more important these differences are, the stronger the risk that the extension results in a misallocation of labour, with too high wages (and low employment, output) in low-productivity firms. Extension mechanisms are also likely to reduce the responsiveness of nominal wages to shocks, as wages are less responsive to local conditions'.

52 Council Recommendation of 12 July 2011 (National Reform Programme 2011 of Italy) (2011/C 215/02).

53 Council Recommendation of 12 July 2011 (National Reform Programme 2011 of Spain) (2011/C 212/01). Indeed the 'automatic extension of collective agreements, the validity of non-renewed contracts and the use of ex-post inflation indexation clauses contribute to wage-inertia, preventing the wage flexibility needed to speed up economic adjustment and restore competitiveness' (*ibid*). For the implications of Spain's rapid deregulation of its collective bargaining system, see ILO, Committee on Freedom of Association, *Report No 371*, *Case No 2947* (Spain) (2014) paras 317–465.

54 Council Recommendation of 10 July 2012 (National Reform Programme 2012 of Belgium) (2012/C 219/02).

55 European Commission, Recommendation for a Council Recommendation on Portugal's 2014 National Reform Programme, COM(2014) 423 final. Portugal was told to 'Explore, in consultation with the social partners and in accordance with national practice, the possibility of firm-level temporary opt-out arrangements' from sectoral contracts agreed between employers and workers' representatives. By September 2014, present proposals on firm-level opt-out arrangements from sectoral contracts agreed between employers and workers' representatives and on a revision of the survival of collective agreements.

56 Thus, concerns continue to be expressed that 'a number of obstacles continue to prevent firms and workers from engaging in firm-level negotiation. If properly implemented, the agreement could also make effective the possibility of derogating from national collective contracts, which was formally

Austerity and Collective Bargaining 'Destruction'

Coordination of economic policy is, however, not the only way by which the Commission is now intervening in national collective bargaining systems. The financial assistance packages introduced after the Euro-crisis in 2010 are a second and more dramatic source of collective bargaining deregulation. Whether directly or indirectly this has led to major initiatives in Ireland, Romania and Greece, where entire collective bargaining structures have been abolished, in the latter two cases in circumstances that violate the international obligations of the countries concerned. In the case of Ireland, in return for financial assistance the government undertook in a Memorandum of Understanding (2010) to 'introduce legislation to reform the minimum wage', and take steps to 'prevent distortions of wage conditions across sectors associated with the presence of sectoral minimum wages in addition to the national minimum wage'.[57] Specific measures included an independent review of the two regimes that provided for wage determination on a sectoral basis, namely Joint Labour Committees on the one hand and Registered Employment Agreements on the other.[58] The latter were recently declared unconstitutional.[59]

An altogether more dramatic assault on collective bargaining structures has taken place in Romania. Again in a Memorandum of Understanding (2011), Romania undertook 'reforms to the wage-setting system allowing wages to better reflect productivity

introduced by the 2011 inter-sectoral agreement but rarely implemented': European Commission, Commission Staff Working Document, Country Report Italy 2015, COM(2015) 85 final.

57 European Commission, 'Memorandum of Understanding on Specific Economic Policy Conditionality' (Ireland) (Accessed 4 September 2014) http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.

58 Department of Jobs, Enterprise and Innovation, *Report of the Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms* (Dublin, 2011). The terms of reference of the independent review – which were to be agreed with the Commission – were to consider 'whether minimum wages and working conditions more stringent [than] those guaranteed by the national minimum wage for the worker categories covered by [Employment Regulation Orders] are justified on the grounds of fairness'. The review concluded that 'the current JLC/REA regulatory system should be retained', though radically overhauled to make it 'more responsive to changing economic circumstances and labour market conditions' (2).

59 *McGowan v Labour Court* [2013] IESC 21, turning largely on law making by collective bargaining in a system where the constitution provides that 'The sole and exclusive power for making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State' (Art 15.2.1). Although having operated successfully for 67 years, the extension procedures were thus found to violate a provision of Ireland's apparently ultra-liberal constitution. The High Court had previously ruled that the Joint Labour Committee system of wage determination was unconstitutional: *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277. See the brilliant blog-post by P McMahon, 'Joint Labour Committee System Declared Unconstitutional' (8 July 2011) www.extempore.ie/2011/07/08/joint-labour-committee-system-declared-unconstitutional/ (drawing parallels with New York's 'sick chicken' case, *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935)) (Accessed 4 September 2014) http://www.extempore.ie/2011/07/08/joint-labour-committee-system-declared-unconstitutional/. Ireland has been left without any legal support for collective bargaining.

developments in the medium term'.[60] The principal means by which this was done appears to have been Law 62/2011, which was as controversial for the manner of its introduction as for its content. So far as the latter is concerned, however, the new law abolished national collective bargaining arrangements, and imposed tight restrictions on sectoral and enterprise-based bargaining. So far as sectoral bargaining is concerned, this could be established in sectors only where the employers taking part employed a majority of the workers in the sector in question. The effect of this requirement was to make collective bargaining at this level 'so difficult that no sector-level agreement has been concluded'.[61] So far as enterprise-based bargaining is concerned, the threshold here was that the union in the enterprise must have in membership more than 50% of the workers in the enterprise in question. According to the ILO Committee of Experts, there has been a 'drastic decrease' in the number of enterprise agreements as a result.[62]

Unlike in the case of Ireland, the changes introduced in Romania have been the subject of scrutiny by the ILO Committee of Experts (though Ireland has recently fallen foul of ILO standards for other reasons).[63] The latter body has expressed concern about the compatibility of the changes with ILO Convention 98, and requested the government to amend the legislation to guarantee the application of freedom of association principles.[64] However, proposals to do just that met some resistance from the IMF and the European Commission in a confidential document leaked to the International Trade Union Confederation.[65] Thus, strongly urging the Romanian authorities 'to limit any amendments to Law 62/2011 to revisions necessary to bring the law into compliance with core ILO conventions', the IMF and European Commission representatives warned that:

> The re-introduction of national collective labour agreements with automatic erga-omnes extension risks resulting in a misalignment of wages and productivity developments across firms, sectors and occupations. We strongly urge the authorities to ensure that national collective agreements do not contain elements related to wages and/or reverse the progress achieved with the Labor Code adopted in May 2011 (e.g. on working time regulation).[66]

60 European Commission, 'Memorandum of Understanding between the European Commission and Romania' (June 2011), para 37. These steps were to be taken 'while respecting the autonomy of social partners, national traditions and practices' (*ibid*).

61 ITUC, 'IMF and EC Apply Behind-the-Scenes Pressure on Romania to Halt the Restoration of Core Labour Rights' (Accessed 4 September 2014) http://www.ituc-csi.org/imf-and-ec-apply-behind-the-scenes.

62 ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013).

63 On the current situation regarding Ireland, see ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013).

64 ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013).

65 ITUC (n 61).

66 (Accessed 4 September 2014) http://www.ituc-csi.org/IMG/pdf/romania.pdf. Steps by the authorities to ensure that national collective bargaining does not include pay would not be consistent with ILO Convention 98, as the ITUC pointed out.

A yet more dramatic assault still on collective structures has taken place in Greece,[67] these being more far-reaching and more explicit than the demands imposed elsewhere. So under the direction of the European Commission, the European Central Bank and the IMF (the Troika):

> it was decided to follow a two-step approach after consultation with the authorities (in particular with the Ministry of Labour) and social partners. Firstly, the government will launch a social pact with social partners to forge consensus on decentralization of wage bargaining (to allow the local level to opt-out from the wage increases agreed at the sectoral level), the introduction of sub-minima wages for the young and long-term unemployed, the revision of important aspects of firing rules and costs, and the revision of part-time and temporary work regulations. Secondly, the government will enforce the required changes in the wage- setting mechanisms and labour market institutions.[68]

These decisions led to a number of important changes to Greek law, so that both sector and enterprise-based agreements could make provision less favourable than that contained in the national agreement. Moreover, ad hoc associations of employees could negotiate these latter arrangements where there were no trade unions, this latter provision a response by the Greek government to the concerns of the Troika that enterprise-level agreements were not sufficiently widespread. One reasons for the absence of such agreements is that there were very few trade unions at enterprise level, with enterprise agreements applying only to enterprises with more than 50 workers.

It is not possible here to do justice to the full range and scope of the changes that were introduced in Greece as a result of 'austerity'.[69] Suffice it to say that in 2012 the ILO Committee of Experts examined the changes introduced in Greece, following a visit to Athens in 2011 by an ILO High Level Mission, which had produced a very detailed and troubling report. On the basis of evidence produced by the High Level Mission and other information provided by the Greek trade unions, the Committee of Experts concluded that the decentralizing measures were 'likely to have a significant – and potentially devastating – impact on the industrial relations system in the country'. The Committee also expressed the fear 'that the entire foundation of collective bargaining in the country may be vulnerable to collapse under this new framework'.[70] This was partly because 90% of the (private sector) workforce was employed in small enterprises, in a system where trade unions

67 See A Koukiadaki and L Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 *Industrial Law Journal* 276.

68 European Commission, *The Economic Adjustment Programme for Greece* (2010) para 31. These changes were accepted '[d]espite the fact that we support Collective Bargaining and Agreements between social partners (a longstanding European value and position recently included in the proposed new Treaty changes)': George Papandreou to Christine Lagarde, Jean-Claude Juncker, Olli Rehn and Mario Draghi, 15 February 2012' (Accessed 4 September 2014) http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf.

69 For full details see ILO, *Report on the High Level Mission to Greece (Athens, 19–23 September 2011)* (2011).

70 ILO, 101st Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2012). (Accessed 4 September 2014) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698934.

cannot legally be formed in enterprises with fewer than 20 employees. In these circumstances,

> granting collective bargaining rights to other types of workers' representation which are not afforded the guarantees of independence that apply to the structure and formation of trade unions and the protection of its officers and members is likely to seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process.[71]

TTIP and Collective Bargaining 'Decentralization'

We are witnessing collective bargaining 'deregulation' and 'destruction' in the interests of 'competitiveness' and 'austerity'. But there is a third consideration likely to pull in the same direction, adding to the pressures for greater decentralization from sector to firm. This is 'free trade', the growth of the oxymoronic 'free' trade agreements, most notably the proposed EU–US Free Trade Agreement (or the Transatlantic Trade and Investment Partnership [TTIP] as it is officially known).[72] TTIP is a highly controversial initiative, not least because of its secrecy, its likely content, and the manner of its enforcement (in some though not all areas). In the United Kingdom, much of the debate has been concentrated on the National Health Service, and the possible implications TTIP will have for a socialized health service. But that is not the only concern, as reflected in motions submitted to the TUC Annual Congress in 2014, with one from the GMB union expressing anxiety that TTIP will 'potentially undermine labour standards, pay, conditions and trade union rights as the US refuses to ratify core ILO conventions and operates anti-union "right to work" policies in half of its states'.[73]

The context here is that TTIP is one of a number of free trade agreements negotiated by the United States with a large number of countries since the collapse of proposals for a

71 *Ibid.* For continuing concerns, see ILO, 103rd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2014): 'national occupational collective agreements have gone down from 43 in 2008 to seven in 2012 whereas firm-level collective agreements have increased from 215 in 2008 to 975 in 2012 (706 signed by associations of persons and 269 signed by trade unions)' (Accessed 4 September 2014) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3149782. These procedures appear to be a clear breach of ILO Convention 98, Articles 2 and 3.

72 See further, KD Ewing and J Hendy QC, Written Evidence to Business, Innovation and Skills Committee, Transatlantic Trade and Investment Partnership Inquiry, 28 January 2015 (HC 804 (2014–15), page 27 for a link to the published version).

73 A 'right to work' state is a state that permits workers not to join a trade union where the union has been certified as a bargaining agent following a vote in which a majority of workers vote in favour of union representation. It means that those who opt out enjoy the significant benefits of unionization (in terms of higher pay and better conditions) without making a contribution. Council of Europe states are effectively right to work states to the extent that compulsory membership of a trade union as a condition of employment is prohibited by both the European Convention on Human Rights (as construed by the European Court of Human Rights) and the European Social Charter (as construed by the European Committee of Social Rights). See H Collins, KD Ewing, and A McColgan, *Labour Law* (Cambridge University Press 2012) ch 12.

global free trade deal. There is of course the North American Free Trade Agreement between the US, Canada and Mexico, as well as bilateral agreements with Singapore, Australia and a host of other countries.[74] US ambitions are now much greater, and it seems that the idea of a de facto global free trade area for US business will be realized by the bolder free trade agreements now being negotiated, one being TTIP and the other being a parallel and equally controversial agreement for the Pacific Rim, also currently the subject of negotiations. It is not the purpose here to consider the wisdom or otherwise of US trade policy. But it is to be noted that the US is not alone in expanding the global reach of free trade, with similar initiatives also being taken by the EU and others.[75] The EU has already concluded a free trade agreement with Korea which provides by Article 13.4 that

> The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely freedom of association and the effective recognition of the right to collective bargaining.

Given that there is likely to be a similar labour chapter in TTIP, why is there any concern that these agreements will affect collective bargaining arrangements? We could begin by asking how meaningful are the commitments to labour standards by our trade partners. Take the United States, an ILO member since 1980.[76] The United States has ratified only 14 ILO Conventions, and only two of the eight fundamental conventions.[77] And while the United States claims that federal law is broadly consistent with ILO standards, there is a long line of decisions of the Freedom of Association Committee that would suggest otherwise. The latter Committee has criticized the extent to which US labour law (i) denies the right to freedom of association to public sector workers, and (ii) denies trade union officials access to workplaces while trying to organize workers with a view to securing certification as a bargaining agent.[78] In addition, the Freedom of Association Committee has criticized the US for denying workers the right to strike by allowing lawful strikers to be permanently replaced. In an important complaint citing a number of companies that had permanently replaced lawful strikers, the Committee said that

> The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it

74 Many of these agreements may be found on the ILO website (Accessed 4 September 2014) http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang–en/index.htm.

75 *Ibid.*

76 The USA had previously been a member of the ILO from 1934 to 1977. Curiously it was not a founding member.

77 This does not include either of the freedom of association Conventions, 87 or 98.

78 For a brief consideration of these cases, see KD Ewing, 'International Regulation' in C Frege and J Kelly (eds), *Comparative Employment Relations in the Global Economy* (Routledge 2013) ch 23.

> legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Committee considers that, if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.[79]

The commitment to respect labour standards by countries such as the USA that have not ratified the relevant ILO Conventions is not a compelling commitment, particularly when the countries in question are clearly in breach of ILO obligations. The fact is that free trade agreements contain hollow commitments on labour rights – commitments to undertakings that are not observed, that no one has any greater intention of observing, with no procedures to ensure compliance.[80] But perhaps more importantly, even if these obligations were complied with it is a commitment to comply with the minimum standards of the ILO, not the prevailing standards of most EU member states. The danger is obvious. In this free trade area there will be an inevitable demand from US corporations to do in Dortmund what they do in Delaware, just like they demanded to do in Dagenham what they did in Detroit. In the same way, European corporations will demand the same power to do in Tuscany what they can already do in Texas. This will lead inevitably to more permissive and flexible procedures as a result, with even more pressure to decentralize pay bargaining arrangements, putting even more pressure on sector-wide agreements in EU member states, as ever more urgent demands grow to move the locus of collective bargaining to the enterprise.

Why? Because the US operates a highly decentralized system of collective bargaining, with the sector-wide initiatives pioneered by Roosevelt's National Industrial Recovery Act having been declared unconstitutional shortly after enactment.[81] US labour law (which has been imported by a number of countries, notably Canada, another free trade partner) effectively mandates enterprise or company level collective bargaining, which in turn is associated with low levels of coverage, though makes collective bargaining arrangements difficult to establish for reasons that need not be explored here, with only about 10% of US workers thought to be protected by a collective agreement.[82] This contrasts with what was the EU

79 ILO, Committee on Freedom of Association, *Report No 284, Case No 1523* (United States) (1991).

80 The point is reinforced by experience of the EU–Korea Free Trade Agreement – Korea has ratified only 24 ILO Conventions and only four of the eight fundamental conventions. It has a poor record before the ILO Freedom of Association Committee: see ILO, Committee on Freedom of Association, *Report No 359, Case No 2602* (Korea) (2008). Korea's commitment to freedom of association is hard to take seriously in light of the foregoing case.

81 *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935). For context, see AJ Badger, *FDR: The First Hundred Days* (Hill & Wang 2008).

82 The Supreme Court of Canada has recently confirmed that the right to bargain collectively is constitutionally protected by the Canadian Charter of Rights and Freedoms: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1. It remains to be seen what effect this has on bargaining levels. In the following week (in an otherwise favourable decision on the right to strike) the same court upheld very high thresholds to be met before a union is entitled to certification as a bargaining agent: *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

norm under active sector-wide bargaining arrangements, when at one time collective bargaining density in the EU15 (excluding the United Kingdom) was well above 70% in the case of most member states. If it is the case – as in my view it is likely – that free trade leads to regulatory convergence in the form of enterprise level collective bargaining, the British experience should stand as a salutary warning to the rest of Europe. The gradual decentralization of collective bargaining in the United Kingdom under Thatcher-inspired initiatives since 1980, and the subsequent adoption of US-style collective bargaining laws under the Blair government, has seen collective bargaining density collapse from 82% in 1980 to just over 20% today.[83]

CONCLUSION

In relation to collective bargaining it is quite obvious what is going on. To this end a very important insight is provided by an ECOFIN Report, in which a number of employment related recommendations were made. These included.

- *decrease* the bargaining coverage or (automatic) extension of collective agreements.
- reform the bargaining system in a *less centralized* way, for instance by *removing* or *limiting* the 'favourability principle', or *introducing/extending* the possibility to derogate from higher level agreements or to negotiate firm-level agreements.
- result in an overall *reduction* in the wage-setting power of trade unions.[84]

These proposals were no doubt highly controversial, which is perhaps why they come with a health warning that 'the taxonomy of reforms into "employment-friendly" and "other reforms" has no normative implications … and should not be understood as necessarily reflecting the recommendations of the European Commission in the field of employment and social policies'.[85]

83 KD Ewing and J Hendy QC, *Reconstruction after the Crisis: A Manifesto for Collective Bargaining* (Institute of Employment Rights 2013).

84 European Commission, *Labour Market Developments in Europe 2012* (European Economy 5/2012) 104 (Accessed 4 September 2014) http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-5_en.pdf.

85 *Ibid.* Production of the report was coordinated by Alessandro Turrini (Head of Unit – Labour market reforms) and Alfonso Arpaia (Head of Sector – Labour market analysis). For comment, see Thorsten Schulten, 'The Troika and Multi-Employer Bargaining – European Pressure Is Destroying National Collective Bargaining Systems', *Global Labour Column*, Number 139 (June 2013): 'The consequences of the strategy of radical decentralisation advocated by the Troika are already evident. Systems of collective bargaining that were once robust have been systematically eroded and destroyed. The collective agreement itself – as an instrument for collectively regulating wages and other employment conditions – is manifestly now at risk' (Accessed 4 September 2014) http://column.global-labour-university.org/2013/06/the-troika-and-multi-employer-bargaining.html. In a very short but lucid piece, Schulten provides an excellent analysis of the four strategies being used by the Troika to 'erode and destroy' collective bargaining arrangements: termination of national bargaining, derogation to firm level, restrictions on extension mechanisms, and the use of non-union 'bargaining' partners. See also Sharan Burrow, General Secretary, ITUC: 'The key objective … is to slash labour costs by replacing multi-employer collective bargaining systems at

There nevertheless appears to be a clear and expanding trajectory, as indicated in the following year's report from the same source:

> Efforts were stepped-up in 2012 to review the wage-setting mechanisms in a number of Member States, notably as part of the reform packages agreed in the framework of financial assistance programmes or in countries undergoing strong market pressure. This includes a drastic overhaul of the wage setting system in Greece, Portugal and Spain … , but also a move towards greater decentralisation of collective bargaining in Italy, as well as the reform of sectorial agreements in Ireland. The automatic [continuation] of collective agreements after they expire was also eliminated in Estonia.[86]

The changes are being driven by the new economic strategy and by the policies of austerity, with free trade likely to produce additional pressures. Many of the initiatives in the direction of deregulation and destruction of collective bargaining activity are likely to breach international labour standards, notably those relating to Romania and Greece, concerning which the ILO supervisory bodies have made the position fairly clear.[87] Spanish collective bargaining changes have also attracted the censure of the ILO supervisory bodies.[88]

The position is not so clear in relation to all the changes, including some of the most egregious such as the decentralization from sector to firm, and the removal of extension mechanisms. This is not to say that the latter should not be contested along with the former, though we should be aware that the ILO supervisory bodies allow flexibility as to bargaining level and extension mechanisms.[89] However, as the supervisory bodies have indicated, that flexibility must accord with the wishes of the parties, and

industry or national level with enterprise level bargaining or to eliminate collective bargaining altogether. A retreat to enterprise-level bargaining is inequitable in all circumstances.' ITUC, 'Frontlines Report Summary' (April 2013), 4. It is hard to argue with that.

86 European Commission, *Labour Market Developments in Europe 2013* (European Economy 6/2013) 56 (Accessed 4 September 2014) http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee6_en.pdf. It is noted, however that 'Limited progress was however made in countries with less urgent need for reforms, but where the functioning of certain wage setting and wage indexation systems has nevertheless been identified as a possible threat to competitiveness' (*ibid*). Unlike the 2012 Report, the 2013 Report is acknowledged to have 'benefited from useful comments and suggestions' from 'experts at the European Central Bank and International Monetary Fund', p. ii.

87 It should also be noted that both the United Kingdom and Sweden have encountered problems in relation to compliance with ILO obligations as a result of the earlier decisions in *Viking* (Case C-438/05), *International Transport Workers Federation v Viking Line ABP* [2008] IRLR 143) and *Laval* (n 27 above). See respectively ILO, 99th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2010), and ILO, 100th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2011) (United Kingdom), and ILO, 102nd Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2013) (Sweden). See also *LO and TCO v Sweden*, European Committee of Social Rights, Case No 85/2012 (European Social Charter, Art 6(2)).

88 ILO Committee on Freedom of Association, *Case No 2947* (Spain) (n 53).

89 See Gernigon, Odero and Guido (n 33).

ought not to be imposed unilaterally by the state.[90] But even taking the most generous view possible of the recent conduct in relation to collective bargaining by the EU and by selected member states, there is nevertheless a lengthy charge sheet that can be drawn up against the EU institutions and a number of national governments. In the meantime ECJ has gone AWOL,[91] leaving the IMF, the Commission and the European Central Bank to do pretty much what they like,[92] hiding behind the empty rhetoric of obligations that must be carried out consistently with ILO obligations, while simultaneously giving directions almost certainly in breach.[93]

One lesson for lawyers from the crisis is that social democratic legal instruments are no defence against neo-liberal economics, and that to win the campaign for social rights it is necessary to win the campaign for progressive economics. To reflect on an earlier era, Keynesian solutions led to social democratic institutions.[94] But social democratic institutions cannot command Keynesian solutions. At the moment, human rights and economics are in conflict. The latter will prevail, in a matter over which electors have no control, unless there is greater resistance and leadership from the institutional labour movement than has so far been displayed. Our contribution as lawyers is to ensure that all EU institutions and all member states live up to the commitment to the rule of law enshrined in TEU, Article 2.[95] Law serves no purpose if courts have neither the courage nor the will to enforce it. As Delors had the wisdom to realize, without enforceable rights workers in some countries may rightly feel that they have no reason to support continuing membership of the EU. If Draghi is right that Social Europe is dead, then so too is the EU, a message that progressive lawyers need to express more loudly and clearly.

90 *Ibid.* Extension mechanisms are not compulsory, but equally they do not violate the principle of voluntary collective bargaining: ILO Committee of Experts, *Giving Globalization a Human Face* (2012) para 245.

91 *Case 370/12, Pringle v Ireland* [2012] ECR I–756.

92 We should not overlook the role of the OECD, which has also made a series of recommendations to members to decentralize or otherwise 'reform' wage bargaining arrangements, in relation specifically to Belgium, Italy, Slovenia and Spain. Paris: OECD, *Economic Policy Reforms* (2012). The latter report also highlights that by 2010 (the most recent data at the time), collective bargaining coverage had declined significantly in Estonia, Ireland, Portugal and Spain (146). (Accessed 4 September 2014) http://www.keepeek.com/Digital-Asset-Management/oecd/economics/economic-policy-reforms-2012_growth-2012-en#page1.

93 As in the case of Romania, discussed above.

94 Ewing and Hendy (n 83).

95 See also the powerful critique in S Sciarra, 'Social Law in the Wake of the Crisis' (2014) Centre for the Study of European Labour Law, University of Catania, Working Paper: 'The state of emergency cannot justify renouncing the rule of law', p. 3. (Accessed 4 September 2014) http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-INT/20140704-100748_Sciarra-n108-2014intpdf.pdf. Professor Sciarra also raises equally important questions about the democratic legitimacy of the foregoing developments. On the rule of law dimension, see further, KD Ewing, 'Austerity and the Importance of the ILO and the ECHR for the Progressive Development of European Labour Law: A Case Study from Greece' in W Daubler and R Zimmer (eds), *Arbeitsvolkerrecht: Festschrift fur Klaus Lorcher* (Nomos 2013) 361.