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Civil Rights and the Future of Labour Law

The fall of the communist regimes at the end of the last century in Europe has certainly demonstrated that, while civil and political rights should be complemented by economic and social rights, the exercise of the latter is inadequate alone for harmonious individual and community development. They are built on the former, which still constitutes the basis of the modern democratic State.

Professor Michał Seweryński has always included this approach in his work and action. I would like to offer him, as an eminent colleague and friend, some reflections on the contribution that the respect of civil rights may bring to the future of labour law. The first part begins by addressing the concept of fundamental rights that has been of extensive use in the recent literature and practice. Its meanings close to, while different from, the one of human rights. I will claim that we should rather keep the notions of social and civil human rights because they are contained in binding universal instruments and are more clearly expressed. The second part underlines the dangers and the potential of focusing on civil human rights.

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1. Human and Fundamental Rights at Work

All or some social rights often are called fundamental rights because they are included in the International Covenants on Human Rights adopted by the United Nations. The word “fundamental” is present in the title of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The preamble emphasizes “the profound belief” of the Council of Europe member states “in those *Fundamental Freedoms* which are the foundation of justice and peace in the world

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and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”.

Thus, these freedoms are fundamental as they guarantee justice and peace and are based on the political principles of democracy, as well as on the recognition of individual human rights, including the right to meet and associate with other people, as set forth in the instrument. The European Union (EU) states that it is founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. It calls for the respect and promotion of *fundamental* rights as enshrined in the Charter of Fundamental Rights of the EU which brings together into a single text all the personal, civic, political, economic and social rights enjoyed by people within the EU¹.

The European Union Agency for *Fundamental* Rights explains that fundamental rights set out minimum standards to ensure that a person is treated with dignity. The EU itself is built on these values and is committed to guaranteeing the rights proclaimed in the Charter of *Fundamental* Rights of the European Union. Whether this is the right to be free from discrimination on the basis of age, disability or ethnic background, the right to the protection of personal data, or the right to get access to justice, these rights should all be respected, promoted and protected².

In the social field, the words “fundamental rights” are used by some domestic legislators. The Algerian Act No 90–11 of April 21, 1990 for example has proclaimed the “*fundamental* rights of the workers”; it includes safety, hygiene and medicine of work³.

At the international level, the Declaration on *Fundamental* Principles and Rights at Work, adopted by the International Labour Organization (ILO) on 18 June 1998 highlights the concept of “fundamental” rights. The recitals also underline the need for the Organization to promote peace, justice, and democratic institutions. The document aims to ensure a link between economic growth and social progress in view of the growing interdependence among Nations. In this context, guaranteeing fundamental principles and rights at work is viewed as taking on particular importance and significance, giving the people concerned the possibility to claim freely, with equal opportunities, their rightful participation in the wealth they have contributed to creating, and fully realise their human potential. This soft law regulation

¹ Article 2 of the Treaty of the European Union which adds that these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

² <http://fra.europa.eu/en/about-fundamental-rights>.

³ M.N.E. Koriche, *Transformations du droit algérien du travail: entre statut et contrat*, Thesis, University of Montesquieu Bordeaux IV, Bordeaux 2008, p. 392.

tends to supplement, rather than replace, traditional norms. It may constitute an intermediate stage in developing protection when the conditions in a country make it impossible to confirm specific commitments by ratifying a binding instrument, in line with the right-based approach, so dear to A. Senn⁴.

The instrument is presented as “promotional”, aimed at translating the ILO values into integrated development programmes⁵. It points out that, on joining the ILO, Members accept the principles and rights enshrined in the Constitution of the Organization, including the annexed Philadelphia Declaration; they commit themselves to working towards the overall objectives of the Organization “to the best of their resources and fully in line with their specific circumstances”. These principles and rights “have been expressed and developed in the form of specific rights and obligations in the conventions recognised as fundamental, both inside and outside the Organization”. Even if they have not ratified the latter, the Member States are thus obliged to respect, promote, and achieve in good faith the following *fundamental* principles: “freedom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; the elimination of discrimination in employment and professions”. The fact that political consensus was achieved on a – limited – set of rights considered fundamental makes this document very important, despite its lack of mandatory application. I note that it expresses concerns for safeguarding peace, justice, and democracy, similar to those in the European convention.

The term “fundamental social rights” is also used in many corporate codes of conduct, as well as negotiated agreements, in certain cases. The content of these documents varies considerably from one to the other⁶.

The concept of “fundamental rights”⁷ covers a variety of concepts that are not easy to define, particularly in the case of social rights⁸.

⁴ A. Senn, *Development and Freedom*, Oxford University Press, Oxford 1999. See also: B. Hepple, *Labour Laws and Global Trade*, Hart Publishing, Oxford 2005, pp. 263–265; S. Deakin, *Renewing Labour Market Institutions*, International Institute for Labour Studies, Geneva 2004, pp. 39, etc.

⁵ Paragraph 4 of the document.

⁶ J.C. Javillier (ed.), *Governance, international law and corporate social responsibility*, ILS, Geneva 2008 ; I. Daugareilh (ed.), *Responsabilité sociale de l'entreprise et globalisation*, Bruylant, Bruxelles 2010; E. Mazuyer (ed.), *Regards croisés sur la responsabilité sociale de l'entreprise*, La documentation française, Paris 2010; M.A. Moreau, *Travail forcé, RSE et sous-traitance dans l'industrie textile en Asie : réflexion sur l'action de l'OIT*, “Droit social”, n° 5, mai 2014, pp. 413–422.

⁷ Th. Meindl, *La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes*, LGDJ, Paris 2003; D. Chagnollaude, G. Drago, *Dictionnaire des droits fondamentaux*, Dalloz, Paris 2006.

⁸ See on this topic: Ch. Kaufmann, *Globalization and labour rights: the conflict between core labour rights and international economic law*, Hart Publishing, Oxford 2007; J. Fudge,

It is ambiguous. For the interpreter to qualify a right as fundamental may lead to give the rights themselves – rather than the power that enforces them – a specific goal, the pursuit of certain values (such as social justice) based on moral or religious precepts, or on a vision of society and the relations between its members. It then refers, explicitly or not, to an *ius naturalis* vision of law, i.e. to the entitlements that derive their basis from natural law. These rights are considered to be accorded the highest level of protection by the international institutions, domestic constitution and courts. In that sense, fundamental rights can neither be granted by the governing authority nor can they be extinguished.

It remains however, as experienced by whoever has practiced international or comparative law, that values differ greatly depending of the region of the world, the belief or the religion of the legal interpreter. How a rule is worded and given effect depends on the ideas, customs, skills, arts, *etc.*, of a people or group, that are transferred, communicated, or passed along, as in or to succeeding generations; in other words, on its culture⁹. If human beings share certainly some basic value, the demarcation line between the ones considered as universal and the ones which are not, is far from being clear, as has been recursively illustrated by the public debate on the relativism of human rights.

The previous remarks are in no way intended to defend such a relativism or to detract from the usefulness of such proclamations or their capacity to convince. Invoking principles and setting social objectives when drawing up and implementing a policy seems an eminently reasonable and often a very desirable thing to do. However, the affirmation in this context of moral “rights” that everyone should enjoy does not automatically make them binding rights in nature. To proclaim, for example, the right to work without being able to join a threat of sanction for failure to respect that right is tantamount to expressing a wish or a political message that is certainly important but carries no legal weight. In many cases,

The new discourse of labor rights: from social to fundamental rights?, “Comparative Labor Law & Policy Journal”, autumn 2007, vol. 29 (1), pp. 29–66; L. Gay, E. Mazuyer, D. Nazet-Allouche (editor), *Les droits sociaux fondamentaux, entre droits nationaux et droit européen*, Bruylant, Bruxelles 2006, p. 10; A. Lyon-Caen, P. Lokiec (eds), *Droits fondamentaux et droit social*, Paris, Dalloz, Paris 2004; J. Iliopoulos-Stangas, *La protection des droits sociaux fondamentaux dans les Etats Membres de l’Union européenne*, Sakoulas-Bruylant-Nomos, Bruxelles 2000; J.M. Thouvenin, A. d’Trebilcock (eds), *Droit international social*, vol. 1, Bruylant, Brussels 2013, pp. 167 and ff.; T. Jaspers, W. Roozendaal, *Fundamental Social Rights: An Added Value to the Protection of Workers? The Increasing Importance of Fundamental (Social) Rights to Development of Labour Law*, [in:] M. Rigaux, J. Buelens, A. Latinne (eds), *From Labour Law to Social Competition Law?*, Intersentia, Oxford 2014, pp. 107–133.

⁹ This is how culture is defined in *Webster’s new world dictionary*, 3d College, ed. 1994.

moreover, the socio-economic situation prevents the adjunction of a legal dimension that would ensure permanence and coercion. When, however, the force of law is added – and only then – the lawmaker’s intent can be searched in the specific rule adopted and the legal standard interpreted in terms of that intent. In brief, the precise meaning given to the notion of “fundamental rights” should be investigated with regard to each piece of law, including to international instruments.

To use, whenever possible, the term “human” rather than “fundamental” actually permits to avoid ambiguities on the binding character of the rights concerned because the human rights are enshrined in clear universal, regional and national binding legal texts.

In the broad sense, most social rights of men – and women – at work contained in the ILO labour conventions may be considered as human rights because they are proclaimed in the UN Covenants of 1966. The trend by some English-speaking thinkers to underline that the defence of workers’ rights is one aspect of the defence of human rights, appears as an attempt to strengthen social solidarity in countries where the accent is on voluntarism in the industrial relations¹⁰. I will from my part focus on a particular group of them, i.e. the civil rights, in the context of labour relations and examine whether and how they may add to the protection of the workers in a globalized environment.

2. Ambiguities and Potential of the Claim for Civil Rights at Work

The importance of human rights at work has been confirmed in the recent history of Europe. Poland has been a major actor in this regard. Significant progress in civil and political rights has been observed in labour and employment relationships (1); they have developed however together with a certain marginalization of social rights; a hierarchy of rights at work has been established and remains controversial outside the ILO while inside the basic consensus that has been reached appears more fragile than expected (2). At the same time, the present flexibilization of the labour market raises the question of whether civil rights may not be pleaded for the defence of the workers (3). The courts play a critical role in the issue (4).

¹⁰ See Ph. Alston, *Labour Rights as Human Rights*, Oxford University Press, Oxford 2005. Compare: C. Fenwick, T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation*, Hart Publishing, Portland, 2010; J. Fudge, *The new discourse of labor rights: from social to fundamental rights?...*, pp. 29–66.

2.1. Progress in Civil and Political Rights in the Labour and Employment relationships

Under the ultra-centralised socialist regimes in Central and Eastern Europe, employment and labour policies were implemented via a proliferation of regulations, court rulings, and administrative instructions, requiring absolutely mandatory compliance. Certainly, the vast number of regulations made their systematic monitoring rather unlikely; in particular, the implementation of provisions intended to protect workers was somewhat lacking in these countries, as all efforts focused on increasing productivity. However, this accumulation of regulations and the organisation of these States gave the authorities considerable powers, especially as there was only limited possibility to appeal their decisions, and collective bargaining between employers and trade unions did not really exist, in the traditional meaning of the term.

The limitation of government powers, combined with true independence of the courts and social partners, have led to sweeping changes in this situation. In a democracy with a market economy, the introduction of a social policy, or even labour legislation, implies acceptance, or at least no strong opposition by those to whom it applies. Acceptance has replaced obligation, to a variable, but very real extent. Indeed, in continental Europe, employers and trade unions are frequently involved in drafting new labour legislation, even beyond labour collective agreements. The government controller's power of discretionary interpretation disappeared at the same time.

The change from a totalitarian system to a liberal regime has led to deregulation, "less government", also meaningless state legislation and, in some cases, the existence of freely negotiated labour collective agreements. It should, however, be noted that fewer laws does not necessarily mean a weaker protection, as the courts continue to hear cases dealing with all types of situations. There has simply been a two-fold transfer of authority from administrative bodies to the courts. As, first of all, legislation cannot regulate all possible situations, judges are granted broader powers to assess cases and issue rulings. Then, in democratic systems, the courts are given jurisdiction over government actions. This even constitutes one of their key characteristics.

Freedom of association, freedom to work and elimination of any kind of discrimination, including on political grounds, have in particular been fully recognized in Central and Eastern European countries, with the abolition of the restrictions existing before, in the interest of the socialist society.

2.2. A Hierarchy of Rights at Work

The disappearance of the two main political blocks has contributed to quickening the pace of globalization. It gave rise to hopes for major economic progress and fears of the effect these developments would have on the underprivileged. Calls were made for the process to be social as well as economic and intense debate broke out at the ILO on how best to regulate it. The discussions revealed that the traditional opposition between employers and workers' representatives has come back once the fear of a communist revolution vanished. The debate centred on the cost of labour standards and whether or not to include a social clause in trade agreements.

Many delegates insisted that consideration be given to other modes of regulating labour that are less binding but better suited to people living in poverty. These standards of a different nature might constitute a first step towards protection when the conditions do not allow a State to ratify a convention. Instruments of this kind may also not exist because it was considered that the time was not ripe for regulatory action.

It was in this political framework that the ILO adopted in 1998 the Declaration on Fundamental Principles and Rights at Work. Briefly, the aim has been to maintain the link between economic growth and social progress in a situation of growing economic interdependency. In this context the guarantee of basic principles and rights at work is particularly important and significant in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth they helped create and to achieve fully their human potential¹¹.

The Declaration presents itself as a "promotional" instrument¹² serving to translate the ILO values into integrated development programmes. It recalls that by the very fact of their adherence to the Constitution of the Organization, the Members agreed to the following principles and rights: (a) trade union freedom (that implies the right to collective bargaining); (b) the elimination of all forms of forced or compulsory labour; (c) the protection against child labour; and (d) the elimination of discrimination in respect of employment and occupation. Those "principles and rights" could be considered as civil rights as they are enshrined in the UN Covenant on Civil and Political Rights.

They "have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization". The Members States, even if they have not ratified the conventions, thus have an obligation to respect, promote and realize in good faith the principles contained in those instruments.

¹¹ See the recitals of the document.

¹² See operative paragraph 4.

It is incumbent on the Organization to help the States meet those objectives and to mobilize for that purpose all “its constitutional, operational and budgetary resources”; the Declaration specifically mentions external resources and support from other international organizations.

It must be stressed¹³ that the 1998 Declaration has the potential to go beyond the purely interstate framework, even if it is essentially addressed to the Organization’s Member States. It concentrates on all the previously mentioned fundamental social rights, which it lists without going into detail about the specific means of implementing them. Its binding value is limited, and the follow-up procedures clearly less demanding than the traditional ILO supervisory mechanisms. Although it is therefore intended first and foremost for the Member States, which are invited to adopt implementing measures, it can easily, precisely because it is generally worded, serve as a direct reference for the new global players. It has been used to define the rules to be followed together by ILO and the major international financial institutions in their activities at country level. It has been echoed in the social charters adopted by regional bodies (European Union, Council of Europe, NAFTA, and MERCOSUR, in particular); more often than not, those social charters are broadly based on ILO standards. Even more, it can be invoked by NGOs calling for the establishment of a list of basic principles to be respected in terms of social policy. It has served as an inspiration for multinational enterprises when they draft their codes of social conduct or define the criteria to be observed in their social reports or audits. Private initiatives thus supplement national law on these points or, what is more often the case, ensure enhanced respect for it.

An assessment of the impact of the Declaration has to be finely balanced. Its adoption has attracted contributions from donors, notably the United States, eager to encourage its implementation. These resources have financed important ILO programmes. The Declaration has also been a factor in the success of the campaign for ratification of ILO core conventions, and beyond that for the dissemination of the rights and principles they contain¹⁴. What is more, in a significant development, today’s bilateral or multilateral cooperation treaties often include a clause on respect for the principles and rights set forth in the Declaration, giving it special legal value.

¹³ See J.-M. Servais, *International Labour law*, 4th ed., Kluwer, The Hague, 2014, §§ 1176 and 210.

¹⁴ A. d’Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at work and its Follow-up*, [in:] ILO, *International Labour Standards. A global approach*, Geneva 2001, pp. 22–23; G. von Potobsky, *El devenir de las normas internacionales del trabajo*, “Revista de Derecho Social – Latinoamérica” 2007, n° 3; U. Muckenberger, *Hybrid Global Labour Law*, [in:] R. Blanpain, F. Hendricks (eds), *Labour Law between Change and Tradition. In Honour A. Jacobs*, Kluwer, The Hague 2011.

The adoption of the Declaration has led however to an acute controversy concerning its effects on the ILO standards-setting activities as a whole. Some¹⁵ have underlined its non-binding character and the risk of focusing only on the so-called core labour standards, while forgetting the others whose importance should not be underestimated on the life, health and well-being of the workers. Doubts are also raised about the actual implementation of those basic principles when most populated countries like China, India or the USA have not yet ratified such an important convention as the one on freedom of association¹⁶. Other writers¹⁷ have rather insisted on the present need for flexibility in the labour market, and on the capacity of the Declaration to respond to the constraints of the enterprises. Those views, clearly of a political as much as of a technical nature, represent two different visions of the future of labour protection: the first is more concerned with the necessary guarantees for the workers, the second, with the economic development of the enterprises whose return normally benefits to its staff.

Ten years later, the ILO adopted a further Declaration entitled *Social Justice for a Fair Globalization* that reaffirms and adjusts the ILO's mandate in the era of globalization. The document considers legal norms as instruments for the elaboration and actual implementation of the desirable social policies rather than as values themselves. The text confirms a change in the approach of the Organization: only "fundamental principles and rights at work" constitute one of its "strategic objectives". The international labour standards are means of achieving them all. Member States should review their situation as regards the ratification of the ILO conventions, as well as the application of its conventions and recommendations, in their efforts to reach more social justice through the ILO priorities. Special emphasis however is put on the instruments classified as core labour standards, together with those regarded as most significant from the viewpoint of governance covering tripartism, employment policy and labour inspection¹⁸.

¹⁵ Ph. Alston, *Core Labour Standards' and the Transformation of the International Labour Rights Regime*, "European Journal of International Law" 2004, vol. 15, No 3, pp. 457–521; idem, *Facing up the complexities of the ILO's core labour standards agenda*, "European Journal of International Law" 2005, vol. 16, No 3, pp. 467–480.

¹⁶ G. von Potobsky, *El devenir de las normas internacionales del trabajo...*; J.M. Thouvenin, A. d'Trebilcock (eds), *Droit international social...*, t. I, p. 177.

¹⁷ F. Maupain, *Revitalization, not retreat: the real potential of the 1998 ILO Declaration for the universal protection of workers' rights*, "European Journal of International Law" 2005, vol. 16, No 3, p. 452–454; B. Langille, *Core labour rights – the true story (reply to Alston)*, "European Journal of International Law" 2005, vol. 16, No 3, pp. 409–437.

¹⁸ The Annex to the Declaration mentions the *Labour Inspection Convention*, 1947 (No 81), *The Employment Policy Convention*, 1964 (No 122), *The Labour Inspection (Agriculture) Convention*, 1969 (No 129), *The Tripartite Consultation (International Labour Standards) Convention*, 1976 (No 144), 'and those standards identified on subsequently updated lists'.

The Declaration of 2008 appears as a programmatic instrument that intends to rationalize the ILO activities in its different fields of competence and to mobilize its means and capacities. It focuses on a better understanding of Members' needs, on the strengthening of technical cooperation, and expert advice, on the improvement of research capacity, empirical knowledge and understanding and on the development of new partnerships with non-state entities and economic actors, such as multinational enterprises and trade unions operating at the global sector level. The Member States are invited to reschedule their social goals along those lines, including through bilateral, regional or multilateral arrangements. Other international and regional organizations with mandates in closely related fields may have an important contribution to make to the implementation of the integrated approach. They should also be associated.

The new Declaration has succeeded in involving more the ILO in the global debate on economic development as exemplified by its participation in recent G8 and G20 meetings. The Organization has regularly the opportunity to present its views on employment and social issues; they have been welcome and supported at that level. The chance to influence the policies of the main global actors has thus been improved.

The Declaration however takes a further step to move development and employment issues towards the centre of the ILO concern and to give the whole of international labour standards a lower priority, with the exception of the civil rights at work mentioned above. The change involves a danger of further softening the legal dimension of the Organization. The application of employment protection standards will not be improved by any weakening of their binding nature and by greater reliance on 'soft law'. Persuasion and conciliation will not work unless there is ultimately a sanction which can be invoked¹⁹. To deny the usefulness of sanctions would tempt many countries to backtrack on the commitments they entered into by ratifying conventions. Admittedly, non-binding mechanisms can usefully supplement legal procedures, but they cannot be substituted for those procedures unless the aim is to "deregulate". While aiming at adapting the ILO setting activities to the present time, the new Declaration brings the risk to be interpreted in a way that reduces the strength and the impact of the ILO *corpus juris*. Actually the standard-setting has already been made more fragile even on essential issues, as illustrated by the recent refusal of the employers group and a number

¹⁹ J.-M. Servais, *International Labour law...*, §§ 1164–1169. See also B. Hepple, *Labour Law and Global Trade...*, p. 274.

of governments at the ILO Conference to continue to consider the right to strike as implicitly contained in the recognition of the trade union freedom²⁰.

Furthermore, one may wonder whether a sophisticated hierarchy of international labour conventions does not deviate from the standards-setting provisions of the ILO Constitution that treats all standards equally.

2.3. Civil Rights as a Complementary Protection for the Workers

The rights included in the United Nations Covenant on Civil and Political Rights may clearly bring some complementary protection to the one afforded by the Covenant on Economic, Social and Cultural Rights, as illustrated by freedom of association that is mentioned in both Covenants. Trade union freedom only can be exercised fully in a general atmosphere of respect for the major public freedoms, the most important being protection from summary execution, harsh treatment, and arbitrary arrest as well as equal access to courts and tribunals.

The ILO Committee on Freedom of Association has received an impressive number of complaints on the matter and confirmed that, while trade-unionists could not claim immunity from prosecution, their cases should be heard rapidly, according to normal judicial procedures, and they should not be harassed for taking part in normal trade union activities. The enjoyment of other public freedoms is important as well for the exercise of trade-union rights: the right to a fair trial, freedom of opinion and expression (freedom of trade union publications and freedom of speech), the right to hold meetings (public and private) and demonstrations, privacy of trade union property and premises (subject to searches, but only in legally authorised cases, under a warrant issued by the legal authority), and the confidentiality of all types of trade-union communications.

We may observe more generally, in Europe as well as in North America, a renewed emphasis on the civil rights at work²¹. The European Committee on Social Rights and the European Court of Human Rights

²⁰ International Labour Conference, 101st session (2012), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), Geneva, ILO, 2012, §§117 and ff. See J. Bellace, *The ILO and the right to strike*, ILR, 2014, vol. 153 (1), pp. 29–70.

²¹ For Spain, see R. Goldschmidt, C.L. Strapazzon, *La hermenéutica responsable y su papel en la protección y promoción del derecho fundamental al trabajo digno: el caso de la nueva redacción del inciso iii de la súmula 244 del tribunal superior del trabajo*, “Revista general de derecho del trabajo y seguridad social”, December 2014, no 39.

in particular play a rather larger role in support of the workers' protection²². A number of decisions and judgements deal not only with the abolition of forced labour or discrimination and freedom of association (including the right not to join a union), but also with personal safety and the protection from sexual harassment, freedom of opinion and expression (*inter alia* in the sensitive domain of the practice of religion), the right to social security benefits and the respect for workers' private life.

The reference to civil rights strengthens in this way the guarantees for the workers and opens new fields for protection. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights provide that everyone has the right to respect for his privacy. The question concerns *inter alia* the collection by the firm of information about its employees. Convention No 181 and Recommendation No 188 on Private Employment Agencies, of 1997, and Convention MLC No 186 on Maritime Labour provide guarantees concerning the processing of personal data²³. Other international or European instruments also apply to employers and workers, such as the OECD Guidelines governing the Protection of Privacy and Trans-border Flows of Personal Data.

92 The ILO Recommendation No 171 on Occupational Health Services includes several paragraphs dealing specifically with the confidentiality of employees' medical records. The Domestic Workers Recommendation, 2011 (No 201) also includes provisions on the protection of personal data used for employment purposes²⁴. In 1996, the Organization prepared a set of practical guidelines on protecting workers' personal data. They cover the ways the information is collected and stored, as well as the security, use, and communication of the data. Workers should be regularly informed about the existence and processing of data concerning them, able to consult the information free of charge and correct it, if necessary, as well obtain assistance in these operations.

The development of electronic communication and production systems has also led to greater interest in protecting privacy. Work on computers raises indeed additional problems. Which limits if any, for instance,

²² See for example: A. Perulli, *Fundamental Social Rights, Market Regulation and EU External Action*, "International Journal of Comparative Labour Law and Industrial Relations", mars 2014, vol. 30 (1), pp. 27–47; F. Dorssemont, K. Lörcher, I. Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing, Oxford 2013; V. Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, "Human Rights Law Review", March 2013; N. Moisard, *L'usage des conventions de l'OIT par la Cour européenne des droits de l'homme*, "Droit social", April 2014, no 4, pp. 365 and ff.

²³ See S. Estreicher, M. Bodie (editor), *Workplace Discrimination, Privacy and Security in an Age of Terrorism*, Kluwer, The Hague 2007.

²⁴ Paragraph 3 a.

to impose to the use of the equipment for private purposes within the enterprise, or even during the working hours? More and more company work rules deal with the question; their answers vary greatly. Regulation in this regard exists mainly at the national level²⁵.

Generally speaking, the insistence on workers' civil rights may be interpreted as an answer by those who wish to maintain strong worker protection, in response to those who promote greater flexibility in labour relations²⁶.

A last point: historically, individual freedoms have been considered to provide protection from excessive government powers; the authorities are mainly²⁷ under a negative obligation, not to do anything to hamper these freedoms. The articulations of the civil and social rights works in both ways. Being also a social right, freedom of association for example, clearly gives positive content to the state's obligations: it must, if necessary, adopt practical measures to ensure the effective exercise of this liberty. Let us consider the case of one of those vast plantations where workers live on their employer's land, in accommodation belonging to the estate. In some cases, the management claimed that their property rights justified denying access to the plantation to outside trade union representatives, or preventing public or private trade-union meetings from taking place on the estate. In this type of situation, the ILO supervisory bodies insisted that the government concerned must enact the necessary legislative and administrative provisions to ensure that trade-union leaders had effective access to the plantations and that any interested workers could exercise their full rights to hold meetings²⁸.

²⁵ R. Blanpain, M. Van Gestel, *Use and Monitoring of E-mails, Intranet and Indirect Facilities at Work Law and Practice*, Kluwer, The Hague 2004; *Information technology and workers' privacy*, "Comparative Labor Law & Policy Journal", winter 2002, special issue, vol. 23, No 2; J.F. Siqueira Neto, *Derecho del trabajo y derechos humanos fundamentales*, [in:] *Libro de informes generales*, XVII Congreso Mundial de derecho del trabajo y de la seguridad social (Montevideo, 2–5 September 2003), Montevideo, Asociación Uruguaya de derecho del trabajo y de la seguridad social, 2003, p. 179 *et seq.*; J. Craig, *Privacy and Employment Law*, Hart Publishing, Oxford 1999.

²⁶ See also S. Laulom, *Les droits sociaux fondamentaux, rempart contre les déconstructions des droits du travail*, "Revue de Droit du Travail", June 2013.

²⁷ See however the report of A.-M. Bougin on the case law of the European Court of human rights at the international seminar on comparative labour law, industrial relations and social security law, organized by the COMPTRASEC, University Montesquieu-Bordeaux IV, on June 30 – July 11, 2008.

²⁸ It should be noted that States which have ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (n° 87), or the 1958 convention (n° 110) on plantations, had committed themselves to taking all necessary and appropriate steps to guarantee these workers' freedom to exercise their trade union rights. Similarly, the 1975 convention n° 141 on rural workers' organisations asks States to ensure that national legislation does not place any obstacles in the way of setting up and developing these organisations, taking into account the specific conditions in rural areas.

2.4. The Role of the Courts

The right to a fair trial, without excessive delays, is another basic right²⁹. I have already mentioned the role of the courts. They are naturally in the best position to determine the proper balance between respect for individual freedoms in the workplace and corporate needs: the issue can only be settled in light of the practical details of specific cases. This remark reminds that social policies are eventually implemented in each company, for each person or a group of persons.

Labour courts, wherever they exist, have a singular capacity to deal with the practical problems of people at work, certainly due to the fact that they often include in Europe lay judges drawn from employer and trade union backgrounds³⁰. The tranquil strength with which judges normally carry out their work has meant that it is easy to ignore their fundamental role in public debates. Indeed, perhaps this gives them an additional advantage in carrying out their work.

The observation should not hide interpretation problems of international instruments on human rights. Indeed, the texts are drawn up in general terms; they leave considerable power to those who interpret them that is not without risk. They usually do not contain any specific indications of limitations on the rights granted, unless they are supplemented by criminal or civil provisions. There is a very real danger of subjectivity, which certainly cannot be completely avoided. It is, for example, tempting to seek to justify employment discrimination that reflects current attitudes, without considering how shocking they can be. Today still, some people, even some courts, try to justify differences in treatment in respect of women at work.

The first danger, therefore, consists in excessively restricting the scope of these provisions, creating several categories of citizens – or workers in our case – and emphasizing their differences in status. A second type of danger has however emerged: choosing, on the contrary, a radical interpretation of these texts that eliminates the most natural distinctions. A pure and simple abolition of distinctions on behalf of equality may even serve to hide deregulation, i.e. the elimination of socially useful protection. At worst, it may result in a truly perverse distortion of this human right. In the case of international instruments, where the monitoring mechanisms seem more fragile, criticisms based on an extremist interpretation may lead interested governments to reject comments, challenge the authority of the supervisory bodies, or even to denounce the international conventions concerned.

²⁹ Article 14 of the UN Covenant on Civil and Political Rights.

³⁰ Ph. Auvergnon (ed.), *The courts and social law. Contributions to a comparative approach*, proceedings of the International comparative labour, industrial relations, and social security law seminar, Comptrasec (Montesquieu-Bordeaux IV University), Bordeaux 2002.

3. Concluding Remarks

To call for civil rights without doubt has brought considerable supplementary protection to the workers, as illustrated in the recent history of Europe. It should however be used with reflection and caution.

Indeed the notion has a more precise basis and meaning than the terms “fundamental rights”. Many have in particular questioned the hierarchy of international labour standards established in the ILO Declaration of 1998. Another Declaration, adopted in 2008, has deepened the trend. Why for example is safety at work not considered as a core labour standard and an important element of governance? A high rate of work accidents is more and more recognized, even from managerial point of view, as a negative indicator of performance at the enterprise or national level.

Beyond, the reference to civil rights alone also carries such risks as the marginalization of other protections of the working life or an interpretation of the legal instruments leading to deregulation. There is a clear danger in not dealing with social rights alongside the individual freedoms of employees, due to the difficulty of focusing on human beings and society at the same time, or combining community life and individual activities. Modern society, which puts the emphasis on civil rights, presents a dominant organisational model likely to form anonymous, interchangeable beings, creating a common mould that erases the individual characteristics of each person. The result may be that individuals lose the desire to act autonomously.

Too much media emphasis on civil rights may also stimulate a process of increasing individualisation, the refusal of a real internal government of the community, a return to hard line liberalism, and an absence of government control of the way we live together³¹. We may indeed observe the tendency for the legislature in a number of countries to give precedence to individual rights over collective rights in employment matters. While the importance put on the rights included in the UN Covenant on Civil and Political Rights, brings an indispensable dimension to employment relations, the priority given to individual freedoms appear to be a further move that leads to controversies.

³¹ See the publications of Mr. Gauchet, in particular: *La démocratie contre elle-même*, Paris Gallimard, Paris 2002 and *L'avènement de la démocratie*, Paris Gallimard, Paris (3 volumes, 2007 and 2010).

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Prawa cywilne i przyszłość prawa pracy

Streszczenie

Upadek komunistycznych reżimów w Europie pod koniec wieku XX pokazał, że choć prawa cywilne i polityczne powinny być dopełnione przez prawa socjalne, to jednak stosowanie tych ostatnich nie jest samo w sobie wystarczające do harmonijnego indywidualnego i społecznego rozwoju. Są one nadbudowane na prawach cywilnych, które wciąż stanowią podstawę współczesnych demokratycznych państw.

Karty niniejszego opracowania zawierają kilka refleksji dotyczących znaczenia, jakie ma poszanowanie praw cywilnych dla przyszłości prawa pracy. Część pierwszą rozpoczyna odwołanie się do pojęcia praw podstawowych, które było intensywnie stosowane w najnowszej literaturze i praktyce. Jego znaczenie zbliża się, pomimo odmienności, do pojęcia praw człowieka. Uznaje się, że należy pozostać przy pojęciach praw socjalnych i cywilnych, ponieważ są one stosowane przez wiążące akty międzynarodowe i jaśniej wyrażone. Część druga opracowania akcentuje niebezpieczeństwa i potencjał skupienia się na cywilnych prawach człowieka.

Tłumaczenie z języka angielskiego – Zbigniew Hajn