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Prison labour, customs preference schemes and decent work: Critical analysis and outlook

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Abstract. *In customs preference schemes, prison labour is primarily viewed as unfair competition, to be rejected out of hand. This form of employment can, however, be understood differently, notably by considering the conditions under which it may constitute decent work, and by seeing it as a tool for rehabilitation. Following an in-depth legal analysis, in which they compare the relevant standards of the ILO to EU and WTO customs regulations in the light of the capability approach, the authors call for the development of a set of rules drawing on several branches of law relating to prison labour.*

Keywords: *prison labour, decent work, unfair competition, tariff policy, ILO standards, European law, vulnerable groups, capability approach, EU, WTO.*

1. Introduction

The ILO Centenary Declaration for the Future of Work, adopted in Geneva on 21 June 2019 (ILO 2019a) is centred on the promotion of decent work for all. The practical translation of such a broad, ambitious aim requires the examination of every area of human labour. It is only through this meticulous work that avenues for reflection can be uncovered and corrective actions identified. In this study, we offer a reflection on the delicate and controversial issue of prison labour and the importance of the concept of decent work within the debate. However, before embarking on this task, we need to identify the various difficulties raised by prison labour.

The starting point for the analysis is as follows: European Union (EU) customs regulations provide for the temporary withdrawal of its preferential regime, the

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Generalised Scheme of Preferences (GSP) (which reduces or removes duties on goods being imported from developing countries into the EU), in case of the export of goods manufactured in prisons or in violation of the Forced Labour Convention, 1930 (No. 29), or the Abolition of Forced Labour Convention, 1957 (No. 105). This approach testifies to a general suspicion towards prison labour, which had already been considered a potential vector for unfair competition by Member States during the creation of the World Trade Organization (WTO) (Feldman 2020, 224; Busse and Braun 2003). This rejection applies regardless of the actual form of the work, its purpose or the public or private nature of the entity for which it is performed.

The objection that may be formulated with regard to such a clear rejection of goods produced in prisons is similar to that seen in this observation of the ILO dating as far back as the 1930s: "… the basis of the complaints of free industry is not so much that the work is done in prisons but rather that the work is done under more favourable commercial conditions than its own" (ILO 1932a, 502; see also ILO 1998, para. 112 et seq.; ILO 2001, paras 84–91; ILO 2007a, para. 122).

This comment perfectly demonstrates the complexity of the problems posed by the production of a good or service by prisoners, which effectively creates prison labour that can compete with both national enterprises and those of foreign countries. Yet labour should not be considered solely with regard to the conditions under which it is carried out. Where international economic law is concerned, the end – namely the commercial market for the elements produced – is also important. In this regard, several cases can be envisaged. First, prison labour may be destined for export abroad or the local market, without distinction. Second, it may be destined solely for a foreign market. In this case, it has the advantage that it does not compete with national enterprises, but there will be (as in the previous case) issues related to international trade regulations, to which we will return. As an exception, these activities that are not aimed at the internal market may involve work performed outside the prison walls, for instance through the use of prisoners on work sites abroad. This specific case will not be addressed in this study, in which we have chosen to examine only the more common traditional form of work performed within a prison establishment. The third and final possibility is that prison labour is not intended for export, but will be traded on a national market, under conditions set by the country.

Depending on the market for which the good or service is intended, prison labour may fall under two separate sets of regulations. The first corpus corresponds to the national and international standards governing work by prisoners, where the latter is aimed at rehabilitation. The second corpus is naturally that of customs regulations, which raises the question of how tariff preference schemes apply to countries contravening the ban on importing products manufactured in prisons imposed by the EU or the WTO.

In this regard, the fact that the EU makes its preferential customs regime conditional on compliance with ILO Conventions Nos 29 and 105 cannot be assimilated to a simple ban on prison labour. Indeed, the ILO does not always consider prison labour to be a form of exploitation or social dumping. In the

responses provided by its Helpdesk for Business, which provides guidance on compliance with international labour standards, the ILO usefully recalls the distinction between forced labour and prison labour.[1] Likewise, in 1931, in the same article on prison labour cited above, the ILO had already recognized that "[t]he aim of employing the prisoner on instructive and useful work is to strengthen his moral character during the period of detention and make him capable of living a straight and regular life. Prison labour is thus an important weapon in the campaign against crime" (ILO 1932a, 522; see also ILO 2001, paras 85–88; ILO 2007a, para. 99).

In addition, an effective solution to ensure that work was compatible with ILO standards would function via the recognition, under the national law of the country concerned, of a legal status specific to imprisoned workers (Auvergnon et al. 2019). In this study, we are not aiming to list the options selected by different national laws on this point for the purpose of comparison. We will focus on what could be an intermediate step before this type of analysis, namely the identification of the minimum legal conditions that must be put in place to allow prisoners to undertake decent work.

The basis theory that we are seeking to develop is inspired by the concept of decent work, as described in the report of the Global Commission on the Future of Work (ILO 2019b), which draws extensively on the capability approach proposed by Amartya Sen (2000). This approach, if taken seriously and applied to the rehabilitative function of prison labour, should lead to reconsideration of the idea that production in prisons is primarily, and necessarily, an activity that distorts competition.

By taking a capability approach, and taking into account the objective of rehabilitation, it seems even more obvious that prison labour should not be organized very differently from free work, notably in relation to the means of production, consent, working conditions (including in terms of working hours and occupational safety) and remuneration. Furthermore, even today, it is necessary to try to "bring the prices of prison products nearer to the level of ordinary industrial prices, at least as far as they are determined by technical equipment. To this extent there would then be no further question of unfair competition" (ILO 1932a, 502; see also ILO 2001; ILO 2007a, paras 99–100; ILO 2012). It may also be considered that competition becomes even more unfair when the labour performed by prisoners is underpaid.[2]

Coherent and rigorous application of the concept of decent work in relation to prison labour contrasts with any approach permitting a form of forced labour to be used. In this way, when production in prisons, carried out through the

[1] See the page entitled "Q&As on Business and Forced Labour" at https://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm#Q3.

[2] Fenwick (2005) recalls that in the United States, since 1979, the ban on transporting goods from prison labour to another state from that in which they were manufactured, imposed by the Ashurst-Sumners Act of 1940, may be lifted if the prisoners were paid the minimum legal wage or a wage equivalent to that paid for free work. The United States also prohibits the importation of goods manufactured using forced labour. See Title 19, para. 1307 of the United States code, available at https://www.govinfo.gov/content/pkg/USCODE-2011-title19/html/USCODE-2011-title19-chap4-subtitleII-partI-sec1307.htm.

work of prisoners, violates fundamental social rights, it can be affirmed that it is a form of work that is not decent, particularly if it does not seem to be suitable for developing the capacities of the people detained (in professional, economic or psychological terms). Furthermore, the requirement of decent working conditions prevails over whether the work is performed on behalf of the State or for a private entity, even if this latter circumstance is taken into consideration when assessing the legality of the work in accordance with ILO standards.

As a result, it should be considered that the ILO Committee of Experts on the Application of Conventions and Recommendations (hereinafter "Committee of Experts"), depending on the current interpretation of Convention No. 29, is not imposing particular limits on the use of compulsory prison labour by the State, with the result that only prisoners who have not been convicted and prisoners awaiting trial cannot be obliged to work (ILO 1968, para. 77; Servais 2015, 142). The approach is different in the case of labour performed by prisoners for private enterprises, which is always considered contrary to the Convention, unless it effectively results from voluntary activity (ILO 2007a, paras 59–60). As for Convention No. 105, this prohibits forced or compulsory labour, including that performed for the State, to the extent that it constitutes a means of political coercion or education, a punishment linked to the political or ideological views of the person, or a method of mobilizing and using labour for purposes of economic development (Article 1).[3]

Countries that are signatories of a standard relating to international economic law and that wish to apply one of its clauses on labour must be aware of the risks of abuse mentioned above. However, in this article, we maintain that, if a social clause takes the work of prisoners into account, it must reflect the nuances of Conventions Nos 29 and 105. More specifically, it must take into account the way in which these texts should be interpreted in the light of the objectives set in the Centenary Declaration (ILO 2019a), which returns decent work to the centre of the discussion, namely by recalling that work must be useful and meaningful (Fenwick 2005; Quigley 2004), and transformative for the individual (Feldman 2020, 223) from a capability perspective.

To ensure that a social clause does not hinder the adoption of policies aimed at the effective rehabilitation of prisoners, labour law must not only *protect* but *support*. With this in mind, it is essential to examine themes that still receive too little coverage in the labour law literature, notably by analysing the role of work for prisoners, working conditions in prisons and cooperation between enterprises and the public authorities. In doing so, particular attention must be paid to the role of the State and the issue of the voluntary nature of the work (Milman-Sivan and Sagy 2020).

The remainder of this article is structured as follows: in section 2, we will examine the social conditionality of international commercial agreements relating to prison labour. In section 3, we will attempt to summarize the current debate on the interpretation of Conventions Nos 29 and 105, highlighting their

[3] In this regard, particular reference is made to the comments by the Committee of Experts on the application of Convention No. 105 by the United States, and more specifically the punishments involving compulsory work imposed for participating in strikes in North Carolina (ILO 2021, 315).

relevance to aspects relating to prison labour. We will then analyse the issue of prison labour in the light of the capability approach, as part of a broad view of the concept of decent work (section 4). In the fifth and final section, we will present our conclusions, drawing attention to the remaining issues.

2. General preference schemes and prison labour

Despite the constant and repeated refusal of Member States to include a social clause in the WTO system (Moreau 1996 and 2002; Servais 1989; Compa 1993; Maupain 1996; Staelens 1997; Dubin 2003; Reis 2010; Duthu-Calvez 2010; Perulli 2014), which would have made it possible to sanction a Member for the violation of fundamental social rights, this principle nevertheless flourished at the margins, in the specific context of relations with developing countries. More precisely, it was demanded by certain Member States of the General Agreement on Tariffs and Trade (GATT), later the WTO, that wished to use the margin for manoeuvre offered to them by establishing general preference schemes. In this way, the United States was first to see in these new rules of international economic law an opportunity to protect itself against imports whose conditions of production did not comply with minimum social standards, notably in terms of wages, as well as with its legal standards regarding workers' rights. Due to the paradoxical way in which it is drafted, the United States customs preference scheme mentions internationally recognized workers' rights without referring to the relevant international labour Conventions in these areas. This lack of reference to ILO standards led us to exclude the United States customs preference scheme from the scope of this study. Instead, we will focus on the relation between generally recognized international standards, namely those of the ILO and the Council of Europe, and the rules of international economic law.

In the following pages, we will see how, at the multilateral scale and within the customs standards of the EU, the prevailing view that has been imposed is one of work in prison as a factor of unfair competition. For international trade, this view of prison labour seems to be the only unavoidable legal standard in relation to minimum compliance with labour law. In this regard, the EU customs regime banning the importation of products manufactured through the (forced or compulsory) labour of prisoners logically mentions ILO Conventions Nos 29 and 105. The issue of their application is therefore embedded into the objective of combating unfair competition in relation to imports. However, after analysing the underlying reasons used to justify the establishment of this link, we will demonstrate later in this article that this is not incompatible with an interpretation of these same international Conventions in support of an improvement in prison working conditions.

In terms of social clauses, it is notable that, following initial disinterest in this type of conditionality, towards the end of the twentieth century, the EU instituted a double approach, on occasion presented somewhat pejoratively as that of "carrot and stick" (Vandenberghe 2008; Orbie and Tortell 2009). At that time, the EU notably started to concern itself with respect for workers' rights in countries wishing to export under preferential conditions. Although it was the motivating dimension – namely access to the incentive scheme – that

was supported by commentators at the time, the punitive dimension – the withdrawal of the preference scheme – also merits in-depth analysis. Due to its impact on the overall customs preference system, this second dimension acts as a mechanism in itself and follows its own reasoning. It is above all the result of a view that has gradually come to dominate: that of a link between working conditions and import management, then between certain labour law rules and this same management framework. This link imposed the idea of a level or a plateau beyond which trade between countries should not be encouraged. Prison labour paved the way for other fundamental social rights. As a result, from the rejection of production simply deemed to constitute unfair competition due to its cost – namely that involving prison labour – was born an imperative encompassing other fundamental social rights, including trade union freedoms. With the analysis of this slow evolution, the difficulty in viewing prison labour from a different perspective to that of a factor of unfair competition is all the more striking.

2.1. Emergence of social conditionality within tariff preference schemes: Customs law and working conditions

In Europe, the GSP would contribute to this evolution by combining an approach focused on fundamental social rights with the pre-existing principle in Article XX(e) of GATT, which provides for a general exception to the rules of the Agreement for the products of prison labour. At its creation in 1971, the European system did not seem destined to include social clauses (Sapir 1995). It was chiefly intended to serve development aid objectives and, although this was less openly acknowledged, to maintain strong links with former colonies (De Schutter 2015, 102–103). As a result, the first preference scheme – which was not at that point presented as a single package[4] – does not mention social rights or the exclusion of products manufactured in prison.

However, from the 1990s, the European GSP would take a new turn with the adoption of Regulation (EC) No. 3281/94,[5] a text that would become the legal basis for the link between customs legislation and compliance with working conditions. Taking a restrictive view, it is possible to underestimate this shift and see this change as the mere appearance of a *social dimension*, rather than a real *social clause*. The criticism that could be made in this regard is that the withdrawal of a supplementary scheme, and one that is moreover an incentive, does not constitute a sanction. Dispersyn (2001) considers that the provisions aiming to integrate concerns linked to human labour are peripheral, as they

[4] In practice, it is a collection of acts targeting various sectors and establishing a preference scheme in these areas for developing countries, namely Regulations (EEC) Nos 1309/71, 1310/71, 1311/71, 1312/71, 1313/71 and 1314/71 of the Council of 21 June 1971, OJ L 142 of 28 June 1971, available (in French) at https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=OJ:L:1971:142:FULL&from=FR.

[5] Council Regulation (EC) No. 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, OJ L 348 of 31 December 1994 (hereinafter "Regulation (EC) No. 3281/94").

only lead to the loss of an additional preference. In formulating this criticism, he does nevertheless recognize that the nuance is slight. Furthermore, the principal difficulty is that his observation is limited to the motivating dimension linked to the incentive scheme, and excludes the other consequence of the recognition of a link between trade and social criteria. Yet this link is established through two different means, which merit separate analysis. In its presentation of the new GSP, the European Parliament saw a punitive social clause and an incentive social clause.[6] Beyond the attachment of the two instruments to the family of social clauses, the terms proposed by European elected representatives opportunely underlined the divergences introduced by the new GSP in terms of reasoning and understanding. The second dimension, namely the incentive social clause, would be implemented from 1 January 1998 through the introduction of special incentive schemes granting a preferential additional margin to all countries respecting certain social standards relating to the right to organize and collective bargaining, the minimum age for work and environmental issues.[7] Combining these two concerns led to a conception of social clauses linked to the promotion of sustainable development through a legal framework. However, we will focus here on the punitive social clause, which itself takes a competition approach proper to international trade and labour law alone, without incorporating environmental considerations.

It was therefore following a first version of the GSP that the European Community decided to overhaul its functioning in 1994 and add a new title on the withdrawal of entitlement to the scheme. The link to the pre-existing issue of taking working conditions into account, as derived from import clauses related to anti-dumping, would become evident in situations justifying temporary exclusion from the list of beneficiary countries. Yet prison work was once again part of the criteria selected, with Article 9 of the regulations of 1994, then 1996, covering the scheme of preferences and, more specifically, situations that could lead to withdrawal or suspension.[8]

2.2. From consideration of working conditions to consideration of labour law

In the consideration of working conditions within international trade, it is possible to see merely a simple attachment to Article XX(e) of GATT (Cepillo Galvín 2008; Sorriaux 2014). But it is also possible to discern there the result of a work of "infusion",[9] namely the acceptance of this link. Once the idea that working conditions could constitute a criterion for the application of customs law had

[6] Report on the communication from the Commission to the Council on the trading system and internationally recognized labour standards (COM(96)0402–C4-0488/96), A4-0423/98, 11 November 1998.

[7] Regulation (EC) No. 3281/94 and Council Regulation (EC) No. 1256/96 of 20 June 1996 applying multiannual schemes of generalized tariff preferences from 1 July 1996 to 30 June 1999 in respect of certain agricultural products originating in developing countries (hereinafter "Regulation (EC) No. 1256/96"), Articles 7 and 8.

[8] Regulation (EC) No. 1256/96, Article 9.

[9] Here, we borrow the concept of the infusion of an idea in the legal process (Levi, 1948).

been widely recognized (Waer 1996), that same customs law could lead to a broader vision of legal conditionality in the domain, in the form of social clauses.

Furthermore, by focusing on the conditions under which goods are produced in prison, rather than solely their trade, the WTO takes a position that remains ambitious despite the narrowness of its legal basis. There certainly does not exist, whether in WTO law or in GATT 1947[10] or 1994[11], a specific binding provision recognizing the legitimacy of a distinct objective of protecting social rights (Luff 2004, 1115). But this progress, while limited, must be compared to the treatment reserved for the prison workforce in other circumstances. In this respect, the difficulty of taking working conditions into account when assessing business rights before States during investment arbitration constitutes an obstacle (Perulli 2018; Treu 2017). Moreover, it should be recalled that the WTO General Agreement on Trade in Services (GATS)[12] has never established exclusions with regard to services provided from prisons, although there are numerous call centres within prison establishments, some of which are private, which are indisputably providing services. It should be noted that, from March 1994, before the conclusion of the negotiations on the new Regulation (EC) 3281/94, Manuel Marín, Vice-President of the European Commission at the time, presented a statement in which he entreated the Commission to make tariff preferences conditional on the prohibition of both prison labour and any form of forced labour. The communication to the Parliament on the future of the preference scheme would largely follow his proposals, notably with regard to the withdrawal of preferences based on working conditions.[13] As a result, in 1994, the mention of goods produced by prison labour was accompanied by a reference to any form of forced labour, and withdrawal became possible not only on the basis of working conditions, but also in the event of failure to observe ILO Conventions Nos 29 and 105.[14]

This change is thought-provoking as, for the first time, a labour law rule is used to justify partial or total withdrawal of the European scheme. It is all the more striking that the perspective developed by the Commission and its Vice-President then makes the fight against forced labour an extension, a prolongation of that which has targeted forced labour in prison for decades. These cases of withdrawal are included in a single paragraph, and appear to be similar. Indeed, they focus on the violation of certain working conditions which justify the prohibition of an import operation. On the other hand, in a separate treatment that seems at first reading to be puzzling, the Commission evokes

[10] General Agreement on Tariffs and Trade 1947, available at https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

[11] General Agreement on Tariffs and Trade 1994, available at https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

[12] General Agreement on Trade in Services, available at https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

[13] Communication from the Commission to the Council and the European Parliament: Integration of Developing Countries in the International Trading System – Role of the GSP 1995–2004, COM(94) 212 final, 1 June 1994 (hereinafter "Communication COM(94) 212"). Available at http://aei.pitt.edu/4213/1/4213.pdf.

[14] Article 9 of Regulations (EC) Nos 3281/94 and 1256/96.

and portrays the legal framework taken from international labour law solely from an incentive point of view, as part of the incentive side of the preference scheme, which is incidentally the only one to be referred to as a social clause in Commission Communication COM(94) 212, mentioned above.[15]

In addition, the mention of the ILO Conventions on forced labour constitutes a clear separate and supplementary stage. This shift, which could only take place in the context of anti-dumping regulations, may be analysed as the product of a maturing process that saw the link between working conditions and trade grow stronger. As that became sufficiently established, anchored in international trade, it was able to develop into a ban drawing on labour law rules. This movement can also be analysed as the bridge between the modern social rights-based approach, as demanded from a fundamental rights perspective, and that originally developed by GATT based on wages, and therefore on the living conditions of workers (Alben 2001). The evolution of the social clause within successive preference schemes also validates the vision of a gradual widening of this connection that was originally recognized in the case of prison production. In 2001, with the overhaul of the preference scheme and the adoption of a new regulation,[16] this social clause on the withdrawal of preferences would see an increase in the number of legal criteria referring to labour law. Indeed, Article 26 of Regulation (EC) No. 2501/2001 provides for withdrawal of the scheme not only in the case of forced labour, but also in the presence of a serious and systematic violation of other fundamental social rights. As a result, the legal regime applicable to imported products with regard to international economic law has evolved to cover the protection of freedom of association, the fight against discrimination and the use of child labour. Although the reference to the importation of products manufactured in prison (and therefore to working conditions alone) remains, it is augmented by serious consideration of labour law. Indeed, and this is probably the main contribution of this regulation, the withdrawal clause no longer applies solely in the case of the importation of products rendered less costly by the working conditions of the workforce, in law or in practice. In effect, freedom of association or non-discrimination, while they may naturally influence the final cost of the product, are not linked to it as directly as forced labour. Moreover, the acceptance of the Council of what became an extension of the legal basis of the mechanism was obtained more smoothly given that it posed no threat to European economic interests (Orbie and De Ville 2010).

With the overhaul of 2001, the punitive social clause maintained the tougher qualitative stance. It is also possible to observe a convergence between the labour law standards taken into account and those mobilized by the incentive social clause (namely, the special incentive arrangements for the protection of labour rights in Article 14, paragraph 2 of Regulation (EC) No. 2501/2001). However, we should not be too hasty in attributing this change to imitation, and

[15] See footnote 13.

[16] Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ L 346 of 31 December 2001 (hereinafter "Regulation (EC) No. 2501/2001").

considering that one has necessarily influenced the other. In fact, as recalled previously, from 1994 the incentive clause has taken into account the right to collective bargaining (Article 7 of Regulation (EC) No. 3281/94), without its coercive equivalent doing the same. The admission of social conditionality for the granting of additional preferences does not therefore necessarily entail its reproduction at the point of determining the scenarios for withdrawal from the ordinary preference scheme. This reasoning did, for that matter, raise lively criticism with regard to both the decision to divide fundamental social rights between the two mechanisms and, more broadly, the possibility of granting ordinary preferences even in the event of violation of the collective rights of workers. In a particularly striking turn of phrase, Tsogas writes: "It seems that, according to this peculiar EU 'carrot and stick' approach, exploiting children and organizing death squads against trade unionists are less serious breaches of human rights than running forced labour camps!" (Tsogas 2000, 363). It is in this respect that the connection with provisions limiting the importation of goods produced using forced labour in prison makes it possible to contextualize the punitive social clauses and their development. In other words, appreciation of the context can be analysed as the fact of identifying the principal characteristics of a standard, with a view to recognizing both its subjective and objective nature. In this case, subjectivity relies on its context of development, symbolization and interpretation (Lacroix 2003). In this respect, the appearance of the social clause in the European GSP could be perceived as the result of a willingness, already well-established in anti-dumping instruments, to address the issue of human labour.

Subsequently, the dynamic of import control, on the basis of working conditions as well as respect for labour law, would be maintained while being grouped together with the incentive clause.[17] Beyond the respective scope of these clauses, it is all the less appropriate to have combined them given that they do not operate on the same basis. In Article 26, paragraph 3(a) of Regulation (EC) No. 2501/2001, the approach ceases to be empirical, as it no longer refers to the effective violation of a labour law or form, instead focusing on the legislative dimension. It is therefore the insertion of one or several standards in the national corpus that will allow a country to avoid withdrawal on this basis. Although there is a synergy between the social rights defended by the two social clauses of the GSP, the punitive social clause can be differentiated by the way it works and its consequences.

This dynamic would be maintained from the overhaul of the Regulation in 2005 until its final version, namely the 2012 Regulation, the application of which has been extended until 2023.[18] Nevertheless, a last adjustment can be noted and makes it possible still today to justify a distinct analysis of the puni-

[17] This second mechanism dedicated to the incentive scheme of the GSP was already present in Article 20 of Council Regulation (EC) No. 2820/98 of 21 December 1998 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001, OJ L 357 of 30 December 1998.

[18] Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No. 732/2008, OJ L 301 of 31 December 2012 (hereinafter "Regulation (EU) No. 978/2012").

tive social clause as it appears in the GSP. Indeed, successive regulations from 2005[19] no longer list the specific breaches regarding working conditions whose violation leads to withdrawal of the GSP. From this date, they refer directly to a list of international conventions, featured in an annex, and grouped within a subcategory dedicated to human rights and the rights of workers (Part A). Once again, the structure of the instrument shows alignment with the incentive social clause that, from the same period, is embedded in a global incentive scheme covering all aspects of sustainable development, known as GSP+. The latter is based precisely on compliance with and ratification of the conventions targeted by the annex mentioned above. However, concerns regarding good governance and the environment contained in the international conventions listed in Part B of the same annex are explicitly excluded from the punitive social clause.

Furthermore, it should be noted that in this latest version, namely the regulation of 2012, the text provides for the possibility of withdrawal in the event of serious and systematic violations of principles laid down in the conventions listed in Part A of Annex VIII, as well as, once again, the export of goods made by prison labour (see Article 19, paragraph 1). Reading the text shows that this first paragraph belongs without doubt to the social clauses governing imports. This positioning reflects the specific treatment given to imports produced in a way that infringes the fundamental rights of the workforce. The technique of withdrawal, contrary to the application of compensatory price measures or the granting of additional preferences, prolongs the initial approach of rejecting prison work as such. It thereby leads to loss of the economic advantage, not solely to the adjustment of a customs tariff. Beyond the importance of distinguishing between integration into the legal corpus and the factual observation of non-observance of the rule implied by the notion of violation, consideration of the situation in fact, rather than the situation in law, theoretically has the advantage of reporting on the position of enterprises. Indeed, it is the employer that omits to apply a labour law rule – which must naturally have been legally recognized, through ratification or an internal text by the country on the territory of which it exercises its activity. Contrary to legislative control, which focuses on the responsibilities and efforts of States, consideration of the violations requires double verification. First, it is necessary to ensure that the rule exists under national law, which is a vital prerequisite, then that the behaviour of one or several enterprises complies with it. Unfortunately, behind this satisfactory appearance, it turns out that GSPs are used to the detriment of these two steps to focus on the pair formed by the exported product and its country of origin. Yet this mechanism, when it is mobilized as part of a sanctions approach, and more uniquely for determining beneficiaries, results in a measure being applied to a nation and to all enterprises within a sector when that measure should instead have been targeted, first of all to avoid sanctioning a group for the wrongdoing

[19] See Article 16, paragraph 1 of Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences, OJ L 169 of 30 June 2005; Article 15, paragraph 1 of Council Regulation (EC) No. 732/2008 of 22 July 2008 applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No. 552/97, (EC) No. 1933/2006 and Commission Regulations (EC) No. 1100/2006 and (EC) No. 964/2007, OJ L 211 of 6 August 2008.

of one or several others, then to ensure that the perpetrator of the violations – the enterprise – is not removed from the chain of accountability or protected by the screen of the country for which customs preferences are suspended. This is the major shortcoming of social clauses linked to imports, especially when they are divorced from price increases associated with anti-dumping measures, as in the case of the GSP. In this regard, it seems crucial to personalize and refine legal regimes targeting imported products, even for partners that could claim the status of developing State. Certainly, this status is the reason for this exemption system and thus, indirectly, the legal condition necessary to justify this type of social clause under the rules of global trade. The fact remains that it must not be a strict boundary, the sole paradigm when considering the means of withdrawing the economic advantages to which these clauses are attached. This is all the more important as it is primarily exporting enterprises that ultimately profit from additional preferences, even though they are at the origin of fundamental social rights violations. However, for the sake of completeness, when questioning this paradigm, the reverse case should be considered: through the use of prison labour, can enterprises, whether national or transnational, play a positive role in the career paths of prisoners?

3. Prison labour in the light of ILO instruments

In the international human rights system, the most important instrument for the protection of prisoners working for private entities is ILO Convention No. 29 on forced labour (Fenwick 2005). Like Article 4 of the European Convention on Human Rights,[20] this text does not draw a distinction between "forced" and "compulsory" labour. In paragraph 34 of the judgment delivered in the case of *Van der Mussele v. Belgium*,[21] the European Court of Human Rights (ECHR) confirms on this point that the "[t]he first of these adjectives brings to mind the idea of physical or mental constraint ... As regards the second adjective, it cannot refer just to any form of legal compulsion or obligation. For example, work to be carried out in pursuance of a freely negotiated contract cannot be regarded as falling within the scope of Article 4 ... on the sole ground that one of the parties has undertaken with the other to do that work and will be subject to sanctions if he does not honour his promise" (see also the analysis of Thouvenin and Trebilcock 2013, 1420).[22]

If the issue of prison labour is taken into account, it is because this situation is one of those that may justify an exemption from the obligation to suppress the use of "forced or compulsory labour in all its forms" as listed in Article 2 of Convention No. 29, which specifies that the term does not extend to the "work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the super-

[20] Text available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[21] European Court of Human Rights, *Van der Mussele v. Belgium*, Application No. 8919/80 (23 November 1983).

[22] However, it should be noted that this case did not concern forced or compulsory labour by prisoners, but the obligation of providing free legal assistance to those in need.

vision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations" (Article 2, paragraph 2(c)). Prison labour (forced or compulsory) is therefore admitted only in the civic interest of society in general, and never in the private interest (Milman-Sivan 2013, 1630).[23]

The interest of society, in this sense, may be direct, as when prisoners participate, through their service, in public works, or indirect, for example through the social benefit associated with the rehabilitative function of regular work for prisoners (Fenwick 2005, 268). Work should be considered an appropriate social measure with a view to crime prevention, also taking into account the fact that "the causes of crime have often to be sought in bad social conditions" (ILO 1932b, 312; see also ILO 2007a; ILO 2012).

Compulsory work is therefore admitted when it is in the public interest. This principle should hold not only for the private sector, but also for the use of prison labour by the State. For the purposes of overall understanding, we should dismiss the legitimacy of all forms of forced or compulsory labour that do not serve the interest of society in general (ILO 2007a, para. 49). In this respect, forms of work that are not meaningful and which do not contribute to the objective of the social rehabilitation of prisoners should be banned. In other terms, if we consider the general reasoning of Article 2, paragraph 2(b) and (c) of Convention No. 29, the State should only be able to impose a work activity on prisoners where that effectively contributes to their rehabilitation. If that is not the case, the criteria of the interest of society at large, which may justify an exemption from the ban on forced or compulsory labour, would not be met.

On this issue, the Committee of Experts defines the concept of "useful work", namely that which is of benefit to the community as a whole (ILO 2007a, para. 124). If this work is performed for the benefit of the private sector, the Committee specifies that it must be performed voluntarily. For this to be considered to be the case, it is firstly necessary for the prisoner to provide formal consent in writing (ILO 2007a, para. 115; ILO 2012, 262). The issue of prisoner consent brings into play the notion of a contract, a fundamental principle on the labour market (Milman-Sivan 2013; Fenwick 2005, 278). This also echoes certain considerations, linked to a more modern approach to penology, namely the idea that rehabilitation takes place via the effective and personal participation of the individual (Van Ness and Strong 2015). However, the Committee of Experts has always applied a second condition for consent to be considered freely given. For this to be the case, working conditions must approximate a free labour relationship (ILO 2007a, para. 60; ILO 2012, 262).

Accordingly, the payment of wages is an indicator of the voluntary nature of the work, to the extent that they are comparable to those available for similar work in the private sector (Fenwick 2005, 278). However, differences in wages and social security benefits have sometimes been deemed acceptable "on the basis that there is lower productivity of prison labour" (ILO 2001, para. 141;

[23] Guido (2019) also underlines that the standard protects prisoners from forced labour for private gain, but does not rule out exploitation by the State.

see also Guido 2019). The wage differential has also been viewed as a kind of functional deduction for reparations to victims, family support and the cost of accommodation and food (Milman-Sivan 2013). However, the literature shows that, to be considered truly *meaningful*, purposeful or useful, the work "must impart meaningful employment skills and habits to prisoners" (Phelan 1997, 1758; see also Guido 2019; van Zyl Smit and Dünkel 1999; Hiller 1915). In this regard, the Committee of Experts has specified that the similarity of working conditions to those of work in a free setting could promote the rehabilitative goal of prisoners' work by helping to create a "real work situation" (Fenwick 2005, 279; ILO 2001). This particular configuration of the principle relating to the voluntary nature of the work may balance the two fundamentally opposed considerations concerning prison labour: that of profit-making and that of rehabilitation (Milman-Sivan 2013, 1629).

Where the work performed by prisoners effectively reflects a real work situation (ILO 2007a, para. 60 and, before that, ILO 1932a, 499), and if the principle of sufficient proximity to the working conditions of the free market applies also in the case of work performed for the State, it could be considered that there is no longer an issue of unfair competition with regard to products manufactured in prisons being placed on the market.

Naturally, the criterion of a "real" work situation should not be applied too narrowly in relation to certain economic conditions and specific production methods. It should be possible to consider the employment of prisoners for the general management of the prison establishment, namely in the areas of laundry, cooking, maintenance and so on, as a real work situation. Yet these activities performed as part of internal prison services are sometimes seen as incidental in economic terms, due to their immediate use, or even not assimilated to "work" in certain judicial interpretations, to the extent that "prisoners are taken out of the national economy"[24] (see Quigley 2004, 1166; Zatz 2008).[25] Furthermore, such activities usually have the shortcoming of requiring limited qualifications and offering few opportunities for development in terms of employment prospects and skills acquisition (see ILO 2007a, para. 49). However, they can, if performed with respect for human dignity, constitute work or service that may contribute to rehabilitation, and which may therefore be justified by a combined reading of paragraph 2(b) and (c) of Article 2 of Convention No. 29. Indeed, it may be considered, to a certain extent, that this work or service forms part of the normal civic obligations of the prisoners.[26]

The condition of the "normality" of the activity performed by prisoners is not expressly provided for by paragraph 2(b) of Article 2 of Convention No. 29.

[24] United States Court of Appeal for the Second Circuit, *Danneskjold v. Hausrath*, 82 F.3d 37 (19 April 1996). Available at https://law.justia.com/cases/federal/appellate-courts/F3/82/37/485388/.

[25] In the literature, some authors stress that "[r]egular participation in work can also help to inculcate prisoners with more disciplined work and personal habits" (Fenwick 2005, 261; Guido 2019).

[26] The Committee of Experts has never, to our knowledge, expressed itself in such terms, but it has indicated that the exception of "normal civic obligations" should be interpreted in the light of other provisions of the Convention (ILO 2007a, para. 47).

However, paragraph 3(a) of Article 4 of the European Convention of Human Rights states that the expression "forced or compulsory labour" (the practice prohibited, in principle, by paragraph 2 of the same Article) does not apply to "work required to be done in the ordinary course of detention" according to the provisions of Article 5 of the same text.[27]

To determine which activities should be considered "work required to be done in the ordinary course of detention", the ECHR takes into account the criteria prevailing in Member States, which notably include the objective of rehabilitation ("reintegration into society") (see also Harris et al. 2014, 280; Dermine 2014, 110; Jacobs, White and Ovey 2010, 187).[28] The parameter of "normality", interpreted in this sense, converges with that of the "proximity" of working conditions of prisoners to those of free labour.

In conclusion, we can affirm that the global architecture of the system is based on coherent reasoning, fully based on the need for the activities demanded of prisoners to have a positive impact on their mental and physical health, and contribute effectively to their rehabilitation (ILO 1932a and 1932b, see also ILO 2007a). Work in a free, productive environment contributes to this objective and serves as a point of reference. What remains to be defined is the role that private enterprise, whose input sometimes appears to be necessary, should play in terms of offering genuinely useful and meaningful work for prisoners, while guarding against any form of exploitation.

4. Prison labour and decent work: The capability approach

We have seen that the main criterion to be observed in relation to the work that might be demanded of prisoners is that it approximates a "real work situation" (see ILO 1932a, 499; 2001, para. 137; 2007a, para. 60). This characteristic, which, according to the Committee of Experts, is necessary to ensure that prisoners' work for private entities can be considered legitimate, is confirmed by the recent changes in conceptual approaches to the notion of decent work. In particular, the transposition of the capability approach into the 2030 Agenda for Sustainable Development (UN 2015) may lead to confirmation of the principle according to which work must always be meaningful and form part of the goal of rehabilitation of prisoners.

The capability approach also appears in the ILO report *Work for a Brighter Future* (2019b), in which the Organization presents a human-centred programme that calls for increased investment in human potential, labour market institutions, and decent and sustainable work. The chapter on increasing investment in people's capabilities refers specifically to the studies of Sen (2000) and Nussbaum (2000 and 2011).

[27] On the definition in question, see European Court of Human Rights, Grand Chamber, *Stummer v. Austria*, Application No. 37452/02 (7 July 2011).

[28] European Court of Human Rights, *Stummer v. Austria*, para. 121.

Similarly, the ILO Centenary Declaration for the Future of Work emphasizes the need to strengthen the "capacities of all people to benefit from the opportunities of a changing world of work", notably through "effective measures to support people through the transitions they will face throughout their working lives" (2019a, 6). This universal objective (the promotion of decent work for all) necessarily extends to prisoners, who are manifestly in a period of transition that should lead to reintegration into free society.

Choosing the capability approach, with a view to identifying the means of responding to the needs of prisoners to better prepare them for their possible future freedom, contributes to attenuating the negative effects of detention. We also know that detention can be associated with poverty (ILO 1932a), including in a relative sense, as the consequence of the failure of certain "basic skills". According to Nussbaum (2000; see also Langille 2019, 62), there are ten central capabilities that all democracies should protect, including the freedom of workers to choose from a variety of lifestyles. The link between poverty and imprisonment also stems from the fact that the situation does not only affect prisoners on an individual basis, it also has consequences for their children and families. In addition, it has an impact on how the community functions, namely on the relationships between its members and its capacity to provide a suitable environment for living, working and raising children, and on the security of life within it (Clear 2008; Khwela 2014; Maeran, Menegatto and Zamperini 2017).

Indeed, it should not be forgotten that "imprisonment" marks a rupture in the experience of life outside, which is interrupted (Clemmer 1940), which favours hostility towards others and social withdrawal, while disrupting family structures (Maeran, Menegatto and Zamperini 2017; Strydom and Kivedo 2009; Haney 2002).

Be that as it may, a low level of education, limited or, at any rate, patchy formal professional experience and not having a clean criminal record makes it extremely difficult to find stable employment when leaving prison (Scott 2010). In this regard, "reintegration" is vital. The positive transformation of a prisoner (seen as a delinquent) and the favourable development of their basic behaviours must make it possible for them to emerge from a state of poverty and find a place once again within society and the family "so that they can once again function as a proper unit" (Khwela 2014, 152).

The objectives of the 2030 Agenda for Sustainable Development should be re-examined in the light of these elements, notably as regards the promotion of "full and productive employment" and "decent work for all" (UN 2015, see target 8.5). In the system of international conventions that we have described, forced labour is only permitted, as we have seen, in a form of "normality" and in the context of rehabilitation policies, that is, where it aims to help the prisoner reintegrate into society.[29] In the description of target 8.5, we find three adjectives, two of which modify the word "employment" and one the noun "work". All evoke the characteristics of the concept of "useful work" defined by the Committee

[29] European Court of Human Rights, Court (Plenary), *De Wilde, Ooms and Versyp v. Belgium*, Application Nos 2832/66, 2835/66 and 2899/66 (18 June 1971), para. 90.

of Experts: the work must be "full", "productive" and "decent".[30] Yet the data shows that the work generally imposed by the State upon prisoners is work that, in fact, is not comparable to a full-time job, given the perennial rarity of job opportunities. It is not "productive" or "decent" either, if we understand this to mean "work that meets people's basic aspirations, not only for income, but for security for themselves and their families, without discrimination or harassment, and providing equal treatment for women and men" (ILO 2000).

As a result, if we take the objective of "decent work" seriously, considering that work, in the specific case of prisoners, forms part of a treatment programme within which it constitutes an educational and therapeutic tool (Maeran, Menegatto and Zamperini 2017) aiming to encourage the prisoner to reintegrate into society, we should exclude from the permissible forms of compulsory work all those that are neither "productive" nor "decent". This perspective can enhance the value of work offered by the private sector, which is likely to provide a "meaningful" occupation for prisoners. The issue is being given increasing attention in the literature, particularly with regard to State policies, which support and encourage cooperation between the public authorities and private enterprises for the purposes of combating forced or compulsory labour, including through forms of prison privatization (see the detailed analysis of Milman-Sivan and Sagy (2020) on the situation in Germany, Austria, Australia and the United Kingdom[31]).

The Committee of Experts has stated several times that the employment of prisoners by private employers is only compatible with the Convention in the case of a free work relationship, meaning that it takes place not only with the agreement of the person concerned, but also with certain guarantees, notably with regard to the payment of normal wages (ILO 1998, para. 119; 2001, para. 133).[32] It strongly reaffirmed this principle with regard to the Russian Federation (ILO 2021, 290–291; see also Milman-Sivan and Sagy 2020).

As long as it does not constitute forced or compulsory labour, it can be argued that work performed by prisoners for private entities (inside or outside prison) may contribute to the goals of the UN 2030 Agenda for Sustainable Development. Likewise, public–private partnership can allow the development of policies for investing in people's capabilities in the special context of detention.

[30] It is interesting to compare the terms used by the UN Sustainable Development Agenda and this passage from an 1829 report that highlights the virtues of work for prisoners, which claims that "[i]t is productive, it is healthful, it teaches convicts how to support themselves when they leave prison, it is reformatory, and is consonant with republican principles" (cited in Quigley 2004, 1162, and Hiller 1915, 854).

[31] With regard to Australia, the Committee of Experts notes in its 2019 report that, according to the Australian Government, prisoners in Tasmania work for private enterprises on a voluntary basis as part of their sentence management plan, which is aimed at facilitating their employment upon release (ILO 2019c, 194).

[32] It notably recalled this in its observations on the implementation of Convention No. 29 in France, in the context of direct requests adopted in 2011, 2014 and 2018 (available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:2698124; see also Auvergnon 2018; Rambaud 2010; OIP 2020). Subsequently, Act No. 2021–1729 of 22 December 2021 on confidence in the judiciary modified the rules applicable to the work of prisoners and introduced a prison employment contract for prisoners who work (Auvergnon 2022).

The theory has already shown that the objections based on principles derived from ILO instruments at this stage – objections generally raised by industrialized States – could be overcome by a ban on all forced prison labour (Milman-Sivan and Sagy 2020, 518).

5. Conclusion

Following this analysis, it seems evident that the issue of prison labour cannot be duly addressed without introducing the individual interests of prisoners into the equation. National or supranational legislation must naturally play a role in protecting their fundamental social rights. This mission is especially important to prevent exporting enterprises from incorporating the exploitation of prison labour as a customary profitability factor in their economic model.

Yet efforts aiming to protect prisoners and, more specifically, to guarantee respect for their fundamental social rights must take into account the imperative of rehabilitation, as it is important for these people to be able to re-establish a place in society upon release. With this in mind, it is vital to consider the prospects for the individual and their capacity to find a job when imposing legal conditions on prison labour, even when the goal is to avoid competing with national and foreign enterprises.

It is therefore a matter of striking a balance, which involves several branches of the law: firstly customs rules, which are imposed upon Members of the WTO and EU and are not therefore decided solely on a national basis where they relate to the importation of products and services from prison labour, followed by, depending on national decisions, criminal law, administrative law and, potentially, labour law, where this activity is limited to the internal market.

On this last point, without claiming to have studied all the solutions adopted, even only in Europe (Nowak 2015), this research has attempted to show that neither international economic law nor international labour law poses an obstacle to developing a set of legal rules in favour of prisoners in the area of work. However, although it does not seem reasonable to ban prison labour, we should not allow prisoners to be underpaid by the enterprise or public entity that agrees to employ them, especially where imprisonment has little (or no) effect on the job in question. Moreover, the more closely prisoners' wages approximate those offered to free workers, the less likely it is that the issue of unfair competition will arise. When envisaging a legal solution, it is therefore appropriate to draw a clear distinction between the benefits that this type of employment can provide for workers in prisons and the spin-off benefits it may generate for the enterprise.

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