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Electronic version

URL: <https://journals.openedition.org/rdctss/1763>

DOI: 10.4000/rdctss.1763

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018

Number of pages: 78-85

ISSN: 2117-4350

Electronic reference

Isabelle Ferreras, "Should Labor Rights Count as Civil and Political Rights? Reflections on Worker Participation in the Government of Firms", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021. URL: <http://journals.openedition.org/rdctss/1763> ; DOI: <https://doi.org/10.4000/rdctss.1763>

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SHOULD LABOR RIGHTS COUNT AS CIVIL AND POLITICAL RIGHTS? REFLECTIONS ON WORKER PARTICIPATION IN THE GOVERNMENT OF FIRMS¹

ABSTRACT

Working from the perspective of a comprehensive and critical sociology of contemporary work, and a companion critical political theory of the firm, this paper defends the following hypothesis: it is useful to consider labour law as directly related to civil and political rights and not to a category of rights that is derived from and secondary or additional to this first set of rights.

KEY WORDS: *Worker Participation, the Firm as Political Entity, Corporate Governance, Public Space, Capitalism/Democracy Contradiction.*

RÉSUMÉ

Au départ d'une sociologie compréhensive et critique du travail et d'une théorie politique de l'entreprise dont il convient de l'équiper, il est pertinent de considérer l'hypothèse suivante : dans une perspective critique et reconstructive, il est temps d'envisager le droit du travail comme émergeant directement des droits civils et politiques et non pas d'une catégorie de droits, dérivés, secondaires ou supplémentaires.

MOTS-CLÉS : *Participation des travailleurs, entreprise comme entité politique, gouvernement de l'entreprise, espace public, contradiction capitalisme/démocratie.*

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Taking as our starting point a political theory of the firm that includes a comprehensive, critical sociology of work,² and equipped with a critical approach that employs what Ferry has called reconstructive ethics, let us consider the following hypothesis: the time has come to define labor rights³ as contiguous with civil and political citizenship, rather than as a category of rights that is derivative, secondary, or accessory. Currently, this is not the case. Citizenship, according to T.H. Marshall's canonical understanding, occurs in three stages, and is connected to a society's phase of development.⁴ From this perspective, any issues linked to the rights of labor investors tend to be thought of in exactly the terms cited above – derivative, secondary, or accessory. Marshall, examining British history, identified a gradual evolution of citizenship within a society: it began with basic civil citizenship, which comprised the rights won in the struggles of the eighteenth century, moved through political citizenship in the nineteenth century, and ended up in the twentieth century with what he called social citizenship. Marshall saw rights as building up in sedimentary layers with the passing years, accumulating and settling over each other, making the exercise of citizenship a richer experience as time went on. This sequential view of history comes up short, however, when mobilized in any discussion of labor rights, because it assumes that they are more or less the only rights at play in the economic realm. This is an unfortunate misconception.

Labor rights are far better understood as part of a broader movement to recognize political rights as extending into the work world. Without intending to, Marshall's sequential understanding of the history of citizenship obstructs this approach; in so doing, it strengthens the partition liberal thought has built to divide the political away from the economic. According to the latter way of thinking, political liberalism requires a philosophy of power that is specific to a field that liberal thinkers have identified as 'political,' while economic liberalism requires a second philosophy (also of power) of its own, limited to what liberal thinkers have identified as 'the economy.' The right to be free and equal exists in the political field. Freedom of enterprise lies in the economic field, as well as the right to freely sign a work contract – to sign away our own freedom and equality, in other words, in exchange (a temporary exchange, in theory) for the yoke of subordinate labor.

It is time we ceased to navigate according to these outmoded distinctions, and detached our understanding of labor rights from Marshall's third and final phase of citizenship, for this way of thinking has trapped us in an impasse. The partition between the economic and the political went up in the eighteenth century and has been maintained

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- 2 My research agenda seeks to lay the foundations for such an approach. See (Ferrerias 2007, 2012, 2017). This article is based on arguments developed in these three books and is, of course, too brief to explore them fully. I invite the reader to refer to them for further detail.
 - 3 This article does not discuss positive law, but rather uses sociology and political philosophy in an epistemological framework that, in the tradition of the Frankfurt School and in particular the work of Habermas (1971) sees emancipation as the core interest of the critical sciences and seeks to identify the emancipatory "critical intuitions" (Ferrerias 2012) of actors as a means to reinforce them using a reconstructive approach, in the sense of the "reconstructive ethics" proposed by Jean-Marc Ferry (1996). The critical understanding of the law that underlies it is close to the philosophy of law advanced by Walter Benjamin (1921), which saw law as an expression of the sedimentation of relationships of social power; more contemporaneously, it is close to critical legal studies that also seek to understand the law as a social construction with the potential to serve as a tool of emancipation.
 - 4 Understood, from a sociological perspective, as a social system, rather than as a contract under the law of any given society. Multiple meanings are, of course, at play in the context at hand: society is a "nomadic" term and it is most interesting to follow it through various academic fields.

through the nineteenth and twentieth centuries. This conception is holding us back. It must be acknowledged that in the world we live in today, the public spaces of our democratic societies comprehensively include the economy. To deny this is to continue refusing workers their citizenship within the confines of the workplace, and this refusal has set us hurtling down a path toward serious crisis. I argue that nothing less than the life of our democracies depends on dismantling this division (see Ferreras 2017), as I will make clear in the next five sections.

I - THE CAPITALISM/DEMOCRACY CONTRADICTION

To explain how we ended up in this particular impasse, let us change maps, setting aside Marshall's rather geological view of citizenship in exchange for a cartography inspired by Marx's pioneering work on the contradictions of capitalism (Ferreras 2007). Here, I suggest the utility of focusing on one contradiction, which I simply identify as the contradiction between capitalism and democracy. Political democracies draw their vitality from the ideal of human equality, and across the world, citizens sense that this ideal is under threat from capitalism's structuring principle, which continues to gain strength and influence. The capitalist principle might be summarised as follows: its aim is to grant political rights exclusively to the holders of capital. The principle of capitalism is very much political in nature, rather than strictly economic: it identifies who has the right to be represented in the government of the common firm. The capitalist principle is clear: only the owners of capital participate in the government of firms, and of labour as well. Yet, outside the firm, workers are also recognised as citizens – “free and equal in dignity and rights.”⁵ Within the firm, a tension exists between the ideals of equality and equal representation that underpin the democratic ideal and the monopolistic power granted to its capital investors. This tension can only grow as the citizens who work in firms perceive the contradiction between a society that affirms the value of the democratic principle, promising them a say in their shared destiny (and control over their own individual destinies), and the growing power that capital investors hold over these same citizens' social and cultural lives, their health care, and their education, not to mention the course of their elections and the fate of their planet, a power that has mushroomed as financialized and globalized capitalism has begun to escape all state control. Currently, across the Western world, voters are angrily expressing their rejection of this system; indeed, once the contradiction between capitalism and democracy has been pointed out, it becomes easier to understand the growing appeal of populist leaders of all stripes. The United States of America may be seen as an extreme case, wherein the contradiction is being resolved by the victory of the capitalist principle over the democratic one, both within the political realm and beyond.⁶

From Marx's perspective, employees are in a heteronomous situation at work⁷ – they sign up for their own alienation. Despite the many labor rights won over the past century-and-a-half of struggle, the situation has changed very little: workers still cannot determine the ends pursued in their workplace, no more than they can determine the de facto norms

5 These words are from Article 1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948: “All human beings are born free and equal in dignity and rights.” They in turn were inspired by the Declaration of the Rights of Man and Citizen of 1789, which set the ideal of liberal individualism as a cornerstone of Western culture at the very least – it is this geopolitical space of capitalist democracies with which we are concerned in the present article.

6 See Winkler 2018.

7 From the term *hetero-nomos*, meaning ruled by laws determined by others, as opposed to *autonomos*/autonomy, meaning ruled by one's own law.

imposed on them through the very processes by which their work is carried out. One thing, however, has changed, and that is democratic culture: it has acquired considerable depth since Marx penned his economic theory. Today, in the Western world, even the least educated and least qualified of workers was born into a stable democratic culture that, at least in word, expects that all citizens be considered equal in rights and dignity.

II - WORK CONTAINS A CRITICAL INTUITION OF DEMOCRATIC JUSTICE

As our production regime has shifted from an industrial economy to a service economy, the presence of customers within the workplace has dramatically weakened the link between work and what we understand as the private sphere, and has sharpened work's political dimension (see Ferreras 2007). Work is, on the whole, a collective experience, and as contemporary workers interact with customers in increasingly flexible workplaces, they are called upon to mobilize their own understandings of fairness and justice. Put simply, the service economy has made workplaces more and more public; the word 'public' here being deliberately chosen to draw attention to a relatively new reality, in which a third party is present in the workplace, in the person of the customer (someone who is neither a colleague nor a hierarchical superior, which were the two 'others' encountered in the worklife of the industrial economy). Work therefore inevitably creates opportunities to mobilize the conventional norms of the public sphere of our advanced liberal democracies – chief among them the covenant of equal dignity. Undeniably, workers in the industrial era were also deeply affected by the unfairness of their work lives (Faure and Rancière, 2007). But back then, no outsiders penetrated the closed spaces of the workshop and the factory floor to “rub it in” – to bear witness, more or less continuously, and as they worked, to the public sphere and its democratic standards of equality, dignity, and collective autonomy. In the factory, the workplace was still a world of thoroughly domestic subordination. A worker might be shocked and outraged by mistreatment at the hands of a hierarchical superior, but that mistreatment took place in a physically closed and “private” space, far from the public and the public sphere.⁸ In the open spaces of our service economy, workers are constantly brought face to face with a third party, the customer, who also happens to be a fellow citizen, and therefore functions as a constant reminder to workers of their expectations of equality. In their interactions, worker and customer mobilize unspoken conventions of the democratic public sphere inside the world of work.

I have proposed that this confrontation can no longer be avoided. Employees, brought face to face with fellow citizens from the public sphere, equal in dignity and rights, can only expect (or hope) that these same citizens recognize their equal dignity in return. And it is only logical that these same potent normative expectations spill over into employees' expectations of their hierarchical superiors, and, more to the point, of worklife in general. Inevitably, as the democratic culture of individual equality deepens and service work draws fellow citizens into the heart of the work world, work is lived as a political experience, driven by the expectation of democratic justice – or what I have proposed be called the “critical intuition of democratic justice” in the workplace. This intensifies the contradiction between capitalism and democracy, which becomes a tension that structures the experience of employment in capitalist democracies: workers are dominated by a regime of domestic

8 A closed space whose Greek etymology, *oikos-nomos*, was perfectly appropriate: the law of the household. Referring to Latin etymology now, the worker served the *domus*, and as a domestic servant, could not even question the decisions of the master. Today's economy bears no resemblance to this *oikos*; indeed, to the contrary, it has moved into the public sphere. See Ferreras 2007.

subordination, subordinate in the workplace to their capitalist principal, and, at the same time, steeped in the expectation and the culture of democracy. Customers are a kind of canary in the mines of the work world, revealing the increasingly noxious tensions between the aspiration to have one's equal dignity recognized through democracy – in the full cultural sense of that term, as Tocqueville observed in America – and the negation of that aspiration in the system of domestic subordination that still structures work relationships in capitalist firms. Customers, often in spite of themselves, usher the culture of the democratic public sphere into the firm.

III - THE FIRM, A POLITICAL ENTITY, PIVOTAL IN THIS CONTRADICTION - MUST BE DEMOCRATIZED

In light of this reading of work and worklife, it is easy to see why the firm ought to be considered as central to this contradiction between capitalism and democracy, which, at the dawn of the twenty-first century, is coming to a head. Mired in the economic theory of the firm, companies trap the individuals through which they function in the core contradiction of our “capitalist democracies” (Cohen and Rogers 1983): as citizens, employees aspire to democratic equality, and at the same time they see that their employers, agents of capital investors, have been granted a monopoly over the power exercised in their workplaces. Our task, then, is to create a political theory of the firm capable of providing a rigorous analytical alternative to the economic theory of the firm prevalent today. Cast as an attribute of the corporation, the firm appears as secondary. And yet, the opposite is true: the corporation has obscured the very existence of the larger institution of the firm – a part wielding power over the whole. Corporate legal scholar Jean-Philippe Robé refers to this phenomenon as “building the firm around the corporation” (translation our own; 2011, 36). It is plainly a legal and conceptual error: the corporation is the legal vehicle that structures the investment of capital in the firm, nothing more. From the perspective of a much-needed political theory of the firm, the power structure that currently rules firms is a monocalameral form of government in which capital investors elect representatives who behave as Aristotelian despots, unquestioned masters reigning unilaterally over household slaves.⁹ The Capital Investors’ Chamber of Representatives – better known as the Board – holds exclusive legislative power and imposes its domestic rule over the entire firm. This form of government exists beyond the reach of labor law and trade law, and extends across the entire value chain, down through to subcontractors and suppliers.

IV - FREEDOM FROM DESPOTISM

Once again in our history we face the question of how to free ourselves from despotism. The West has a long and proud tradition of identifying and dethroning despots, but here, in the realm of the firm, under the cloak of the corporation, wearing economic clothing, so to speak, the despots are more difficult to spot. But it does not actually follow that a society that recognizes the – private – property rights of those who invest their capital in a firm via the corporation (or via any other legal vehicle for structuring capital, for that matter) must grant the exclusive right to govern that firm to those capital investors. No legal or moral imperative prevents us from rethinking the architecture of the firm and the way it distributes and upholds the powers governing everyday life within it. Critically examining

⁹ Again, I am intentionally employing this Aristotelian terminology, as it is powerfully revealing: “household” is the Greek *oikos*, which, as you recall, gave rise to the word “economy” – the law of the household.

the architecture of power specific to the life of the firm requires us to acknowledge, at the descriptive level, that the firm (again, I underline, as opposed to the corporation) is a “political entity” (Ferreras 2017), defined by the power dynamics underlying the relations between labor and capital within it. In other words, a firm combines the legal structuring of the investment of capital through corporate law with an ill-defined institutional structuring of the investment of labour, through labour law. The legal structuring of capital through corporate law is well defined, while the right of labor investors to organize meaningfully at the level of the firm has yet to be established. Labor law, particularly as embodied in institutions that already exist thanks to years of pressure from organized labor, such as collective bargaining, works councils, and union representation, should be considered as a parallel attempt to structure labor investment.

Assessing the future of firms brings us up against a classic political problem: how to transition from a despotic to a representative form of government. More specifically, in the case of the firm, it raises the question of how to transition from the conditions of heteronomy that characterize work under capitalism as we currently know it to conditions in which all of a firm’s investors have the right to a voice in the government that rules them – and even more specifically, how to erect an institutional structure that offers the two constituencies of the firm, both necessary investors in it, the means to exercise collective autonomy in a democratic setting, to use the language of Castoriadis (1975). Such expansive, comprehensive thinking about firms ought not to limit itself to corporate law alone; it must also look past the limits of the principle of subordination, in the classical sense of that term as understood in labor law. Moreover, it must give serious consideration to the power dynamics at play in firms, and thus to the ongoing potential for conflict that exists within them. This means abandoning a simplistic approach to firms as mere economic organizations run according to a set of purely instrumental calculations in favor of an approach that sees firms as political entities in and of themselves, in which many kinds of power relations unfold, only some of whose features can be measured and assessed according to monetary and other quantitative indicators.

Throughout the twentieth century, capitalist democracies have undertaken initiatives intended to foster or facilitate worker participation in the management of their work and firms. But there is an important distinction to be noted between government and management (or governance) (see Ferreras 2012). To govern is to play a significant part in deliberation, coupled with negotiation, over the terms of an exchange – in this case, economic. It is a process that fosters discussion of both ends and means.¹⁰ What this article is exploring, in other words, is the idea of carving out a place for workers in the government of firms, not only their management. Management involves bargaining over the means of carrying out a project defined elsewhere and beforehand by someone else (again, heteronomy as opposed to autonomy) – in this case, by capital investors. The terms of exchange in deliberation are political; that is, they mobilize conceptions of justice and have to do with the ends of the activity in question, not just the means to achieving them. The terms of negotiation and bargaining are highly limited, and each term of the exchange is quantified and clearly delineated: salaries, working hours, schedules, production rates are chips to trade in exchange for subordination, efficiency, productivity, and social order. Government deals with ends as well as the practical pursuit of these ends (in the business world, this is the domain identified as strategy, and comprises major questions such as: What kind of service or product does a firm produce? Where? What happens to profits?); management

10 In the tradition of Pizzorno’s classic thinking on “political exchange,” I refer to an analytic rather than a practical distinction, which I have put forward with Jean De Munck, identifying three dimensions of what we called “democratic exchange:” deliberation, bargaining, and experimentation (De Munck and Ferreras, 2012).

is concerned with the implementation of a predetermined framework decided upon during a deliberation held beforehand among other actors authorized by persons other than labor investors and/or their representatives. Government takes place in the charted terrain of the democratic public sphere, and acknowledges the equality of all as a foundational principle. Management is carried out in the private sphere, where those who hold greater power can set the terms of the exchange. The field of firm management has generated a long list of methods for involving workers as a way to make firms more functional, more productive, and more efficient.¹¹ So if we are to think critically about work today, the real challenge is to examine the question of what it would mean for workers to exercise their right to weigh significantly and meaningfully in the government of the firms to which they contribute, as well as in their management. In other words, we must explore what it might mean to give them voice with regard to the ends of their activity, and not only the means.

V - HOW TO OPERATE THE TRANSITION?

This is a major transition, from despotism to democratization. To achieve it in the political realm, our Western societies all passed through what I have called a “bicameral moment” (Ferreras 2012, 2017). Taking this long-term historical view and applying it to firms allows us to imagine a way out of the current situation. Currently, labor investors have no voice in the government of their firms; this right is enjoyed exclusively by capital investors, through the legal structure of the corporation. However, two kinds of investment are necessary for a firm to succeed in any undertaking: of labor and of capital. The firm, in other words, is composed of not one but two “constituencies” (Ferreras 2012). But while capital investment has been recognized and rewarded with its own institutional structure, the same remains to be accomplished for labor investment. Certainly, some corporate boards in Europe have included some worker representation since the second half of the twentieth century, notably in Germany, where *Mit-bestimmung* (co-determination) is the rule for firms of a certain size and in certain sectors. This, alongside institutions such as European Works Councils, is evidence of the persistence of the intuition that workers have a right to organize in the institutional structure itself, and to representation in firm government – that it is both legitimate and necessary. The time has surely come to stop favoring one foundational logic of the firm over the other, and to give the same weight to the political and expressive rationality of labor investors as is given to the instrumental logic of capital. The two constituent bodies of the firm must be recognized as equal. Reading over the history of political bicameralism and its accompanying political and legal theory, one sees how crucial recognizing this dual logic has been to breaking away from despotism, to the process of democratizing our societies, and to the continuation of the democratic project.

Pursuing the long road of democracy into the economy requires us to recognize that it is possible to rethink the government of firms, and their executive power, in terms of their responsibilities to both capital investors (through their Boards), and to their other constituency, labor investors. These two groups of investors, capital and labor, make up the firm together. And in a bicameral system of government, a Parliament is made up of two chambers, which represent these two constituencies – in the case of the firm, what is currently known as the Board, and which is in reality the Capital Investors’ House of Representatives, and an equivalent House of Representatives for labor investors, yet to be convened. These two chambers would guarantee that each group is represented in its own right, and would have to work together in order to exercise legislative power. A

11 While “liberated companies” (Carney and Getz 2012) and other CSR practices have proven profitable for company shareholders, whether they actually do more than involve employees in the management of their companies remains to be seen.

firm's top management would thus be answerable to both Chambers, and responsible for fostering productive compromise and cooperation between them, compromises that nourish the firm's growth in ways that benefit both sets of interests, instead of just one. Ideally, these Chambers would gather jointly in order to maximize learning, cooperation, and fruitful deliberation. A majority (50%+1 vote) would be necessary in each Chamber to pass legislation.¹² Each of the two Chambers would also have veto power over any major decisions affecting the life of the firm.¹³

Finding ways to bolster the critical intuition behind all major developments that have driven the history of labor law is one of the most important challenges we face today. Institutions dearly won by preceding generations are now being dismantled as trade union freedom erodes across the globe, deepening inequalities¹⁴ and driving voters to ever-more destructive and extreme choices in our elections.¹⁵ The intuition of workplace citizenship, so incisively stated in the introduction to the French Auroux Laws of 1981, is this: as they are "citizens in the city, so too must workers be [citizens] in their firms." If we are to break free from the contradiction between capitalism and democracy, now is the time to take this intuition seriously. If we do not extend and strengthen democracy, then we cannot be surprised when capitalist despotism gains the upper hand – which it currently is. And labor law, as it upholds the possibility of equal dignity for labor investors, must take a – fighting – position at the vanguard of the fight for people's civil and political rights.

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- 12 This is a key difference compared with *Mit-Bestimmung*, which is a monocameral system and requires a simple majority in a single chamber. Under such conditions, it is easy for management to obtain a majority. For more detail on differences between these two systems of government see (Ferrerias 2017)
 - 13 In concrete terms, we might imagine that a country that deemed it desirable to encourage this model of government, considering that its values were a better fit with the society it sought to foster than those of despotic government by capital holders, might implement tax incentives for firms wishing to transition to bicameral government. Certainly, tax incentives have been offered to firms for reasons less lofty than that...
 - 14 See Jaumotte and Osorio Buitron 2015.
 - 15 See Coutrot's study (2018), which shows a link in France between alienating conditions in the workplace and votes for extreme-right-wing candidates or abstention.

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Research subjects: Sociology of services, transformations of work and of the firm, trade union action, political theory of the firm, future of democracy.

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