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RESTRAINT OF TRADE

by Prof. dr. Antoine T.J.M. Jacobs[1]

1. A trio of concepts

One of the themes of this afternoon's session is called "restraint of trade" and I would not be amazed if some of you are a bit puzzled about this notion, as indeed it is a rather obscure notion in the field of labour law.
What does the concept of "restraint of trade" relate to?
I think, that the organisers of this conference may have choosen this theme, as it comes close to another concept, that is less obscure and very much in the center of contemporary legal-political debate in Israel: the concept of the Freedom of Occupation.
And as a Dutchman I would like to add that it also comes close to a concept, that the Constitution of The Netherlands enshrines since 1983: the freedom of work, or in French - from where the Dutch borrowed it - the "liberté du travail".

A trio of concepts - restraint of trade/liberté du travail/freedom of occupation - with strong similarities.
Let me illustrate that with some examples.

If at present judges in Israel are confronted with clauses under which a union could demand that its members alone could apply to be employed in a particular undertaking - so called closed shop agreements - they feel a certain reluctance to enforce such clauses, considering them as infringing upon the freedom of occupation.
If they are confronted with clauses under which former employees are limited in taking up a job for a competitor, they feel a certain reluctance to enforce such clauses, considering them as infringing upon the freedom of occupation.
I refer to the Zim judgment of your National Labour Court, 1993[2], and to two Egged cases of your Supreme Court, 1993 and 1994.[3]
If French judges are confronted with this type of clauses, they feel a certain reluctance to enforce those clauses, considering them in contradiction with the concept of "liberté du travail" (freedom of work).
If in Britain or in the United States judges are confronted with such clauses

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[1] Professor of Labour Law, Social Security Law and Social Policy, Catholic University of Brabant, Tilburg, The Netherlands.

[2] National Labour Court in the case Histadrut/National Union of Seamen Officers versus Zim Israeli Shipping Company, Ltd, June 27, 1993.

[3] Supreme Court, March, 1994, on a case of 14 pensioners of Egged.

they feel a certain reluctance to enforce them as they consider them as being "in restraint of trade".

These examples show you how much similarity there is between these three concepts. There is - under the cloth of a variety of notions - one basic idea: citizens must have the right to earn their living in an occupation freely entered upon and businessmen must enjoy a wide area of enterpreneurial freedom.

It is interesting to note, that these three concepts even have to a large extent the same roots - 18th century liberalism - but through different historical contexts the various concepts all have acquired a distinctive colour and smell.

The concept of **"restraint of trade"** was born among the political economists of the 18th century, notably in Britain, who advocated the benefits of freedom of trade in contrast to the many restrictive economic rules and practices of those days. And lawyers were quick to integrate this concept as a guiding principle for the development of the common law: contractual clauses were considered null and void if they were in "restraint of trade".
This common law concept of restraint of trade spread all over the British Empire. It also became part of the common law of the United States. In many American states it is codified in statutes. To mention only D.C. Code §28-4502 (1981), which provides, that

> "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce ... is declared to be illegal."

Right from the start of the industrial era, organised labour experienced the dark side of this doctrine. Trade unions were considered to be in restraint of trade. Collective agreements and notably closed shop agreements were considered null and void as they were "in restraint of trade". Strikes, picket-lines etc. were tortuous actions as they were apparently "in restraint of trade". So it is not unfair to say, that the very concept of "restraint of trade" has been the traditional enemy of modern labour relations and thus also of modern labour law in the Anglo-American world! But this enemy, dominant in the 19th century, gradually lost its power until it seemed completely defeated in 1918. 20th century labour law contains numerous rules and it condones innumerable practices, which evidently are in restraint of trade.
If the concept of restraint of trade has survived in labour law, it is only in marginal sections: In those areas where statutory law had not yet penetrated. There you can still find judges taking resort to the concept of restraint of trade to establish the law. A classic example in Britain and the United States is the idea of covenants of non-competition. Should they be upheld or not? As statutory law in Britain and many an American state is silent on this subject, judges have taken resort to the concept of "restraint of trade" perhaps not to quash these clauses altogether but in any case to mitigate them.
The idea is, that the freedom of trade requires that a worker should be free to offer his services wherever he wants, and that covenants restricting him in that, are in "restraint of trade".

If I subsequently turn to the French concept of "liberté du travail", it immediately strikes us how this concept, stemming from almost the same roots, has acquired a much less capitalist and much more social colour and smell.
The historical credentials of the concept of "liberté du travail" go back to the language of the French Enlightment philosophers of the 18th century and were adopted in Constitutions in France and elsewhere in Europe in the aftermath of the French Revolution of 1789.
Soon thereafter it became a battle-cry against slavery and all kinds of forced labour. A large part of the 19th century still had to be devoted to abolishing slavery. And even in this century this fight had to be repeated after forced labour had returned in Nazi-Germany as Arbeitseinsatz.
The growing aversion from slavery and forced labour ultimately was voiced in the prohibitions of slavery and forced labour, laid down in Conventions of the ILO, of the Council of Europe, the United Nations, etc.
The concept of "liberté du travail" can take much of the credit of this achievement.
So this concept of "liberté du travail", broadly speeking, was never seen as an enemy of modern labour law, it was never defeated and it was held in great esteem throughout the 20th century. And as I already mentioned, in the Netherlands it was enshrined in the Constitution as recently as 1983.
The workers movement could use the idea of "liberté du travail" to claim the right to strike - all prohibitions on strikes were interpreted as hindrances of the workers to stop working in order to pressure the employers to improve the working conditions.

However, even that sympathetic concept of "liberté du travail" has occasionally been stained in the eyes of the workers movement.
The idea of "liberté du travail" was sometimes invoked in the course of industrial action by workers who were not willing to participate in the action and by their employers. They claimed "liberté du travail" to cross picket-lines and to neglect boycotts. Very much to the dislike of organised labour which saw this as subversive actions aimed at breaking the strike.
Moreover the idea of "liberté du travail" was not propitious to those in the labour movement who supported closed shop arrangements.
So, even that nice notion of "liberté du travail" is not without ambiguity.

Finally I arrive at the third concept which is quite close to that of "restraint of trade" and "liberté du travail", which we owe to the German legal theory and that is the concept of "Berufsfreiheit", **freedom of occupation.** It was enshrined in the German Constitution of 1949. We meet it in the law of other states such as California[4] and - as I noticed during my stay here in Israel - it also is included among the Basic Rights of the State of Israel.

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[4] Cal. Bus. & Prof. Code § 16600 (West 1987) (IERM 545:22): "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."

If one hears the term "freedom of occupation" one would not immediately think of labour law. Prima facie this term refers to the notion to freely exercise professional occupations like those of medical doctors, lawyers, architects and so on. But if you stretch it widely enough it certainly can also embrace a "liberté du travail" for the workers[5] and a right of employers to be protected against interference in business.[6] And indeed, in the case law of the German Constitutional Court the basic right of Berufsfreiheit - freedom of occupation, has acquired this wide interpretation.[7]

I hope that this comparative review has gone towards demonstrating, that concepts of freedom of business and employment are present in all the major legal families of the Western world. And that they also are being guarenteed under a variety of legal notions, each of them with its own connotations.

2. The limitations put upon these concepts

Yet, despite the fundamental roots of the concepts of freedom of occupation, "liberté du travail", restraint of trade, in Western law, these concepts cannot reasonably be invoked as absolute principles. There has been a long tradition requiring, that these concepts should only be applied within limits.

In the Anglo-American world the judges have always accepted, that the doctrine of restraint of trade was to find its borders where statutory law explictly allowed restraints of trade.
In the words of the actual German constitution of 1949 it is said:

> "The practice of trades, occupations and professions may be regulated by or pursuant to a law."

And when the Dutch constitution of 1983 came to embrace the concept of "liberté du travail" it did so in a phrase which provides in full:

> "The right of every Dutchman to freely choose work is recognised, save for limitations by or pursuant to a law."

So it is clear, that the constitutional fathers too have had the wisdom to recognise, that freedom of occupation and "liberté du travail" cannot be proclaimed as absolute values. They may be exercised but within bounds. Otherwise - as with all liberties - they can turn against public interests.

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[5] See the Series of decisions and judgments of the German Constitutional Court, referred to as BVerfGE 7, 377; 11, 30 [40]; 16, 6 [21].

[6] BVerfGE 7, 377 [397]; 50, 290 [363].

[7] BVerfGE 7, 377 [397]; 50, 290 [362]; 59, 302 [315]; 75, 284 [292]; BVerfGE 82, 209 [223].

But how strong are these bounds?
If it is written, that the freedom of occupation or "liberté du travail" may be regulated by or pursuant to a law, does that mean, that freedom of occupation, liberté du travail and restraint of trade are absolute values in all areas, where such regulations are missing?
If the answer is "yes", then a great deal of the terms and conditions of employment can be challenged, as they are not regulated by statutory law but by collective agreements.
It seems to me a dangerous development if "restraint of trade", "liberté du travail" and the freedom of occupation were to serve as guiding principles for the interpretation of employment contracts.

Yet, the problem is even wider. Are all the limitations on these concept, "by or pursuant to a law" beyond dispute?
In countries like Britain, possibly: yes, thanks to the still prevalent idea that "parliament is sovereign" - acts voted by parliament cannot be challenged before the courts.
But in quite a number of countries, like the US, Germany and Israel, acts of parliaments are no longer sacrosanct. They can be challenged before the courts and rejected by the courts if they contravene constitutional values.
So what does it mean to say that freedom of occupation is recognised within the boundaries of the law? If the laws can be abolished by the courts when they contradict a basic value, this is a circular reasoning!

We may agree that everything depends on the wisdom of the judiciary. If the judiciary is not disposed to allow parliament large powers to limit the freedom of occupation it can quash massively statutory labour laws.
If however the judiciary is disposed of respecting the supremacy of parliament in deciding the social-economic framework, it will leave untouched the vast majority of labour laws.

In Germany the Constitutional Court has always recognised that parliament has a wide degree of freedom in fixing the measures it sees appropriate and necessary to pursue its objectives.[8] It may give priority to considerations of efficiency.[9] This is as true as it is in matters pertaining the freedom of occupation as it is in all employment and social political and economical aims.[10]

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[8] BVerfGE 7, 377 [400]; 14, 19 [23]; 53, 135 [145]; 54, 237 [249]; 60, 215 [231]; 77, 84 [106]; 81, 156 [193].

[9] BVerfGE 7, 377 [406]; 77, 308 [332].

[10] BVerfGE 77, 84 [106]; BVerfGE 77, 308 [332].

3. The future

That leads me to present you some reflections on the **future role** of this trio of concepts in labour law and industrial relations.

On the one hand one might argue that the application of the concepts of freedom of occupation, liberté du travail, restraint of trade, may in the future well enhance the rights of workers and even the unemployed.
To give you just a few examples: These concepts can be invoked
- by sportsmen, hampered by existing contractual arrangements such as the transfer system[11]
- by elderly workers, hampered by upper age limits[12]
- by political activists, hampered by Berufsverbote[13] (limitations on access to certain jobs)
- by unemployed persons, unprepared to be pressured to accept any job being offered to them under the penalty of losing their benefits.
etc.
If the concepts of freedom of occupation/liberté du travail/restraint of trade were uncompromisingly applied in these cases this would contribute to a libertarian society with priority for individual rights of workers and the unemployed. However, the existing case law on these issues do not show that judges are very eager to apply these concepts uncompromisingly. They seem to be more inclined to consider the existing limitations as justified.

On the other hand it is obvious that the employers too may increasingly invoke this trio of concepts. We are living in an era of **neo-liberalism**. The values of market-forces have been reevaluated. The reins on the freedom of enterprise have gradually become suspect. To promote economic growth, the creator of jobs, "restraints of trade" should be abolished - or to say it with a Thatcherite slogan: building business, not barriers.
And against this backdrop the concepts of freedom of occupation/"liberté du travail"/restraint of trade may well become banners in the hands of those who embark on a crusade against existing labour and social security law.

They can even give this crusade a social appearance as more and more economists in the West maintain that modern labour law has become the enemy of the workers. Once established in their favour, it is now strangling the very existance of jobs. Labour in the Western countries has become too costly a commodity. It is replaced by technology. And as far as it cannot be replaced by

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[11] This was done in the Dutch case Hoge Raad, October 17, 1980, NJ 1981, 41 (Mühren), in which the plaintiffs were unsuccessful.

[12] BVerfGE 1, 264 [274]; 9, 338 [344ff].

[13] BVerfGE 17, 226; 22, 114; 39, 334; 63, 266.

technology, it is relocated to countries, where its price is much less expensive. If the wealth of the Western nations is to be maintained, it is time for deregulation or at least for flexibility of the laws of the labour market. This philosophy is no longer only professed by conservatives, but we can hear it daily from the mouth of socialists as well.
And the legal concepts of freedom of occupation/"liberté du travail"/restraint of trade can be helpful as vehicles to spread this philosophy into the most distant areas of labour/management relations.

In Germany the concepts of freedom of occupation has been invoked in cases challenging the statutory provisions on employment agencies[14], on the employment of handicapped workers[15], on hours of work[16] and paid leave[17], on co-determination[18], on dismissals[19], on aspects of compulsory social security schemes.[20]

However, only in a very small minority of these cases, has the German Constitutional Court held the basic right of freedom of occupation as infringed upon by the statutory provisions. In the overwhelming majority of the cases the Court accepted the limitations put upon the freedom of occupation, as being reasonably founded and necessary; not disproportionate and not unfair.

So the first impression is, that the trio of concepts - freedom of occupation, liberté du travail, restraint of trade - in recent years has not inspired judges to a wholesale attack on existing equilibriums in labour law and labour relations. They have seldom been used to promote individual interests of workers and unemployed persons against existing restraints.
And they have seldom been used to promote employers interests against existing restraints.

But perhaps this first impression is not completely correct and at the moment I'm engaged in a research project with my collegue Prof. Ruth Ben-Israel from Tel Aviv University to acquire a more thorough knowledge of the developments

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[14] BVerfGE 21, 245; 21, 261; 77, 84; see also Court of Justice European Communities, Judgment 23.4.1991 (Höfner); see also Betriebs-Berater 1991, p. 2530.

[15] BVerfGE 57, 139.

[16] BVerfGE 22, 1; 23, 50; 41, 360.

[17] BVerfGE 77, 308; 85, 226.

[18] BVerfGE 50, 290 [365].

[19] BVerfGE 84, 133; BVerfGE 85, 360.

[20] BVerfGE 10, 354; 34, 62; 69, 373; 81, 156; 83, 1.

in this field in various countries. Therefore both of us would be most grateful for your observations on this item in the official discussion or in the lobby of this conference.

Anyway, it seems not too risky to suppose that the judiciary in the forseable future is going to be more frequently questionned about the impact of this trio of concepts on existing labour law and industrial relations, not the least here in Israel. This may become an important challenge for your Labour Courts, when they are entering the next 25 years.

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