THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EMPLOYMENT RELATIONSHIP
(PREFACE + CONCLUSIONS)

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 'leitmotiv' 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. 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 followed:

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 been invited to contribute too. 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, 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 ILO (in particular the fundamental rights conventions) and the 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 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 CJEU's case-law referring to the ECHR as a source of "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 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).

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 organized 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 European Court of Human Rights, 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

[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.

relating to the ECHR's impact on individual and collective employment relations. Also elucidating the book's concept, these conclusions can thus also 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 Court'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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The European Convention on Human Rights and the Employment relation

Filip Dorssemont and K. Lörcher

1. The approach of the European Court of Human Rights towards employment relations: international, intertextual and social

Fundamental social rights are enshrined in specialised international standards. Given the nature of some of these covenants and charters, they can be qualified as genuine human rights. As an international human rights organisation, the Council of Europe is committed to the indivisibility and interdependence of human rights. In times extremely hazardous for the effective exercise of human rights, the ECtHR is a beacon of light, providing guidance and orientation for those plying troubled waters. All European legal and judicial institutions but also all bodies and persons bearing political responsibility are bound to abide by the letter and spirit of ECtHR case-law as a European floor for the protection for human rights.

For more than 50 years, in awareness of the important challenges to the exercise of civil and political rights, the Court has stressed how civil, political but also social rights are intertwined. In certain (sometimes extreme) cases, it has recognised that a number of civil rights also have a social dimension, as so eloquently stated in *Airey v. Ireland*:

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention". [1]

Such an approach is mirrored in a reversed way by a famous Resolution of the 1970 International Labour Conference' on Trade Union Rights and Their Relation to Civil Liberties' stressing how civil rights are crucial for the effective enjoyment of trade union freedom.[2]

Consistent with such an approach, the Court has developed the important method of referring to international standards when interpreting Convention rights. A wide range of sources and standards exists, enabling the Court to establish the current international state-of-the-art regarding a Convention right.

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[1] ECtHR, 9 October 1979, *Airey v. Ireland*, no. 6289/73 § 26; See also *Sidabras and Dziautas v Lithuania* ECHR 2004-VIII (2004) 42 EHRR 104, § 33 (quoted by Hendrickx and Van Bever in this book) and the Grand Chamber decision: ECtHR, *STEC and others V. United Kingdom,* 6 July 2005, no. 65731/01 and 65900/01, §52.

[2] This resolution is available in the Proceedings of the International Labour Conference (81st session 1994) which contains a general report by the CEACR (Report III (Part 4B), ILO Geneva), to which the ECtHR explicitly referred in its judgment (GC) of 12 September 2011, *Palomo Sánchez and others v. Spain*, no. 28955/06 e.a., §§ 22 and 23.

Combining its intertwined rights approach and its method of taking international standards into account in its Grand Chamber's *Demir and Baykara* judgment, the Court has opened the door to a more social dimension, reversing its previous (very restrictive) jurisprudence by recognising the right to collective bargaining as falling within the ambit of the the right to form and join trade unions (Article 11 ECHR). More importantly, it has established a new interpretational methodology of intertextuality, drawing on all relevant international human and social rights standards - whether from the UN, the ILO, the Council of Europe (in particular the ESC) or even the European Union – and the case-law of the competent supervisory bodies in its interpretation of the ECHR. In sum, the ECHR provisions are no longer interpreted in an isolated but in an intertextual manner. The Court does not operate in a *vacuum.* The impact of this new interpretational methodology, embodied in the *Demir and Baykara* judgment, constitutes the momentum leading to this book, a book providing the opportunity to revisit the substance of the ECHR relevant to the employment relationship.

t is - sometimes vigorously and even in respect of the *Demir and Baykara* judgment - criticised for being hyperactive. It is similarly criticised for interfering with legal niceties particular to Member States, for transgressing the margin of appreciation accorded to the Contracting Parties, etc.[3] This publication departs from a more favourable assessment of the Court's approach, highlighting how it could enhance the protection and enforcement of human rights.

2. The European Convention on Human Rights with reference to *labour*, the *worker* and the *employer*

The ECHR was not adopted as a charter of social rights, let alone workers' rights. Indeed, with the exception of the Declaration of Philadelphia (1944) and the Community Charter of Fundamental Social Rights of Workers (1989), no international instrument relates solely or primarily to workers' rights. However, the opposite *hypothesis* deserves credit as well. The Convention similarly does not refer to a distinct category of civil and political rights, referring instead in a very generic way to human rights and fundamental freedoms. The only international instrument to which it pays tribute is in fact the Universal Declaration of Human Rights (UDHR, 1948) which is taken "into consideration" *in its entirety*, despite the fact that the Contracting Parties only seek to "to take the first steps for the collective enforcement of *certain* of the rights stated in the Universal Declaration". The UDHR tands as a classical illustration of the indivisibility of civil and political rights and economic, social and cultural rights. This indivisibility was stressed "*avant la lettre*", *id est* prior to the well-known bifurcation of this set of indivisible rights into civil and political rights on the one hand, and economic, social and cultural rights on the other hand. For this reason, the recitals of the UDHR make no explicit reference to the idea of indivisibility. In its Preamble, the posterior Charter of Fundamental Rights of the European Union (2007) relates the fundamental rights

[3] See recently the inaugural speech of Professor Janneke Gerards, *Het prisma van de grondrechten,* Nijmegen, Radboud Universiteit, 2011 and M. Bossuyt, "Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations" *Human Rights Law Journal*, Vol 28, No 9-12. 2007. 321-332.

enshrined in the Charter explicitly to the "indivisible … values" upon which the European Union has been built.

The ECHR is not mute on either the issue of "labour" or the existence of workers. It explicitly prohibits forced *labour* in Article 4. It implicitly refers to workers where it recognizes the right of "everyone" to form and join trade unions for the defence of his interests in Article 11. Last but not least, the ECtHR takes the workplace into account in assessing the legitimacy of restrictions to ECHR rights. Sometimes this context serves as an argument, especially when a general interest requires States to ensure the protection of Convention rights vis-à-vis employers. Furthermore, the Court indeed considers employees to be in a vulnerable position.[4] This vulnerability implies that a restriction generated by an employer's recruitment or dismissal policy might have a 'chilling effect'[5] on the exercise of the Convention rights. However, States, when confronted with applications lodged against them, have also referred to the existence of an employment relationship to justify restrictions of Convention rights by referring to the duty of loyalty, reserve, discretion.The Court has recognized that this obligations is able to restrict the freedom of expression at work. [6]

The question arises whether Article 4 and the related case law provide guidance on the concept of "***labour***" which has to be taken into account for the purposes of this provision. The guidance given is indicated in a negative manner. Article 4 delimits the concept of (forced) labour by indicating what does fall outside its ambit. Certain activities are indeed exempted from the ambit of Article 4, meaning that they cannot be construed as "forced or compulsory labour". Since it is very difficult to argue that these activities are in fact undertaken on a purely voluntary basis, let alone that a refusal will not be sanctioned by a threat or penalty, it seems likely that these activities cannot be considered to constitute "labour" as such. In sum, these exemptions might be helpful in defining what constitutes "labour" for the purpose of Article 4. These exemptions describe activities outside the sphere of a formal economy tying workers to employers. They tend instead to describe obligations not stemming from an employment relationship, let alone an employment contract. Furthermore, they describe a relationship between a citizen and his community at a municipal or even national level. In a very recent case, *C.N. and V. v. France,* the Court has emphasized that for the determination of "forced or compulsory labour", the nature and volume of the work as such needs to be taken into account.[7] For this reason, it disqualified the activities of a minor assisting her sister

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[4] See in this respect above all ECtHR 11 January 2006, *Sørensen and Rasmussen v. Denmark,* nos. 52562/99 and 52620/99, § 59.

[5] Though restrictions of Convention right affecting the employment relationship seem to have such a chilling effect, the latter is identified less often in employment cases. The "chilling effect" was recognized by the Court in ECtHR 21 July 2011, *Heinisch v. Germany*, no. 28274/08, § 91 and in ECtHR, 12 February 2008, *Guja v. Moldavia,* no. 14277/04, § 95. Certain judges have criticised the lack of consideration for the issue of the "chilling effect" in their dissenting opinions in recent employment cases: ECtHR, 12 September 2011, *Palomo Sanchez v. Spain,* nos. 28955/06, 28957/06, 28959/06, 28964/06, 28389/063 and 28961/06 and ECtHR, *Trade Union of the Police in the Slovak Republic and others v. Slovakia*, no. 11828/08.

[6] See inter alia : ECtHR 21 July 2011, *Heinisch v. Germany*, no. 28274/08 , § 64 and ECtHR, *Trade Union of the Police in the Slovak Republic and others v. Slovakia*, no. 11828/08, § 57.

[7] ECtHR, 11 October 2012, *C.N. and C. v. France*, no. 67724/09, § 74

(who was subjected to forced labour) with domestic work after attending school and finishing her homework as forced or compulsory *labour.* The Court considered that these were activities which could reasonably be expected from a member of a family or a person belonging to the household (*au titre de l'entraide familiale ou de la cohabitation*). Thus the Court seems to identify yet another sphere of "sociabilitas" falling outside the ambit of Article 4 ECHR.

The notion of a "***worker"*** seems paramount in delimiting the scope *ratione personae* of the right to organize. Inevitably the question arises which persons can be construed as workers for the sake of delimiting the scope of the right to form and join trade unions.

It could be argued that it is irrelevant whether a "trade union" is the result of the generic freedom of association or in stead of the more specific right to form and join trade unions. A trade union will always fall within the scope of Article 11 ECHR. This definitional issue was first *explicitly* raised in *Sigurjónsson*.[8] In this case, the question arose whether an association (Frami) which taxi drivers needed to join to obtain a government licence could be regarded as a trade union. The Icelandic government did not agree with this characterisation. At issue in this case was whether, based on a statutory provision, Iceland could make granting a licence to drive a taxi dependent on prior membership in Frami. The statutory provision created a *pre-entry closed shop*.[9]

The government assumed that "trade unions" constituted worker organisations defending the interests of their members in conflicts with their employers. Frami, the organisation in question, consisted primarily of *self-employed* persons working without staff. The Court refused to clarify the definitional scope of the term "trade union", stating that Frami could in all respects be characterised as an association. It considered "that it was not necessary to decide whether Frami" could also be regarded as a trade union, "since the right to form and join trade unions in that provision is an aspect of a wider right to freedom of association rather than a *separate* right."[10]

This approach is based, however, on the unproven assumption that the protection conferred by the right to organize lacks specificity. Insofar as the ECtHR attaches certain corollary rights to the right to organize not inherent to freedom of association, the importance of the definition remains intact. In the case concerned, the Court only had to deal with the *individual* dimension of the right to organize. In our view, the issue of specific corollary rights is more likely to come into play with regard to cases dealing with the collective dimension of the right to organize. In her contribution, Van Hiel actually disqualifies Frami as being a trade union due to the fact that its members were self-employed. If judged otherwise, the association might claim to have a right to bargain and to have recourse to strike, though this runs counter to a classical conception of competition law as we tend to know it. Whether self-employed workers can actually engage in a process of collective bargaining to defend their economic

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[8] European Court of Human Rights, 30 June 1993, *Sigurdur Sigurjónsson v. Iceland,* No 16130/90.
[9] See the contribution of Isabelle Van Hiel.
[10] European Court of Human Rights, 30 June 1993, *Sigurdur Sigurjónsson v. Iceland,* § 32.

interests remains a debated issue. [11] In sum, the idea that "everyone" can form and join a trade union should not be taken in a literary way.

In a subsequent case, *Syndicatul Pastorul Cel Bun v. Romania*[12], the Court did refer to the right to form and join trade unions. The case dealt with an association which organized priests and employees working for the Romanian Orthodox Church for the defence of their professional interests in the Bishopric Olthania. The Romanian government and the Bishopric challenged the idea that an employment relationship existed between the priests and their bishop, stating that the relationship was based on a religious vow (*serment*) as opposed to a civil law contract. The Court dismissed this argument, ruling that the relationship between the priests and their bishop, let alone between the ordinary workers and their bishop, could not be separated from the rule of contract law, despite the fact that priests took a "vow" and that all members were financed by the State as opposed to the bishopric. Hence, the Court seems to be moving towards a broader approach to the concept of what constitutes an employment relationship. The mere fact that the alleged "employer" is not paying the workers or that the origin of the employment relationship with a candidatein a state of prosternation on the verge of priesthood is shrouded in incense seems to be immaterial.

In our view, it is worthwhile interpreting the notion of trade unions under Article 11 ECHR in a way consistent with the scope *ratione personae* of the right to organize in more specialised international instruments. ILO Convention No. 87 (1948) defines workers' and employers' organisations within the meaning of the Convention as "any organisation of workers or of employers for furthering and defending the interests of workers or of employers". Employers are unambiguously included within the scope of the right to organize. Article 5 of the Revised European Social Charter expressly applies to employers and workers alike. Like the Convention, Article 8 of the ICESCR does not make clear who holds the right to organize. In this respect, it could be argued that the right to form and join trade unions is also applicable to employers. In other words, the notion of "trade unions" *sensu lato* could refer both to employer associations and to trade unions *sensu stricto*.

In at least two cases, the Court has considered Article 11 of the European Convention to be applicable to employers who claimed that they had been put under an illegitimate pressure to join an employers' organisation. In *Gustafsson*[13] and *Kellermann*,[14] the references to the right to organize were *implicitly* applied to employers arguing that their freedom *not* to join an employers' organisation was being curtailed. In our view Article 14 of the Convention

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[11] See in this respect the refusal of the CJEU to apply the Albany immunity to agreements concluded between an association of farmers and slaughterers to fix a slaughterhouse entry price, despite the fact that Article 12 of the Charter of Nice was invoked. The Court ruled that these agreements did not constitute agreements between organisations representing employers and workers : CJEU, 13 December 2006, T-217/03 and T-245/03

[12] ECtHR, 31 January 2012, *Syndicatul 'Pastorul Cel Bun* v. Romania, No 2330/09. This case is currently dealt with by the Grand Chamber following an appeal by the Romanian Government which was accepted by the competent panel.

[13] ECtHR, 25 April 1996, *Gustafsson v. Sweden*, 15573/89. See L. Schut, "De cao als spin in het web: het recht om geen cao af te sluiten valt niet onder artikel 11 EVRM", NCJM Bulletin, 1998, 18-36.

[14] ECtHR, 1 July 2003, *A. B. Kurt Kellermann v. Sweden*, no. 41579/98.

(prohibiting discrimination) constitutes a compelling reason to accord the right to organize to employers and workers alike.

It is obvious that works councils are not trade unions. An application from a Turkish national whose membership in an Austrian works council was retracted on the basis that he did not have Austrian nationality was declared manifestly ill-founded. In *Karakurt,*[15] the Court found that works councils were established under Austrian law, and were not private, voluntary associations within the meaning of Article 11 of the European Convention. The finding in the *dicta* that the term "association" must be given autonomous meaning seems to suggest that the terms "trade union" or "*syndicat*" within the meaning of Article 11 must likewise be ascribed autonomous significance.

The mere fact that Article 11 authorizes Contracting Parties to impose restrictions to the right of freedom of association on members of the armed forces, the police and the administration of the State does not imply that a generic prohibition of their right to organize and defend their interests through trade union action is in conformity with the ECHR. Neither does this formula justify generic restrictions applicable to the "civil service" as a whole.[16]

The distinction between the private and public sectors does however come to the fore in a different context, *id est* in the case law related to the freedom of expression of workers and trade union officials. As a general rule the fact that a worker is working for a public institution or an enterprise offering a 'service of general interest' raises an argument in favour of the protection of workers' statements relating to the functioning of the institution or the enterprise involved. On the other hand, the mere fact that the functioning of these institutions and enterprises affects the "public interest" necessitates a more cautious attitude on behalf of a public sector worker who, as a public servant, is supposed to provide evidence of a particular form of discretion and reserve. Though employees in the private sector are not exempted from such an obligation, the Court does suggest that there might be a gradual difference.[17]

In a recent case, *Trade Union of the Police in the Slovak Republic and others v. Slovakia,* the "trust" of the public in the proper functioning has been qualified as a legitimate criterion for restricting freedom of expression.[18] In our view, public trust can only cease to be blind when whistleblowers are allowed to express their critical views *in foro externo.* In *Heinisch*, the Court ruled in this respect that:

> "While the Court accepts that State-owned companies also have an interest in commercial viability, it nevertheless points out that the protection of public confidence in the quality of the provision of vital public service by State-owned or administered companies is decisive for the functioning and economic good of the entire sector. For this reason the public

[15] ECtHR, 14 September 1999, *M. Karakurt v. Austria*, nr. 32441/96.
[16] See for in-depth analysis the contribution of Dorssemont.
[17] See ECtHR 21 July 2011, *Heinisch v. Germany*, nr. 28274/08, § 25.On the obligation of reserve and discretion, see the contribution of Voorhoof and Humblet.
[18] ECtHR, *Trade Union of the Police in the Slovak Republic and others v. Slovakia*, nr. 11828/08, § 65.

shareholder itself has an interest in investigating and clarifying alleged deficiencies in this respect within the scope of an open public debate."[19]

In sum, the ECHR does not just envisage an abstract citizen. Two provisions are interwoven with the issue of employment relationships. Furthermore, the Court has provided evidence of a growing awareness of the fact that employment relationships generate restrictions to the exercise of Convention rights which need to be justified given the circumstances of each case and the particular nature of the enterprise or institution concerned. Though it has recognized that these rights can be restricted due to the circumstances involved, it has never ruled that an employment relationship can justify an overall prohibition of the worker exercising or invoking his Convention rights.

3. Substantive issues: Intertextuality as a hermeneutical tool for judges and professors

Intertextuality has not just been helpful for the ECtHR. It has also been a very helpful tool for scrutinizing ECtHR case law in a critical and constructive manner. In their contributions, the authors of this book have pointed out divergences between the approach of the European Court and that adopted by other judicial or quasi-judicial actors. Furthermore, a transversal analysis of the Court's case law with regard to the exercise of Convention rights at the workplace seems to highlight the situation that the issue of contractual waiving of these rights is treated differently depending upon the rights concerned.[20] In some fields the contractual waiving of these rights is readily accepted on the basis of the idea that a worker can "restore" his entitlement to exercise those rights by offering dismissal. In other fields, this idea is criticized *in nuce* by challenging the validity of such a legal act, even if undertaken during the recruitment procedure. Last but not least, it is worthwhile comparing cases related solely to the exercise of one single Convention right in order to assess whether the quality of being a worker exercising a right *at the workplace* will be a potential source of restrictions of one's freedom rather than providing an argument in favour of increased protection.

- A transversal view of the substantive contributions reveals that the Court has taken a very different stance on the issue of waiving rights granted by the ECHR. In *Sorensen and Rasmussen*, the Court sitting as a Grand Chamber ruled in a seemingly general way that it *"can accept that individuals applying for employment often find themselves in a vulnerable situation and are only too eager to comply with the terms of employment offered"*. [21] For this reason, the Court did not consider the contractual waiving of the negative freedom of association to be a relevant or valid legal act which could be taken into consideration. In their

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[19] See ECtHR 21 July 2011, *Heinisch v. Germany*, no. 28274/08, § 89.
[20] On the issue of waiver, see especially the De Schutter contribution.
[21] ECtHR 11 January 2006, *Sørensen and Rasmussen v. Denmark* nos. 52562/99 and 52620/99,§ 59. See also the contribution of Van Hiel.

joint contribution on the right to privacy, Hendrickx and Van Bever have demonstrated that there are limits to the contractual waiving of privacy rights, despite the importance attached to the concept of "reasonable privacy expectations" in assessing such restrictions. In her contribution in the field of the freedom to manifest religious convictions, Vickers has criticized the reluctant attitude of the Court to recognize the right to *manifest* his or her religion or belief at work under Article 9 ECHR. The rather illusory or theoretical option an employee has to offer his dismissal is too often treated as a sufficient safeguard.

- In his comparison of ECtHR case law in the field of equality and non-discrimination with the *acquis* of the European Union, Bruun states that "[i]t seems clear that there exists an astonishing discrepancy between the standard applied by the CJEU in comparison with the ECtHR". He argues that the Court has been much more lenient in the absence of a concept of direct discrimination to justify unequal treatment. He is very critical of the major burden of proof imposed on applicants, as opposed to EU non-discrimination law which introduces in a number of fields the idea of a reversal of such a burden. Dorssemont's criticism of the Court's case law in the field of anti-union discrimination, forcing applicants to establish an *intention* of the employer complements this scepticism.

- In the Voorhoof and Humblet contribution, another kind of transversality prompts highly critical comments on the Court's understanding of the right to freedom of expression at the workplace. They compare the freedom of expression of workers *at work* with that of other citizens exercising these rights *outside* the workplace. As a matter of principle, workers are bound by an obligation of loyalty to their employer, irrespective of their status as private sector employees or that of civil servants or employees in the public sector. According to the Court such an obligation restricts the right to freedom of expression of workers and trade union officials criticizing their employer. The difference to the citizenship-State relation is overwhelming. A State could never invoke the "loyalty" (patriotic civicism) of its citizens as a way of restricting their freedoms. In fact, citizenship is intertwined with the entitlement to fundamental rights and freedoms, rather than with restrictions thereto. A number of constitutions even grant citizens a right to resist authorities which unduly restrict or violate their freedoms. In the corporate world, the *Diktat* of loyalty is apparently *not* based upon an employer's respect of freedoms. Whereas the Court has always considered the free speech of journalists to be essential to the proper functioning of democracy, in *Aguilera Jimenez* the Court unfortunately considered that trade union criticism of the work organization "did not fall within the context of any public debate on matters of general interest, but related to issues that specifically concerned company P."[22] This unfortunate qualification was "overruled" by the Grand Chamber, ruling that the trade union's criticism did concern "a matter of ***general*** interest".[23] In this respect, the Court seems to suggest that trade union criticism is nearly as worthy of protection as criticism voiced by journalists which is of ***public*** interest. In *Palomo Sánchez* the statements expressed transcended a purely individual or private matter, insofar as

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[22] See ECtHR, 8 December 2009, *Aguilera Jiménez a.o. v. Spain*, nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06, 28964/06, § 32.

[23] See ECtHR, 12 September 2011*Palomo Sánchez a.o. v. Spain*, nos. 28955/06, 28957/06, 28959/06, 28964/06, § 72.

they related to a collective labour dispute. In *Szima v. Hungary*[24], the Court limits the scope of what a trade union official can publicly state in his capacity as such to criticism regarding labour-related issues Criticism on the way the Hungarian police functions both internally and externally was not considered to be "labour related". In sum, the Court gives the impression that the freedom of expression accorded to trade union officials is of less significance than that accorded to journalists, and even seems to deny the capacity of trade union officials (contrary to ordinary workers) to engage in whistle-blowing.

This differential treatment disadvantaging trade union officials does not stop there. The bounds of loyalty also preclude statements or opinions considered to be "grossly insulting or offensive"[25]. The question arises whether the division between grossly offensive and merely offensive is easy to drawn. Furthermore, as indicated in the dissenting opinion in *Sanchez*, the Court "gives the curious impression of placing trade union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively".[26] In sum, trade union officials do not seem to enjoy the margin of manoeuver afforded to citizens having recourse to artistic, indeed satirical statements or opinions found in cartoons and caricatures.[27]

- In the contribution relating to freedom of religion, Vickers assesses the extent to which the Court's approach in dealing with conflicts between this freedom and other Convention rights deviates from the non-discrimination approach set forth in EU Directive 2000/78 (equal treatment in employment and occupation). Whereas the ECtHR had to assess the collective rights stemming from the freedom of religion to the benefit of the Churches and ecclesiastical organisations, the EU Directive adopts a more individualistic stance on the issue, focusing on the individual who argues that he or she is being discriminated against on the basis of his or her religion or belief. In the absence of cases brought before the CJEU, it is still hazardous to assess whether the CJEU will deviate in practice from the seemingly more collectivistic stance of the Strasbourg Court. It is even more difficult to assess which of the two approaches can be considered as the most activist. Indeed, the conflict at stake is inherent to the structure of freedom of religion, a fountain of individual and collective rights. A similar question might arise when assessing ECtHR case law in the field of Article 11 ECHR. As highlighted in the contributions of Van Hiel and De Schutter, the Court has historically had to deal with requests from applicants invoking their negative freedom of association. At the same time, it has also been very reluctant to develop the collective dimension of the right to organize and to recognize rights of trade unions or rights which trade union members could exercise collectively. Since other complaint procedures involving supervisory bodies more specialized in the field of social rights are only accessible to employers and workers' organisations, it is only natural that the Court has become a heaven for the individual complaints of people not wishing to

[24] ECtHR, 9 October 2012, *Szima v. Hungary*, nr. 29723/11, § 31.
[25] See ECtHR, 12 September 2011, *Palomo Sánchez a.o. v. Spain*, nos. 28955/06, 28957/06, 28959/06, 28964/06, § 76.
[26] See the dissenting opinion in *Palomo Sánchez.*
[27] See also the critique of Voorhoof and Humblet.

become a member of a trade union at all or wishing to belong to a different trade union. Hence, the impression could emerge of a Court not very sympathetic or at last empathetic towards trade unions. According to De Schutter the Court in recent years has somewhat distanced itself from its individualistic stance by ensuring "that unions can defend the interests of workers by collective bargaining". The author concluded that in this way "the 'individualist' excursion that started in the early 1990s was closed in 2002 with *Wilson and others* and in 2008 with *Demir and Baykara*." Van Hiel also stresses that the judgments strengthening trade union rights were pronounced after fierce doctrinal criticism on the rather individualistic and "negative" approach of the Court towards the right to organize. In line with De Schutter, the author explains that this evolution occurred in an era characterized by a decline in trade union membership. She criticizes the assumption underlying the need to protect workers against closed-shop systems (viz. against trade unions), stating that it is equivalent to a need to protect the citizen against the State. The implicit analogy between State and trade unions came once more to the forefront in the *Viking* and *Laval* judgments, with the CJEU putting trade unions on a par with public authorities in deeming them to be actors potentially restricting "fundamental economic freedoms"' through the exercise of their legal autonomy.

- Another way to assess the Court's intervention shift from individualistic to collectivist is to compare protection of the right to organize with that of the right *not* to organize. Though both aspects affect the individual dimension of the freedom of association, it is clear that increased protection of the positive freedom of association compared to the negative freedom could be described as favourable to trade unions. In the past, the assumption has been defended that, whereas the Court protects the positive freedom of associations against sticks (*Danilenkov*) and carrots (*Wilson and Palmer*), it has always demanded that any restriction of the negative freedom of association was operated under the threat of loss of livelihood.[28] The compulsion needed to be operated through the menace of social hardship. Van Hiel's analysis of the *Olafsson v. Iceland* case calls for a more mitigated vision. The author rightly points out how the Court construed this case as being very near to the issue of negative freedom of association. In the case, non-affiliated employers were obliged *ex lege* to contribute to the employers' association. She points out that "the amounts were relatively modest and the degree of compulsion to which the applicant was subjected could be regarded as significantly less serious than in other cases, where an applicant's refusal to join a union resulted in the loss of his employment or professional licence and as a consequence his means of livelihood". In sum, though the Court has not yet formally shielded restrictions to the negative freedom of association from financial *incentives* to associate, it has narrowed the gap between the differentiated protection of both positive and negative protection.

- In his contribution Van Drooghenbroeck provides further illustration of the cautious approach the Court adopts to the conflict between individualism versus collectivism. He analyses the so-called "labourisation of fair trial standards". The Court does not consider the institution of a collegiate judicature based upon a designation by trade unions of lay judges to

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[28] See F. Dorssemont, "The right to form and to join trade unions for the protection of his interests under Article 11 ECHR", *European Labour Law Journal*, v1, 2010/2, 200-201.

be incompatible *in se et per se* with Article 6 ECHR. The Court does not oppose the institutionalisation of the role of trade unions, though it does insist on essential safeguards to uphold fair trial standards.

- The divide between individualism and collectivism should not be overestimated from a procedural point of view. In his contribution, Hendy shows how the Court in some cases has allowed requests to be submitted from individual and collective applicants alike. In *Wilson and Palmer,* where employer practices restricted the individual right of employees to be represented by a trade union and hence the right of the trade union to be heard, according to the author "the infringement of an ECHR right impinged directly on the trade union". The mere fact that in certain cases both individual and collective applicants could submit a request might be a means to overcome the admissibility restriction of Article 35 ECHR which precludes the admissibility of an application that is "substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement and contains no relevant new information". Hendy argues that this obstacle does not preclude preparing the ground for the Strasbourg application through such a procedure of international investigation or settlement. However, solely collective actors should come into play first. The subsequent application solely operated by one or more individual workers could then be distinguished from this collective complaint. A recent judgment of the Court validates another litigation strategy. In *Eğitim Ve Bilim Emekçileri Sendikasi v. Turkey*[29], the Court did not declare an application inadmissible of a trade union affiliated to a confederation, despite the fact that the confederation had previously submitted a substantially identical complaint to the ILO Freedom of Association Committee.

4. Procedural and institutional issues and challenges

In addition to all the substantive issues the Court faces important procedural and institutional challenges. They can be characterised by two major developments. The first is the EU's accession to the ECHR described in greater detail in Lawson's contribution. This cumbersome and politically difficult negotiation and ratification process - still far from achieving its final result - will in the end clarify and enhance the legal status of the ECHR and open up new procedural opportunities for citizens under the jurisdiction of EU Member States to challenge EU law directly before the ECtHR.

The second development aims at empowering the Court to cope with the first and probably most acute problem arising i.a. from its own success: the number of applications. Though the 'Brighton Declaration' has concluded to a certain extent the political discussions on the necessary 'Reform of the Court', the practical results remain to be seen.[30] However, the Court is already working on building up its own 'infrastructure', allowing it to deal more effectively with the enormous orkload. The well-known backlock of cases is particularly severe in respect of cases assigned to category IV of the Court's own priority policy, i.e. the

[29] ECtHR, 25 September 2012, *Eğitim Ve Bilim Emekçileri Sendikasi v. Turkey,* n° 20641/05
[30] See the contribution of K Lörcher.

so-called 'non-repetitive and non-priority cases'[31]. However, most of the cases assigned to this category are directly or indirectly linked to issues of social law, in particular all cases dealing with the freedom of association guaranteed under Article 11 ECHR. For the effective exercise of these rights it is of utmost importance that these cases do not have to wait years before a final decision is taken, but instead can be decided upon within a 'reasonable time'. One further solution could and probably should be to assign the most important social rights cases to category II, i.e. applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or the European system). This would allow the Court to better cope with its own '*Demir and Baykara*' approach.

In respect of taking into account international standards and their relevant case-law one element could be enhanced dialogue with the supervisory bodies responsible for interpreting and applying the relevant international standards, in particular the European Committee of Social Rights, but also the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) or the UN Committee on Economic, Social and Cultural Rights (CESR).

5. The way ahead

This book wishes to contribute to the debate on human rights approaches in the social field. It aims not only to enrich the academic and jurisdictional discussions, but also addresses trade union legal practitioners who are seeing themselves increasingly confronted with social (human) rights issues.

This publication can help in integrating and indeed strengthening the ECHR dimension in any trade union litigation strategy (at both national and European level). Building on arguments derived from the ECHR at national level will already force the domestic judiciary to take account of and deal with those ECHR provisions which are essentially or nearly exclusively labour related. In this respect, Article 4 and Article 11 ECHR are at the heart of forced labour and freedom of association cases. However, the book clearly demonstrates that many other Convention rights can be relevant to labour-related cases.

The exhaustion of domestic remedies,and all further steps to be taken to get through the 'admissibility' door for the access to the ECtHR are described in detail by Hendy in his contribution. The experience on which this part of the book is based will be helpful for all trade union and other lawyers engaged in social policy cases for integrating this human rights dimension in their litigation strategies.

This is crucial in an era of seemingly permanent economic crisis, in which the resultant cutbacks in the level of social protection may conflict with Convention requirements on e.g. freedom of association (for deregulating collective bargaining), on private life (for

[31] For the Court's case priority policy and its seven categories (the first three of which are urgent, important (see below in the text) and cases relating to Articles 2 to 5(1) ECHR), see the contribution of K Lörcher.

termination of employment issues[32]), on property protection (for pensions). Since this is not (yet) the focus of the present publication, the next TTUR book will be dealing with these specific issues in more detail.

However, the approach advocated transcends the realm of litigation being beneficial for the system of human rights protection in general. In particular, the different international systems of (social) human rights protection are increasingly under pressure from employers and even from certain governments. Each of the systems (whether UN, ILO or Council of Europe) is worth protecting, and indeed needs to be protected, in order to allow the Court to continue developing its international approach. Trade unions at different levels play an important role in this protection. This publication offers an opportunity to better understand the interactionay between the various human rights protection systems.

As such, the publication targets all persons interested in social human rights and in helping to give the ECHR a genuine social dimension.

[32] Although not related to the consequences of the crisis the important judgment ECtHR (Former Fifth Section) 9 January 2013, *Oleksandr Volkov v. Ukraine,* no. 21722/11 recognises in general that termination of employment issues are falling in the ambit of Article 8 ECHR (see in particular § 165).