

**Human Rights in Employment Relationships:
Contracts as Power**
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HUMAN RIGHTS IN EMPLOYMENT RELATIONSHIPS: CONTRACTS AS POWER

Olivier De Schutter*

ABSTRACT. *The extension of human rights to inter-individual relationships between the employer and the worker, requires transposing norms that were originally designed to apply to the relationships between the public authorities and the individual to an entirely different situation. It also requires that we determine the weight to be given to the choice of the individual rights-holder, when the alleged violation has its source in a contractual relationship between the employer and the worker. And it raises the question of how the procedural rights of workers (to form and join unions, and to collective bargaining) relate to the substantive rights they may invoke in the employment relationship. In examining how the case law of the European Court of Human Rights has evolved in addressing these questions, this study takes seriously the idea that coercion may be the result either of forcing an individual to obey another under the threat of sanctions, or of proposing a reward to the individual that he or she cannot refuse.*

RESUME. *L'extension des droits de l'Homme aux rapports interindividuels noués entre l'employeur et le travailleur, exige de transposer des règles originellement pensées pour régir les rapports entre les autorités publiques et l'individu, à une situation entièrement différente. Cela requiert aussi de déterminer le poids qu'il faut reconnaître au choix de l'individu titulaire de droits, lorsque la violation qu'il allègue a sa source dans le rapport contractuel qu'il a noué avec l'employeur. Cela soulève enfin la question de savoir comment les droits procéduraux des travailleurs (de former et de devenir membres de syndicats, ou de négocier des conventions collectives) se rapportent aux droits substantiels qu'ils peuvent invoquer dans le cadre du rapport d'emploi. En examinant comment la Cour européenne des droits de l'Homme a évolué sur ces questions, cette étude prend au sérieux l'idée que la contrainte peut résulter aussi bien de la menace de sanctions à l'encontre d'un individu, que de la promesse d'une récompense qu'il n'est pas en mesure de refuser.*

I. Introduction

Human rights transform the relationship between the State and the market in ways that are now well understood. States are required to protect human rights by regulating the conduct of private actors, such as employers, in order to ensure that these actors do not adopt conduct that could lead to human rights violations. That obligation to protect is an obligation of means: it is understood as a duty to adopt all reasonable measures that, in the circumstances, a State could be expected to take in order to ensure that what it cannot do directly, it does not allow to happen indirectly. In situations where an employer does infringe the rights of its employee, any responsibility of the State would be of a derivative kind: if we leave aside the exceptional cases where the said employer may be considered to act as a *de facto* agent of the State, such State responsibility may only stem, not from the conduct of the employer itself, which cannot be imputed to the State, but from the failure of the State to adopt the measures that would have been appropriate to avoid the violation from occurring. That failure is sometimes described as a failure to exercise due diligence, by which we mean that the duty of the State is to control conduct adopted by another, using various instruments at its disposal including (albeit not limited to) regulation.

The theory is now well accepted, and broadly agreed to.¹ Under the European Convention on Human Rights, it may be said to have emerged, in the context of employment relationships, in the famous

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¹ See, e.g., E.A. Alkema, 'The third-party applicability or *'Drittwirkung'* of the European Convention on Human Rights', in F. Matscher, H. Petzold, and G.J. Wiarda (eds), *Protecting Human Rights : The European Dimension*, Carl Heymans Verlag, Köln, 1988, p. 35 ; A. Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993 ; A. Drzemczewski, 'The European Human Rights Convention and Relations between Private

1981 case of *Young, James and Webster v. the United Kingdom*. There, the European Court of Human Rights, sitting in plenary, concluded that the United Kingdom could not seek refuge behind the fact that the 'closed shop' agreement that the applicants were denouncing had been concluded between the British Rail and three unions. The view of the British government was that, as a collective agreement, the measure challenged by the applicants was in essence a private agreement between two non-State actors (a company and unions), for which the State could bear no responsibility. The agreement provided that employment within the British Rail would be reserved to the members of those unions, forcing all current or prospective employees to join one of the unions in question : the Court noted that, while it had been concluded between the British Rail and the unions, 'it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained'.² The judgment condemned the United Kingdom for not having sufficiently protected workers from a collective agreement affecting the substance of their freedom of association under Article 11 of the Convention.

There is little doubt that the finding of violation must have pleased, in fact, the government concerned: by the time the case was litigated before the Court, the conservative Thatcher government had removed the Labour Party from power, and it does not require a stretch of the imagination to think that they may have been relieved that the 1974 Trade Union and Labour Relations Act, that had lifted the prohibition on closed shops, which they had intended to abolish anyway, would now have to be revised because of the mandate from the European Court of Human Rights. What matters to us, however, is that an important principle had now been affirmed: under the European Convention of Human Rights, States parties must protect human rights in employment relationships, even if this requires interfering in agreements concluded between the employers and the workers, and whether or not the workers are acting through their unions.

The *Young, James and Webster* case left a number of questions open, however, many of which are still not fully answered today. Two difficulties in particular emerge. First, it has become common for States to discharge their duty to protect human rights in private (or inter-individual) relationships by simply applying directly the rules of international human rights law to those relationships, without adopting further implementation measures. Through the doctrine of direct application of human rights treaties (or, less frequently, by incorporating the rules contained in such treaties into domestic constitutions or legislation), national courts are then empowered to impose on private actors, including employers, rules that were initially designed in the international legal order to apply to States, and that were to regulate the relationships between the State organs and individuals under their jurisdiction. But this process of transposition creates a number of difficulties.³ The position of the employer cannot be simply equated to that of the State, and courts may face obstacles in trying to address the employer-worker relationship on the basis of rules that were framed for other purposes.

The second question concerns the significance that should be recognized to the choice of the individual rights-holder, when the alleged violation has its source in a contractual relationship between the employer and the worker. Is that choice real, and must it be respected as the manifestation of the self-determination of the individual? Or is that choice necessarily - and fatally - tainted by coercion, in a context in which the employment unrelationship is bound to be unequal? The latter was the position famously adopted by Engels in his 1844 book, *Condition of the Working Class in England*, at a time when the issue that was debated was whether the legislator should be allowed to intervene to limit to ten hours per day the maximum working time.⁴ But even supposing the worker gives his genuine

Parties', *Netherlands International Law Review*, No. 2 (1979), p. 168 ; A. R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart, Oxford, 2004; O. De Schutter, *International Human Rights Law*, Cambridge Univ. Press, 2010, chapter 4.

² Eur. Ct. HR (plen.), *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A No. 44, para. 49.

³ Some of these are addressed, at a theoretical level, in the contribution of Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale L.J.*, vol. 111 (2001), p. 443.

⁴ F. Engels, *The Condition of the Working Class in England* (orig. 1844) (repr. St. Albans, Herts., 1974).

consent to certain conditions attached to the employment, how determinative should that fact be? May the worker dispose of his freedom as if it were a mere property right? If A is recognized a right X, does that imply that A may choose to sell X off, or to barter the right X away against an advantage to which A attaches greater value? The question of waiver is both narrower and broader than the previous one. It is narrower in the sense that it may be seen as a sub-question that is raised in the process of moving from the duties of the State towards the citizen to the duties of private actors towards other private actors, referred to above : indeed, one of the most important differences between the power exercised by the State over the individual and the power exercised by the employer over the worker, is that, in principle at least, the worker is free (in the formal sense) to accept the terms of employment offered, or to reject them. But the questions of consent and coercion, and of the possibility of one worker waiving his rights in the employment context, is at the same time broader : it concerns the role of basic rights in the employment relationship, regardless of the source of that basic right -- whether the right is found in an international human rights treaty, or in a domestic constitution or in legislation.

In order to address these questions, this chapter proceeds in three steps. The next section examines the relationship between the *procedural* rights to form and join unions, to resort to collective action and to enter into collective bargaining processes, and the *substantive* rights of workers vis-à-vis employers, such as their freedom of expression or their right to respect for private and family life.⁵ It addresses the question whether the two sets of rights are in some sense a substitute for one another, in other terms, whether strengthening procedural rights (and the role of unions as representatives of workers' interests) might justify adopting a weaker degree of scrutiny of measures that might affect the substantive rights of workers. Section III then describes the first (procedural) route, examining how the European Court of Human Rights has protected the right of workers to form and join unions and to resort to collective action in order to defend their rights. Section IV moves to the other (substantive) route. It looks at how the substantive rights recognized to workers (such as freedom of expression or the right to respect for private and family life) are in fact protected in the implementation of the European Convention on Human Rights: it attempts to summarize the difficulties we face when we transpose rights and duties designed to regulate the 'vertical' relationships between the State and the individual, to the 'horizontal' relationships between the employer and the worker. Section V discusses in greater detail one specific question that arises in this process of transposition, which concerns the possibility for the worker to waive her rights -- to sacrifice them against the promise of certain advantages which she may value more highly. Section VI provides a brief summary of the conclusions reached.

II. Two approaches to protecting human rights in employment relationships

1. The emergence of the duty to protect workers' rights

There was nothing inevitable, in the logical sense, to the extension of human rights to private relationships as was foreshadowed in *Young, James and Webster*. In theory, one could imagine a regime in which the human rights recognized the individual can only be invoked against the State, without the State being imposed any positive duty to protect. In such a regime, human rights would be simply irrelevant to the relationships between private employers and workers. Beyond perhaps an elementary duty to protect the parties entering into a contractual relationship of employment from physical assault,⁶ the State would have no other obligation to intervene in such relationships, imbalanced though as they may be. In the sphere of the market, individual freedoms would be clashing with one another, and the outcome of the clash would be determined solely by the ability for each party to force the other into a certain agreement -- a truce in the battle they wage against each other --,

⁵ It is acknowledged that freedom of expression may be used as a procedural right against employers, when exercised to challenge certain working conditions for instance.

⁶ As has been remarked by Matthew H. Kramer, 'in almost every situation outside the Hobbesian state of nature, conduct in accordance with a liberty will receive at least a modicum of protection', particularly through the role of the State in guaranteeing the physical security of the person (in M. H. Kramer, N.E. Simmonds and H. Steiner, *A Debate Over Rights. Philosophical Enquiries*, Oxford Univ. Press, 1998, repr. 2000, pp. 11-12).

based on the bargaining power each party would be able to exercise. Courts would have no choice but to enforce the agreement, whatever the conditions under which it was concluded (absent situations of duress or coercion), and whatever the consequences for the rights of the individual. Private parties would have 'freedoms', and they would be allowed to exercise such freedoms, in particular, by seeking to push other private parties into the conclusion of agreements on terms that are most favorable to them; but they would have no 'rights' to oppose to other private parties, in the sense that no private actor would be duty-bound to abstain from certain forms of conduct that could threaten any other private actor's enjoyment of his rights.

Such a regime, however, would not ensure that the human rights of individual are 'practical and effective', rather than 'theoretical and illusory', as famously expressed by the European Court of Human Rights.⁷ It would expose job-seekers, and all those involved in an employment relationship, to various forms of abuse, the result of their generally weak bargaining position. And while it would still not be allowable for States to directly interfere with the basic rights of the individual, the result for the individual, for all practical purposes, would be the same: the passivity of the State -- its failure to react to violations committed by the private employer -- would allow violations of the rights of the individual to continue unabated, as the private actors responsible would benefit from a complete impunity. There may be no logical necessity under the Convention in imposing on the State a duty to protect individuals from the infringements of human rights that occur in private relationships; but the political necessity does seem unescapable.

2. Two routes towards protecting workers' rights

The State, therefore, must rescue the individual from the impacts of entering into employment relationships in which, due to his weak bargaining position, he may not be able to resist certain sacrifices that have far-reaching consequences on the enjoyment of his basic rights. But there are in principle two routes through which the State could discharge this duty. One route is to simply equalize the bargaining positions of both sides to the employment contract, in order to ensure that there no imbalance between the parties emerges such that one can impose its will upon the other. 'Equalizing' means, in general, strengthening the position of workers, by allowing them to form unions, and then force employers to negotiate with the unions as representatives of the workers' interests. Adam Smith made perfectly clear more than two centuries ago why that may be required : the wages paid for labour, he wrote in the *Wealth of Nations*, depend on the terms of the contract negotiated between the worker and the employer. But the interests of both parties are 'by no means the same. The workmen desire to get as much, the masters to give as little as possible. The former are disposed to combine in order to raise, the latter in order to lower the wages of labour'. And Smith noted lucidly that it would be naive to simply equate the result of the negotiation between the two parties with the just price of labour, because of the imbalance between them:

It is not ... difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides,

⁷ Eur. Ct. HR, *Airey v. Ireland*, judgment of 9 October 1979, Series A n° 32, 2 EHRR 305, para. 24 ; Eur. Ct. HR (GC), *Demir and Baykara v. Turkey* (Appl. No. 34503/97), judgment of 12 Nov. 2008, § 66 ('Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory'). For another example where this requirement of effectiveness led the European Court of Human Rights to conclude that the rights of the Convention imposed positive obligations on States parties (in particular, allowing an interpretation of Article 4 ECHR on the prohibition of slavery to also apply to private action), see Eur. Ct. HR (2nd sect.), *Siliadin v. France* (Appl. No. 73316/01) judgment of 26 July 2005, ECHR 2005-VII, § 89 (where the Court takes the view that limiting the question of compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue, including the ILO Forced Labour Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the International Convention on the Rights of the Child, and would amount to rendering it ineffective).

authorizes, or at least does not prohibit their combinations, while it prohibits those of the workmen. We have not acts of parliament against combining to lower the price of work; but many against combining to raise it. In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.⁸

In remarking that employers more frequently combine between themselves to lower the price of labour than workers are able to conspire for the opposite purpose, and that workers generally, because they have no property, are compelled to find work and cannot afford to remain idle, Smith was in fact building a powerful argument in favor of the freedom to form unions and to force the employer to set wage through collective bargaining processes. In this, he was clearly ahead of his times. More than a century later, we would still find the legal profession in the United States grappling with this issue: progressives on the Supreme Court such as Oliver Wendell Holmes or Louis D. Brandeis were still compelled then to painstakingly explain to their colleagues why 'yellow dog' contracts, through which employers gave work on the condition that the workers would refrain from joining a union while in the company's employment, could be challenged by strikes or other forms of collective action. They made the argument that such a clash of freedoms, each party seeking to coerce the other into making certain concessions (the unions seeking to force the employer to abandon the practice of 'yellow dog' contracts, and the employer seeking to force prospective workers to accept such clauses), was simply one manifestation of the 'struggle for life' characteristic of market relationships in general. In fact, even these Progressives would not have gone so far as to say that the legislator had a positive duty to prohibit 'yellow dog' contracts altogether.⁹

These debates remain strikingly relevant to our contemporary situation. The following section examines how far has the European Court of Human Rights traveled along this procedural route, one that seeks to ensure that the rights of workers are protected by strengthening their ability to rely on collective action and by empowering unions. The Court has built a strong jurisprudence protecting the procedural rights of workers, thus equalizing the otherwise generally imbalanced relationship between the employer and the individual worker. However, that jurisprudence has been forced to navigate between the protection of the rights of individual workers, including the right not to join a union, and the protection of the rights of unions as such, whose ability to act effectively may justify restrictions to individual workers' rights. It is the search for a balance between these two imperatives that explains how the case-law has developed, and why it has been doing so with so much hesitation.

III. The procedural route: the union rights of workers under the European Convention on Human Rights

1. Workers' rights and unions' rights in European human rights law

The position of the European Court of Human Rights in the area of union rights may be conceptualized as having shifted along a spectrum of solutions. At one end of that spectrum (the individualistic end), *individual workers' rights* would be paramount, and any form of collective action or any possibility for unions to force employers to agree to collective bargaining would depend on whether they manage to mobilize individual workers into exercising pressure -- and the employer, reciprocally, could use any incentives he might choose to avoid workers from coalescing and to refuse to dialogue with unions. At the other end of the spectrum (the collectivist end), the rights of workers would be seen to require for their effective protection that *unions' rights* be strengthened, as it is only

⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (orig. London, 1776), Book I, chapter viii.

⁹ *Hitchman Coal & Coke Co. v. Mitchel, et al.*, 245 U.S. 229, 263 (1917) (Brandeis, J., dissenting, with Holmes and Clark, JJ., concurring with the dissent).

through collective representation at all levels, including at the level of the undertaking, that workers can improve their bargaining position: in this alternative logic, the individual rights of workers (including their right not to join unions and their right to opt out from the regimes established through collective bargaining) could be sacrificed in order to allow the unions' prerogatives to be maximized.

The Court has chosen a middle route in its interpretation of Article 11 of the European Convention on Human Rights, that guarantees the right to form and join unions. On the one hand, departing from the original intent of the drafters of the Convention, it has gradually espoused the view their right to organize implied a right for workers not to join a union. This resulted in excluding closed-shop agreements. The Court was moved to such a solution largely on the basis of the European Social Charter and the case-law of its supervisory organs, as well as by reference to other European or universal instruments, that demonstrate an emerging consensus at international level on the need to protect the negative aspect of the freedom of association. This was a gradual shift, that began with *Young, James and Webster* in 1981 and was confirmed in judgments of the 1990s.¹⁰

On the other hand however, the Court did recognize the limits of a purely individualistic logic. In its extreme form, such a logic essentially would lead the relationships between employers and unions to resemble a "struggle for life" -- a brute clash of competing forces seeking to coerce each other into making certain concessions¹¹ --. Some cases suggest that the Court is relatively tolerant when such a struggle turns in the advantage of the workers. In the 1996 case of *Gustafsson v. Sweden* for instance, where a restaurant owner was finally obliged to close his business because of a union boycott against him to force him to join a collective agreement, the Court acknowledges that 'although compulsion to join a particular trade union may not always be contrary to the Convention, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 will constitute an interference with that freedom' and that therefore 'national authorities may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association'.¹² However, since the restaurant owner in that case was being

¹⁰ See *Sibson v. the United Kingdom* judgment of 20 April 1993, Series A no. 258-A, para. 27; *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, para. 35, Series A no. 264; and Eur. Ct. HR (GC), *Sørensen and Rasmussen v. Denmark* (Appl. Nos. 52562/99 and 52620/99), judgment of 11 January 2006, §§ 72-75 (finding that the fact that the applicants had been compelled to join a particular trade union struck at 'the very substance of the right to freedom of association guaranteed by Article 11', the Court found that Denmark had not protected the negative right to freedom of association, noting that 'there is little support in the Contracting States for the maintenance of closed-shop agreements' and that several European instruments 'clearly indicate that their use in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms' (para. 75).

¹¹ That was, in substance, the position advocated by Justice Brandeis in the *Hitchman Coal & Coke Co.* case, where he defended the view that unions should not be prohibited from exercising pressure on an employer to abandon his practice of imposing non-unionization as a condition for employment. He saw the confrontation between the employer and the union as one in which two freedoms were exercised, aiming at opposite objectives, and without any one of the parties having any duty towards the other. In exercising collective action in order to force the employer to open his company to unionized workers, Brandeis noted, the unions were not 'coercing' the employer in a legal sense. For 'coercion' in that sense 'is not exerted when a union merely endeavours to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in the legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the [company's] whole case is rested upon agreements [i.e., employment contracts including a 'non-unionization' clause] secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a close non-union shop. The employer may sign the union agreement for fear that *labor* may not be otherwise obtainable; the workman may sign the individual agreement for fear that *employment* may not be otherwise obtainable. But such fear does not imply coercion in the legal sense' (*Hitchman Coal & Coke Co. v. Mitchel, et al.*, 245 U.S. 229, 263 (1917) (Brandeis, J., dissenting, with Holmes and Clark, JJ., concurring with the dissent)).

¹² Eur. Ct. HR, *Gustafsson v. Sweden* (Appl. No. 15573/89), judgment of 25 April 1996, para. 45. Rights other than freedom of association may also call for the adoption of measures of protection by the State in the

pressured by industrial action not to join an association, but rather to conclude a collective agreement (that could be tailored to the specific conditions of his business), the Court considered that the State had not exceeded its margin of appreciation by refusing to prohibit the blockade and boycott against the restaurant, and thus protecting the alleged right of the restaurant owner to conclude only individual contracts of employment with his (seasonally recruited) employees : strictly speaking, the right of the restaurant owner not to be forced to become a member of an association was entirely preserved.¹³

The individualistic logic meets its limit once it leads to what might be called the commodification of the right of the individual worker to be represented by a union or to resort to collective action. While the Court recognizes in principle that the worker should have a right to choose whether or not to join a union, it does require State authorities to intervene in situations where an employer aims to discourage workers from unionization by using financial incentives: the promise of financial rewards is seen as an unacceptable way to seek to influence the worker's choice, which should be untainted by such incentives. In the 2002 case of *Wilson, National Union of Journalists and Others v. the United Kingdom*, the workers were offered by their employers to sign a personal contract and lose union rights, or accept a lower pay rise: in other terms, an employer could under British law offer higher wages to workers in order to encourage them to not join the union and not be represented by the union in collective bargaining schemes. This was in effect undermining the ability for the unions to represent the workers effectively. The Court noted that 'it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers'.¹⁴ It concluded that Article 11 ECHR had been violated since

... it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, ... domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.¹⁵

In other terms, although workers have a freedom not to join a union, which excludes closed shop agreements, the employer must be enjoined from pressuring how that freedom is exercised, by inducing workers through financial means to prefer the negotiation of individual contracts of

employment relationship : see, e.g., Eur. Ct. HR (GC), *Palomo Sánchez and Others v. Spain* (Appl. No. 28955/06, 28957/06, 28959/06 and 28964/06) judgment of 12 September 2011 (freedom of expression).

¹³ The Court noted that States parties to the Convention has a wide margin of appreciation in this regard. See Eur. Ct. HR, *Gustafsson v. Sweden*, judgment of 25 April 1996, para. 45 ('In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining, and the wide degree of divergence between the domestic systems in the particular area under consideration, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed').

¹⁴ Eur. Ct. HR (2nd sect.), *Wilson, National Union of Journalists and Others v. the United Kingdom* (Appl. nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002, § 46.

¹⁵ *Id.*, para. 47.

employment to collective representation through the union. Indeed, allowing the employer to use such means would destroy the ability for unions to exercise their core function -- i.e., to represent the collective views of the workers who chose to join the union seek, through the union, to strengthen their bargaining position vis-à-vis the employer. When, in 2008, the Court for the first time recognized the right to collective bargaining under the European Convention on Human Rights in the case of *Demir and Baykara* -- a right it had been reluctant to accept in the past¹⁶ --, this position of the Court -- opposed to the commodification of union rights -- was implicitly further confirmed.¹⁷ For how would a union be able to effectively persuade an employer to enter into collective bargaining, if the employer may simply bribe workers to opt for individual contracts of employment instead?

In sum, the trajectory of the Court's case-law has been to move from an approach that initially allowed for the unions to protect the rights of workers by obtaining 'closed shop' agreements (the reverse, in a way, of 'yellow dog' contracts imposed by the employer on prospective workers), to an approach that now ensures that unions can defend the interests of workers by collective bargaining -- but leaving it free to workers to choose whether or not to join the unions purporting to represent them. The Court has never situated itself at the 'collectivist' end, in which only the positive freedom to join unions would be recognized and in which collective bargaining would be guaranteed, both benefiting unions even at the expenses of workers' freedom to choose ; but the 'individualist' parenthesis that was opened in the early 1990s was closed in 2002 with *Wilson and others* and in 2008 with *Demir and Baykara*. This evolution may be summarized as follows :

	A. No right to collective bargaining	B. Right to collective bargaining
1. Freedom to form and join unions, but no 'negative' freedom not to join unions	A1 Initial position of the court (phase 1, until recognition of the negative freedom of association in 1980s)	B1 'Collectivist' approach to the protection of workers' rights: solution encouraging representation of these rights through the unions
2. Freedom both to form and join unions, and 'negative' freedom not to join unions	A2 'Individualist' approach to workers' rights: both employers and unions seek to gain workers' loyalty, using various incentives at their disposal - position adopted by the Court in the 1990s, until <i>Wilson and Others</i> confirmed limits to the possibility for employers to resort to financial incentives (phase 2)	B2 Current position of the Court (phase 3)

While they have evolved over time, these procedural safeguards guarantee the right of workers to act through unions and recognize certain rights to the unions themselves. But should such safeguards be

¹⁶ See, for instance, *National Union of Belgian Police v. Belgium*, 27 October 1975, § 39, Series A no. 19; *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, §§ 34-35, Series A no. 21; the *Swedish Engine Drivers' Union v. Sweden* judgment of 6 February 1976, Series A no. 20, pp. 15-16, §§ 39-40 (noting that 'While the concluding of collective agreements is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests'); or, more recently, *Francesco Schettini and Others v. Italy* (dec), no. 29529/95, 9 November 2000; and *UNISON v. the United Kingdom* (dec.), no. 53574/99, ECHR 2002-I; and in the *Wilson, National Union of Journalists and Others v. the United Kingdom* judgment of 2 July 2002 (nos. 30668/96, 30671/96 and 30678/96, § 44.

¹⁷ Eur. Ct. HR (GC), *Demir and Baykara v. Turkey* (Appl. No. 34503/97) judgment of 12 November 2008, § 154 ('... the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions').

seen as a substitute for the protection of the substantive rights of workers, restricting the ability for employers to impose certain restrictions to the rights of workers in the employment relationship? We may in principle imagine a situation in which, without prejudging the outcome, the State simply discharges its duty to protect fundamental rights in the employment relationship by ensuring that the workers may form unions, and unions resort to collective action, in order to compensate for the imbalance between the employer and the individual worker in the negotiation of the said contract. An interesting question would be whether, following this procedural approach, the recognition by the Court of a fully "collectivist" solution -- tolerant of 'closed shop' agreements where the unions manage to obtain such agreements, and recognizing that the right to collective bargaining is an essential component of the freedom to form and join unions for the defence of workers' interests (B1) -- would suffice to justify a 'hands-off' attitude of the Court with respect to the substantive rights of workers that could be affected in the employment relationship. In other terms, to which extent would the ability of the worker to be represented by unions in the negotiation of working conditions lead the Court to trust the result of that bargaining process, without assessing in substantive terms the compatibility of the agreement reached? Is it enough to strengthen the bargaining position of workers, without also assessing the outcomes of the negotiation concerning the conditions of employment?

That question must remain, for the moment, a theoretical one. The Court has remained shy from moving to B1 (the fully 'collectivist' solution). It has instead sought to achieve a balance between the individual rights of workers and the rights of unions as their representatives. Unions are recognized certain rights under the Convention, and workers are therefore not unable to organize, and to pursue the defence of their rights collectively, including by resorting to industrial action and by entering into collective bargaining. By recognizing these rights and by protecting workers from measures adopted by employers that would negate them (as illustrated by the case of *Wilson and Others*), the States parties are providing certain means to the workers to defend their interests. At the same time however, each individual worker has the right not to join a union and thus, may choose not to be represented by the union in the negotiation of working conditions: provided that choice is not distorted by financial incentives, it is a choice that must be respected. It is in that sense that the position of the Court is an intermediate one, that cannot be seen as a substitute for assessing whether the substantive rights of the workers are respected in the employment relationship.

2. The strength of unions in contemporary Europe

The procedural route in any case may be insufficient. That is not only because 'closed shop' agreements recognizing the unions, in effect, a monopoly in the representation of workers, are seen as an interference with the (negative) freedom of association of employees, thus denying unions a monopoly in the representation of workers' interests. It is also because employment contracts are increasingly individualized -- leading to a myriad of kinds of employment, with highly variable levels of security, being proposed to the worker¹⁸ --: in that context of increasingly flexibilized and casualized forms of employment, collective action through unions is an option that cannot be seen as a substitute for the protection of the basic rights of the worker in the employment relationship.

Indeed, the strength of social dialogue and, thus, the ability for collective bargaining to effectively protect the worker from the imposition of conditions of employment that might lead to a sacrifice of his fundamental rights, vary significantly from country to country. In the EU-27 for instance, about two thirds of the workers are covered by collective agreements, but the coverage rate is much higher in Austria, Belgium, Slovenia, Sweden, France and Finland, all countries where 90 % or more of workers are covered by a collective agreement, than in the Baltic States where this applies only to a quarter of

¹⁸ On this evolution, see in particular Robert Castel, *La montée des incertitudes. Travail, protections, statut de l'individu*, Paris, Seuil, 2009; and Robert Castel, *Les métamorphoses de la question sociale. Une chronique du salariat*, Fayard, 1995 (esp. the conclusions, where he discusses the current evolution of waged employment as "negative individualism", that is the result of the individual worker being "subtracted" from his membership into groups).

all employees or less.¹⁹ The member States having acceded to the EU in 2004 have generally much lower collective bargaining coverage rates than the 'older' member States : with the exception of Slovenia and Romania, all of the 'new' Member States have collective bargaining coverage rates of around 50% or less. The following graph illustrates these discrepancies :

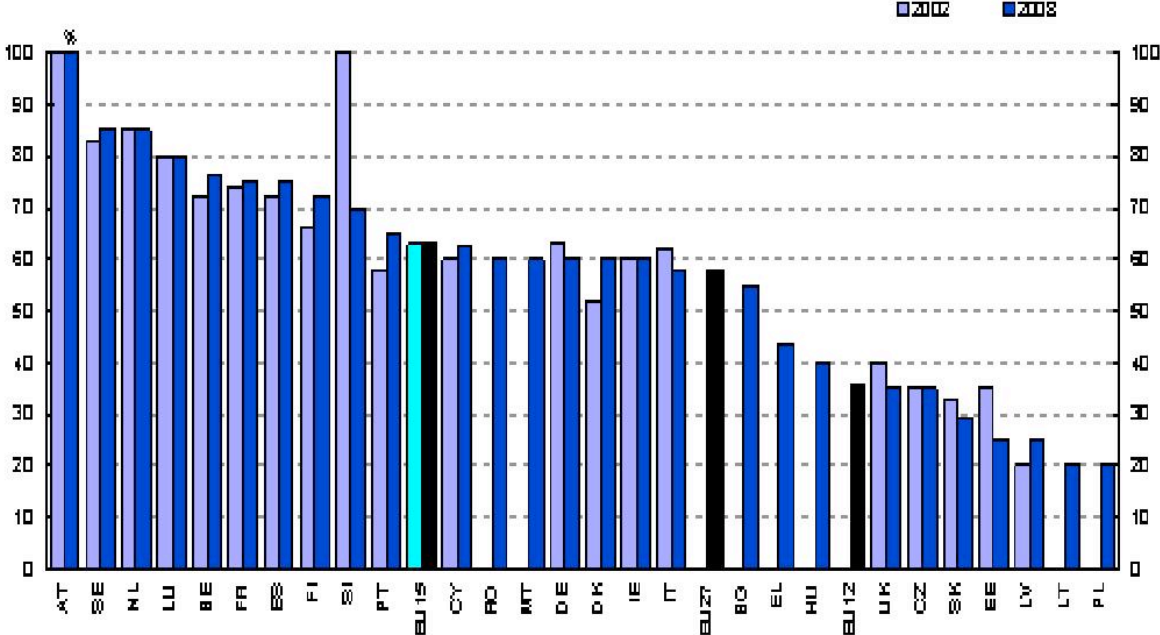


Fig. 1. Bargaining coverage rates by country, 1997/1999 and 2007/2009, Source: European Commission, *Industrial Relations in Europe 2010* Report, MEMO/11/134 of 3.3.2011 (chart prepared on the basis of J. Visser, ICTWSS database 3.0, 2010).

The insufficiency of a purely procedural approach to the protection of the fundamental rights of workers -- that would protect rights to form and join unions and, for unions, to enter into collective bargaining -- also results from the relatively weak rate of unionization in some EU member States. This provides a further indicator of the individualization of the employment contract and of the relative inability of unions to effectively intervene on behalf of the workers whom they purport to represent.

¹⁹ European Commission, *Industrial Relations in Europe 2010* Report, MEMO/11/134 of 3.3.2011.

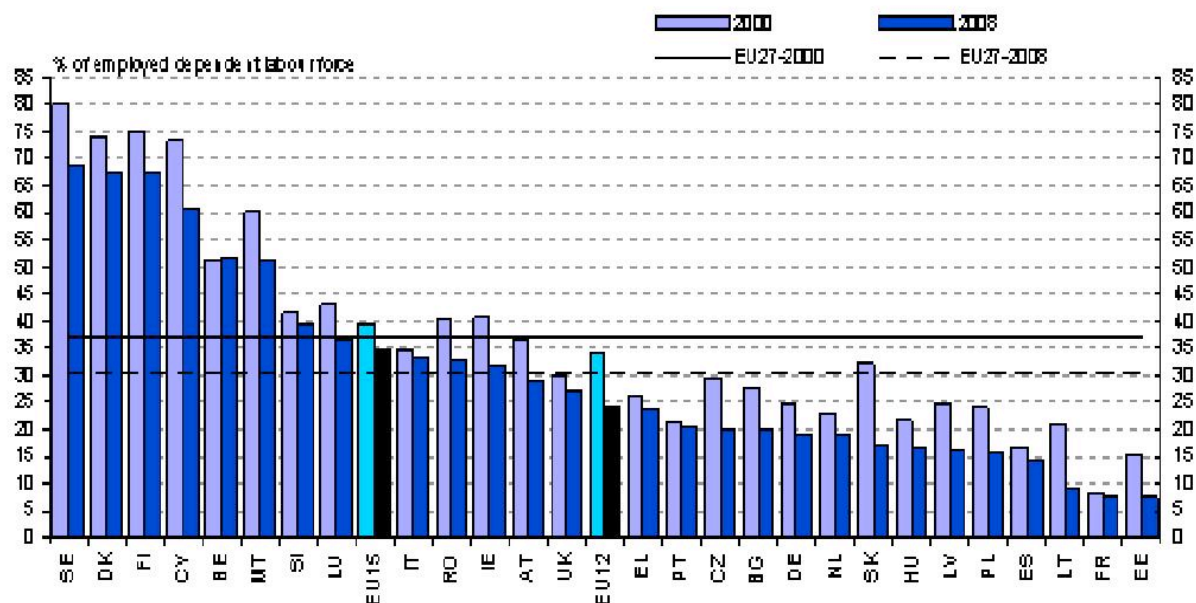


Fig. 2. Union density by country, 2000-2008, Source: European Commission, *Industrial Relations in Europe 2010 Report*, MEMO/11/134 of 3.3.2011 (chart prepared on the basis of J. Visser, ICTWSS database 3.0, 2010).

These figures concerning the degree of unionization or the coverage of collective agreements in EU Member States provide another demonstration that, taken alone, the procedural route would be insufficient to adequately protect the rights of workers: unions, in short, are often not in a position that is sufficiently strong to justify a courts using only a low level of scrutiny of the restrictions to the fundamental rights of workers. For these rights to be effectively protected, something more is required: an understanding of how the rights of the Convention other than the freedom to form and join unions can be invoked in the context of employment relationships. Indeed, the other route through which the fundamental rights of workers could be protected in the employment relationship is to regulate that relationship directly, in order to ensure that the human rights of workers are fully preserved, and that the employer does not abuse his dominant position by imposing restrictions to these rights that go beyond what the nature of the employment requires. It is to this second route -- substantive, rather than procedural -- that we now turn.

IV. The substantive route: transposing human rights from the State to the employer

How should the rights and freedoms guaranteed in the European Convention on Human Rights be applied to the employment relationship? By which techniques should provisions, designed to be invoked in the context of the 'vertical' relationships between the State and the citizen, by transposed to 'horizontal' relationships between private parties? One obvious possibility -- by now the most commonly adopted by the member States of the Council of Europe²⁰ -- is to apply directly the rights and freedoms of the European Convention on Human Rights to the interindividual relationships, that

²⁰ See, for studies comparing the status of the European Convention on Human Rights in different national legal orders, Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe. The ECHR and Its Member States, 1950-2000*, Oxford Univ. Press, 2001; Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford Univ. Press, 2008.

is, to empower domestic courts to adjudicate private law disputes on the basis of the substantive guarantees of the Convention. This is the option sometimes referred to as 'direct third-party applicability' of human rights, by reference to the theory of '*unmittelbare Drittwirkung*' originally developed in Germany to justify the reliance, especially in labor disputes, of the fundamental rights of the German Basic Law.²¹

But such a transposition is not necessarily easy to effectuate. In part, this is because national courts receive relatively little guidance from the European Court of Human Rights in this regard, as the role of a regional jurisdiction ensuring compliance of States with their human rights obligations in the international legal order are quite different than the role of domestic courts in seeking to achieve a balance between conflicting rights or interests of individuals in private disputes.²² But this is not simply a problem of framing -- of how issues are presented to the judge in private law adjudication and in the international legal process respectively. It is, more fundamentally, a problem at substantive level. Human rights were originally designed to protect the individual from the power of the State, and their regime is deeply marked by that initial purpose. With the exception of some rights, of marginal significance for the employment relationship, restrictions to rights are allowable, provided the limitations imposed comply with certain conditions: that is the case for instance, under the European Convention on Human Rights, for the right to respect for private and family life, freedom of religion, freedom of expression, or the freedom to form and join unions. But those conditions are defined with the regulatory and executive powers of the State in mind, and the regime applicable to the 'vertical' relationship between the individual and the State may therefore not always be easily transposable, *mutatis mutandis*, to the 'horizontal' relationship between private individuals.

1. A legitimate aim

Consider first the condition of legitimacy, which imposes on the State that it always ground the restrictive measures it adopts on a legitimate objective. It is of course the duty of the State to act in the public interest, and it is the duty of courts to ensure that, in imposing restrictions on human rights, it remains faithful to what the public interest requires. In contrast, individuals pursue a variety of aims, and it would violate an elementary principle of moral pluralism to impose on all individuals that they only act in accordance to some predefined notion of what serves the common good. Hence, the condition according to which restrictions to the rights of the individual may only be justified if they are based on the pursuit of a legitimate aim is generally of little use in relationships between private parties.

However, the employment context deserves a specific comment in this regard. In principle, employers acting in the context of the employment relationship, should have in mind their fiduciary duty to the shareholders, and they should aim therefore at maximizing profits and minimizing costs. Whether or not a particular employer acts according to such 'business necessity' should be ascertainable by the judge, and only exceptionally should it be allowable for the employer to put forward other objectives

²¹ See H.C. Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts, I*, Tübingen, Mohr Siebeck, 1952, pp. 53 and ff. ; W. Leisner, *Grundrechte und Privatrecht*, München-Berlin, Ch Beck'sche Verlagsbuchhandlung, 1960, 414 pages ; and, for an examination of how the German courts have applied this approach, K.M. Lewan, 'The Significance of Constitutional Rights for Private Law : Theory and Practice in West Germany', *International and Comparative Law Quarterly*, vol. 17 (1968), p. 571; Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, Duncker & Humblot: Berlin (2000), pp. 26-28.

²² For this reason, Andrew Clapham has taken the view that 'Drittwirkung is not helpful at the international level. The European Court of Human Rights is not seeking to harmonise constitutional traditions but to ensure international protection for the rights contained in the Convention. Key questions in Drittwirkung doctrine are the weight to be given to different rights such as: the right to free development of the personality, the right to work, the right to strike, the right to property, freedom of conscience, the right to equality, the right to free enterprise, and the right to freedom of contract. Drittwirkung theories which are based on the presence of social power or the sanctity of freedom of contract (protected under Article 2 of the German Basic Law) cannot really help to solve the international protection of the rights found in the European Convention on Human Rights' (Andrew Clapham, *Human Rights in the Private Sphere*, Oxford : Clarendon Press, 1993, at 181-182).

to justify imposing restrictions to the rights of workers. Thus, the sphere of employment, just like market relationships in general,²³ may in principle be seen to occupy an intermediate position, between the public sphere (in which the State seeks to fulfil the public interest) and the private sphere (in which individuals are free to make choices that correspond to their beliefs and convictions, whether or not these are aligned with those of the majority): the nature and scope of the restrictions that the employer may impose on the individual worker should depend, not on the subjective preferences or 'tastes' of the employer, but on the necessities of the undertaking.

But that apparently simple criterion -- 'business necessity' -- may be difficult to apply in practice. First, the conduct of an employer based exclusively on what is objectively in the interest of the business enterprise may lead to defer to the 'tastes' of the public, that may be tainted by social norms and discriminatory attitudes.²⁴ It would not be acceptable for an employer, or for any other market actor, to adopt decisions on the basis of such illegitimate motives, for instance by refusing to recruit an employee who would be in contact with the clientèle from which hostile reactions are feared, or who may not be welcome by his colleagues.²⁵ That was one of the issues at stake in the case of *Feryn* presented to the European Court of Justice under the EU's Race Equality Directive.²⁶ A representative of the Feryn NV company had publicly asserted that his firm would not recruit persons of Moroccan origin, and the Court of Justice was asked whether this constituted a form of discrimination prohibited by the Directive. One of the arguments of the company was that, since the recruitment was for fitters to install up-and-over doors at the customers' houses, the distaste customers had for Moroccans could be a factor in recruitment decisions. In response, Advocate General Poiares Maduro noted that 'The contention made by Mr Feryn that customers would be unfavourably disposed towards employees of a certain ethnic origin is wholly irrelevant to the question whether the Directive applies. Even if that

²³ Indeed, in market relationships, the roles of each individual (and thus the conditions that such an individual may force another party to accept in their mutual relationships) are in principle defined by the nature of the transaction between them. As noted by Hüseyin Özel, this explains the "de-humanizing" aspect of the market: 'since an "individual in the market" must behave only on the basis of the hope of gain or fear of hunger (or pain and pleasure for that matter), he is forced to be reduced to an individual who lacks "depth", as we ordinarily use this metaphor for people'; we must behave in the market, that is, as 'shallow Utilitarians', 'by identifying hunger and profit as the only two motives that guide our lives' (H. Özel, *Reclaiming Humanity: The Social Theory of Karl Polanyi*, Ph.D. dissertation, Univ. of Utah, 1997, pp. 54-5). It is this characteristic of market relationships that explains why the anti-discrimination law can generally apply to such relationships, when it would be more difficult (and highly contestable with regard to the exigences of the right to respect for private life) to apply the prohibition of discrimination, for instance, to the choice of friends whom X invites for a party at home, or to whom Y chooses to become a member of a private association. Thus, when the question was asked, in the context of the negotiation of Protocol No. 12 to the European Convention on Human Rights, of the scope of application of the principle of non-discrimination that States parties were committed to enforce under the protocol, the answer was that 'any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc).' (Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 Nov. 2000, para. 28). These are domains where private preferences should not be allowed to matter: they are "semi-public", rather than just "private".

²⁴ See, e.g., Cass Sunstein, 'Why Markets Won't Stop Discrimination', *Social Philosophy and Policy*, vol. 8 (1992), p. 21 (reproduced in *Free Markets and Social Justice*, Oxford Univ. Press, Oxford, 1997).

²⁵ See, per analogy, concerning homophobia in the armed forces of the United Kingdom, that the British government was invoking as a justification for excluding gays from the army, the position of the European Court of Human Rights according to which: '...these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour' (Eur. Ct. HR (3rd sect.), *Smith and Grady v. the United Kingdom* judgment of 27 September 1999, para. 97).

²⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

contention were true, it would only illustrate that ‘markets will not cure discrimination’ and that regulatory intervention is essential. Moreover, the adoption of regulatory measures at Community level helps to solve a collective action problem for employers by preventing the distortion of competition that – precisely because of that market failure – could arise if different standards of protection against discrimination existed at national level.²⁷ The Court apparently agreed, finding the answer too obvious to deserve an explicit discussion of the argument.²⁸

The *Feryn* case illustrates that we cannot trust the market to ensure that irrational behavior, tainted by prejudice, shall be "filtered out" simply through competitive pressure, as in the fantasized world of some neo-classical economists or law and economics scholars.²⁹ Rather, the market registers preferences: it functions as a receptacle for social norms and tastes. It would therefore not be consistent with the requirements of human rights in employment that "business necessity" should always provide the baseline from which to assess the acceptability of certain restrictions to workers' rights. The duty of courts, rather, is to screen out those motives: they must ensure that the motives invoked by business actors are not tainted by social norms or result in arrangements that lead to the exclusion of certain individuals because of certain characteristics they present, unless such characteristics are strictly related to the requirements of the post.

Indeed, even that may not be sufficient. There exists a right to work in international human rights law, variously described as imposing on States a duty to formulate and implement an employment policy with a view to “stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment”,³⁰ or to adopt "effective measures to increase the resources allocated to reducing the unemployment rate, in particular among women, the disadvantaged and marginalized".³¹ A core obligation of States in this regard -- one that States must comply with even if they face important resource constraints -- is to ensure non-discrimination and equal protection of employment, and thus in particular to ensure "the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity".³² It follows again that "business necessity" alone is not sufficient, if that leads to take as given certain routine ways of organizing the workplace, of recruiting the workforce, or of defining the tasks of the individual workers, that result in excluding certain categories of workers (or potential workers) and prohibiting them from acceding to employment or from realizing their full potential within the organization.

Indeed, it is this that the notion of "reasonable accommodation" seeks to convey. At EU level, the notion has been codified in the 2000 Employment Equality Directive, as a means to favor equality of treatment of persons with disabilities.³³ At international level, 'reasonable accommodation' is referred

²⁷ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, [2008] ECR I-5187. In his opinion, AG Poiares Maduro cites the work of Cass Sunstein referred to above.

²⁸ For comments, see Rüdiger Krause, *Common Market Law Review*, vol. 47 (n° 3) (2010), pp. 917-931; or Laetitia Driguez, 'Lutte contre les discriminations à l'embauche fondées sur la race ou l'origine ethnique', *Europe*, octobre 2008, comm. n° 321, pp. 27-28.

²⁹ See in particular Gary Becker, *The Economics of Discrimination*, Chicago Univ. Press, 2nd ed. 1971 (orig. 1957); or Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Harvard Univ. Press, 1992.

³⁰ ILO Convention (No. 122) concerning Employment Policy, 1964 (entered into force on 15 July 1966), article 1, paragraph 1.

³¹ Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights) (2005), UN doc. E/C.12/GC/18 (6 February 2006), para. 26.

³² *Id.*, para. 31.

³³ See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16 (reasonable accommodation 'means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer').

to in the Convention on the rights of persons with disabilities, where it is defined as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.³⁴ As a legal requirement, reasonable accommodation has its source in attempts to reconcile freedom of religion and the requirement of equal treatment of persons with disabilities, on the one hand, with occupational requirements, on the other hand. Its defining feature is that it requires that laws, regulations or practices that may lead to indirect discrimination against certain groups, or that may create obstacles to certain individuals having access to certain jobs or exercising certain responsibilities, be re-assessed in order to eliminate that impact wherever possible without imposing on the employer an 'undue burden'.³⁵ The 'constraints' of the employer are not fixed, or immutable: they are plastic, and it is this plasticity that the employee, or the prospective employee, may insist on, in requesting that his or her rights be accommodated within the organisation of the workplace. That is not to say that the positive duty of the employer to rearrange the policies of the enterprise is without limits: it must be understood reasonably, and in particular it should not impose on the employer costs that would be disproportionate to the need to ensure an inclusive working environment.³⁶ However, despite this limitation, the notion is a promising one. It could be made to serve not only to promote the integration of persons with disabilities, but also, more broadly, to ensure that the 'right to work' becomes a reality for all those who -- whether or not as a consequence of a disability or a religious belief -- present certain 'differences' that may create

³⁴ Convention on the Rights of Persons with Disabilities (adopted by the UN General Assembly in A/RES/61/106 on 13 December 2006, entered into force on 3 May 2008), 2515 U.N.T.S. 3. Art. 5(3) of the Convention includes the duty to provide reasonable accommodation as included in the prohibition of discrimination: "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided".

³⁵ The leading case was *Eldridge c. British Columbia*, (1997) 3 S.C.R. 624, decided by the Supreme Court of Canada. The appellants in that case were born deaf and their preferred means of communication was sign language. They argued that it followed from the requirement of equality that they should be provided sign language interpreters as an insured benefit under the Medical Services Plan. They relied on s. 15(1) of the Canadian Charter of Rights and Freedoms, which provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. Having failed to obtain a declaration to that effect in the Supreme Court of British Columbia, they then appealed to the Supreme Court of Canada, contending that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment. The Canadian Supreme Court agreed, noting: 'The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. [...] It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"' (paras. 78-79). See also, for an example concerning freedom of religion, *Multani v. Commission scolaire Marguerite-Bourgeoys*, (2006) 1 S.C.R. 256.

³⁶ In the United States, Title VII of the Civil Rights Act of 1964 provides that an employer must *reasonably accommodate* an employee's religious beliefs and practices unless doing so would cause "undue hardship on the conduct of the employer's business." The notion of 'undue hardship' that appears under this legislation has been interpreted in a way that is particularly generous to the employer, as illustrated by the leading case of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (in which the Supreme Court ruled that an employer need not incur more than minimal costs in order to accommodate an employee's religious practices). According to the Equal Employment Opportunity Commission (EEOC), an employer can deny a requested accommodation if it can demonstrate that it causes it an undue hardship where accommodating an employee's religious practices would require anything more than ordinary administrative costs; would diminish the efficiency in other jobs; would infringe on other employees' rights or benefits; would impair workplace safety; would cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work; or if the proposed accommodation conflicts with another law or regulation. That is a particular restrictive reading of the duties of the employer to provide reasonable accommodation of the employee's religious beliefs.

obstacles to their employment.³⁷ Indeed, even notions that are apparently beyond reproach -- such as "merit", "qualifications", or "ability to perform the job" -- in fact can turn out to be highly contestable once it is realized that their definitions depend on certain preconceived ways of organizing the workplace or of performing the job.

Finally, there is a third reason why the question of which objectives the undertaking may legitimately pursue -- allowing it to impose certain restrictions on the rights of its employees -- may be difficult to answer. Some organisations pursue objectives that go beyond profit-making or that are distinct from profit-making, and they may insist on the fact that the message they wish to convey to the public would be blurred if they were forced to include within their workforce workers whose conduct could be seen as contradicting their advocacy. That is the specific situation of churches or other organizations whose ethics is based on religion or on (non religious) convictions, or of advocacy organizations such as political parties, trade unions, or media, that promote a certain political message.

In agreement in this regard with the EU legislator,³⁸ the European Court of Human Rights has recognized that employees of such organisations may be subject to particular restrictions, in order to ensure that their responsibilities within the organisation shall not put in jeopardy the possibility for such organisations to disseminate their message. The leading judgment adopted on 4 June 1985 by the German Federal Constitutional Court (*BundesVerfassungsgericht*) provided the model for this doctrine. There, the German Federal Constitutional Court was asked to decide whether a doctor employed by a catholic hospital who has publicly expressed views favorable to the freedom to seek abortion, and an employee of a youth club established by a catholic monastic order who had left the catholic church, could be laid off by the churches by which they were employed. Overruling the labour courts, the Federal Constitutional Court considered that they could.³⁹ It based its judgments on the right recognized to the churches under Article 137 § 3 of the 1919 Weimar Constitution to freely regulate matters pertaining to their internal functioning -- what the Court calls their right to self-determination, or *Selbstbestimmungsrecht* --, a freedom that, in the Court's view, also extends to the conclusion of employment contracts. While this did not entirely remove the employment relationship between the Church and its employees from the protection of labour law when churches exercise their contractual freedom (*Privatautonomie*), and while it did not allow the Church to impose on its employees arbitrary and disproportionate restrictions to their constitutionally protected freedoms, or conditions contrary to good morals and public policy, it did imply the right for the churches to impose on its employees certain conditions of loyalty, that the Court sees as a condition of credibility for the Church.⁴⁰

³⁷ The scope of the requirement to provide reasonable accommodation and, in particular, its meaning in the context of alleged religious discrimination in the workplace, shall be central to four cases pending before the European Court of Human Rights at the time of writing: *Nadia Eweida and Shirley Chaplin v. the United Kingdom* (Appl. No. 48420/10 and 59842/10); and *Lillian Ladele and Gary McFarlane v. the United Kingdom* (Appl. No. 51671/10 and 36516/10) (concerning the right to wear visibly a crucifix on a neck-chain when in uniform at work). For the decisions adopted by the domestic courts in these cases, see *London Borough of Islington v. Ladele*, (2009) EWCA Civ. 1357 (Court of Appeal, 15 December 2009); *McFarlane v. Relate Avon Ltd.*, (2010) EWCA Civ. B1 (Court of Appeal, 29 April 2010); *Eweida v. British Airways plc*, (2010) EWCA Civ. 80 (Court of Appeals, 12 February 2010); and *Chaplin v. Royal Devon & Exeter Hospital NHS Foundation Trust*, (2010) ET 1702886/2009 (Employment Tribunal, 21 April 2010).

³⁸ See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, cited above, Art. 4 § 2 (providing that the EU Member States may provide that, 'in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos': such organisations therefore may be authorized to require individuals working for them 'to act in good faith and with loyalty to the organisation's ethos').

³⁹ Cases nos 2 BvR 1703/83, 1718/83 et 856/84, *BVergG*, vol. 70, pp. 138-173.

⁴⁰ Churches may in that regard rely on Article 2 § 1 of the German Basic Law (*Grundgesetz*, initially promulgated on 23 May 1949), that stipulates that 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the

Following those judgments, the European Commission on Human Rights approved the position of the German Federal Constitutional Court concerning the case of the doctor employed in a catholic hospital : it referred in that regard to the need to respect the freedom of expression of the Church under Article 10 of the European Convention on Human Rights, essentially ensuring that such freedom of expression would guarantee churches the same freedom than that recognized under the *Selbstbestimmungsrecht* guaranteed under the German Constitution.⁴¹ The recent case-law of the European Court of Human Rights appears to confirm that approach. In *Obst v. Germany* for instance, the Court agreed with the German courts that an employee of the mormon Church in charge of public relations, who had confessed to his superiors to having committed adultery and had sought their help in this regard, could be dismissed, because adultery is considered by the mormon faith to be among the worst sins: the Court noted that the rights of the mormon church under Articles 9 and 11 of the European Convention on Human Rights (respectively guaranteeing freedom of religion and freedom of association) should be balanced against the right of the employee to respect for his private life (under Article 8 of the Convention), and that in the case in question, the German courts may not be said to have acted unreasonably.⁴²

At the same time, it is important to insist on the limits of this case-law. First, the Court does not abandon the requirement of proportionality between the objective that the church seeks to achieve by imposing a requirement of 'loyalty' on its employees, and the degree of the restrictions imposed on the employee's rights: instead, the Court links the acceptability of such restrictions to the fact that an employee openly adopts a behaviour that would run counter to the message of the Church and might damage its credibility.⁴³

Second, in contrast to the views expressed by the European Commission on Human Rights in the *Rommelfanger* case, the Court does not rely on the freedom of expression of the employer to convey a message to the general public, based on Article 10 of the Convention. Instead, the Court explicitly notes in *Obst* that it takes into account the specific nature of the occupational requirements imposed by an employer whose ethos is based on religion or convictions. And it cites in this regard the provisions of the Convention that protect freedom of religion and freedom of association (articles 9 and 11, respectively), as well as Article 4 of the EU Employment Equality Directive, which is limited to churches or organisations whose ethos is based on a religion or on (non-religious, philosophical) convictions.⁴⁴ Therefore, the judgment of the Court should not be interpreted as automatically extending to employers who want to convey a message, for instance, opposed to extra-marital relationships or in favor of tolerance towards migrants, that would justify them in excluding employees who commit adultery or who express intolerant views, outside the specific situation where the employer is an organisation whose ethos is based on religion or convictions.⁴⁵

moral law.' In the case of churches, this right to self-determination is defined by Article 137 § 3 of the Weimar Constitution, which Article 140 of the 1949 Basic Law refers to (by stating that the articles of the Weimar Constitution relating to religious societies (*Kirchernartikel*) remain valid).

⁴¹ Eur. Comm. H.R., Appl. No. 12242/96, *M. Rommelfanger v. Federal Republic of Germany*, dec. of 6 September 1989, *D.R.*, vol. 62, p. 151, p. 171.

⁴² Eur. Ct. HR (5th sect.), *Obst v. Germany* (Appl. No. 425/03), judgment of 23 September 2010, paras. 51-52. See also, for instance, Eur. Ct. HR (5th sect.), *Siebenhaar v. Germany* (Appl. No. 18136/02), judgment of 3 February 2011, para. 46 (concerning the dismissal of the applicant from her job as educator in a kindergarten set up by the Protestant Church, after her employer learned about her activities within the Universal Church, to which the applicant had vowed obedience: 'La Cour note que la nature particulière des exigences professionnelles imposées à la requérante résulte du fait qu'elles ont été établies par un employeur dont l'éthique est fondée sur la religion ou les convictions (...). A cet égard, elle estime que les juridictions du travail ont suffisamment démontré que les obligations de loyauté étaient acceptables en ce qu'elles avaient pour but de préserver la crédibilité de l'Eglise protestante à l'égard du public et des parents des enfants du jardin d'enfants').

⁴³ On the condition of proportionality, see below, the following section.

⁴⁴ See above, n. 37.

⁴⁵ See also Eur. Ct. HR (GC), *Palomo Sánchez and Others v. Spain* (Appl. No. 28955/06, 28957/06, 28959/06 and 28964/06) judgment of 12 September 2011, para. 76 ('the requirement to act in good faith in the context of an employment contract does not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests').

That is not to say that, under the European Convention on Human Rights, there is no place for what the United States courts call the "expressive freedom of association",⁴⁶ recognized to (non-religious) organizations who wish to convey certain messages or values that may justify them in choosing whom to employ on the basis of criteria that may otherwise be suspect.⁴⁷ Employers may invoke the freedom of expression recognized under Article 10 of the Convention where they are political parties, media, non-governmental organisations or unions -- what the German doctrine refers to as *Tendenzbetriebe* or advocacy-based organisations,⁴⁸ or what, in her concurring opinion to *Roberts v. Jaycees*, Justice O'Connor called 'expressive associations'.⁴⁹

The 2007 Case of *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom* provides an illustration. In that case, the Court found a violation of Article 11 ECHR due to the inability of a trade union to expel one of its members who belonged to an extreme-right political party which advocated views inimical to its own. The Court noted on that occasion that 'Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership. By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share

⁴⁶ See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (noting that 'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends', and thus to be protected from regulation compelling an association to accept certain members that it does not desire and that could impede the ability of the association to express its views). In *Boy Scouts of America and Monmouth Council, et al. v. Dale* (530 U.S. 640 (2000)), the membership in the Boy Scouts of James Dale had been revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court considered that the Boy Scouts had violated New Jersey's public accommodations law and that the Boy Scouts were required to admit Dale (160 N.J. 562, 734 A.2d 1196 (1999)). The Supreme Court, in a 5-4 decision with the opinion delivered for the majority by Justice Rehnquist, considered that this requirement violated the Boy Scouts' 'expressive associational right' grounded in the First Amendment, a right that benefits not only advocacy groups, but all groups that 'engage in some form of expression, whether it be public or private'. On the impact of the *Dale* judgment on employment anti-discrimination law, see, inter alia, Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515 (2001) (proposing a typology distinguishing commercial organizations, expressive organizations, and quasi-expressive organizations, the latter being organizations that both engage in expression and participate in the commercial marketplace); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119 (2000) (approving *Dale* and noting that pluralism and diversity of organisations are in the long term more conducive of individual freedom than imposed uniformity); and Karen Lim, *Freedom to Exclude After Boy Scouts of America v. Dale: Do Private Schools Have a Right to Discriminate Against Homosexual Teachers?*, 71 Fordham L. Rev. 2599 (2003).

⁴⁷ In the case-law of the (now abolished) European Commission on Human Rights, see *Van der Heijden v. the Netherlands* (Appl. No. 11002/84, dec. of 8 March 1985, D.R., 41, p. 264), in which the Commission accepts as compatible with the European Convention on Human Rights the dismissal of the applicant from the Limburg Foundation for immigration, an organisation aiming at defending the rights of migrants, after his membership in an extreme-right political party was disclosed.

⁴⁸ As defined in Germany under § 118 of the Works Constitution Act (BetrVG) (which describes such undertakings or organizations as "Unternehmen und Betriebe, die unmittelbar und überwiegend 1. politischen, koalitionspolitischen, konfessionellen, karitativen, erzieherischen, wissenschaftlichen oder künstlerischen Bestimmungen oder 2. Zwecken der Berichterstattung oder Meinungsäußerung, auf die Artikel 5 Abs. 1 Satz 2 des Grundgesetzes Anwendung findet". See also, inter alia, Dominique Laszlo-Fenouillet, *La conscience*, Paris, L.G.D.J., 1993, p. 357.

⁴⁹ See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), 633-634 (contrasting the situation of an organization 'engaged in commercial activity', which 'enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities', with the situation of 'an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members', and noting that in the latter case 'Protection of the message itself is judged by the same standards as protection of speech by an individual. Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice').

their beliefs and ideals. Similarly, the right to join a union “for the protection of his interests” cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union: in the exercise of their rights under Article 11 § 1 unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union'.⁵⁰ It related this to the fact that unions are not quasi-public bodies simply set up to perform certain functions in the interests of workers, by delegation from the State. Instead, said the Court, 'historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues'.⁵¹

The freedom of expression of employees or members of advocacy-based organizations may thus be limited, in order to ensure that the organization shall be able to convey its message to the public without this mission being interfered with, or being made more difficult, by the individual opinions expressed by its employees or members.⁵² But the doctrine must be treated with great caution. It certainly would not extend to situations where an employer wishes to impose a certain "culture" or project an "image" towards the outside world, and would seek to rely on that objective to justify otherwise inadmissible restrictions to the rights of its employees.

2. A predictable legal framework

Once it is agreed in principle that human rights designed to apply to the relationships between the State and individuals under its jurisdiction are applicable, *mutatis mutandis*, to relationships between the employer and the employees, we must confront a second question. Restrictions to human rights classically may only be imposed when 'in accordance with the law'. The requirement is that the domestic law be sufficiently clear in its terms, or in the interpretation it has been given by courts, to provide the rights-holders with adequate indications as to the circumstances in which public authorities are empowered to interfere with their freedoms, and the conditions the authorities must comply with in doing so, thus allowing the citizens to anticipate the consequences of their conduct.⁵³ But how is this condition of legality to be understood, when the interference is the result of conduct by a private party, the employer, rather than by a State agent?

In contrast to a wide range of other situations in which human rights are applied to relationships between private parties, the answer to that question is relatively straightforward in the context of employment. The reason for this is simple. The employer and the worker are not just individuals that interact in the marketplace, whose mutual relationships can be understood as two freedoms that may occasionally clash when they seek to gain access to the same advantages for which they compete: instead, these relationships are *regulated*, and it is this regulatory framework that must comply with this requirement of legality.

We may express this in Hohfeldian terms.⁵⁴ Most relationships in the market sphere are relationships that are not mediated by rights and obligations, so that to the liberty (or 'privilege') of A (to adopt a certain course of action), there corresponds merely the absence of a right of B (to object to that course

⁵⁰ Eur. Ct. HR (4th sect.), *Case of Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom* (Appl. No. 11002/05), judgment of 27 February 2007, para. 39.

⁵¹ *Id.*, para. 50.

⁵² See however Evert Verhulp, *Vrijheid van meningsuiting van werknemers en ambtenaren*, Den Haag, Sdu, 1996, pp. 104-5 (according to whom employees of such organizations should be recognized a freedom to express views critical of the orientation of the organization).

⁵³ See, for instance, *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 23, paras. 50-51; *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, p. 30, para. 67.

⁵⁴ W. N. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, 23 *Yale L.J.* 16 (1913); W. N. Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, 26 *Yale L.J.* 710 (1917). These essays are reproduced in W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cook (ed.), New Haven, Yale Univ. Press, 1964, repr. Greenwood Press, 1978.

of action being chosen): actions are taken, and losses may be incurred by others as a result, without any such losses having to be compensated. That, after all, is what the struggle for life -- or "competition" -- is about. This is not so however in the employment relationship. Once a worker and the employer are linked through a contract, their relationships are regulated by the statutes applicable to that relationship, as well as by the contract itself within the limits set by law. Indeed, regulations also apply prior to the conclusion of the contract, in the course of the negotiation of its terms or in the process of matching the demand for skills expressed by the employer and the supply of labour by the candidate-worker. Though at this stage, the role of power relationships remains important -- the respective bargaining power of the parties may matter considerably in setting the terms of the contract --, the negotiation thus does not take place in a void.

It is therefore not particularly difficult to require from the various sets of rules that apply to the employment relationship both prior to the conclusion of the employment contract and after that, that such rules present the qualities (particularly in terms of their clarity, allowing their application to be relatively predictable) that are otherwise required from State regulation when it is the public authorities rather than private actors that impose restrictions to human rights. Whether the rules defining the conditions according to which restrictions may be imposed are stipulated in laws⁵⁵ or regulations (or in the case-law providing them with an authoritative interpretation), in statutes adopted by professional associations,⁵⁶ in collective agreements,⁵⁷ in the staff regulations adopted by the employer, or in the individual contract of employment itself, should not make any difference: what matters is that the powers of the employer to impose certain restrictions to the employees' rights, for instance in the exercise of the supervision of the work performed in the undertaking, are circumscribed by a legal or regulatory framework sufficiently precise and detailed to avoid the risk of arbitrariness or discrimination, and to ensure that the worker shall not refrain from exercising the freedom he/she should be recognized simply because of uncertainty about the consequences that might result from such exercise.

3. Restrictions that are proportionate

The third condition that restrictions to rights or freedoms protected under the Convention must comply with is that such restrictions must be proportionate, i.e., that they should not go beyond what is 'necessary in a democratic society'. In practice, it is this condition that is generally decisive. Yet, it is one where the transposition from vertical relationships between the State and the individual under its jurisdiction, to the horizontal relationships between private parties, for instance between the employer and the worker, may be the source of particular difficulties. The reason for this is that, whereas the imbalance between the State and the individual justifies us in requiring from the State that it refrains from imposing restrictions to the individual's right that go beyond what is necessary for the fulfilment of the public interest, we are not presented with the same imbalance in the relationships between two private parties. Particularly when a private actor infringes upon the human right of another by exercising a basic freedom -- for instance, when freedom of expression impacts on the right to respect for private life, or when the freedom of association exercised by the union in adopting its internal regulations affect the 'negative' freedom of association of its members --, it cannot be expected from a

⁵⁵ See, e.g., Eur. Ct. HR (4th sect.), *Fuentes Bobo v. Spain* (Appl. No. 39293/98), judgment of 29 Feb. 2000 (in which restrictions to the freedom of expression of the applicant, who had been laid off after he insulted the management of the Spanish television -- his employer --, were said to be based on the Statute of Workers and on Law No. 4/80 of 10 January 1980 on the status of radiodiffusion and television: the dismissal was finally found to constitute a disproportionate sanction and thus a violation of freedom of expression); or Eur. Ct. HR (GC), *Palomo Sánchez and Others v. Spain* (Appl. No. 28955/06, 28957/06, 28959/06 and 28964/06) judgment of 12 September 2011 (in which the dismissal of the employees on disciplinary grounds was based on the Labour Regulations (approved by Royal Legislative Decree no. 1/1995 of 24 March 1995), which provided that 'verbal or physical attacks on the employer or persons working in the company' could constitute grounds for dismissal).

⁵⁶ Eur. Ct. HR, *Casado Coca v. Spain* (Appl. No. 15450/89) judgment of 19 February 1993, Series A, n°285-A, paras. 41-43.

⁵⁷ Eur. Ct. HR (plen.), *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A No. 44.

private actor X that it only adopts a conduct that brings about a minimal impairment to the right of other private actors with whom X interacts.⁵⁸

This does not imply, however, that the condition of proportionality is inappropriate in such situations. In the case of *Palomo Sánchez and Others v. Spain* for instance, the applicants had been dismissed following what their employer considered to be an abusive exercise of their freedom of speech. The European Court of Human Rights had to decide whether the restriction imposed on the freedom of expression of the applicants satisfied the test of proportionality. The Court had no difficulty in applying the test to private relationships, concluding from its comparative law analysis that 'the domestic legislation seeks to reconcile the employee's right to freedom of expression with the employer's rights and prerogatives, requiring in particular that a dismissal measure be proportionate to the conduct of the employee against whom it is taken', and that 'even if the requirement to act in good faith in the context of an employment contract does not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests, certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations'.⁵⁹

That the transposition of the 'proportionality' test from "vertical" (State-individual) to "horizontal" relationships (between private actors) is possible in principle, does not mean that it is always easy to effectuate in practice. All too often, the case-law of the European Court of Human Rights provides little guidance to domestic authorities, including judicial authorities, as to how to achieve this. Indeed, since the protection of the 'rights of others' may constitute a legitimate aim justifying that restrictions be imposed on the rights and freedoms of the Convention, it is tempting for the Court to consider that, where rights of private parties are in tension with one another, the conflict between the right asserted by the alleged victim before the Court (such as the right of the worker aggrieved by a measure adopted by the employer), on the one hand, and the right which the national authorities have sought to protect by the adoption of measures (such as the right of the employer imposing the restriction), on the other hand, should be resolved through the classical application of the necessity test: according to this test, only where the protection of the rights of others by the Legislator or by the Executive – or, indeed, by the courts – strictly requires that a limitation be brought to rights and freedoms guaranteed under the Convention, should such limitations be allowed. This, in practice, has been the preferred way to solve situations of conflict. It is, moreover, a practice clearly encouraged by the reference, in the 'limitation clauses' contained in the second paragraphs of Articles 8 to 11 of the Convention or in paragraph 3 of Article 2 of Protocol no. 4 ECHR, to the 'rights and freedoms of others' among the legitimate aims which may justify certain restrictions being brought to the rights concerned. And it presents two significant advantages: it dispenses the Court from explicitly acknowledging the existence of a conflict between rights; and it ensures that the conflict will be addressed by reliance on a well-established technique which both the Court and the commentators are familiar with.

Obvious as it may seem, however, this solution is problematic. It distorts the reality of the conflict between competing rights or interests. Such a distortion may influence the outcome in two different directions. On the one hand, by its very structure, the 'necessity' test is based on the idea that the right is the rule, and the measure interfering with the right the exception: thus, far from ensuring that both rights be effectively balanced against one another, it may result in one right being recognized a priority over the other, simply because it has been invoked by the applicant before the Court, when the competing right is invoked by the government in defence of the measure which is alleged to constitute a violation of the Convention.⁶⁰ On the other hand however, the very opposite bias may be interfering

⁵⁸ See in particular on this difficulty O. De Schutter and F. Tulkens, "The European Court of Human Rights as a Pragmatic Institution", in E. Brems (ed.), *Conflicts Between Fundamental Rights*, Intersentia, Antwerp-Oxford-Portland, 2008, pp. 169-216.

⁵⁹ Eur. Ct. HR (GC), *Palomo Sánchez and Others v. Spain* (Appl. No. 28955/06, 28957/06, 28959/06 and 28964/06) judgment of 12 September 2011, paras. 75-76.

⁶⁰ As noted by Eva Brems, the result is that '[a]lthough both human rights are equally fundamental and *a priori* carry equal weight, they do not come before the judge in an equal manner. The right that is invoked by the

with the judgment of the European Court of Human Rights in such situations: because the situation presented to the Court is one in which the State must refute an allegation of violation presented by an individual rights-holder, the stakes may be biased against the individual, and in favor of the State which is presumed to embody the interest of the collectivity. This is the danger which Ch. Fried and L. Frantz first pointed at when, in 1959, the balancing test first made its appearance in the First Amendment case law of the United States Supreme Court.⁶¹ Roscoe Pound had already anticipated this danger in 1921, noting that ‘If [in weighing two competing interests,] we put one as an individual interest and the other as a social interest we may decide the question in advance of our very way of putting it’.⁶² This danger, clearly implicated by the ‘balancing’ metaphor, is of course especially real where the conflict between two fundamental rights occurs – as is always the case before the European Court of Human Rights – in a procedural setting in which one of the rights in conflict is endorsed by an entity such as the State, who is presumed to embody a broad collective interest whose weight, in comparison to that of the individual right-holder, will necessarily appear considerable, at least until we realize that this individual might well be representative, in his claims, of far wider societal interests, which the State may have paid insufficient consideration to.⁶³

None of this is to suggest that the requirement of proportionality has no role to play in assessing the acceptability of the restrictions that the employer seeks to impose on workers' fundamental rights, or that judges face insuperable obstacles in relying on such a test. Rather, what these difficulties show is that there are risks involved in simply equating the relationship that may exist between the employer and the worker to the relationship that exists between the State and the individual under its jurisdiction: this explains, in part, why the case-law of the European Court of Human Rights may be an imperfect guide for domestic jurisdictions confronted to such situations.⁶⁴

IV. The question of waiver: contracting out of human rights

A perhaps even more delicate question is whether, by entering freely into the employment relationship, the worker may be considered to have waived certain fundamental rights, either because certain limitations to such rights are inherent in the nature of the employment concerned, or because

applicant receives most attention, because the question to be answered by the judge is whether or not this right was violated. The arguments of the defendant may advance the theory that granting the applicant’s claim would violate an additional human right. Through these arguments, the protection of that secondary right may find its way to the judge’s reasoning, but it is not among the legal questions to be directly addressed’. See E. Brems, ‘Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms’, *Human Rights Quarterly*, vol. 27 (2005), pp. 294-326, at p. 305.

⁶¹ *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (‘Whether First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown’). See Ch. Fried, ‘Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test’, *Harv. L. Rev.*, vol. 76 (1963), pp. 755 and ff.; L. Frantz, ‘Is the First Amendment Law? A Reply to Professor Mendelson’, *California L. Rev.*, vol. 51 (1963), pp. 729 and ff., at pp. 747-749.

⁶² R. Pound, ‘A Survey of Social Interests’, *Harv. L. Rev.*, vol. 57 (1943), pp. 1 ff., at p. 2 (study initially written in 1921). The full citation is the following: ‘When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance of our very way of putting it’.

⁶³ See, for other examples, O. De Schutter, ‘La souveraineté de l’Etat et les droits de la personne immigrée’, *Revue du droit des étrangers*, 1995, no. 84, pp. 261-270.

⁶⁴ The direct application in private relationships of human rights recognized in domestic constitutions creates similar difficulties : as noted by Aharon Barak, the President of the Supreme Court of Israel (although writing here in his non-judicial capacity), ‘where constitutional provisions do not contain limitations clauses regarding the restriction of one person’s right arising from the right of another, the obvious result is that judges will have to create judicial limitation clauses. Thus, judges will acquire enormous constitutional power without any concomitant constitutional guidance’ (A. Barak, ‘Constitutional human rights and private law’, in D. Friedmann and D. Barak-Erez (eds), *Human rights in private law*, Oxford-Portland-Oregon, Hart Publishing, 2001, p. 13, at p. 17).

the worker agreed explicitly to certain limitations. In a number of instances, including in the recent past, the European Court of Human Rights has recognized that certain restrictions to the rights of employees could be deemed acceptable, where such restrictions had been consented to and because of such consent. In that sense, the waiver of rights is not unconditionally prohibited under the European Convention on Human Rights.⁶⁵ Yet, whether such a consent given by the employee provides a sufficient and adequate justification for the restriction shall depend on the scope of the restriction, and on the seriousness of the consequences to the individual: the more wide-ranging and important the restriction, the more difficult it will be to save it by invoking the individual's consent. Thus, in a judgment delivered on 7 October 2010 in a case concerning Russia where a serviceman was denied a parental leave in violation, allegedly, of the right not to be discriminated against on grounds of sex, the European Court of Human Rights considered that the argument that a serviceman was free to resign from the army if he wished to take personal care of his children was particularly questionable, given the difficulty in directly transferring essentially military qualifications and experience to civilian life.⁶⁶ A similar reasoning had been held already by the Court in the 1995 case of *Vogt v. Germany*, where the Court found that Mrs Vogt, a secondary school teacher, who had been a permanent civil servant but had been suspended and dismissed on account of her membership and activities with the German Communist Party (Deutsche Kommunistische Partei- "DKP"), was a victim of a violation of freedom of expression because of the impossibility for her, in practice, to find employment as a schoolteacher outside the public sector.⁶⁷

The consent of the individual to certain restrictions to his or her rights is thus *one* factor that the Court may take into account, but it is never the *sole* factor determining the outcome: it is only in combination with other factors that it may play a role. Moreover, the Court has set forth a number of conditions which the 'consent' of the individual to the sacrifice of his or her rights must satisfy in order to be taken into consideration. By setting out such conditions, the Court seeks to ensure that, to the extent that such consent plays a role at all in defining the scope of the obligation to protect, it will not be abused.

The leading judgment in this regard was delivered on 13 November 2007 by the Grand Chamber of the European Court of Human Rights in the case of *D.H. and Others v. the Czech Republic*. There, in response to the complaint of their parents that Roma children were placed in special schools for children with learning difficulties considered unable to follow the ordinary school curriculum, the Czech Republic had expressed the view that the parents had in fact consented to the placement: "it follows", the government argued, "that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against". The Court disagreed. It noted that "the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent (...) and without constraint".⁶⁸ The Court found that these conditions were not satisfied in the case it was presented with

⁶⁵ See for instance Eur. Ct. HR, *Kalaç v. Turkey* (Appl. No. 20704/92), judgment of 1 July 1997, para. 28 ; Eur. Ct. HR (5th sect.), *Obst v. Germany*, judgment of 23 September 2010, para. 50; Eur. Ct. HR (5th sect.), *Siebenhaar v. Germany* (Appl. No. n° 18136/02), judgment of 3 February 2011, para. 46.

⁶⁶ Eur. Ct. HR, *Konstantin Markin v. Federation of Russia* (Appl. No. 30078/06) judgment of 7 October 2010.

⁶⁷ Eur. Ct. HR, *Vogt v. Germany* (Appl. No. 17851/91) judgment of 26 Sept. 1995, para. 44 (where the Court notes that there were several reasons for considering dismissal of a teacher to be a very severe sanction: the effect on the reputation of the person concerned, the loss of livelihood and the virtual impossibility in Germany of finding an equivalent post). Comp. with Eur. Ct. HR, *Otto v. Germany* (Appl. No. 27574/02), dec. of 24 November 2005 (concerning a police officer denied a promotion to the position of a chief inspector, because of his membership and activities for a political party, Die Republikaner: the Court concludes that the application alleging a violation of the freedom of expression guaranteed under Article 10 ECHR is manifestly ill-founded, in particular since 'Unlike Mrs Vogt, the applicant was not threatened with losing his livelihood by not receiving further promotion').

⁶⁸ Eur. Ct. HR (GC), *D.H. and Others v. the Czech Republic* (Appl. No. 57325/00), judgment of 13 November 2007, para. 202 (referring to *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A no. 227,

: in particular, it doubted whether "the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent", especially in the absence of adequate information provided by the authorities.⁶⁹

The approach of *D.H.* is in principle transposable to employment relationships, as acknowledged by subsequent judgments of the European Court.⁷⁰ However, in order to understand the full range of the implications, it must first be observed that, notwithstanding the insistence of the Court on the need for the waiver to be expressed univocally -- in other terms, the individual alleged to have renounced a right must have done so explicitly rather than implicitly --, in practice, the consent may be deemed to be real, if implicit, where it follows from the very nature of the employment concerned. Indeed, certain restrictions to the exercise of fundamental rights that would otherwise not be acceptable may be justified in the particular context of the employment relationship, as the Court has repeatedly stated.⁷¹ Such restrictions may be considered admissible, even in the absence of an explicit consent of the individual : by taking up the employment, in other terms, the individual must be presumed to have agreed to the restrictions that follow unavoidably from the nature of the occupation concerned.

In listing when it may be acceptable to justify restrictions to certain rights and freedoms by the waiver of the individual, the Court alludes to two other conditions that deserve a particular comment in the context of the employment relationship. First, the Court explicitly requires that the waiver be authentically free -- at a minimum, not tainted by coercion. This of course does not merely exclude physical coercion: it also excludes other, more subtle forms of pressure. Indeed, it is meant to reach even beyond duress as it appears in contract law. In fact, the reference to the 1980 case of *Deweere v. Belgium* suggests that the Court has in mind any situation in which, *either because of the fear of negative consequences or because of the irresistible attractiveness of the advantages offered*, the (prospective) worker cannot realistically be expected to refuse to consent to a particular limitation to his or her right (Box 1).

Box 1. Coercion as the promise of a reward the individual cannot refuse

The reference by the *D.H. v. Czech Republic* Court to the *Deweere v. Belgium* judgment is indeed remarkable, because that judgment acknowledged with a particular clarity the dangers associated with presenting an individual with an alternative, where the benefits associated with one branch so clearly outweigh the benefits associated with the other that the 'freedom to choose' of the right-holder

paras. 37-38 (on the requirement of informed consent) and to *Deweere v. Belgium*, judgment of 27 February 1980, Series A no. 35, para. 51 (on the absence of constraint)).

⁶⁹ *Ibid.*, para. 203.

⁷⁰ See for instance Eur. Ct. HR (GC), *Konstantin Markin v. Federation of Russia* (Appl. No. no. 30078/06), judgment of 22 March 2012, para. 150 (applying the doctrine of *D.H. v. Czech Republic* to the situation of a man serving in the army and denied the parental leave that he would have been granted had he been a servicewoman: citing *D.H.*, the Court rejected the Government's argument that by signing a military contract the applicant had waived his right not to be discriminated against on grounds of sex).

⁷¹ See, already cited above, Eur. Ct. HR (GC), *Palomo Sanchez and Others v. Spain*, judgment of 12 September 2011. Freedom of expression provides a typical example. The Court considers that, in principle, employees owe their employer a duty of loyalty and discretion, which implies in particular that their freedom of expression may be interpreted more narrowly than if they were simply members of the general public : see for instance *Vogt v. Germany* judgment of 26 September 1995, cited above, para. 53; Eur. Ct. HR (1st sect.), *De Diego Nafria v. Spain* (Appl. No. 46833/99, judgment of 14 March 2002, para. 37; Eur. Ct. HR (GC), *Guja v. Moldova* (Appl. No. 14277/04) judgment of 12 February 2008, para. 70 ('Article 10 applies also to the workplace, and ... civil servants...enjoy the right to freedom of expression. At the same time, the Court is mindful that employees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion'); Eur. Ct. HR (5th sect.), *Marchenko v. Ukraine* (Appl. No. 4063/04), judgment of 19 February 2009, para. 45 (referring to the "duty of loyalty, reserve and discretion" owed to the employer).

becomes purely formal, or even fictitious. The case concerned a retail butcher in Louvain, Belgium, who was facing prosecution for having violated certain price regulations: in addition to imprisonment of one month to five years and a fine of 3,000 to 30,000,000 BF (a significant sum at the time), Deweer was liable to various criminal and administrative sanctions, including the closure of the offender's business. However, the prosecuting authorities suggested that he pay a sum of 10,000 BF by way of friendly settlement, that would also avoid him to have his business provisionally closed, pending the outcome of proceedings before a criminal court. As one might expect, Deweer paid the transactory fee, and he thus escaped prosecution. But he then filed an application against Belgium, alleging that he had been coerced into waiving his right to have his case decided by an independent tribunal. The Court agreed. It rejected the argument that the compromise proposed to Deweer was particularly favorable to him. Indeed, said the Court, it precisely therein -- in the "flagrant disproportion" between the two alternatives facing the applicant' -- that the problem lies: 'The "relative moderation" of the sum demanded [...] added to the pressure brought to bear by the closure order. The moderation rendered the pressure *so compelling* that it is not surprising that Mr. Deweer yielded'.⁷²

The *Deweer* judgment, approvingly quoted by the Court in the 2007 case of *D.H. v. Czech Republic*, stands as a reminder that the coercion may take two forms. It may consist in the threat of sanctions imposed on those who refuse to comply. But it may also consist in the promise of certain advantages to those who will yield. The prohibition of coercion thus appears as a bulwark against the subjection of rights to market relationships. Once a particular human right may be bartered away, or exchanged against a monetary reward, it becomes a mere commodity: those with the highest bargaining power will be in a position to obtain from others that they sacrifice their rights, and those who have less will be highly vulnerable to pressure.⁷³ It is precisely the same reasoning which led the Court, in the 2002 case of *Wilson and Others* referred to above, to conclude that the United Kingdom had been acting in violation of the European Convention on Human Rights by allowing a private employer to offer financial rewards to the employees who would conclude individual contracts of employment rather than be represented by the unions. What the Court says, in substance, is that a wider range of opportunities -- the choice whether or not to trade the right against another advantage, that the right-holder values more highly -- does not necessarily result in more freedom, in the substantive sense: it may instead be a source of vulnerability and allow forms of pressure to be exercised that otherwise would not be allowable.⁷⁴

By assimilating the promise of financial rewards to coercion, the Court also draws the attention to the fact that, in having to choose whether or not to accept the offer, the individual is *alone* -- and that, should he reject the offer, others might in turn accept it, thereby increasing the costs to the individual of his choice. The last condition identified by the Court in *D.H. v. Czech Republic* among the conditions that might make waiver acceptable relates to precisely that issue. The Court stated there that, even if the Roma parents had consented to their children being placed in special schools meant for children with learning disabilities, that could not be construed as a choice in favor of segregated education. For the choice of an integrated system was not really open to these parents: indeed, since each Roma family had to make that choice *alone, without knowing what the others might choose*, their "choice" may have been motivated primarily by a desire not to place their children in a hostile environment, in which they would feel isolated and ostracized.⁷⁵ This situation may be described as a

⁷² Eur. Ct. HR, *Deweer v. Belgium*, judgment of 27 February 1980, para. 52 (emphasis added).

⁷³ On this, see in greater detail Olivier De Schutter, "Waiver of Rights and State Paternalism under the European Convention on Human Rights", *Northern Ireland Legal Quarterly*, vol. 51, N° 3, 2000, pp. 481-508.

⁷⁴ Robert Lee Hale was one of the most insightful writers on this apparent paradox. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923). For an excellent comment from an institutionalist economist's perspective, see Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. Miami L. Rev. 261 (1973).

⁷⁵ In the words of the Court: "...the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma" (*D.H. and Others v. Czech Republic*, cited above, para. 203).

simple prisoner's dilemma, in which the solution that appears optimal from the *individual's* point of view (to remain in the 'special school' in order not to have to fear plunging the child into the hostile environment of the regular school) does not correspond to what would be considered optimal from the point of view of all individuals in the same situation, if they were able to act *jointly* through collective action :

		Choice for parents of B	
		Send child B to the regular school	Send child B to the 'special' (predominantly Roma) school
Choice for parents of A	Send child A to the regular school	A:3, B:3 collectively optimal	A:-3, B:0 A is plunged into a hostile environment in the regular school as other Roma children remain in the 'special' school
	Send child A to the 'special' (predominantly Roma) school	A:0, B:-3 B is plunged into a hostile environment in the regular school as other Roma children remain in the 'special' school	A:0, B:0 individually optimal

It hardly deserves emphasis that it is such a collective action problem that workers face, when asked on an individual basis to consent certain sacrifices against the promise of financial or other rewards: while such rewards, if obtained by unions representing workers, might be welcome and perhaps worth the sacrifices involved, where the same is proposed to individual workers acting in isolation, acceptance may reflect a fear that others might accept (so that the worker rejecting a proposal will end up in a worse situation), more than a genuine agreement to the terms offered. Where the choices are interdependent, true consent requires the possibility of collective action.

In sum, while not irrelevant, the choice of the individual worker to waive her rights in order to obtain an employment or certain rewards from the employer, is to be treated with caution. It is not a substitute for assessing whether the restriction to her rights complies with the conditions outlined above, including the condition of proportionality: only the restrictions that pursue a legitimate aim, are adequately regulated, and are necessary for the pursuance of the objectives of the organization, will in principle be acceptable. At most, the consent of the individual may lead the judge to be more lenient in applying the proportionality test.

And such caution is entirely justified. Of course, the kind of compulsion on the right-holder that a private actor may exercise in contractual relationships differs from that which the State may exercise : as noted by Heilbroner, 'there is a qualitative difference between the power of an institution to wield the knout, to brand, mutilate, deport, chain, imprison, or execute those who defy its will, and the power of an institution to withdraw its support, no matter how life-giving that support may be. Even if we imagined that all capital was directed by a single capitalist, the sentence of starvation that could be passed by his refusal to sell his commodities or to buy labor power differs from the sentence of the king who casts his opponents into a dungeon to starve, because the capitalist has no legal right to forbid his victims from moving elsewhere, or from appealing to the state or other authorities against himself'.⁷⁶ But that difference between the police State and the capitalist monopolizing economic power relates to the means through which compulsion may be exercised, or to its nature, rather than to the reality of compulsion itself. For in fact, private compulsion may exercise an equally powerful constraint on the free will of the individual right-holder. In situations where the right-holder is in a

⁷⁶ Robert L. Heilbroner, *The Nature and Logic of Capitalism*, W.W. Norton & Co., New York and London, 1985, at 39-40.

situation of need and where he or she faces few alternatives (or none at all, as in situations of monopoly or monopsony), in particular, the possibility for the private actor with whom the right-holder interacts to withhold certain goods or services (such as a waged employment) may in fact lead to a form of coercion equivalent to that at the disposal of the State.

Particularly since the rise of large-scale private organisations in the early 20th century, it is understood that the liberty of the individual whether or not to submit to certain conditions which another actor seeks to impose on him is not always more present in interindividual (or ‘horizontal’) relationships, particularly in market relationships, than in the (‘vertical’) relationships between the State and the individual. It is therefore fitting that human rights courts have generally considered with suspicion the argument that the State should be allowed not to intervene in private contractual relationships, out of respect for the ‘free will’ embodied in such contracts. On the contrary, they have generally adopted the view that, while the consent of the individual may be *necessary* to justify certain restrictions to his/her rights, such a consent, as expressed in contractual clauses, should never be considered, as such, a *sufficient* justification. It is significant for instance that, in a number of cases concerning restrictions to the right to respect for private life of employees, the European Court of Human Rights did not satisfy itself with the consideration that the employees concerned must be presumed to have consented to such restrictions as a condition for their employment, but instead examined whether the said restrictions were justified as ‘necessary, in a democratic society’ (as required under para. 2 of Article 8 ECHR) to the achievement of the legitimate aims put forward – for instance, public safety on a vessel or on a nuclear plant,⁷⁷ or respect for the rights of the Church, the employer, under Articles 9 and 11 of the Convention.⁷⁸

V. Conclusion

This paper sought to address how the rights of workers in the employment relationship are protected under the European Convention on Human Rights. Three conclusions emerge. First, although the European Court of Human Rights protects, to a certain extent, not only the right to form and join unions (as explicitly guaranteed in the Convention), but also the right to collective action and to collective bargaining, the exercise of such procedural rights is not seen as a substitute for the protection of the substantive rights of workers. In part, this can be explained by the fact that in its

⁷⁷ Eur. Ct. HR (1st sect.), dec. of 7 November 2002, *Madsen v. Denmark*, Appl. n° 58341/00 (inadmissibility); and Eur. Ct. HR (4th sect.), dec. of 9 March 2004, *Wretlund v. Sweden*, Appl. n° 46210/99 (inadmissibility).

⁷⁸ See Eur. Ct. HR (5th sect.), *Schiith v. Germany* judgment of 23 September 2010, paras. 53-75. In this case, the Court concludes that the applicant's right to respect for private and family life has been violated after he was dismissed by the Catholic Church, which was employing him as a chief organicist in a non-ecclesiastical function. The Court notes in this regard that since the dismissal is based on elements that relate to the private life (the separation of the applicant from his spouse and his cohabitation with another woman from whom he was expecting a child), the German labour courts should have exercised a stricter degree of scrutiny, adequately balancing the rights of the Church as employer with those of the applicant. According to the Court, the duty of loyalty agreed to by the applicant upon signing his contract of employment cannot be interpreted as depriving him from the protection of the Convention rights in this regard: 'La Cour admet que le requérant, en signant son contrat de travail, a accepté un devoir de loyauté envers l'Eglise catholique qui limitait jusqu'à un certain degré son droit au respect de sa vie privée. De telles limitations contractuelles sont autorisées par la Convention si elles sont librement acceptées. La Cour considère cependant que l'on ne saurait interpréter la signature apposée par le requérant sur ce contrat comme un engagement personnel sans équivoque de vivre dans l'abstinence en cas de séparation ou de divorce. Une telle interprétation affecterait le cœur même du droit au respect de la vie privée de l'intéressé, d'autant que, comme les juridictions du travail l'ont constaté, le requérant n'était pas soumis à des obligations de loyauté accrues' (para. 71). It is noteworthy that this judgment was delivered by a Chamber of the Court established within the same section that, on the same day, delivered the *Obst* judgment referred to above, where the Court took the view, *a contrario*, that an employee of the Mormon Church having confessed to adultery could be dismissed, considering that the Mormon Church is a faith-based organization. In neither of these cases was the consent of the individual, expressed by agreeing to the terms of employment, the decisive factor: even where such a consent is established, the courts still are under a duty to examine whether the restriction imposed to the rights of the individual comply with the substantive conditions imposed under the Convention.

interpretation of Article 11 of the Convention, the Court adopts an intermediate position, that accepts neither the monopolization of the power to represent workers in the hands of unions (as would be the case under 'closed shop' systems), nor the possibility for the employer to buy the loyalty of individual workers by promising financial rewards to those who choose not to be represented through a union. If the power of unions were even stronger, it might be seen as representing a sufficient safeguard against the risk of workers' rights being abused, and the Court may have felt that it was dispensated from being diligent in ensuring that such abuses do not take place. But the Court, wisely, has not opted for that approach: the measures adopted by the employer are no more to be trusted because unions could in principle protest them, than measures adopted through democratic procedures should be immune from scrutiny because the political opposition can make itself heard.

But if courts are to protect human rights in employment relationships, then how? A range of difficulties emerge from the fact that the rights and freedoms listed in the European Convention on Human Rights were designed, and drafted, in order to address State power, and not the private power exercised by organizations on their employees. The guidance that the European Court of Human Rights may provide remains limited, in part because the geometry of the cases it is presented with presents strong differences in comparison to the kind of private law litigation that develops before domestic courts. The implication is not necessarily that human rights, as they appear stipulated in international treaties as obligations imposed on the State, cannot be relied upon by domestic courts in order to impose obligations on private parties. But in applying these rights to private relationships, courts may have to be inventive, and the criteria developed by international monitoring bodies may not always provide them with well suited answers. There are also other options available to States than the direct application of internationally recognized human rights to inter-individual relationships. Domestic courts may interpret notions of domestic law (such as the notions of 'fault' or 'negligence' in civil liability cases, or 'good faith' or 'abuse of rights' in employment relationships) in order to ensure that these notions embody the requirements of international human rights.⁷⁹

Finally, there is the question of waiver. The single most important difference between the power yielded by the State in its regulatory capacity and the power exercised by the employer (including the State as employer) on its employee, is that the employer only may exercise such power because of the consent of the individual towards whom it is addressed. That factor alone, however, is not to be treated as decisive. The European Court of Human Rights adopts a realistic view about the respective bargaining position of parties in the employment relationship, and more importantly, it refuses to treat all human rights as following the model of the right to property: even where the individual values a particular advantage, for instance a higher wage, more than the ability to exercise the right which he agrees to sacrifice, that will not end the inquiry. Rights are not mere commodities, nor are they just bargaining chips in a negotiation, that the individual right-holder may choose to barter away: the fact that they are enjoyed and protected matters not to that individual alone, but to all society. It is here, in the recognition of the status of human rights as public goods, the preservation of which matters to all, that the European Court of Human Rights provides us with its most important lesson: where the rights of one individual can be taken away by an unscrupulous employer abusing his position, it is the rights of all which are under threat of being revoked.

⁷⁹ This is a technique sometimes referred to as '*mittelbare Drittwirkung*': see, e.g., A. Barak, 'Constitutional human rights and private law', in D. Friedmann and D. Barak-Erez (eds), *Human rights in private law*, Oxford-Portland-Oregon, Hart Publishing, 2001, p. 13, at pp. 21-24; S. Gardbaum, 'The 'horizontal effect' of constitutional rights', *Michigan Law Review*, vol. 102 (2003), pp. 401 and ff.). The 1958 *Lüth* decision of the German Federal Constitutional Court provides the classic illustration: in this case, the Constitutional Court took into account the freedom of expression of Lüth in order to find that the boycott he had initiated against the a film produced by a former collaborator with the Nazi's should not be treated as the kind of intentionally caused damage that may give rise to an obligation to compensate, under section 826 of the German Civil Code (BGB) (7 BverfGE (1958)).