THE FUNDAMENTAL RIGHTS OF WORKERS

THE FRENCH EXPERIENCE IN COMPARATIVE PERSPECTIVE

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INTRODUCTION

In Europe, the trend of the la st decades has been in favor of the development of fundamental social rights. In national systems as well as in the European Union, the protection of workers'rights has, in particular, been strengthened. France appears to be one of the most protective systems with strong constitutional guarantees and fairly comprehensive courts' interpretation (1).

Three rights, specifically attributed to workers, appear, in the French system, as fundamental: the right to association in a union, the right to strike and the right to participation in the management of the company and to collective bargaining.

It should be immediately added that, beyond such specific rights, workers may enjoy other social rights (like the right to health) recognized generally to all individuals as well as the protection of the equality principle. This principle is essential today in all European States as it prohibits all discriminations in employment or in the workplace, based on origin, sex or religion (2)

The French specificity is undoubtedly more accentuated, regarding the first three rights previously mentioned. This study will thus intend to stress their importance and effectivity in France, by analyzing these rights in comparative perspective.

Two major points of study will be considered: the identification of the fundamental rights of workers (I) and their effective protection (II).

I. The Identification of the Fundamental Rights of Workers

Workers' rights appear in most countries in Europe in the middle of the XIXth century but will become constitutionally grounded only in the XXth century. From their constitutional foundation (A) emerges an often substantial scope of application (B).

A The constitutional foundation of workers'rights

1 Widely present in continental European constitutions, the right to association in a union includes different aspects: freedom to create unions, freedom to be part of a union or not, free union activities inside a company… As such, this right appears to be classified as an individual right and therefore a right of each worker but it also appears as a collective right, the right of association of workers which may require to be enforced in the State as well as in private companies. In Italy, the 1947 Constitution states that "the organization of unions is free" (3) and the German Constitution from 1949 affirms, that "the right to create associations in view of improving working conditions and economic conditions is guaranteed for everyone and for all professions"(4). In Spain, the 1978 Constitution refers to the free institution and activity of workers'unions and employers' associations which"contribute to the defense and promotion of their respective economic and social interests"… (5). The Portuguese Constitution, from 1976 also affirms, in broad terms, that the right to be part of a union is a condition and guarantee of the unity of workers for the defense of their rights and interests" (6), referring to both the individual and collective components of the right.

In France, the constitutional recognition dates back to 1946 with the Preamble of the Constitution of the IVth Republic which states that " every man may defend his rights and interests through union's action and associate with the union of his choice"(7). Although the 1946 Preamble has been given constitutional value by the Constitutional Council (8), the current Constitution of 1958 simply mentions that the fundamental principles of the right to union association belong to the legislative domain (9).After making several references in its caselaw, the Constitutional Council strongly confirmed its constitutional value in the landmark case of July 25, 1989 "

Prévention des licenciements économiques" (10). As defined, the right includes the right to register in a union of someone's choice or to not register at all in any professional union. The right benefits to any person, employee or employer, national or foreigner. The Constitutional Court remains competent to strike the proper balance between the right to union association and the freedom to work.

2 Defined as the right to stop working for the defense of collective professional interests, the right to strike is explicitly guaranteed in many European constitutions (Italy, Spain, Greece, Portugal, Romania, The Czech Republic,…)(11). In Germany, the right is only implicit, deducted from the freedom of action of professional unions (12). The objectives of the strike are sometimes mentioned in the constitutional text, based on the defense of collective professional interests. In Germany, the Constitutional Court defines the conditions of a strike, by making it possible only after all negotiation attempts have failed. Furthermore, certain categories of workers may be deprived, in principle, of the right to strike (Judges, police officers…)

The right to strike may finally appear as an individual freedom in some States (Italy, Spain or France…) or as a collective right in others (Germany, Greece, Sweden, Belgium…). In France, the right is mentioned, for the first time, in the Preamble of the 1946 Constitution which indicates that "the right to strike can be exercised within the framework of its legal regulation". Since the incorporation of the Preamble in the 'block of constitutionality" in 1971(13), the constitutional value of the right to strike is doubtless. The Constitutional Council reaffirmed such value in its landmark decision of July 25, 1979 "Droit de grève à la radio et à la télévision", by squashing a law which provided for normal broadcasting in case of a strike (14).

3 The affirmation of the right to participate in the management of the company as a constitutional right is a more specific feature of the French system, because of its broad formulation. If it includes, like other European systems, the right to collective bargaining,

it goes much beyond, since the 1946 constitutional Preamble refers to " the right of every worker to participate throughout representation to the collective

determination of the conditions of work and to the management of the company"(15). The constitutional right to collective bargaining is therefore affirmed in Germany and Spain where the Courts made it implicit in the rights of unions, in Portugal where the 1976 Constitution precisely defines collective bargaining or Greece where the 1975 Constitution refers to free collective bargaining and arbitration (16). International law also refers to such right, like the ILO Convention N°154 of 1978. In France, the Constitutional Council has explicitly regarded the provisions of the 1946 Preamble as positive constitutional law since its landmark cases "Emploi des Jeunes"(17) et "Service fait"(18) of 1977. In these decisions, a wide margin of appreciation is left to the legislator in order to determine the conditions of application of the right to participation. The application may therefore vary according to the legal status of companies, their size and the number of employees (19).

B The large scope of application of workers'rights

1 In the relevant European systems, the right to association in a union is interpreted as implying the freedom to create unions and the free regulation of these entities and of their actions, without interference of the State (20). The freedom of workers within the union has to be guaranteed as part of the general right. In France, the Labor Code organizes, in conformity with the constitutional principles, the freedom of creation, organization and action of unions. The only limitations are related to the prohibition of direct political activities and to the mandatory respect of non- discrimination rules.

One specific issue can be added here, regarding the negative corollary of the freedom of association which is the freedom not to associate with a union. Prohibited in the United Kingdom and in the United States, the system of "closed shop" leading to the exclusive hiring of individuals belonging to a union and often to a union supported by the company, is also rejected in continental Europe, the freedom not to associate being regarded as a fundamental personal freedom. Union monopoly regarding the hiring process in a company or the representation of workers for the purpose of collective bargaining, is therefore unconstitutional (21).

2 The right to strike is given in the different European systems, a variable scope of application. In most cases, it has to be conciliated with other constitutional principles. The legislator is in charge of regulating the use of the right to strike and therefore protect some special interests or activities. The protection of health, national security and public order may thus lead to limitations of the right. Certain activities that appear particularly valuable for the national community have to maintain a minimum level of operation, even in time of strikes, most noticeably in the transport and energy sectors.

In France, where the constitutional value of the right to strike has been affirmed regularly by the Constitutional Council, the legislator can never suppress such right but can only provide limitations (22). The right is not an absolute right and limitations apply in public services where an obligation of "minimum service" has been defined. Certain categories of public agents may even be deprived of the right to strike if their presence at work is necessary for the satisfaction of "essential public needs". Activities of police, justice, defense or health are in particular targeted.

3 Regarding the right to participation, the constitutional regime applies mainly in comparative law to the right to collective bargaining. States have to abstain from taking any measures of limitations. Legislators may have to interfere in order to guarantee an effective exercise of the right, like in Spain. Likewise in France, the legislator may determine the conditions of application of the general right to participation of workers or encourage the forms of concertation between social partners. Every worker, from the public or private sectors, is entitled a right to participation, including part-time workers (23). However, the Constitutional Council has considered that the principle of participation does not entail an obligation for the government to engage into collective bargaining before the adoption of a legislation regulating essential aspects of labor law, in particular the regime of the 35 hour work week (24).

If the constitutional foundation of workers'rights represents an important basis of effectivity, the judicial protection will show the strength as well as the limitations of such rights.

II. The Protection of the Fundamental Rights of Workers

The analysis in terms of protection of rights command to take in consideration the role of the courts in deciding cases and the scope of the limitations that may be necessary in the course of their implementation. Such analysis does reveal the strength of the protection of the workers' rights (A) with an emphasis on the will of the judges to restrain the field of limitations (B).

A The guarantees of effectivity of the protected rights

1 European constitutional courts have generally given an extensive interpretation of the right to form a union. The Italian court has protected, in particular, the freedom of unions to set their own rules and the Spanish judge has guaranteed the free exercise of unions' activities which implies that they should be free of government's interference.

In France, the Constitutional Council protects, in addition, the union's freedom against the employer's intervention or limitation attempts. For this purpose, the protection of this right is associated with that of free exercise of the activities of workers' representatives. It is affirmed as a constitutional requirement (25) which includes the constitutionality of the preliminary administrative authorization necessary to terminate the contract of a workers' representative. The Court has also validated several pieces of legislation which conferred diverse advantages to the unions. As an example, it affirmed the possibility for an employer to communicate specific information, exclusively to the unions that are present in the company (26).

2 The right to strike receives variable constitutional guarantees in Europe and its status appears less protected than the right to association. As an illustration of the relative ambiguity surrounding its protection, the European Court of Human Rights has refused to make the right to strike an essential corollary of the right to form a union which is only written in the European Convention of Human Rights of 1950 (Article 11). The Court had in the past, admitted that collective bargaining, although unwritten, was an essential part of this right but refused to rule accordingly, regarding the right to strike (27). In the same case, the European Court also considered that the prohibition in

the UK of so-called “solidarity strikes” did not infringe Article 11 of the Convention…

In continental Europe, mainly in Southern States, the protection of the right to strike appears to be more effective. In Spain, the Constitutional Court has affirmed that the determination of the essential character of a public service cannot justify the prohibition of the right to strike but may only lead to certain regulations in order to maintain a sufficient activity of the service (28).

In France, the constitutionalization of the right to strike implies that the legislator cannot deprive any worker, whatever his (her) status, of such right. All employees are thus protected, in the public or private sector. One source of protection lies in the monopoly of the legislator to regulate the conditions of the right to strike. No executive authority, national or local may have this power. The legislator bears also the responsibility to determine which acts of strike are legal and which ones are not.

3 In continental Europe, the constitutional right to collective bargaining is effectively protected by courts. In Germany, Italy, Spain or Portugal, in particular, the protection of this right implies that Parliaments or Governments have to refrain from taking any measure that would lead to the limitations of the right. Positive obligations may be identified by courts in order to create a space of freedom of discussion between social partners.

In France, the right to participation is exercised through committees of hygiene and security and through parity company commissions that have competence regarding the determination of labor conditions and the application of collective agreements negotiated within the company. The Constitutional Council confers a wide protection to the right of

participation and has ruled in particular than no law can modify, in an excessive way, previous collective agreements , legally adopted (29) nor interpret such agreements in a manner incompatible with the original negotiators’ intent, unless the legislator can strongly demonstrate the general interest to do so (30).

B A restricted field of limitations

1 The right of unions to lead actions within a company is generally accepted but it must be conciliated with other constitutional rights like the freedom of enterprise and property rights. However such action should be linked to the interest of workers in the company and cannot bear political motivations. The German and Italian Constitutional Courts prohibit therefore actions of a political nature but do allow some union propaganda on the company's premises. The Supreme Court of the United States may sanction excessive pressure on the part of the employer but does admit that the latter can invoke business efficiency to express criticism on union actions and the economic risks implied by strikes (31). In France, the courts have focused in particular on the issue of the conciliation between the collective aspect and the individual aspect of the right to association. The Constitutional Council has ruled, for instance, that the capacity of the union to act in court on behalf of a worker, without a specific mandate, should not infringe the worker's personal freedom (32) In another case, the Court also considered that the union's communication within a company should be compatible with the operation of the company's network system, should not interfere with the worker's job obligations and should finally take in consideration the worker's freedom of choice to accept or to refuse a message (33).

2 In most Europe, the legislator is the only authority entitled to set limits to the right to strike. All limitations are reviewed under a proportionality test in order for the constitutional court (Spain, Italy…) to guarantee a sufficient effectiveness. Proportionality review may also justify more restrictions to the right. In Spain, for instance, the Court decided in a 1990 case that more severe limitations to the right to strike could be necessary during vacations 'periods. In Italy, only agents who are not employed in services or activities considered as essential for the national community, may exercise the right to strike.

The French courts also use proportionality to make a conciliation between the right to strike and the so-called "principle of continuity of public services" which enjoys a similar constitutional value (34). As a result, agents whose activity is essential to the operation of a public service may be deprived of their

right to strike. The legislator may also prohibit the use of repeated short strikes' strategy or raise from 5 to 1" days the delay of notification of a planned strike. More severe obligations may be imposed to air transport workers when airport security may be at stake (35). More generally, the Constitutional Council ruled that the initiative of a strike could only come from a union.

Such solution appears to be a strong limitation to the right in its individual dimension as it guarantees only a collective exercise (36). A legislation of 2008 has limited, in a similar way, the right to strike of employees of kindergartens and primary schools.

Regarding workers in the private sector, the Court has finally ruled that their collective liability, implying the compensation for damages caused by the strike, could not be barred by a specific legislation, setting another type of limitation to the exercise of the right (37).

3 Regarding the limitations to the right of participation, it should first be noted that no constitution requires that social partners have the obligation to negotiate or, if collective bargaining has started, that it should result in the signature of an agreement.

More generally, "appropriate concertation" doesn't necessarily imply the signature of a collective agreement. In case of the failure of a negotiation, the Constitutional Council has considered, in France,that a unilateral decision taken by the employer, may be a legal response (38).

In concluding, we should note that these collective workers' rights are being exercised in a context of profound social, economic or technological changes. Constitutional courts should continue to guarantee their effectivity, driven by their constitutional value, without creating too many obstacles for the legislator to ensure that the regime of these rights be adapted to the new conditions of society. Comparative Law today shows that the level of protection regarding the rights of workers appears to be higher in Continental Europe and in France in particular, than in most other regions of the world. These European States may set an important precedent and one could just hope that they could economically afford, in the long run, such a high protection in the global world.

NOTES

(1) See L. Gay, E. Mazuyer, D. Nazet-Allouche (Ed.), Les droits sociaux fondamentaux, Entre droits nationaux et droit européen, Bruylant, 2006 p.13
(2) Cf Déclaration des droits de l'homme et du citoyen, 1789, Article 18
(3) Constitution of Italy, 1947, Article 39, al.1
(4) Fundamental Law of Germany, 1949, Article 9, al.3
(5) Constitution of Spain, Article 7
(6) Constitution of Portugal, 1976, Article 55
(7) Constitution of France, 1958, Preamble of 1946, Al.6
(8) Cf Decision of the Constitutional Council, 81-127 DC des 19 et 20 janvier 1981, Sécurité et liberté

(9) Constitution of France, 1958, Article 34
(10) Decision of the Constitutional Council 89-257 DC, 25 juillet 1989, Prévention des licenciements économiques
(11) See generally, L.Favoreu et alii, Droit des libertés fondamentales, Dalloz, 7th edition, p. 357
(12) Decision of the Constitutional Court of Germany, June 11, 1958
(13) Decision of the Constitutional Council (C.C.), 16 juillet 1971, Liberté d'association
(14) Decision C.C. 79-105 DC, 25 juillet 1979, Droit de grève à la radio et à la télévision
(15) Constitution of France, 1958, 1946 Preamble, Al .8
(16) See Constitution of Greece, 1975
(17) C.C. 79 DC, 5 juillet 1977, Emploi des jeunes
(18) C.C. 83 DC, 20 juillet 1977, Service fait
(19) C.C.86-207 DC, 25-26 juin 1986, Privatisations
(20) See L. Favoreu et alii, op.cit., p.332
(21) C.C. 83-162 DC, 19-20 juillet 1983, Démocratisation du secteur public et 96-383 DC, 6 novembre 1996, Négociation collective
(22) C.C. 144 DC, 22 octobre 1982
(23) C.C. 80-128 DC, 20 janvier 1981, Travail à temps partiel
(24) C.C. 401 DC, 10 juin 1998, Loi sur les 35 heures
(25) C.C. 88-244 DC, 20 juillet 1988, Loi d'amnistie
(26) C.C. 83-162 DC, 19-20 juillet 1983, Démocratisation du secteur public
(27) European Court of Human Rights, April 8, 2014, n° 31045/10, National union of rail, maritime and transport workers v. United Kingdom
(28) Constitutional Court of Spain, Decision n°4/1990
(29) C.C. 2008-570 DC, 7 août 2008
(30) C.C. 03-465 DC, 13 janvier 2003, Loi relative aux salaires
(31) See B. Veneziani, La liberté syndicale en droit comparé, Annuaire international de justice constitutionnelle, 1997, t.XIII, Economica- PUAM, p.377

(32) C.C. 89-257 DC, 25 juillet 1989, Prévention des licenciements économiques
(33) C.C. 2013-345 QPC, 27 septembre 2013, Syndicat national Groupe Air France
(34) C.C. 79-105 DC, 25 juillet 1979, Droit de grève à la radio et à la télévision
(35) C.C. 2012-650 DC, 15 mars 2012, Loi relative à l'organisation du service aérien
(36) C.C. 2007-556 DC, 16 août 2007, Déclenchement de la grève
(37) C.C. 82-144 DC, 22 octobre 1982,Irresponsabilioté pour faits de grève
(38) C.C. 97-388 DC, 20 mars 1997, Fonds de pension
(39)