Bulletin of Comparative Labour Relations

Individual Labour Rights as Human Rights

96

The Contributions of the European Court of Human Rights to Worker's Rights Protection

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Elena Sychenko

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VOLUME 96

Founding Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, was also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors Authors. He passed away in October 2016.

General Editor

In 2015 Frank Hendrickx, Professor of labour law at the Faculty of Law of the University of Leuven (Belgium) joined as a co-Editor. Frank Hendrickx has published numerous articles and books and regularly advises governments, international institutions and private organisations in the area of labour law as well as in sports law. He is the Editor-in-Chief of the European Labour Law Journal and General Editor of the International Encyclopaedia of Laws.

Introduction

The Bulletins constitute a unique source of information and thought-provoking discussion, laying the groundwork for studies of employment relations in the 21st century, involving among much else the effects of globalization, new technologies, migration, and the greying of the population.

Contents/Subjects

Amongst other subjects the Bulletins frequently include the proceedings of international or regional conferences; reports from comparative projects devoted to salient issues in industrial relations, human resources management, and/or labour law; and specific issues underlying the multicultural aspects of our industrial societies.

Objective

The Bulletins offer a platform of expression and discussion on labour relations to scholars and practitioners worldwide, often featuring special guest editors.

The titles published in this series are listed at the end of this volume.

With the most sincere gratitude to my family for their support, understanding and patience and to Prof. Bruno Caruso

Notes on Author

Elena Sychenko is an associate professor at Saint Petersburg State Polytechnic University. She received her PhD degree from the University of Catania in 2016, a master degree with honours from Saint Petersburg State University in 2004. During the last five years she published about twenty articles in peer-reviewed journals in Russian, English, French and Italian and two books in Russian. She is a regular contributor to the French peer-review journal 'Revue de droit comparé du travail et de la sécurité sociale', which reviews the conclusions of the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights relevant to labour law and a contributor to ILO LEGOSH system. She is a member of several professional networks, such as CIELO (Comunidad para la investigación y el estudio laboral y ocupacional), Centre of modern labour law (Tblissi State University, Georgia) and a member of the association 'Lawyers for labour rights' (Moscow, Russia).

Table of Contents

Introduction

'Nations prosper in the global economy...by building their institutional advantages on a floor of fundamental human rights...'
Sir Bob Hepple[1]

In recent years there has been a substantial debate over the interconnection between labour rights and human rights.[2] These debates were mainly conceptual in nature whilst international and regional human rights mechanisms, from a practical perspective, have so far been rather underexplored from the labour rights perspective.[3] My research, as set out in this volume, is largely inspired by a desire to explore how individual labour rights have been referred to in the human rights jurisprudence of the European Court of Human Rights (the Court or the ECtHR). The goal of my analysis is to highlight the Court's views on these rights for the benefit of practitioners working in this area, to show that human rights are not only 'important ideological weapons in the development of labour law,'[4] but can also be practical tools in the legal practice as well.

The aim is to demonstrate that Strasburg 'is not that far'[5] from national labour courts. This international Court has now adopted binding legal positions in respect of discrimination in employment, wages, unfair dismissal, employee's privacy protection, occupational safety. Its legal positions have already changed certain aspects of the national labour laws of some members of the Council of Europe (CoE). The fascinating

1. Bob Hepple. Rights at Work Global, European and British Perspectives. London: Sweet & Maxwell, 2005. pp. 6–7.
2. Keith David Ewing, The Human Rights Act and Labour Law. Industrial Law Journal 27(4) (1998): 275–292; H. Collins, Theories of Rights as Justifications for Labour Law In: G Davidov, B Langillc, editors, 'The Idea of Labour Law'. Oxford: OUP, 2011, 137; G Mundlak, Labor Rights and Human Rights: Why Don't the Two Tracks Meet? Comparative Labor Law and Policy Journal 34 (2012): 237; L Compa, Solidarity and Human Rights. New Labor Forum 18 (2009): 38; K. Kolben, Labor Rights as Human Rights? Virginia Journal of International Law 50(2) (2010).
3. Ebert Franz Christian, Martin Oelz, Bridging the Gap between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts. ILO (2012): 2.
4. Bob Hepple, Future of Labour Law. The Comparative Laboratory Law Journal 17 (1995): 626.
5. Lo Faro, Responsabilità e sanzioni per sciopero illegittimo: cambia qualcosa in Italia dopo Laval?, in Giornale di diritto del lavoro e delle relazioni industriali, 2011, n. 3, p. 419.

evolutionary character of the European Convention of Human Rights (ECHR) makes me argue its growing applicability for the protection of wages and of occupational safety.

Substantive individual labour rights (also referred to as 'rights at work' in this volume) are the least researched area of the ECtHR's jurisprudence. These rights include fundamental employment rights such as the right for wages, for protection from unfair dismissal, from discrimination and the right to occupational safety at work. Substantive individual labour rights for the purposes of this research also comprise civil liberties that should be recognised or protected at the workplace, such as the right to freedom of religion, of expression and the right to respect for private life.

The research in this volume is based on the analysis of 347 cases, considered by the Strasburg bodies in the last fifty-three years (from 1963 until October 2016). The cases were considered chronologically in order to establish evolutionary trends in the ECtHR's reasoning and its interconnection with the policy changes in European countries.

The present research comprises four parts, each devised in chapters which are further organised in sections and subsections. Every chapter sets out brief conclusions.

Part I provides research on theories presently dealing with the history, tools and philosophic justification of the integration of social and labour rights in the ECHR. It includes analysis of the ECtHR's perception of the margin of appreciation, the balancing of rights and of the proportionality test as far as these concepts are used in the adjudication of 'employment law' cases.

The remaining three parts are dedicated to the jurisprudence of the ECtHR on protection of the rights at work. My division of the case law into three parts reflects the ECtHR's first cases on 'genuine' ECHR rights which are explicitly relevant to the protection of the rights at work. Accordingly, Part II explores the ECtHR's approach to the prohibition of forced labour (Article 4) and discrimination (Article 14).[6] Part III draws together my research on case law relating to the protection of civil liberties at work; specifically in the areas of the protection of privacy, the right to respect for private life and of the freedoms of religion and expression, including more minor references to freedom of association. Particular focus is drawn to cases about unfair dismissals.

Part IV explores the jurisprudence of the ECtHR on protection of wages and occupational safety at the workplace. These issues were initially outside the scope of the ECHR; however, the evolutionary interpretation of its norms allowed the ECtHR to adopt particular approaches to the relevant rights of employees, which are researched in two chapters. Each of them comprise sections setting out the author's reflections on how the ECtHR's interpretation of the ECHR may be formulated in respect of protection from psychosocial risks (PSR) at work, and in respect of the right to a decent wage.

In Conclusions the most important positions of the ECtHR in respect of the protection of individual labour rights are synthesised to emphasise their current and potential impact on the labour laws of the members of the CoE.

6. References to articles in this volume are to the European Convention on Human Rights, unless otherwise specified.

PART I

The Integration of Labour Rights in the European Convention on Human Rights

This part is devoted to the evolution of the ECHR, and highlights the widening of the scope of protected rights and the emergence of labour law cases before the ECtHR. In order to understand this expansion of the ECHR, which has been vividly described by commentators as an 'awakening of the sleeping beauty',[1] there is a need to trace the history of the Convention. It is also necessary to explore the legal concepts elaborated by the ECtHR for its justification of 'evolutive' interpretation and the use of these concepts in cases concerning labour rights. The ECtHR's approach to the cases concerning the protection of individual labour rights will be researched through investigating the concepts of the margin of appreciation, balancing and proportionality as those concepts have been used by the ECtHR in adjudicating cases.

1. This epithet is usually used to describe the rise of the ECtHR's authority in the 1970s; Jochen Frowein, first used this term in 1984, and it has now been adopted by a number of other scholars. *See*, Jochen Frowein, European Integration Through Fundamental Rights. University of Michigan Journal of Law Reform 5 (1984): 8; Ed Bates. The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights. New York: Oxford University Press, 2010, p. 277.

CHAPTER 1

History of the Convention: A Long Way to European Quasi-Constitutional Court

In this chapter the fundamental link between the ECHR and the protection of labour rights will be established, starting from the research of premises of social rights protection found in the original drafting of the ECHR. The development of the Conventional system will be traced, focusing on its role in the enlarged CoE after the accession of post-communist countries. In conclusion some reflections about the accession of the European Union (*'EU'*) to the CoE will be formulated.

§1.01 DRAFTING OF THE ECHR

It is common to say that the ECHR was designed as an instrument of protection from totalitarianism, being drafted shortly after the fall of Nazi Germany against the background of post-war enlargement of totalitarian Soviet states.[2] As the Ex-President of the European Court noted, 'The Convention was an innovative response, perhaps even revolutionary, to genocide, atrocities and monstrosities of the Second World War and the period that preceded it'.[3] Since the Nuremberg judgments had established a new concept of international responsibility and consequently a new concept of national sovereignty, it was considered necessary to establish effective international guarantees for human rights.[4]

2. As W. Churchill put it in a speech in Strasburg on 12 August 1949, 'We have to... protect ourselves against any risk of being overrun, crushed by whatever form of totalitarian tyranny' Available at: http://www.coe.int/aboutcoe/index.asp?page=peresFondateurs&l=en (accessed 1 October 2014).
3. L. Wildhaber, De L'évolution Des Idées Sur Les Missions De La Cour Européenne Des Droits De L'homme in La Promotion de la Justice, Des Droits de L'homme Et Du Règlement Des Conflits Par Le Droit International edited by Marcelo Gustavo Kohen. Martinus Nijhoff Publishers, 2007, p. 644.
4. Gordon L. Weil. The European Convention on Human Rights: Background, Development and Prospects. Leyden: A.W. Sythoff, 1963, p. 22.

The fundamental human rights, listed solemnly in the Universal Declaration of Human Rights (UDHR) in 1948, needed some mechanism by which they could be enforced. By 1949 it had become rather evident to international society that International Covenant, which had to represent the international guarantee of human rights, would be very long in coming (in that time it was not yet clear that the rights would be divided into two separate Instruments[5]). The adoption of the ECHR by the countries of the CoE was a way of implementing the UDHR pending the finalisation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In hindsight, it is obvious that the ten founding countries which comprised the CoE in 1949 would represent a more homogenous group of countries than eventually expanded numbers of the members of the UNO. Thus they could more easily reach consensus on what human rights were worthy of international recognition and protection, particularly taking into account that the political and civil rights concerned were already fixed in their domestic legislations.

This is supported by the Preamble of the ECHR, which states expressly that: 'the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

Drafting of the Convention began shortly after the creation of the CoE in 1948. It was not an easy process as even in this 'homogenous' circle of countries there were different views on the due scope of the future Convention, on the mechanism of protection and the possibility of restricting national sovereignty. The main points of dispute were the following: (1) the definition of rights; (2) the list of rights; (3) the process of supervision and the right for individual petition. The discussion around these points of controversy could contribute to the understanding of the roots for future expansion of the ECHR and therefore deserves closer examination.

[A] Dispute on Definition of Rights

According to the Papers of the First Session of the Committee of Ministers[6] held in Strasburg in 1949, the proposal to define each right was opposed by some representatives who argued that the rights mentioned were already 'abundantly dealt with.'[7] The French representative, M. Teitgen, thought that mere enumeration of a statement of principles such as in the UDHR, could be enough to be easily enforced by the European

5. For example, USSR and Syria opposed the idea of placing economic, social, and cultural rights in a separate instrument. *See* J. Whelan Daniel. Indivisible Human Rights: A History. University of Pennsylvania Press, 2011, p. 75.
6. Papers of the First Session of the Committee of Ministers, 1949. Strasbourg. Available at: http://www.coe.int/t/dgal/dit/ilcd/archives/selection/cm/1949Aug.pdf (accessed 1 November 2014).
7. *See* the opinion of the French representative M. Schuman. *Ibid.*, p. 34.