THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EMPLOYMENT RELATION

The accession by the European Union to the European Convention on Human Rights (ECHR) has opened up new possibilities in terms of the constitutional recognition of fundamental rights in the EU. In the field of employment law it heralds a new procedure for workers and trade unions to challenge EU law against the background of the ECHR. In theoretical terms this means that EU law now goes beyond recognition of fundamental rights as mere general principles of EU law, making the ECHR the 'gold standard' for fundamental (social) rights.

This publication of the Transnational Trade Union Rights Working Group focuses on the EU and the interplay between the Strasbourg case law and the case law of the Court of Justice of the European Union (CJEU), analysing the relevance of the ECHR for the protection of workers' rights and for the effective enjoyment of civil and political rights in the employment relation. Each chapter is written by a prominent European human rights expert and analyses the case law of the European Court of Human Rights (ECtHR), and also looks at the equivalent international labour standards within the Council of Europe (in particular the (Revised) European Social Charter), the International Labour Organization (ILO) (in particular the fundamental rights conventions) and the UN Covenants (in particular the International Covenant on Economic, Social and Cultural Rights) and the interpretation of these instruments by competent organs.

The authors also analyse the ways in which the CJEU has acknowledged the respective ECHR articles as 'general principles' of EU law and asks whether the Lisbon Treaty will also warrant a reassessment of the way it has treated conflicts between these 'general principles' and the so-called 'fundamental freedoms'.

The European Convention on Human Rights and the Employment Relation

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Preface

'All human rights are universal, indivisible and interdependent and interrelated.' This Credo of the Council of Europe, reaffirmed by the Committee of Ministers on the occasion of the 50th Anniversary of the European Social Charter on 12 October 2011, may be considered as the 'leitmotif' of this publication. In particular, the indivisible nature of civil and political rights on the one side and social and cultural rights on the other side can best be expressed by exploring the 'social dimension' of the European Convention on Human Rights (ECHR). Their interdependent and interrelated character can best be demonstrated by the jurisprudence of the European Court of Human Rights (ECtHR), taking into account international and European human rights standards when interpreting the Convention, especially in the social field.

Against this background, 'The European Convention on Human Rights and the Employment Relationship' is the result of a research project directed by the Transnational Trade Union Rights Experts Network (TTUR). Filip Dorssemont, Klaus Lörcher and Isabelle Schömann have coordinated the efforts of the members of the network and the external experts involved. The TTUR network is an independent expert network providing valuable advice to the European Trade Union Institute (ETUI). Founded in 1999 by the late Brian Bercusson, it brings together leading labour law professors from eight Member States with an active interest in the development of EU labour law and ETUI researchers.

At present, the composition of this group is as follows: Niklas Bruun (Stockholm and Helsinki Universities), Klaus Lörcher (former legal secretary at the European Union Civil Service Tribunal), Thomas Blanke (Oldenburg University), Simon Deakin (Cambridge University), Filip Dorssemont (Université Catholique de Louvain), Antoine Jacobs (Tilburg University), Csilla Kollonay-Lehoczky (Central European University, Eötvös Loránd University, Budapest, Hungary), Mélanie Schmitt (University of Strasbourg), Bruno Veneziani (University of Bari) and Isabelle Schömann (ETUI).

On the occasion of this publication, other recognised ECHR specialists have also been invited to contribute. The publication is thus the result of the joint efforts of distinguished and upcoming experts in the fields of labour law and human rights working in a variety of EU Member States.

This book was preceded by two other scientific projects of the TTUR network which gave rise to the following two publications:

B Bercusson, *European Labour Law and the EU Charter of Fundamental Rights* (Baden-Baden, Nomos, 2006).

N Bruun, K Lörcher and I Schömann, *The Lisbon Treaty and Social Europe* (Oxford, Hart Publishing, 2012).

The conceptual approach of these two books, the first two volumes of a trilogy, bears witness to the TTUR's attachment to fundamental rights as a lever for social

justice and progress. The present volume, the last of the trilogy, maps the progressive development of human rights within the EU legal order and the increasing relevance of human rights in achieving a more social Europe.

The basic idea behind the book is to highlight the potential of the ECHR when interpreted using the methodology developed in the *Demir and Baykara* unanimous judgment of the Grand Chamber of the ECtHR of late 2008. Alongside looking closely at this approach, the authors were asked not just to analyse ECtHR case law, but also to take account of the equivalent international labour standards within the Council of Europe (in particular the (Revised) European Social Charter), the International Labour Organization (ILO) (in particular the fundamental rights conventions) and the United Nations (UN) (in particular the International Covenant on Economic, Social and Cultural Rights), reviewing how these instruments are interpreted by the competent organs and comparing this with relevant ECtHR case law.

Article 6 of the Treaty on European Union (TEU),[1] as amended by the Lisbon Treaty, articulates the EU's more elaborated human rights architecture. This provision can be unfolded as a triptych. Historically, human rights protection was developed through the case law of the Court of Justice of the European Union (CJEU) referring to the ECHR as a source of the 'general principles' of EU law (*cf* Article 6, § 3 TEU). The classical reference to fundamental rights as mere 'general principles' raises the question whether a reassessment is needed of the way in which the CJEU has treated conflicts between these 'general principles' and the so-called 'fundamental (economic) freedoms'. This provision recognises human rights as a source of *fundamental* principles.

As the second panel of the unfolding triptych, this book gains further momentum from the EU's constitutional obligation (Article 6, § 2 TEU) to accede to the ECHR. But finally and most importantly—and completing the 'triptych'—the TEU sets a minimum level of protection of fundamental rights in recognising that the EU Charter of Fundamental Rights has the same legal value as the Treaties (Article 6 § 1 TEU). This is particularly important with regard to the fundamental social rights enshrined under the 'Solidarity' Title of the Charter. Indeed, the final horizontal provisions of the Charter contain these safeguards by referring twice to the ECHR (*cf* Articles 52(3) and 53 of the Charter).

[1] Article 6 TEU:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The book is the result of two seminars held in Brussels in the winters of 2010 and 2011, where the project itself and its draft chapters were discussed in the presence of external discussants. Both seminars were organised by the *Atelier de Droit social* of the Université Catholique de Louvain on the premises of the Fondation Universitaire of Belgium. They were hosted by Filip Dorssemont with the indispensable assistance of two junior researchers, Auriane Lamine and Marco Rocca. The TTUR network is indebted to the new President of the ECtHR, Judge D Spielmann, for his presence and valuable guidance in the 2010 seminar. The final chapters were submitted in the summer and autumn of 2012. The conclusions were written in the winter of 2012.

The book provides a balanced equilibrium of general chapters elucidating the conceptual background of the research project and chapters providing an in-depth analysis of the *acquis* of Strasbourg case law and the potential of the most relevant provisions of the ECHR with a social dimension. No formal grid was imposed on the authors writing the commentaries, though a common methodology has been respected. The book also contains provisional conclusions relating to the ECHR's impact on individual and collective employment relations. Also elucidating the book's concept, these conclusions can thus be read as an introductory chapter.

The book shows in several ways how the ECHR continues to be a 'living instrument', to be 'interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory' (to use the ECtHR's standard formulation).

The ETUI would like to thank the authors for their in-depth analysis, which shows how a comprehensive interpretation of fundamental social rights, based on ECtHR case law and underlined by both international standards and the role of the CJEU in upholding the rights enshrined in the ECHR, can contribute to the achievement of a better and more social Europe.

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1

The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara *Judgment, its Methodology and Follow-up*[1]

KLAUS LÖRCHER

Un jour, je l'espère, l'objectif que se rapprochent les droits civils et politiques et les droits économiques et sociaux sera atteint. C'est l'intérêt de tous.
(*Jean Costa*, Former President of the ECtHR, 18 October 2011, on the occasion of the 50th anniversary of the European Social Charter)

IN A GLOBALISED economy rocked by (financial) crises at increasingly short intervals, the problem facing all sections of society with regard to their rights and interests is becoming more and more acute. The European Convention of Human Rights (hereinafter the Convention or the ECHR), until now seen mainly as an instrument for ensuring civil and political rights, has been given an important push by recent European Court of Human Rights (hereinafter the Court or the ECtHR) case law giving it a more socially oriented dimension.

The *Demir and Baykara* judgment of November 2008[2] can be considered as *the* landmark case[3] in this respect. It not only provides freedom of association

[1] Certain parts of this contribution are based on N Bruun and K Lörcher, 'Social Innovation: The New ECHR Jurisprudence and its Impact on Fundamental Social Rights in Labour Law' in I Schömann (ed), *Mélanges à la mémoire de Yota Kravaritou: A Trilingual Tribute* (Brussels, ETUI, 2011) 335 ff, though further developed and updated.

[2] ECtHR (Grand Chamber [GC]) (12 November 2008), App No 34503/97, *Demir and Baykara v Turkey* [2008] ECHR 1345. The substantive consequences of this judgment on Article 11 ECHR will be dealt with under Section 4.3.6. However, it should be noted from the outset that a first judgment in this case was handed down by a Chamber of the Second Section (21 November 2006), a judgment against which the Turkish government appealed to the Grand Chamber. For the sake of simplicity, any subsequent mention in this contribution of *Demir and Baykara* will, in the absence of further specification, refer to the Grand Chamber's judgment of November 2008.

[3] See, for example, K Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39(1) *ILJ* 1; V Wedl, 'Neues aus der Judikatur des EGMR zu gewerkschaftlichen Grundrechten, (2009) *Das Recht der Arbeit* 458 ff; J-P Marguénaud and J Mouly, 'La Cour européenne des droits de l'homme à la conquête du droit de grève—A propos de l'arrêt de Chambre de la Cour européenne des droits de l'homme Enerji Yapi Yol Sen c. Turquie du 21 avril 2009' (2009) *Revue du Droit du Travail* 502 ff;

(Article 11 ECHR) with real content by explicitly recognising the right to bargain collectively (in contrast to its previous jurisprudence),[4] it also opens up the whole ECHR to a more socially oriented interpretation,[5] mainly by referring to international (labour) standards.[6] This chapter aims to look into this methodological approach in greater detail.

1 INTRODUCTION

Methodology in legal matters is a challenging exercise, in particular when it comes to human rights and even more so when the relation to international standards is at stake. It is in this context that the *Demir and Baykara* judgment is placed and has therefore to be analysed.

It might appear strange that this judgment should deserve such attention. Out of the approximately 15,000 judgments handed down by the Court since its establishment

K Lörcher, 'Das Menschenrecht auf Kollektivverhandlung und Streik—auch für Beamte (Zu den Urteilen … *Demir und Baykara* und … *Enerji Yapi-Yol-Sen*) (2009) *AuR* 299 ff; Comments by *Dorssemont* und *Gerards*, European Human Rights Cases (EHRC) 2009, pp 65 ff; S Van Drooghenbroek, 'Les frontières du droit et le temps juridique: La Cour européenne des droits de l'homme repousse les limites, Cour européenne des droits de l'homme (Grande Chambre), Demir et Baykara c. Turquie, 12 novembre 2008' (2009) *Revue Trimestrielle des Droits de l'Homme* 811 ff. More critical points of view (in particular in relation to the methodology used) are expressed by J-F Cohen-Jonathan and G Flauss, 'La Cour européenne des droits de l'homme et le droit international' (2008) *Annuaire français de droit international* 529; A Seifert, 'Recht auf Kollektivverhandlungen und Streikrecht für Beamte. Anmerkungen zur neuen Rechtsprechung des EGMR zur Vereinigungsfreiheit' (2009) *KritV* 357 ff; ATJM Jacobs and J van Drongelen, 'Nieuwe vleugels voor de vakverenigingsvrijheid van art. 11 EVRM' (2009) 84(36) *Nederlands Juristenblad* 2345 ff. For a more recent general analysis of the interpretation approaches used by the ECtHR, see the special issue of the 'Revue Générale de Droit International Public' ((2011) 115(2) with 'Dossier *Les techniques interprétatives de la norme international*) and H Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System—An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Cambridge, Intersentia, 2011).

[4] In a more general perspective, see F Dorssemont, 'The Right to Form and to Join Trade Unions for the Protection of His Interests under Article 11 of the European Convention on Human Rights—An Attempt "to Digest" the Case Law (1975–2009) of the European Court on Human Rights' (2010) 2 *European Labour Law Journal* 185 ff.

[5] The contributions on the substantive articles of the ECHR will deal with this aspect in greater detail. Concerning the Court's increasing case law on social rights and issues, see, eg: R Allen, R Crasnow and A Beale, *Employment Law and Human Rights*, 2nd edn (Oxford, Oxford University Press, 2007); L Caflisch, 'Labour issues before the Strasbourg Court' in *ILO* (ed), *The Distinguished Scholars Series*, http://www.ilo.org/public/english/bureau/leg/download/series.pdf; J-P Marguénaud and J Mouly, 'Cour Européenne des Droits de l'Homme et droit du travail' presentation, Paris, 21 March 2008; E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing, 2007).

[6] See also the former ECtHR's president, Costa, in respect of the Court's references to the European Social Charter: 'D'abord, la Convention a fait des incursions sur le terrain de la Charte sociale (principalement dans le domaine du travail et du droit syndical). Ensuite, notre Cour s'est livrée à une utilisation extensive de l'article 14 de la Convention européenne des droits de l'homme en faveur des droits économiques et sociaux. Enfin, elle cite de plus en plus fréquemment la Charte sociale dans ses arrêts, pour s'en inspirer'. 18 October 2011, speech on the occasion of the 50th anniversary of the European Social Charter, p 2, http://www.coe.int/t/dghl/monitoring/socialcharter/Activities/50anniversary/SpeechCostaCeremony50Ann_en.pdf, 15 ff. For a more general analysis of the Court's case law referring to Council of Europe treaties, see European Court of Human Rights (Research Division) (ed), *The Use of Council of Europe Treaties in the Case Law of the European Court of Human Rights*, Council of Europe, European Court of Human Rights, Strasbourg, June 2011 http://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf.

in the late 1950s,[7] it is the one to which most attention is devoted in this chapter. This is due to several factors: it constituted an open reversal of previous jurisprudence (a rare fact in judicial history), it was adopted by the Grand Chamber, the decision was taken unanimously and—in the context of this contribution the most important element—it develops an internationally oriented interpretation methodology with binding ('must') character.

This chapter attempts to analyse the explicit methodological considerations presented by the Court in that judgment, exploring the extent to which the ECHR may indeed be of relevance for (different) social rights by discussing three main questions: first, the main essence of the Court's methodology is clarified (Section 2); second, the criticism raised against this methodology is examined (Section 3); third, the follow-up of this approach is explored—has the Court applied this methodology in its subsequent practice, in particular with regard to social issues or rights (Section 4)?; and, finally, a number of conclusions are provided (Section 5).

2 THE METHODOLOGY: INTERPRETING THE ECHR IN LINE WITH INTERNATIONAL (LABOUR) STANDARDS (THE '*DEMIR AND BAYKARA* APPROACH')

In *Demir and Baykara* the Court adopted a clearly defined attitude to economic and social rights by its explicit and unprecedented use of a consolidated approach to interpreting the Convention by means of systematic reference to international (labour) standards. In the Court's own language, the message could be called 'Interpretation of the Convention in the light of other international instruments'.[8] In her recent in-depth analysis of the Court's interpretation methods and principles, Hanneke Senden also acknowledges the great importance of this judgment in respect of 'comparative' methodology.[9]

2.1 Development of its Approach

How did the Court proceed? On the basis of the description and analysis of previous jurisprudence, it developed a consolidated methodology by way of systematic reference to international (labour) standards and the case law of their respective supervisory bodies.

[7] The 'old' Court delivered fewer than 1,000 judgments. The number of judgments delivered by the new Court exceeds 14,000. *European Court of Human Rights*—Annual Report 2011 (Strasbourg, 2012), p 12.

[8] As heading II.A. It appears at least surprising that Cohen-Jonathan and Flauss (n 3) qualify this heading as 'intitulé didactique' (532), thus diminishing if not rejecting its legal value.

[9] 'Only on rare occasions, such as in the Grand Chamber judgment *Demir and Baykara*, does the Court extensively discuss its use of the comparative method': Senden (n 3) 224. Attributing references to international (human rights) standards to a 'comparative' method would, however, appear to be questionable. To answer this (more terminological) question is not the purpose of this contribution and will therefore not be developed further here.

2.1.1 Basic Interpretation Principles

In §§ 65–68 of *Demir and Baykara*, the Court describes the basics of its interpretation approach, ie, the respective general interpretation rules contained in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT) (§ 65),[10] the necessity of interpreting ECHR rights in a manner making them 'practical and effective' (§ 66), the consideration of references to international law for interpretation purposes (§ 67) (sometimes called the 'consensus method') and, finally, that the Convention is a 'living' instrument (§ 68). One might assume that these principles are separate and that the third (references to international law in § 67) had no outstanding importance. Though all interlinked, it is this third principle to which the Court now attaches greater importance than in the past, as reflected by the heading of this section of the judgment ('The practice of interpreting Convention provisions in the light of other international texts and instruments') with no further mention of the other principles. However, this becomes obvious when looking at the further reasoning (§§ 69 ff).

2.1.2 Description of the Relevant Case Law in Respect of International Instruments

The starting point in the description of the Court's case law is the term 'Diversity' (of international texts and instruments used for the interpretation of the Convention). This can be seen as confirming the assumption that the Court had no systematic point of view on this element prior to *Demir and Baykara*. Describing first the previous jurisprudence referring to 'General international law' (§§ 69–73) and then highlighting the specific role of 'Council of Europe instruments' (§§ 74 and 75), the Court continues with a more analytical section ('Consideration by the Court'). In § 76 it refers to the 'rules and principles … accepted by the vast majority of States' and in § 77 to the case law of the supervisory organs of the European Social Charter (ESC).[11] It goes on to clarify that it has 'never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State' (§ 78) by quoting relevant case law (§§ 79–83).

2.2 Three Elements to which Reference is Made and their Degree of Relevance as 'Conclusions'

Under the heading 'Conclusions', the Court summarises its methodology in §§ 85–86.[12] These two paragraphs are quoted in full on account of their eminent importance. It is

[10] In ss 2 and 3, references to §§ without further specification refer to paragraphs in the *Demir and Baykara* judgment.

[11] It is interesting to note that the two cases mentioned here pertain to Article 11 ECHR (*Sigurður A Sigurjónsson v Iceland*, 30 June 1993, § 35, Series A, No 264; and *Sørensen and Rasmussen v Denmark* [GC], App Nos 52562/99 and 52620/99, §§ 72–75, (2006) ECHR 24).

[12] See F Tulkens, 'Introduction to the Seminar Dialogue between Judges 2009' in European Court of Human Rights (ed), *Fifty Years of the European Court of Human Rights viewed by its fellow International Courts* (Strasbourg, 2009) 13.

on the basis of these conclusions that the methodology will be described below (and the criticism examined later):

> 85 The Court, in defining the meaning of terms and notions in the text of the Convention, *can and must take* into account *elements of international law* other than the Convention, the *interpretation* of such elements *by competent organs*, and the *practice of European States* reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> 86 In this context, it is *not necessary for the respondent State to have ratified* the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies … (Emphasis added)

Accordingly, the ECtHR's methodology involves taking into account three main elements:

(1) elements of international law;
(2) the interpretation of such elements by competent organs;
(3) the practice of Council of Europe Member States.

These elements will now be examined further, before analysing the *Demir and Baykara* judgment with regard to whether the Court (and in the affirmative to which extent) applies these elements in the interpretation of the Convention in its later case law.

2.2.1 Reference to 'Elements of International Law' Irrespective of Ratification

This reference is obviously the most important and far-reaching element of this judgment.

2.2.1.1 'Elements of International Law'

Under this term, the Court not only understands universally applicable (ie, the UN or the International Labour Organization (ILO)) treaties but even non-European ones such as the American Convention on Human Rights (§ 72). Furthermore, it points out that it has also referred to 'intrinsically non-binding instruments of Council of Europe organs' (§ 74), ie, a vast array of instruments.

In the case at hand, the Court takes into account at a universal level ILO Conventions 87,[13] 98[14] and 151,[15] giving them priority over the two UN Covenants

[13] See the references to the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) in *Demir and Baykara* (n 2) §§ 37, 100, 122 (the reference in §§ 123–25 and 152 are more of a factual nature).

[14] See the references to the Right to Organise and Collective Bargaining Convention 1949 (No 98) in *Demir and Baykara* (n 2) §§ 42, 147, 165, 166.

[15] See the references to the Labour Relations (Public Service) Convention 1978 (No 151) in *Demir and Baykara* (n 2) §§ 44, 148, 165.

on Civil and Political Rights[16] and on Economic, Social and Cultural Rights,[17] and at a European level the European Social Charter.[18] As non-binding instruments, a Council of Europe Recommendation[19] and the EU Charter of Fundamental Rights[20] are mentioned. The Court thus follows in full its own criteria.

2.2.1.2 'Irrespective of Ratification'

Looking at the case law quoted in §§ 79–83, the Court has 'never' made a distinction as to whether a treaty has been ratified or not.[21] Therefore, it is logical that the Court concludes that '(i)t is sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of Member States' (§ 86). It is this element which is perhaps the most criticised (see below, 3.2.1.2).

On the basis of the set of arguments put forward in §§ 65 ff and §§ 79–83 in particular, the Turkish government's objection (§§ 54 and 62) on the grounds of Turkey not having accepted either Article 5 or 6 ESC[22] were rejected by the Court.

2.2.2 Reference to 'the Interpretation of Such Elements by Competent Organs' (Case Law of the Relevant Supervisory Organs)

It is important to recall that the Court, in interpreting the ECHR, refers not only to the standards as such but also to the case law of the respective supervisory organs established to review the conformity of national situations with respect to international (labour) standards. As justification, the Court refers to previous jurisprudence (§ 77).

Looking at the case at hand, the Court refers to the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR)[23] and the Committee on Freedom of Association (CFA),[24] as well as the Council of Europe's European Committee of Social Rights (ECSR).[25]

2.2.3 Reference to 'the Practice of European States'

As the third element needing to be taken into account in the Court's interpretation of the Convention, the 'practice of European States reflecting their common values'

[16] See the references in *Demir and Baykara* (n 2) §§ 40, 99, 122, 124.

[17] See the references in ibid.

[18] See the references in *Demir and Baykara* (n 2) to Article 5 in §§ 45, 103, 122; and to Article 6 in §§ 49, 149, 165.

[19] See the references in *Demir and Baykara* (n 2) on the status of public officials in Europe in §§ 46 and 104.

[20] See the references in *Demir and Baykara* (n 2) to Article 12(1) in §§ 47, 105, 122; and to Article 28 in §§ 51, 150, 165. At the time of publication of this judgment, the Lisbon Treaty making this Charter legally binding (by virtue of the (new) Article 6(1) TEU) was not yet in force.

[21] The main authority to which the Court refers in § 79 is the *Marckx v Belgium* (GC) judgment. The importance is underlined by the fact that this is the only judgment to which the Court refers in its conclusions on the interpretation methodology (§§ 85 and 86).

[22] See the references in *Demir and Baykara* (n 2) § 149 (concerning Article 6 ESC).

[23] See the references in ibid, §§ 38, 43, 101, 122, 147, 166.

[24] See the references in ibid, §§ 38, 102, 122; see also subsequent (Fifth Section) judgment (30 July 2009), App No 67336/01, *Danilenkov and others v Russia*, § 130.

[25] See the references in *Demir and Baykara* (n 2) §§ 50, 149.

(§ 85) is mentioned. It is first interesting to note that the Court does not quote previous case law to justify this element. Second, the Court would have to examine not only the practice as such but also to which extent it reflects 'their common values'. Third, there is a close link to the acceptance of international instruments by the Council of Europe Member States inasmuch as this is also an element of 'practice' of these States.

Accordingly, in later sections of this judgment, the Court describes in brief the practice in European Council of Europe Member States, including the interpretation and application process.[26]

2.2.4 Degree of Relevance: 'Can and Must Take into Account'

The Court not only mentions the three elements of (internationally oriented) interpretation but also defines their relevance in the process of interpretation. The main message here is that these elements not only 'can' but also 'must' be taken into account. This self-obligation is far-reaching: taking this statement literally—a normal assumption for a judgment—it means that in *all* applications in which it has to interpret the Convention ('defining the meaning of terms and notions in the text of the Convention': § 85), the Court has to search for and find all elements of international law and practice relevant for the specific problem to be solved. This is the first step towards 'taking into account' what follows and consists of carefully examining the contents of these elements and weighing up their relevance.

It will probably be at this stage that the somewhat contradictory wording 'may constitute' will come into play. Indeed, it would appear that the main purpose of the whole examination exercise is to find out whether there is a common denominator ('consensus emerging', 'continuous evolution': § 85).

In any event, in the case at hand the Court not only took account of but also based its whole decision on the elements described. Their relevance for the decision-making process (aimed at reversing previous jurisprudence on Article 11 ECHR) could not be demonstrated better.

2.3 New or Consolidated Approach?

Does this constitute a new approach? One might negate this by pointing out that in its previous case law, as quite extensively demonstrated, the Court had already referred to international (even non-binding) standards and also—to a certain extent—to the case law of relevant bodies.[27] Interestingly enough, such references had been used by the Court even in certain cases pertaining to social rights.[28] This aspect of the methodology may thus be considered as already well established.

[26] See the references in ibid, concerning the right to organise in §§ 48 and 106, and the right to bargain collectively in 52, 151 and 165.

[27] See the references to previous case law in *Demir and Baykara* (n 2) §§ 67 ff; see later reference to *Demir and Baykara* in ECtHR (First Section) judgment (15 January 2009), App No 42454/02, *Menchinskaya v Russia*, § 34.

[28] See the references in *Demir and Baykara* (n 2), inter alia § 70 to the ILO Forced Labour Convention (No 29) in the ECtHR (Second Section) judgment (26 July 2005), App No 73316/01, *Siliadin v France* [2005] ECHR 545, § 85.