Justice at Work

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Abstract:

Theories of justice suitable for ordinary market transactions are not appropriate in the special context of work, because they must confront the challenges of the subordination of employees and the risk of commodification of workers by treating them like things or machines. It is argued that the legal protection of fundamental or human rights provide the robust guarantees that are required to protect people against abuses of power in relations of subordination and their focus on values that respect everyone's dignity and humanity combats the dangers of commodification. The strategy of securing justice at work by protecting human rights in the workplace, even in private businesses, has become possible in Europe as a result of four developments in the legislation of the

European Union and the jurisprudence of the European Court of Human Rights. These developments concern the application of discrimination law to employment, the positive duty placed on states to protect human rights, the restriction on contract terms that limit protection of human rights by reference to a test of proportionality, and most recently the development of a broad protection against unjust dismissal.

Rezumat:

Teoriile justiției adecvate tranzacțiilor de piață obișnuite nu sunt potrivite în contextul special al muncii, deoarece acestea trebuie să facă față provocărilor subordonării angajaților și riscului transformării lucrătorilor în bunuri, prin tratarea acestora ca pe lucruri sau mașini. Se susține că protecția juridică a drepturilor fundamentale sau a drepturilor omului oferă garanțiile solide care sunt necesare pentru protejarea oamenilor împotriva abuzurilor de putere în relațiile de subordonare și concentrarea acestora pe valori care respectă demnitatea și umanitatea tuturor combate pericolele transformării în bunuri. Strategia de asigurare a justiției la locul de muncă prin protejarea drepturilor omului, chiar și în întreprinderile private, a devenit posibilă în Europa ca urmare a patru evoluții ale legislației Uniunii Europene și jurisprudenței Curții Europene a Drepturilor Omului. Aceste evoluții se referă la aplicarea legii privind discriminarea la angajare, obligația pozitivă impusă statelor de a proteja drepturile omului, restricționarea clauzelor contractuale care limitează protejarea drepturilor omului prin

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referire la un test de proporționalitate și, cel mai recent, dezvoltarea unei protecții ample împotriva concedierii nelegale.

Keywords: justice at work, protection of fundamental or human rights, employment law, workplace

I. Introduction

The topic of *Justice at Work* combines my scholarly interests in the law of contract, employment law, and most importantly the moral conviction that there should be just institutions and rules to govern every workplace. Aristotle considered the topic of justice in two contexts: first, the idea that a person could possess the virtue of being a just person; and second the idea that the state should have a just constitution[225] My topic invites you to consider yet a third context of justice: justice in employment relations and the workplace.

The idea of justice is a contested concept. People have different ideas of what justice requires: some emphasise equality, others fairness, and yet others the vital importance of individual freedom or personal autonomy. They also have conflicting ideas about the relative importance of justice in comparison to other values such as freedom, wealth, or happiness. Moreover, the demands of justice differ according to the context: sometimes justice requires identical treatment, as in the case of one vote for each person in a democracy; on other occasions justice requires us to differentiate between people by for example raising the tax burden on those who can afford it pay the most and awarding priority in welfare provision to those who are most in need.

Ultimately, therefore, the project of investigating and articulating a theory of justice at work requires the development of a view about what justice requires in this particular context. The general context is a market or business context where people enter into contracts. In the first section, the essay outlines what are conventionally regarded as the principles of justice applicable to market transactions. It is then claimed that theories of justice suitable for ordinary market transactions are not appropriate in the special context of work and contracts of employment. It will be argued that there are two distinctive problems or challenges that must be confronted when developing an idea of justice suitable for the workplace. In the following discussion, these special features of the task of describing justice at work will be called the problems of the subordination of employees and the risk of commodification of workers. These problems will be explained in sections two and three.

In order to address these two challenges adequately in a theory of justice at work, the argument in the fourth section is that in this context the idea of justice must contain at least two distinctive and additional elements to those applicable to market transactions in general. First, it requires robust guarantees against possible abuses of power at work.

Those abuses are principally committed by employers, but they may occur between workers, as in, for example, cases of sexual harassment in

[225] In Aristotle, *Nicomachean Ethics V*, and Aristotle, *Politics*: see Mark LeBar and Michael Slote, "Justice as a Virtue", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL =<https://plato.stanford.edu/archives/spr2016/entries/justice-virtue/>.

the workplace, or in disputes between a trade union and a member. Second, justice in the workplace requires respect for the humanity of all workers. They should be treated with respect and dignity, not as mere cogs in a machine with no intrinsic value in themselves.

The next section points out that ordinary laws do not provide the necessary guarantees and robust protections that a theory of justice at work requires. It will be argued that those two special requirements of a theory of justice at work can only be effectively addressed by the adoption of one powerful idea: the protection of human rights at work. Fundamental rights provide the kind of robust guarantees that are required to protect people against abuses of power. Human rights, as a type of fundamental right, focus on values that respect everyone's dignity and humanity. The application of human rights at work therefore combines the two essential and distinctive elements of a theory of how to achieve *Justice at Work.*

In a final section of the essay, it is acknowledged that the introduction of human rights law into ordinary workplaces and contractual relations between private employers and employees is a relatively unfamiliar field of application for human rights law. Nevertheless, it will be observed that four crucial developments in the legislation of the European Union and the jurisprudence of the European Court of Human Rights (ECtHR) have paved the way for a systematic and coherent application of human rights law to private employment.

A new right that will soon have to be recognised in the workplace will be a right to disconnect from electronic communications.

II. The Justice of Contracts and Markets

When we take a job, the core legal institution that is applicable to the economic relation is normally a contract, the contract of employment. This contract has many similarities to other contracts. For instance, it is based upon an agreement and involves a market exchange, in this case the payment of wages by the employer in return for the personal performance of work by the employee. As in the majority of contracts in modern times, most of the main provisions and the details of the contract of employment will usually be recorded in a printed form, often drafted by the employer's lawyers. Like many other business and consumer contracts as well, the offer of employment by an employer is frequently made on a take-it or leave-it basis, with no possibility of negotiation of the terms.

For most contracts, the justice of the institution of contracts or market transaction is commonly perceived as deriving in part from the freedom of the parties to choose to enter into a contract or to decline it, and in part from the parties' ability to choose its terms. These freedoms are combined with the formal equal treatment of both parties by law to achieve a just economic relationship based on respect for both autonomy and equality.[226] In the nineteenth century, the movement in law from status relations to

[226] Those traditional views of the justice of contract have been explored and criticised in Hugh Collins, *The Law of Contract* 4th edn. (London: Butterworths, Law in Context, 2003) Chapter 2.

contractual was regarded politically progressive, because the contract symbolised the growth of freedom and equality and replaced the compulsory hierarchies of feudalism.[227] It is true, of course, that superior bargaining power can distort the qualities of freedom and equality in many kinds of contracts. Especially in consumer contracts, businesses may attempt to exclude the rights of a consumer to redress against breach of contract or to take advantage of them by misleading or aggressive marketing practices. Yet good regulation can effectively counter this kind of market failure caused by inequality of bargaining power. For instance, if a standard form contract contains a one-sided or unfair clause, the clause can be prohibited and invalidated.[228] Equally, the market can be cleansed of misleading and aggressive marketing practices by a mixture of criminal sanctions, injunctions, and restitution for unjust enrichment.[229]

Because the law governing the enforcement of contracts rests fairly clearly on these liberal political foundations of respect for liberty and equality, the justice of most contracts is usually assumed. Moreover, compliance with these conditions of liberty and equality is also likely to ensure that any market exchange is welfare-enhancing for both parties. As a consequence, in most contemporary political philosophy, provided that market failures are addressed, the justice of ordinary market transactions is presupposed. In addition to those principles of liberty and equality, what justice requires in the economic sphere is to ensure that everyone has effective access to markets, with the backstop that, by means of taxation and redistribution, everyone receives necessities or basic entitlements such as food, shelter, education, and health care. In Europe those two tasks of justice in the economy and markets are now broadly divided between levels of government: the European Union is primarily concerned with ensuring effective access to functioning markets for everyone through its guarantees of fundamental market freedoms and anti-discrimination laws;[230] whereas national governments are principally charged with the task of ensuring that all their citizens enjoy minimum standards of welfare and well-being.[231]

In my view, however, that general approach to justice in contracts and markets breaks down when two distinctive features of the contract of employment are acknowledged. These two special features of the contact of employment present distinct challenges to a theory of justice at work. The normal reliance on the justice of free and fair contractual relations is inadequate and inappropriate in this context. A more detailed examination of these two special features of employment relations reveals what institutional arrangements the goal of achieving justice at work may require.

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[227] Henry Sumner Maine, *Ancient Law* (ed. Pollock) 10th edn., (London: John Murray, 1906) p.174; Otto Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 *Modern Law Review* 635.

[228] E.g. European Directive 93/13 on unfair terms in consumer contracts [1993] OJ L 95/29.

[229] European Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

[230] Hans-W Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018).

[231] The European Union may also have a role in the performance of this task of welfare provision: Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity,* (Oxford: Oxford University Press, 2015).

III. The Problem of Subordination

The first special feature is that the contract of employment creates a relation of subordination or 'practical authority'.[232] The terms of a contract of employment normally empower an employer to direct the employee on the work to be performed and to manage its completion. Failure by the employee to obey such instructions often conveyed through a bureaucratic organisation will normally result in disciplinary actions including dismissal. This power relation between employer and employee is sometimes likened to the prerogative power of absolute monarchs, but there are some important differences. Unlike the power relation of an absolute dictator over ordinary citizens of a state, the power relation in employment is created by a consensual contract between the parties; and unlike citizens trapped in totalitarian states, an employee always has the option to quit (otherwise he would be a slave), though of course the economic consequences of resignation and unemployment might be severely detrimental.

The power relation of practical authority or subordination at the heart of the contract of employment is inherently opposed to the liberal values of freedom and equality that accord a measure of justice to other market transactions.[233] Although there is freedom to enter into the contract, the terms of the contract of employment render the employee to a considerable extent an instrument of the employer. Not only must the employee obey the instructions of the employer, but the employer will expect to receive loyalty to the aims of the enterprise both while the employee is at work, but also outside working hours.

With regard to the obligation of loyalty at work, for instance, employees who report criminal conduct by their employer to the police – in other words whistle-blowers – are in breach of the duty of loyalty owed to the employer under the contract of employment and can normally be dismissed for breach of that duty. Special laws, now required by the right to freedom of expression under article 10 of the European Convention on Human Rights,[234] are needed in order to protect employees from the adverse consequences of such a breach of contract.

With regard to the loyalty expected outside working hours, many employees these days find themselves dismissed or disciplined for remarks posted on social media. These remarks may have nothing to do with the employer's business; the reason for the dismissal may be no more that the employer is concerned that it might be associated with the employee's remarks. The American woman who posted a picture of herself making a rude gesture with her finger as the Presidential motorcade passed her on her bicycle on a Sunday morning was dismissed by her employer, because her employer feared the loss of clients as a result of being associated with a message critical of Donald Trump.[235] The employer assumed it had the right to control this minor act of

[232] This adapts a concept used in theories of law: Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) p. 10; Andrei Marmor, 'An Institutional Conception of Authority' (2011) 39 *Philosophy & Public Affairs* 238.

[233] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester, Virginia Mantouvalou (eds.), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) 48.

[234] *Guja v Moldova* (App. no. 14277/04) [2008] ECHR 144 (ECtHR), *Heinisch v Germany* (App. no. 28274/08) [2011] ECHR 1175 (ECtHR).

[235] Joanna Walters, 'Woman who gave Donald Trump the middle finger fired from her job', *The Guardian* (7 November 2017) <https://www.theguardian.com/us-news/2017/nov/06/woman-trump-middle-finger-firedjuli-briskman> accessed 9 January 2018.

political expression by its employee; and under American law it was correct. I am pleased to report, however, that this story has a happy ending: on reading press reports of her dismissal, the woman is reported as having received 240 job offers from other employers!

My central point is that employment creates an extensive and authoritarian power relationship, which poses an inherent challenge to most liberal values. The hierarchy of the workplace establishes relations of inequality between individuals. A boss expects levels of deference and obedience that would be unusual anywhere else except perhaps in a courtroom. Freedom of expression is curtailed at work, often for good reason, for if everyone chatters all the time, no work will get done. Yet the control on freedom of expression impinges on duties to serve the public interest and extends to every aspect of our lives, including outside of the workplace and when we are off duty. There is no such thing as being off-duty in the sense of being free from the shackles of the duty of loyalty to the employer. These controls also interfere with respect for our private life. Surveillance at work though cameras, monitoring of telecommunications, and physical tests achieves a level of detailed information and control over workers that authoritarian and repressive governments can only dream of with respect to their policing of their citizens.

If we accept this argument that there is an inherent contradiction between the legal institution of the contract of employment and core liberal values such as liberty, equality, autonomy, privacy, and freedom of expression, we should recognise that, in order to achieve justice in employment and the workplace, there is a need to provide effective legal protections against any potential abuse of power. In the relation between the citizen and the state governed by public law, to prevent the abuse of power by governments there must be vigorous constitutional protections of the rule of law and individual rights. Similarly, in the workplace, the risk of the abuse of power by employers (and sometimes others in the workplace) requires a system of justice that is like a political constitution: justice at work requires a legal framework that affords all workers permanent, robust, and effective protections against abuse of power. As one of its key ingredients, that constitution for the workplace must have measures to protect the core liberal moral values such as equality, liberty, freedom of expression, and respect for privacy from destruction or diminution in the relation of subordination that comprises the contract of employment. This constitution for the workplace must therefore have similar ingredients to a political Bill of Rights.

IV. The Problem of Commodification

The second feature of employment that marks it out as presenting a special challenge for theories of justice is that it usually provides the principal source of income, self-esteem, and meaning for our lives. Through work we usually earn at least enough to sustain ourselves and our dependants; we develop self-respect by performing a useful role in society through our work; and in most jobs people develop a sense that their life is meaningful and worthwhile. No other contract (unless you count marriage as a contract rather than a status) has that combination of features that place it right at the core of our lives and life-plans. Many people feel that their social status and purpose in life is built on their work. For most of us, work is the principal place where we become, in the words of Joseph Raz, 'authors of our own lives'.[236]

[236] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) Pt. V.

Yet work does not always serve those significant functions. Workers may in fact only be able to find jobs in which they are treated not much better than a machine, without a significant opportunity to achieve either material well-being or meaning and fulfilment for their lives. The wages may be so low and intermittently received that a worker may find it impossible to establish a home, a family, and to enjoy other aspects of life such as drinking coffee in a café or watching football. Jobs may also involve harsh working conditions, in which the worker is treated no better than a robot. Under those working conditions, it will be almost impossible to develop self-esteem, personal relationships, and a sense of purpose in life. A well-known example of such appalling working conditions concerns migrant domestic workers.[237] They can be brought to European cities from abroad, either through illegal trafficking or false promises of decent work and an education, and then these migrants are effectively locked up in a rich person's home, required to work all day, every day, caring for children, cleaning and cooking, and then forced to sleep on the floor, and, of course, they receive no pay. Almost as severe conditions will be found in the sweatshops of every country. Sweatshops are workplaces with very poor working conditions and bad pay, where the workers are forced to work by economic necessity and sometimes physical violence. In the ironically named 'fulfilment centres', which comprise warehouses where workers pick, pack and ship orders of goods to customers, the intense work pressure and relentless control exercised through computerised management techniques ensure that workers feel diminished to the level of machines. Migrant agricultural workers also typically suffer from such brutal working conditions that their jobs are frequently described as 'modern slavery'. These various kinds of exploitative work relations fail to provide individuals the valuable benefits concerning material welfare and self-affirmation that are associated with work. In his early work, Karl Marx tried to describe this common situation in the early factories as one where workers were estranged from their true natures in seeking fulfilment through work.[238]

Of course, people can have bad experiences as a result of entering many other kinds of contracts. Their package holiday may be a disaster; the new car may break down; or they may suffer food poisoning from a meal at a restaurant. For these sorts of contracts, there is always the option of not making them again or seeking a different supplier next time. In contrast, the option of not taking or quitting a job in which a worker is treated as a mere instrument may not be available in practice. As well as a possible shortage of alternative jobs in the labour market, the economic pressure to continue to work under appalling labour conditions is maintained by the need to satisfy basic needs combined with the reluctance of welfare systems to support anyone capable of working.

To put the point another way, there is nothing inherent in a market society that prevents labour or personal services from being treated as a commodity, bought for the lowest price possible, and then disposed of when no longer needed. It is true that employers need to be assured that there will be an available workforce, so that they must pay enough to allow their employees to stay alive, but that

[237] Virginia Mantouvalou, "'Am I Free Now?" Overseas Domestic Workers in Slavery', (2015) 42 *Journal of Law and Society* 329.

[238] Karl Marx, 'Economic and Philosophical Manuscripts' in L. Colletti, ed., *Early Writings* (London: Penguin/NLB, 1975) pp. 322-34.

requirement seems minimal and, in any case, does not always hold true where, for example, there is a plentiful supply of cheap labour such as temporary migrant workers from the global south.

For these reasons, in a society committed to treating people as human beings and offering them possibilities to flourish and be the authors of their lives, it is necessary to regulate the contract of employment. The International Labour Organisation proclaims that everyone should have the possibility of decent work.[239] Unless a job produces the valuable benefits that are associated with work, such as self-respect, personal fulfilment, and social relationships, far from providing a valuable opportunity for individuals, it appears to place them in a condition in which they are not treated with the standards appropriate for a human being. They are treated as if selling labour power or their personal performance of work is no different from a sale of goods, without any relational dimensions that respect the psychological expectations of work and working relations.[240] If a just society is one that treats its members as human beings, it should not tolerate these exploitative and mechanical working conditions. The law needs to ensure that people are not treated merely as commodities or machines.

Employment law (or labour law) can strive towards that goal through a wide range of possible measures that try to ensure fair and dignified treatment for workers. These measures may include protection against unfair treatment at work including unjust dismissal, unjust remuneration, exploitative working conditions, and may also support workers having a voice at work through trade unions, which can often, by virtue of their collective power, more effectively represent their vital interests. Indeed, most of the content of the laws governing work can be conceived as having their ultimate rationale in a mission to prevent the commodification of labour.

V. A Foundation in Human Rights

In view of the special characteristics of the contract of employment, it has been argued that the achievement of justice at work requires two adjustments to the normal principles of liberty and equality that provide the foundation for justice in markets and contracts. First, in order to resist the institutional tendency of employment relations towards unaccountable hierarchy and unrestrained subordination, the achievement of justice at work needs the law to provide robust guarantees for rights of workers to liberty, equality, privacy and other liberal values. Second, justice at work demands that the workplace must be a humane place, somewhere where people are not treated like robots managed by computer algorithms and where they can find meaning for their lives through their work and the relationships made at work. Whilst labour law undoubtedly pursues those twin objectives as an important part of its normal mission, the subject can often be regarded as a field where ordinary contract law principles provide the principal foundations for employment law. This view tends to relegate employment law to perform a supplementary and regulatory role that address instances

[239] ILO, *Decent Work Agenda*: https://www.ilo.org/global/topics/decent-work/lang—en/index.htm (accessed 12/072019).

[240] John Gardner, 'The Contractualisation of Labour Law' in Hugh Collins, Gillian Lester, Virginia Mantouvalou (eds.), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) 33; Hugh Collins, 'The Contract of Employment in 3D' in David Campbell, Linda Mulcahy, and Sally Wheeler (eds.), *Changing Concepts of Contract: Essays in Honour of Ian MacNeil* (Palgrave Macmillan, 2013).

where contractual practice and market failures undermine respect for the principles of liberty and equality. Whilst the need for special regulation of employment contracts is clear in view of the aforementioned distinctive features of the contract of employment, ordinary legislation that may be amended or abolished according to political preferences does not secure the immutable and intransigent guarantees needed to lay down the foundations for the aspiration of justice at work for everyone.

What is required instead is a constitutional foundation for the workplace. This foundation should provide both a robust set of individual rights as protection against abuse of power and permanent guarantees against the commodification and instrumentalization of labour. These objectives can probably be best achieved by conceiving of the foundations for justice at work as comprising a legal framework that prioritises the protection of human rights at work. In this context, support for human rights at work is intended to address both of the distinctive challenges presented to the achievement of justice at work. Human rights law serves the purpose of protecting those fundamental rights that are akin to constitutional rights or civil liberties, which protect autonomy and dignity by placing constraints on the actions of the powerful. Human rights law also is a legal expression of the value of respect for the dignity and equality of human beings, which is the opposite of treating workers like a commodity. The core ingredient of the ideal of justice at work should therefore comprise the protection of the human rights of workers. Human rights law should provide the foundations of labour law rather than be constructed as a variation of the general law of contract.

But how can human rights apply in the workplace? These rights are usually thought to be applicable in the public sphere to governments and states, but not to private business organisations that employ workers. As in the case of the Universal Declaration of Human Rights, human rights assert moral standards that all national governments are supposed to observe with regard to their citizens. Human rights can be used as grounds for criticising governments, armies, and other public bodies. They can be used as reasons or seeking to topple governments or to intervene to rescue the hapless citizens of failed states. Human rights are also frequently proclaimed in national constitutions and binding international conventions such as the European Convention on Human Rights. Although human rights law performs a vital function in those political and constitutional contexts, human rights have not traditionally been associated with legal regulation of work and the contract of employment. How should we conceive in practical terms the idea of justice at work comprising the protection of human rights at work?

Clearly, we need to think of human rights as applicable not only to the state and public law, but also horizontally in private law between citizens and crucially in the contract between employers and employees. The workers should be able to invoke their human rights against their employer, and the employer must be placed under a correlative duty to respect those rights and not interfere with them without good justification.

VI. Human Rights as Workers' Rights

Fortunately, this configuration of human rights as workers' rights, with correlative legal duties placed upon employers, though once novel, is now becoming fairly settled legal practice in

Europe. It is possible to identify four stages of development in the application by courts of human rights to contracts of employment and the workplace.

The first breakthrough in the application of human rights to work relations came from the development of anti-discrimination law. In the European Union, the principle of equal pay for equal work was developed by the Court of Justice into a general principle of equality between men and women.[241] The European Treaty extended the principle of equality to other protected characteristics to racial or ethnic origin, religion or belief, disability, age or sexual orientation.[242] At about the same time, the European Court of Human Rights was able to extend protections against discrimination to other disadvantaged groups, since the prohibition against discrimination with respect to human rights in Article 14 ECHR was not confined to a fixed list of protected characteristics. That court broke new ground, for instance, by protecting gay men and lesbians working in the armed forces,[243] and, in *IB v Greece*,[244] by protecting workers from being victimised for being HIV positive. These were remarkable legal developments, because they applied the human right to treatment as an equal or treatment with equal respect regardless of personal characteristics to workers against their private employer as well as to citizens against the state.

A second breakthrough came when the European Court of Human Rights proclaimed that a state's duty to respect human rights includes a positive duty to pass laws to protect those rights of citizens in their daily lives, including at work. The Court insisted, for example, that the contracting states should pass laws so that public and private employers could not unjustifiably interfere with their employees' freedom of expression,[245] or their freedom of association by preventing them from joining and participating in the activities of trade unions[246] (or choosing not to participate in them).[247] The positive duty placed on states to protect the human rights of employees at work does not ignore the interests of the employer, since the employer also has rights that should be protected. Instead, the European Court of Human Rights requires states to provide protection for human rights subject to a test of proportionality that balances the employer's interests against those of the employee. Consider, for instance, the example of *Redfearn v United Kingdom*.[248] Mr Redfearn was an active member of a far-right political party known as the British National Party. The party is a racist, neo-Nazi movement, which is opposed to the European Union and the European Convention on Human Rights. Following complaints from trade union representatives, the employer dismissed Mr Redfearn because it was concerned that his continued employment would cause difficulty with customers and colleagues and might lead to violence. Mr Redfearn's legal claims in the United Kingdom all failed. The European Court of Human Rights concluded, however, that Mr Redfearn's application should

[241] Case 149/77 Defrenne (No.3) v SABENA [1978] ECR 1365, 1378.

[242] Article 19 Treaty on the Functioning of the European Union (first agreed in the Treaty of Amsterdam 1997).

[243] *Smith and Grady v United Kingdom* (App. No. 33985/96) [1999] ECHR 180.

[244] *IB v Greece*, (App. No. 552/10), Judgment of 3 October 2013.

[245] *Vogt v Germany* (1996) 21 EHRR 205; *Palomo Sanchez v. Spain*, [2011] ECHR 1319.

[246] *Wilson and National Union of Journalists v UK* [2002] ECHR 552.

[247] *Sigurjonsson v Iceland* (1993) 16 EHRR 462; *Sorensen and Rasmussen v Denmark* (2008) 46 EHRR 29.

[248] *Redfearn v UK* [2012] ECHR 1878.

succeed in principle, because in accordance with Article 11 of the European Convention of Human Rights on freedom of association, an employee should have a claim against his private employer for unjust dismissal if the reason for the dismissal was membership of a lawful political party. The failure of UK law to provide such protection to the applicant was a breach of the Convention unless it could be established that the interference with the right to freedom of association was a proportionate measure in pursuit of a legitimate aim. In this case, the Court hinted that the employer's concern to prevent violence in the workplace would probably have provided such a proportionate justification of the dismissal of Mr Redfearn, but mere dislike of his political views would have been insufficient. The case illustrates both how contracting states have a positive duty under the European Convention on Human Rights to protect employees against interference with their Convention rights by private employers, and how under the Convention states may permit such interferences for a legitimate purpose of the employer provided that the interference is proportionate.

A third breakthrough is still in the process of being specified. It is often said that human rights are inalienable. But this statement is not correct. Whilst one may not be able to sell one's human rights to the state, it is often necessary for the state to balance the conflicting rights of citizens against each other, and in striking the right balance the state may well be influenced by what had been agreed between the parties as a trade-off between their rights. With regard to workplace justice, the issue that is being explored in a number of contexts is to what extent an employer can use the terms of the contract of employment to place constraints on an employee's exercise of human rights. The answer in general is that a consensual interference with the employee's fundamental rights is possible, but must be a proportionate measure in pursuit of a legitimate aim, though admittedly that answer does not tell us very much. This principle leaves considerable indeterminacy regarding what may be regarded as a legitimate aim and whether an interference was proportionate. Under the duty of loyalty owed by employees, for instance, an employer may expect and require employees to limit their right to freedom of expression by not expressing themselves in ways that harm the reputation of the employer or its products. For instance, Mr Crisp worked in an Apple store in England selling iPhones. The terms of his contract stated that he should not denigrate his employer or its products. Nevertheless, on social media, though within a privacy setting, he told his 'friends' that his iPhone was a shoddy product (he used more colourful language in fact). On learning of the content of these messages from one of these socalled friends, the employer dismissed Mr Crisp. Although the UK tribunal recognised that this was an interference with Mr Crisp's freedom of expression, it decided that the interference was in pursuit of a legitimate aim, namely, the protection of the reputation of the employer and its products, and was proportionate in view of the explicit rules laid down by the employer in the contract of employment against denigrating the employer's product.[249] But does that mean that employer can protect themselves against a finding of interference with a human right by inserting suitable terms in the contract of employment? It seems not, but the limits on the employer's power to excluded

[249] *Crisp v Apple Retail* (UK) Ltd ET/1500258/11 (22 November 2011).

human rights remain obscure. Consider for instance the case of *Bărbulescu v Romania*,[250] where an employee was dismissed for contacting his family and fiancée via a social media messaging service in contravention of an express prohibition by the employer against all personal messages while at work. The European Court of Human Rights insisted that such a complete ban on contacts with friends and family during the working day was too great an interference with the right in Article 8 of the European Convention on Human Rights to respect for private life and the family. We might say that the degree of subordination and commodification in that employer's workplace was incompatible with respect for the human rights of its employees. The lesson is that the powers conferred on the employer by the contract of employment and consent by the employee are constrained if they would amount to a disproportionate interference with the human rights of workers.

A fourth breakthrough is still at an incipient stage. Dismissal from a job can lead to not only a loss of income but also the loss of all those other features associated with work, such as self-esteem, social status, respect from others, and the opportunity to give one's life meaning. The European Court of Human Rights has recognised that in some cases of dismissal, the damage to all these benefits obtained from work may be so severe as to render a dismissal a disproportionate interference with the right to respect for private life. The right to respect for private and family life under Article 8 of the European Convention on Human Rights extends to a right to personal development. Dismissal can in some cases demolish that right to personal development. For instance, in *Özpinar v Turkey*,[251] a female judge was dismissed following an anonymous complaint 'on behalf of a group of patriotic police officers' about, amongst other things, her unsuitable friendships, clothing, and make-up. It seems that she behaved like a single professional woman in Western Europe, including, what was perhaps regarded as the most shocking aspect of her behaviour, not living with her parents. In response to her dismissal, the European Court of Human Rights held that she was entitled to, but had not received, guarantees against arbitrariness, and in particular a guarantee of adversarial proceedings before an independent and impartial supervisory body in order to contest her dismissal. The Turkish judge won her case in part because the dismissal was not properly justified in the Turkish legal proceedings, and in part because of the severe consequences for her private life and personal development resulting from the permanent destruction of her career as a judge. What this case demonstrates is that human rights law in Europe demands from the contracting states that they should enact laws to protect all workers against arbitrary or unfair dismissals that cause them serious loss and adverse effects in their ordinary lives. Because the employer's power to dismiss workers is a key aspect of employees' subordination in the contract of employment, this protection of a right against unjust dismissal is a vital ingredient in the institutional arrangements required to achieve justice at work.

These four developments in European human rights law go a long way towards answering the puzzles surrounding the application of human rights law to the

[250] *Bărbulescu v Romania*, (App. no. 61496/08), [2017] ECHR 754.

[251] *Özpinar v Turkey* (App. no. 20999/04) (Judgment 19 October 2010); see also the loss of a career as a security guard: *Boyraz v Turkey (*App. no. 61960/08) [2014] ECHR 1344.

context of private employment relations. They address in particular the problems of translating the content of rights that are framed as protection against oppressive governmental action towards citizens into rules and principles that can be applied in contractual contexts such as employment. These developments also support the view that not only the state but private bodies can be duty-bearers under human rights law, with the qualification that private actors, in view of their own possession of protections for their human rights, should be granted broad scope for the pursuit of their own legitimate interests.

VII. Conclusion

My central claim has been that a proper understanding of the requirements of justice in the context of employment and the workplace should lead us to construct the foundation of the legal framework not in the general law of contract but rather in the law of human rights. It is possible to derive the key ingredients of adequate protection of workers against subordination and commodification through an elaboration of human rights with horizontal effect. The law of contract continues to play an important role in shaping the relation between the parties and describing the trade-offs between the rights of employers and workers, but the terms of the contract must always be subject to the mandatory principles and requirements of proportionality of the law of human rights.

In conclusion, let me remark that this project of identifying the nature and requirements of justice at work is necessarily an ongoing project. As the world of work changes, so too the dimensions of justice at work need to be revised. Even the notion of being at work has been transformed during the decades that I have reflected upon this topic, for so many of us now work from home at all hours of the day and night. A new right that will soon have to be recognised in the workplace will be a right to disconnect from electronic communications. Nevertheless, despite this changing world of work, I hope that I have persuaded you that the ideal of justice at work for all can only be achieved through a vigorous protection of human rights at work.

Nota redacției: Articolul a fost publicat inițial în *LSE Law, Society and Economy Working Papers* 18/2019, Revista Forumul Judecătorilor primind permisiunea autorului și a revistei engleze în vederea republicării exclusive a studiului în România