Best Friend, False Friend: The "Favour" Rule in Comparative Labour Law

LUCA RATTI*

Employment relationships can be governed by multiple legal frameworks, including statutory labour codes, collective bargaining agreements (at both enterprise and sectoral levels), and individual employment contracts. How are conflicts between these sources of law resolved? In many jurisdictions, the "favour rule" addresses such conflicts by prioritising the source that offers the greatest benefit to the employee. This rule aims to prevent employers from leveraging their superior bargaining power in individual contracts to undercut more favourable terms established through collective bargaining. However, comparative analysis reveals that the scope of the favour rule is narrowing in some jurisdictions, where it is increasingly applied as a guiding principle rather than a strict rule.

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* Associate professor in European and comparative labour law, University of Luxembourg. I am grateful to Elisabeth Brameshuber, Nicola Countouris, Filip Dorssemont, Stein Evju, Franck Lecomte, Nastazja Potocka-Sionek, to the editors of this special issue, and to the two anonymous reviewers for their valuable comments and suggestions. I remain responsible for any errors and omissions.

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I. INTRODUCTION

> *Une fois la volonté individuelle ainsi érigée en condition nécessaire et suffisante du lien de droit, chacun doit pouvoir choisir la loi qui lui convient — avoir la loi pour soi — et devenir son propre législateur — avoir soi pour loi.*
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> Supiot, A. (2015, p. 284)

WHEN IN 1977 MR. AMBELOUIS'S notary firm was shut down, his secretary, Ms. Chevallier, was dismissed and found herself without income. Almost by chance, she discovered that she might count on the rules of a very outdated regional collective agreement for notaries, concluded back in 1960, which entitled dismissed employees to receive a special compensation in addition to any other compensation provided by the national collective agreement, which in turn dated back to 1955. Meanwhile, the new national collective agreement, which came into force in 1975, did not make any reference to such special compensation, nor to any cumulative advantage in case of dismissal. Rejected in both first instance and appeal, in 1988, Ms. Chevallier's claim was famously upheld by the French *Court de Cassation*, which for the first time in French law held that, irrespective of the position of the standard in the hierarchy of sources or their entry into force, what applies is the one providing more favourable entitlements to the employee concerned.[1]

This French case — which mirrors similar comparative examples in other legal systems — illustrates that the favour rule, as key to resolving conflicts between different legal sources of labour law, may typically materialise across at least three different scenarios.

The first scenario concerns the *relationship between statutory law and collective bargaining agreements* (of all levels). Based on the favour rule, the potential conflict between them is resolved in that the collective agreement may derogate from the law if the deviation is (formally) permitted (or not otherwise prohibited) by the law itself and if such deviation is in a sense favourable to the worker. This solution may be based on the consideration that the law sets minimum protective standards that are sometimes imperative, but more often dispositive, so can be enhanced by collective and individual agreements.

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1. Cass. Ass. Plén. 18 mar. 1988, pourvoi n°84-40083, Bull. Civ. 1988 A.P N°3 p. 3.

In the second scenario, *individual employment contracts are called into play, whenever they conflict with applicable collective agreement(s)*. Without the favour rule, the employer as the stronger party in the relationship could easily impose its own conditions through individual bargaining. Employment contracts therefore prevail only if they are more favourable to the worker than the applicable collective agreement(s). In the relationship between individual stipulations, on the one hand, and collective agreements (and legal provisions), on the other hand, the favour rule contributes to secure a smooth interplay between legal sources of different levels.

The third and more complex scenario concerns the case of *conflict between collective agreements of different levels*, i.e., typically national/branch/sectoral collective agreements (first level) containing provisions that differ from enterprise/establishment/territorial agreements (second level). This case of conflict is the most problematic to resolve as which rule should govern it is still disputed. One option would be to prioritise the first over the second level, thereby following a sort of vertical hierarchy between them. Alternatively, one could think of prioritising the second level, given that it is closer to the interests regulated, so that subsidiarity becomes the guiding rule. One last option would be to return to the favour rule, following a pattern of comparison between the clauses stipulated at the two levels. In this case, the question is also whether the single clause must be compared, or the appreciation must rather be contextual and comprehensive, thus allowing some form of "compensation" between more and less favourable stipulations.

In contract law, instances may arise where a degree of favour towards one party (or the beneficiary of a unilateral stipulation) is permissible under certain circumstances.[2] In labour law, the favour rule takes on a distinctly delineated significance. Amongst the doctrines that govern the law of employment relations, the "favour" rule — often qualified as "principle of favourability" — constitutes a well-grounded and probably the best companion of labour law interpreters. In some jurisdictions, the favour rule has acquired a broad meaning and prescribes that in the conflict between two or more legal norms applicable to an individual case, or in the alternative interpretation of a specific provision or contractual stipulation, the one that is more favourable to one specified party is to be applied and the less favourable one is to be superseded (Eurofound, 2022).

2. Examples can be furnished by looking first and foremost at the 1900 German civil law (BGB), based on the rationale of protecting the weaker position of a party: § 2084 BGB on the interpretation favouring effectiveness of a testamentary disposition; § 491 on consumer credit agreements; § 944 favouring the possessor of an inheritance.

Other jurisdictions simply have not accepted favour as universal rule and rather they resolve conflicts between sources through different legal constructions.

In the making of labour laws in Europe during the 20th century, textbooks and academic monographs seemed to take for granted that the legal rules of such an emerging discipline ought to be based on the favour principle[3] (Cessari, 1966; Hueck & Nipperdey, 1957; Wlotzke, 1957), considered as the soul of labour law representing one of its specific general principles (Chalaron, 1989, p. 243). The rule found an autonomous meaning when considered together with the "non-waivable" — or cogent — nature of labour law provisions, this latter designating the particular force of such provisions against possible derogations (waivers) by individual contracting parties (Bogoeski, 2022; Davidov, 2020). Both the "favourable" and the "non-waivable" features of labour law contributed to nurturing the indeterminate and relational essence of the employment contract (Brodie, 2016).

The focus of this article is on the favour rule as an autonomous device that enables a relatively unproblematic solution to questions of primacy, against a background of a multitude of sources all in abstract capable of providing some regulatory solution (Gyulavári & Menegatti, 2019a). By examining situations where the favour rule is currently at stake in a comparative perspective, this article will argue, first, that such erosion has transformed an old, probably "best friend" of labour law interpreters into a "false friend" from a comparative perspective. Second, it will advocate that the current state of legal sources suggests conceiving of the favour rule no more as a general principle of labour law, it being mostly confined to help adjudicating very specific situations in an increasingly limited number of jurisdictions.

Given the virtually infinite applications of the favour rule and its broad theoretical implications, it must be noted from the outset that a selection of legal systems had to be made. The favour rule being context-specific, such selection needed to be based, on the one hand, on the most significant examples coming from the historical developments of labour law, and, on the other hand, by identifying the main legal culture or "family" to which the single system belongs, which in labour law may have a significant impact on the way the topic is conceptualised. The analysis will thus encompass several "groups" of countries, including: a) European jurisdictions where favour emerged and was later developed as a proper general principle of law (France, Italy, Germany, Spain, and Austria); b) European jurisdictions where a more or less fundamental role is played by collective autonomy and social public order (Nordic countries

3. *Günstigkeitsprinzip* in German; *principe de faveur* in French; *principio di favore* in Italian.

and, by contrast, Poland); c) common law jurisdictions where the favour rule does rarely appear in legal reasoning and it therefore results marginal in the very theorisation of labour law sources (U.K. and U.S.). The selection may appear to some extent arbitrary, or at least questionable; it is, however, intended to be a second-best option to keep the analysis relatively concise and at the same time to offer diversity and usefulness to readers. In the analysis of selected jurisdictions, a more functional approach will therefore be employed, focusing on the primary objective of the favour rule, assessed in accordance with its function and context. This will allow me to address the increasingly fragmented architecture of labour regulation, which seems to intercept vertically, horizontally, and institutionally with a wide array of regulatory sources and actors (Gesualdi-Fecteau et al., 2024).

The article proceeds as follows. It will first analyse the three scenarios that were in the background of Ms. Chevallier's case, concerning notably the relationship between statutory law and collective bargaining agreements (Section II), the conflict between individual employment contracts and applicable collective agreements (Section III), and conflicts between collective agreements of different levels (Section IV). It will then conclude (Section V) by questioning whether a weakened rule such as that of favour still keeps the value of a proper legal principle or is rather relegated to a secondary role in solving conflicts between labour law sources.

II. FAVOUR AS COROLLARY OF LABOUR LAW'S NON-WAIVABLE NATURE: CONFLICTS BETWEEN THE LAW AND COLLECTIVE AGREEMENTS

In what follows, attention will first be paid to the function of legal norms *vis-à-vis* collective agreements and individual employment contracts. It is in those contexts, in fact, that the real nature of the favour rule can be appreciated, with a view to corroborate whether its original role as architrave of the entire edifice of labour law can still play a role at present time.

In Otto Kahn-Freund's *Labour and the Law*, the law in general, and labour law in particular, is identified as "[…] a technique for the regulation of social power" (Davies & Freedland, 1983, p. 14). What he defined as protective regulatory legislation denoted a public order nature, so that both employers unilaterally, and collective agreements mutually, could not establish lower standards than those provided by the law (Davies & Freedland, 1983, p. 48–49). In this sense, protective regulatory legislation had the effect of being imperative on the parties.

Divergences between legal provisions and collective agreements' clauses can be detected across all areas of labour law. An assessment of how these divergences are regulated in selected jurisdictions may usefully show to what extent the favour principle is still apt to govern them.

Examples in the European continental context abound. In French law, the relationship between the law and collective agreements is still governed by the favour rule, which is concretely operationalised through a benefit-by-benefit assessment, thus comparing situations having the same object (Auzero et al., 2022, pp. 86–88). In this case, the appreciation of whether a provision is more favourable is based on the individual situation of the employee concerned, and not on the situation of a group of employees. In recent years, at least after the reform introduced by the law so-called "El Khomri" of 2016,[4] the law labelled specific provisions of the Labour Code as of "public order" (*ordre public social*) — a "keystone" of French labour law (Baugard, 2015; Supiot, 2007). From such label derives that those provisions are no longer subject, unless explicitly specified, to derogations by collective agreements.[5]

In Spain, the favour rule in the relationship between the law and collective agreements was first elaborated by scholars, then developed though the case law, and finally recognised in Article 4 of the 1976 *Ley de Relaciones Laborales*. The rule can now be found in Article 3(3) of the Workers' Statute, *Estatudo de los Trabajadores* (ET), which provides that any conflicts between labour standards deriving from the law or collective agreements, which will still have to comply with the minimums of mandatory law (*minimos de derecho necesario*), must be resolved by application of the more favourable standard globally assessed, according to an annual calculation, with respect to quantifiable concepts.[6] The rule requires, on the one hand, that there be a conflict between two or more labour provisions (*normas laborales*), all in force, that regulate the same situation and, on the other hand, that the conflict be resolved by selecting the provision

4. Loi n° 2016-1088 du 8 août , 2016 relating to work, the modernisation of social dialogue, and the securing of professional careers.
5. Notable examples can be detected in the area of working time. Cf. *e.g.*, Article L.3121-28 C. trav., which qualifies overtime as of public order. Article L.3121-28 C. trav. provides that "Any hour worked in excess of the legal weekly working time or the working time considered to be equivalent is overtime and entitles the employee to additional pay or, where applicable, to an equivalent compensatory rest period."
6. RDL 2/2015, de 23 de octubre, approving the revised text of the Workers' Statute (ET) Article 3.3: Los conflictos originados entre los preceptos de dos o más normas laborales, tanto estatales como pactadas, que deberán respetar en todo caso los mínimos de derecho necesario, se resolverán mediante la aplicación de lo más favorable para el trabajador apreciado en su conjunto, y en cómputo anual, respecto de los conceptos cuantificables.

among the competing ones that contains the rule most favourable to the worker. Article 3(3) operates in combination with the principle of the minimum norm, of which it represents the other side: the latter operates at the time of rulemaking, while the former at the time of application. The principle, at present, is of little application, as the assumption of competing norms, all simultaneously in force, rarely occurs (Monereo Pérez et al., 2023).[7]

In Italy, the favour rule already found its legal basis in the 1942 Italian Civil Code (*Codice Civile*). Article 2078 provided that in the absence of legal provisions and collective agreements, usages may apply. However, the most favourable usages for workers may prevail over the provisions of the law. Usages do not prevail over individual employment contracts.[8] The limited scope of such "usages" in the employment context solicited doctrinal analyses to derive a proper principle of favour from an overall consideration of the protective function of labour laws (Cessari, 1966, pp. 43–44). Recent reforms have paved the way for a more dynamic interaction between the law and collective agreements, especially concluded at enterprise level. Article 8 of Decree-Law No. 138/2011 introduced the possibility for "proximity collective agreements" to also operate *in pejus*, thus providing less favourable terms and conditions of work compared to the law (and sectoral collective agreements), on a limited number of subjects, including the introduction of monitoring systems at the workplace, the classification and grading of personnel, the use of fixed-term and part-time contracts, the regulation of some aspects of working time, and even the consequences of termination of the employment relationship.[9]

An interesting feature of the functioning of the favour rule in the conflict between the law and collective agreements concerns its widespread use even outside of the European context. The attitude of continental European law towards considering the law as a solid set of mandatory provisions that cannot be derogated from by collective agreements, in fact, seems to have entered some

7. In principle, there cannot be statutory law and collective agreements providing conflicting rules, as the latter must comply with the law (Article 85(1) ET) and are subject to it (Article 3(1) ET).
8. Cod. Civ. Article 2078 https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1942-03-16;262 (Author's own translation).
9. On the consequences of dismissals, the law specifies that collective agreements cannot regulate the consequences for "discriminatory dismissal, dismissal of the female worker in conjunction with marriage the dismissal of the worker from the beginning of the period of pregnancy until the end of the periods of disqualification from work, as well as up to one year of the child's age, dismissal caused by the worker's or employee's application for or use of parental leave and for the child's illness, and dismissal in case of adoption or foster care" (D.Lgs 138/2011, Article 8(2)(e)) (Author's own translation).

Latin American legal systems, most of which contain protective principles in favour of workers. As recalled by Sergio Gamonal and César Rosado Marzán, the labour laws of Argentina, Brazil, Chile, and Uruguay are based on a combination between the favour rule and the non-waivability principle. For instance, Article 7 of the Argentinian *Ley de Contrato de Trabajo* provides that "[i]n no case may parties agree on terms less favorable to the employee than those provided in legislation, collective agreements, or arbitral decisions with force of law, or which are contrary to them." (Gamonal & Rosado Marzán, 2019, p. 96)

No such principles (or combination thereof) can be detected as such in the U.S. Although the Thirteenth Amendment to the U.S. Constitution originally provided "a basis for worker-protective legislation through the ban of involuntary servitude" (Gamonal & Rosado Marzán, 2019, p. 41), its increasingly narrow interpretation allows courts to prioritise contractual freedom over workers' protection. Furthermore, individual employment rights can be modified *in pejus* by collective stipulations for the sake of promoting the collective good (Goldman & Corrada, 2014). Matthew Finkin describes this attitude in terms of "union dispossession of labor protection," grounded on unions being not only better placed than individuals to bargain, but also more likely to accommodate workers' interests in the light of "collective goods" (Finkin, 2020). At a more institutional level, the lack of favour rule must be considered against the doctrine of federal pre-emption, which allows — not uncontroversially, as in the case of the Wagner Act — federal laws to prevail over state legislation (Belfort, 1998; Pittard & Butterworth, 2015).

An even more convoluted landscape emerges when considering British labour law. On the one hand, formal sources are to be considered in conjunction with so-called "voluntary sources" (Adams et al., 2021, pp. 48–49). On the other hand, the co-existence between the common law of the contract of employment and protective statutes emanating from the Parliament is intertwined in an "intricate symbiosis" (Freedland, 2016, pp. 28, 34). Their respective interpretation is at times complicated by the fact that not all statutory provisions may be apt to create contractual obligations (Anderman, 2000). In this respect, A. C. L. Davies usefully distinguishes two periods: the first one — largely corresponding to that famously defined as collective *laissez-faire* by Kahn-Freund — when primacy of the contract of employment over legal standards can be observed; and the second one, present time, when courts see statutory legislation as the primary source of regulation, the common law of contracts "playing a supplementary or 'gap-filling' role" (Davies, 2016, p. 81). Davies provides examples from working time regulation and constructive dismissal that "prompted" common

law arguments on the basis of precise statutory rights (Davies, 2016, pp. 82–83). Worker-protective considerations do not fully explain judicial reasoning in the U.K. in the area of labour law, since it was mostly thanks to the role acquired by statutory legislation that judges could develop innovative doctrines that were favourable to the workers concerned (Davies, 2016, p. 95). This result, however, did not derive from affirming or defending the favour rule as cornerstone of the system of labour laws, but rather from respecting the protective function of statutes as expression of the Parliament's priority over common law developments.

The comparative analysis conducted so far on the first scenario — potential conflicts between the law and collective agreements — reveals, on the one hand, that the favour rule still governs such conflicts in most European jurisdictions and, on the other hand, that its absence in common law jurisdictions is somewhat compensated by an intricate relation between formal and voluntary sources. This scenario, in any case, derives from the confluence of the favour rule with the non-waivable character of most pieces of statutory labour laws, which combination prevents waivers by, and fosters protection of, individual workers, thus ensuring better entitlements.

Debatable across all jurisdictions where the favour rule applies is to determine what counts as "more favourable stipulation". The most sophisticated construction derives from the German Supreme Court, which has established that no "cherry-picking" is possible when comparing different standards of treatment, this pointing to a comparison made globally considering all conditions. Moreover, only objectively related working conditions would be included in a favourable comparison, so that no such connection could be established between remuneration and termination.[10]

III. FAVOUR AS A LIMIT TO CONTRACTUAL FREEDOM: CONFLICTS BETWEEN COLLECTIVE AGREEMENTS AND CONTRACTUAL STIPULATIONS

Conflicts may arise not only from the contrast between legal provisions and collective agreements, but also between them and individual contractual stipulations. This is a context where the contract of employment is juxtaposed

10. German BAG 20 April 1999 – 1 ABR 72/98. However, there are a number of situations in which it is not possible to find even an approximately correct answer to the question of what is less favourable in an individual case. A typical example of this is notice periods: are longer or shorter ones more favourable for employees? It always depends on who wants to terminate the contract.

with external rules testing the so-called "normative" efficacy of collective agreements, i.e., their capacity to conform private parties' contractual behaviour, limiting their freedom to what is more favourable to employees.

In German labour law, the favour rule (*Günstigkeitsprinzip*) is an expression of the principle of protection under labour laws, intended to ensure that individual employment contracts cannot deviate from the provisions of a collective agreement to the disadvantage of employees. Elements in that direction can be extracted from the German legislation on collective bargaining agreements (TVG — *Tarifvertragsgesetz* 1949), which provides that contractual stipulations can legitimately deviate from a collective agreement only insofar as they are permitted by the collective agreement itself through a so-called "opening clause" (*Öffnungsklausel*) — i.e., a clause that expressly allows individual agreements to deviate — or contain a change to the regulations in favour of the employee (4(3) TVG[11]). The favour rule provided by § 4(3) of the TVG can therefore be subsumed under the term *Unabdingbarkeit*, or indispensability/inderogability (Däubler, 2020, p. 67).

Similarly, § 3 of the Austrian Labour Constitution Act, which expresses the favour rule at its paragraph 1,[12] provides that when examining whether a special agreement within the meaning of paragraph 1 is more favourable than the collective agreement, those provisions that have a legal and factual connection must be summarised and compared (Mosing, 2018).

According to Article L. 2254-1 of the French *Code du travail*, collective agreements (*conventions collectives*) apply to employment contracts unless the latter contains more favourable provisions. Thus, two rules govern the

11. German TVG § 4(3) on the effects of collective agreements' normative part provides that "Agreements that derogate from a collective agreement are only permitted if the collective agreement allows for this or contain an amendment of the terms in favour of the employee." Tarifvertragsgesetz 1949, § 4(3). English official translation available at: https://www.gesetze-im-internet.de/englisch_tvg/englisch_tvg.html. The principle also applies to agreements concluded by the works council (*Betriebsvereinbarung,* or BV), but, in such cases, any potential conflict is mitigated by § 77(3) of the *Betriebsverfassungsgesetz* (*BetrVG*), which prohibits the regulation of working conditions through a BV when these are already governed by a collective agreement (*Tarifvertrag*) unless the collective agreement allows this expressly. English official translation available at: https://www.gesetze-im-internet.de/englisch_betrvg/.
12. Austrian Arbeitsverfassungsgesetz, § 3(1): "The provisions in collective agreements, insofar as they regulate the legal relationships between employers and employees, can neither be repealed nor restricted by a works agreement or employment contract. Unless the collective agreement excludes them, special agreements are only valid if they are more favourable for the employee or concern matters that are not regulated in the collective agreement." (Author's own translation).

relationship between collective agreements and employment contracts. First, the collective agreement applies to the employment contract. This means that, in principle, workers can enjoy the benefits of the collective agreement without it having to be incorporated into the employment contract.[13] Second, if the two provisions — that of the collective agreement and that of the employment contract — deal with the same issue, the one more favourable to the employee will apply. It is inferred from the application of the favour rule that, even with full knowledge of the facts, employees cannot contractually waive the benefits provided by the collective agreement, since an individual agreement involving a waiver would clearly be less favourable to them. It is the so-called "normative effect" of collective agreements, understood as the assimilation of collective rules with legal norms, both objectively (i.e., in their relation with individual stipulations) and subjectively (with *erga omnes* effect) (Jeammaud et al., 1998).

The favour principle in Italian law finds an express recognition in the 1942 Civil Code. The rules expressed therein apply to the relationship between sources of different hierarchical level. Article 2077(1) *Codice Civile* provides that individual employment contracts between persons belonging to categories covered by the same collective agreements must conform to the provisions of the latter. Article 2077(2), which does not apply, however, between different collective agreements, specifies that, by operation of law, the clauses of collective agreements take the place of individual employment contracts' stipulations concluded prior or post the collective agreement, which differ therefrom, unless such stipulations included in the individual employment contract contain special conditions more favourable to the workers concerned. Despite this provision explicitly regulating the relationship between individual employment contracts and collective agreements, its consistent interpretation extends its effects to the law, as collective agreements were recognised within the corporative system as having the same legal value as the law.

In Polish law, the favour rule (*zasada korzystności)* retains the value of a fundamental principle, prescribing that "terms of employment contracts that are less advantageous for employees than labour law provisions are void by virtue of law and are replaced by respective legal provisions" (Hajn, 2003, p. 193). It is expressed in Article 18 of the Polish Labour Code, which provides that

13. The application of collective agreements to the employment contract also means that if the former imposes an obligation on employees, but the latter does not provide anything, in the conflict between the "silence" of individual stipulations resulting in a more favourable outcome and an express term (less favourable) provided by collective agreements, the *Court de Cassation* will let the collective agreement prevail.

the provisions of employment contracts and other acts on the basis of which an employment relationship is established may not disadvantage an employee more than the provisions of labour law (Article 18(1)). The rule is assisted by a specific sanction, consisting in the combination between nullity and displacement, since in such case the less-favourable provisions are invalid, and the appropriate provisions of labour law apply instead (Article 18(2)). The favour principle applies "only in relation to indirect semi-dispositive norms which permit derogations only in favour of an employee" and is to be excluded whenever, in specific cases, contractual stipulations more favourable than legal provisions result in conflict with the general clause of Article 8 of the Polish Labour Code on the abuse of right (Kumor-Jezierska, 2018, pp. 84–85).[14]

Some Nordic European jurisdictions apply the favour rule in specific cases and not as a general principle. Norway allows pejorative derogations of common standards by individual agreements in several areas of labour legislation, such as the length of notice periods, wage deductions, and annual holidays. As argued by Stein Evju, while the first two are justified by historical reasons, mainly related to the deference of labour legislation to "liberal ideas of freedom of contract," derogation clauses on holidays with pay are aimed to accommodate diversity and flexibility (Evju, 2008, pp. 65–66). Sweden ascribes limited importance to mandatory provisions, so that most labour legislation is "semi-mandatory" in that collective agreements regulate the majority of subjects in labour law. However, individual stipulations may normally not deviate to the employee's detriment (Julén Votinius, 2019).

British labour law does not feature any favour rule governing the relationship between collectively agreed standards and contractual stipulations. The real question there is rather to what extent the provisions contained in collective agreements can be incorporated in individual employment contracts. As is well known, different forms of incorporation exist. Rooted in a conceptualisation of labour relations as fundamentally contractual in nature, British labour law presumes that collective agreements are not to be intended as enforceable legal sources, unless a specific intention to incorporate can be detected. Incorporation here fundamentally means bindingness of the terms deriving from collective agreements for the parties of an employment contract (Wedderburn, 1992). The means by which collective stipulations become part of such employment contract

14. Article 8 of the Polish Labour Code provides that "No one is allowed to exercise any rights in the manner that would be contrary to their socio-economic objective or the principles of community co-existence. Any such act or omission by a person exercising their right is not considered an exercise of that right and is not protected." (Author's own translation).

range from express incorporation to incorporation by custom and/or implied incorporation (Sanders, 2016).

Whenever the ability of individual stipulations to derogate from norms provided by collective agreements or even the law is questioned, interpreters can adopt the view that such derogations would contradict the non-waivable nature of labour standards (Davidov, 2020, p. 500). As this section has shown, in fact, the favour rule tends to overlap with the non-waivability principle as far as waivers are understood in the broadest sense possible.

IV. FADING OUT: CONFLICTS BETWEEN COLLECTIVE AGREEMENTS OF DIFFERENT LEVELS, BEYOND OR AGAINST THE FAVOUR RULE

Recalling the case of Ms. Chevallier, we now turn to the third scenario where collective stipulations deriving from different levels of collective agreements may conflict one another.

Considered in a comparative perspective, the analysis of this third scenario would need more caution and may suggest more articulated conclusions, based on two main considerations. On the one hand, the variety of (and divergence between) different models of industrial relations — typically polarised along the continuum single channel-dual channel — requires a refined analysis of the dynamics between the "conflictual" model of collective bargaining agreements and the more "cooperative" model of codetermination at the company level (which is absent in many jurisdictions). On the other hand, the relationship between collective agreements of different levels involves systemic aspects of domestic labour laws that, although cannot be examined within the limits of the present article, should at least be sketched. Suffice it to recall that patterns of decentralisation of collective bargaining differ widely across the EU, with some countries embarking on radical reforms that prioritise company-level agreements in the establishment of the main labour standards applicable to employees, and some other countries maintaining their structure of collective bargaining (Gyulavári & Menegatti, 2019b, pp. 8–11). Such reforms have often been prompted by inputs deriving from EU institutions through so-called 'memoranda of understanding' aimed at stabilising the public finances of specific Member States while imposing the introduction of opt-out and flexibility clauses in favour of decentralised collective agreements (Pecinovsky, 2018; Schulten & Müller, 2015). Still, across EU countries, the rules that prioritise one or the other level of collective bargaining do not follow consistent patterns.

In Italy, despite the pivotal role of the favour rule in the two first contexts analysed above, neither legislation nor the case law have resolved the conflicts between collective agreements of different levels by prioritising the most favourable one. The case law of the Italian Court of Cassation has held that the principles of hierarchy and specialty, typical of legislative sources, cannot be used to resolve a conflict between collective agreements of different levels. The conflict between collective agreements of different territorial scope (in this case, national and regional) is resolved on the basis of the actual will of the social parties, to be inferred by coordinating different provisions, all having equal dignity and binding force.[15] Since the already mentioned Article 8 of Decree-Law No. 138/2011, the "specific agreements" referred to in its paragraph 1 (denominated "proximity agreements") can derogate from — i.e., introduce less favourable rules than — provisions contained in sectoral collective labour agreements. The only limit to such derogatory effect — as recalled by the Italian Constitutional Court — is that those "proximity agreements" must comply with the Italian Constitution as well as with the constraints deriving from EU and international law[16] (Article 8(2-bis), Decree-Law no. 138/2011). This leads one to consider Italy to be a system where enterprise-level collective agreements are increasingly authorised to derogate from sectoral collective agreements (and even from the law), provided that a serious check on the representativeness of the contracting parties is assured (Del Punta, 2021, pp. 353–356).

In Spanish labour law, the general rule is that of Article 84(1) of the Workers' Statute,[17] which provides that competition between collective agreements should not happen (Palomenque López & Alvarez de la Rosa, 2021). If it occurs, generally, either the rule derived from Article 83(2) on collective autonomy[18] or the

15. As a result, even territorial agreements can extend the effectiveness of national contracts and derogate from them, even *in pejus*, without precluding the provisions of Article 2077 of the Italian Civil Code, subject only to the safeguarding of rights already definitively acquired in the assets of workers, who cannot receive detrimental treatment by reason of the later legislation of equal or different level.
16. IT Corte Costituzionale, 28 March 2023, n. 52. (ECLI:IT:COST:2023:52).
17. According to Article 84(1) of the Workers' Statute: "A collective bargaining agreement, throughout its term, may not be affected by the provisions of collective bargaining agreements of a different scope, unless otherwise agreed, pursuant to the provisions of Article 83.2 above and subject to the provisions of the following section." (Author's own translation).
18. According to Article 83(2): "The most representative trade unions and employers' associations, of a state or autonomous community, may, by means of inter-branch agreements, establish clauses on the structure of collective bargaining, their case, the rules to resolve concurrency conflicts between conventions of different scope." (Author's own translation).

one of Article 84(2)[19] on the priority of company-level agreements will apply. As a consequence, no regulatory space is reserved for the favour principle when potential conflicts between collective agreements of different levels arise (Ojeda Avilés, 2014, pp. 34–35). A marked turn towards prioritising company-level agreements started with Royal Decree-Ley 3/2012, which overturned the very structure of legal sources; in some areas (e.g., working time, remuneration), the enterprise-level collective agreement could prevail over the sectoral one, beyond any favourable rule. In this way, the collective agreement could become a tool for competing on costs and no longer an instrument for establishing a level playing field. The idea behind that reform was that the collective agreement is a tool and not an obstacle in the management of industrial relations. In reality, this may result in increasing competition based on labour costs, having in the long run a detrimental impact on working conditions (Baylos Grau, 2013). For this reason, with a reform introduced by Royal Decree-Ley 32/2021, Article 84(2) was significantly amended and now excludes *inter alia* that basic salaries and their supplements regulated by a company-level collective agreement may have priority over sectoral-level collective agreements.[20]

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19. According to Article 84(2) of the Workers' Statute, as reformed in 2012, "The regulation of the conditions laid down in a company agreement, which may be negotiated at any time during the validity of collective agreements at a higher level, will have priority to apply in respect of the State, regional, and regional or lower-level in the following subjects: a) The amount of the basic salary and salary supplements, including those linked to the company's situation and results. b) Credit or compensation for overtime and specific pay for shift work. c) Time and distribution of working time, shift work arrangements and annual holiday planning. d) Adaptation to the business of the professional classification system of workers. e) The adaptation of the aspects of the procurement modalities that are attributed by this law to company agreements. f) Measures to promote reconciliation between work, family and personal life. g) Those other than the collective agreements and agreements referred to in Article 83.2." (Author's own translation).
20. According to the new text of Article 84(2) of the Workers' Statute, as reformed in 2021: "The regulation of the conditions established in a company agreement, which may be negotiated at any time during the term of collective agreements of a higher scope, shall take precedence over the State, regional or lower-level sectoral agreement in the following subjects: a) The payment or compensation of overtime and the specific remuneration of shift work. b) The timetable and distribution of working time, the shift work regime and the annual planning of holidays. (c) The adaptation of the occupational classification system for workers to the company's sphere. d) The adaptation of the aspects of the contracting modalities attributed by this Act to company agreements. e) Measures to favour co-responsibility and the reconciliation of work, family and personal life. f) Those others provided for in the agreements and collective bargaining agreements referred to in Article 83.2. Collective agreements for a group of companies or a plurality of companies linked for organisational or

France stands out as another notable example of how the resolution of conflicts between collective agreements of different levels has significantly evolved over the years, leading to an erosion of the collective bargaining system as a whole (Moizard, 2024). In fact, in all areas not covered by Article L. 2253, paragraphs 1 and 2 of the Labour Code,[21] the company agreement takes precedence over other agreements, resulting therefore as the general and preferred level of collective bargaining, even when less favourable for workers (Article L. 2553-3, second indent).

Overall, a visible trend towards the decentralisation of collective bargaining, aimed at prioritising collective agreements at enterprise or territorial level over sectoral/national ones, can be observed across EU Member States (Waddington, et al., 2023). As highlighted by Eurofound,

> Since 2008, and most notably in the countries affected significantly by the crisis, not only have various possibilities for companies to deviate from sectoral or national collective agreements been made easier, but legal changes have also addressed the so-called favourability principle. […]
>
> The favourability principle has been weakened in the context of labour market reform packages in response to the economic crisis. (Eurofound, 2015, p. 34)

In light of the comparative examples mentioned above, it becomes evident how much those policies have been driven by the need for flexibility in the regulation of employment relationships, an increase in the specificity of individual companies or production sectors, and the preparation of social plans capable of cushioning, at company level, unfavourable events (Jacobs, 2012; Keune, 2010).

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productive reasons and identified by name, as referred to in Article 87.1, shall have the same priority of application in these matters.

The collective agreements and collective bargaining agreements referred to in Article 83(2) shall not be entitled to the priority of application provided for in this paragraph." (Author's own translation).

21. Article L. 2553-1, French Labour Code lists 13 items that are in principle established by sectoral/branch collective agreements, including employees' remuneration, job specifications, measures on fixed-terms contracts, equality between men and women, etc. In turn, Article L. 2553-2, French Labour Code, provides that on a number of matters, company agreements cannot include different stipulations "except when the company agreement provides at least equivalent guarantees."

V. CONCLUSION: FAVOUR AS A RULE OR AS A PRINCIPLE?

When Ronald Dworkin introduced the distinction between rules and principles, he famously argued that the difference is essentially logical.

> Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. (Dworkin, 1977, p. 24)

A legal principle, on the contrary, "states a reason that argues in one direction, but does not necessitate a particular decision" (Dworkin, 1977, p. 26). Therefore, as put by Scott Shapiro,

> principles do not dispose of the cases to which they apply. They lend justificatory support to various courses of actions, but they are not necessarily conclusive. Valid principles, therefore, may conflict and typically do. Moreover, in contrast to rules, principles have "weight." When valid principles conflict, the proper method for resolving the conflict is to select the position that is supported by the principles that have the greatest aggregate weight. (Shapiro, 2007, p. 26)

According to Joxerramon Bengoetxea (1993), a principle denotes something which, *inter alia*, is useful to mark certain important characteristics of a legal system, to express general concepts obtained from particular rules of a legal system, or to designate those rules of the legal system that have a fundamental character. Fundamental principles further describe those rules that formulate the general aims of a legal system, which should be based on standards of justice and equity (Bengoetxea, 1993, p. 72). In their concretisation, principles need to be evaluated not only in theoretical terms, but also and especially by reference to the outcomes of concrete cases (Tridimas, 2000).

In EU law, the dissemination of the favour rule across Member States has been so pervasive that, despite the subsidiarity principle governing the relationship between EU and Member States in shared competence, all EU labour law directives are based on a specific form of the favour rule. Being led by minimum harmonisation, the EU legislator is entitled to set "minimum requirements for gradual implementation" (Article 153(2)(b) Treaty on the Functioning of the European Union), and EU social policy directives "shall not prevent any Member State from maintaining or introducing *more stringent protective measures*

compatible with the Treaties" (Article 153(4) Treaty on the Functioning of the European Union).[22]

In a context of increased fragmentation — horizontal, vertical, and institutional, as remarked by Dalia Gesualdi-Fecteau et al. (2024) — principles typically help to untangle complexity and identify the aims and fundamental character of a legal system, useful to guide the solution of concrete cases.
Favour started to emerge as a proper principle in some of the jurisdictions analysed in this article, and has informed the interpretation of most labour laws during the last century. In conjunction with non-waivability, favour as a principle further contributed to defining the primary features of labour laws, particularly in comparison to other legal disciplines. Favourability could be qualified as a "general principle" because of its recurrence in statutory legislation, informing the hierarchy between labour law sources as well as its universal and consistent application by the courts (Ghestin et al., 1994, p. 461).

From a comparative perspective, however, the complexity of modern systems of labour law no longer allows consideration of favour to be a universally applicable rule, and probably not even a legal principle in strict terms. As already observed by Lord Wedderburn more than 30 years ago, not only are the hierarchies of labour law systems irreducibly diverse (Wedderburn, 1992, pp. 261–262), but also their internal complexity and fragmentation — along the three scenarios depicted in the preceding sections — is less and less steered by the favour rule. A comparative examination of labour law jurisdictions does not always find its rationale in the conventional juxtaposition of legal traditions or families, notably common law versus civil law. As posited by Simon Deakin et al., the historical divide between common law and civil law systems, in fact, falls short in identifying meaningful disparities in labour regulation from a longitudinal perspective (Deakin et al., 2007). Yet, notable differences have been emphasised between continental European systems and common law jurisdictions.

Functionally, a consideration of the favour rule in comparative perspective has revealed that in the European context, what used to be a *passe-partout*

22. In EU secondary law, see, for example, Article 16(2), Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, according to which EU Member States are left free "to apply or to introduce laws, regulations or administrative provisions which are *more favourable* to workers or to encourage or permit the application of collective agreements which are *more favourable* to workers" (emphasis added). See also Article 4(1), Directive 2002/14 establishing a general framework for informing and consulting employees in the EU, for which its arrangements for information and consultation are without prejudice to "any provisions and/or practices in force *more favourable* to employees" (emphasis added).

(i.e., a master key) to resolve most conflicts between legal sources in labour law has now been relegated to an ancillary role. Across European continental countries belonging to the civil law tradition where it was first established, the favour rule suffered an inexorable erosion through legislative reforms introduced in recent years, allegedly to align with new demands for flexibility, business dynamism, and economic and productivity purposes.

The same French system of labour law, while recognising the favour rule as a "fundamental principle of labour law" (Peskine & Wolmark, 2023),[23] refuses to provide it with super-legislative (i.e., constitutional) value.[24] Its gradual erosion through legislative reforms is increasingly raising issues on its real significance (Jeammaud, 1999, p. 115; Pélissier, 2001, p. 389) and casts doubts on its concrete effectiveness (Daugareilh, 2019, p. 222; Meyrat, 2009).

In common law jurisdictions, particularly the U.K. and U.S., the very rule of favour does not operate as such for the particular articulation of legal sources, and as a consequence of the doctrine of implied terms incorporated in the employment contract (Golding, 2023). British labour law does not recognise "a unifying principle such as the civil law 'principle of favourability,'" but rather pivots the articulation of different rules on the contract of employment, by which "many of the terms and conditions derived from collective bargaining acquire judicial force" (Adams et al., 2021, pp. 48–49). This results in several cases where the legislative intent is unclear or even ambiguous, which does not allow the courts to properly adjudicate in favour of employees' rights to enforce protective statutory rights (Anderman, 2000, pp. 227–228).

Almost a decade ago, Alain Supiot apprised us of the inevitable displacement of state law and sovereignty due to the diminishing prominence of *ius cogens* norms in preference to dispositive provisions (Supiot, 2015, pp. 283–284). In some labour law systems, the cogency of norms was assisted by the favour rule as a mechanism to recognise the importance of sources' plurality by governing their correlation in favour of employees. In other systems, especially in common law and in European Nordic countries, no such rule can be detected, as "[t]here is not necessarily consistency in [labour] legal policy considerations or substantive assessments, neither over time not horizontally between provisions at a given point in time" (Evju, 2008, p. 63).

The gradual disarticulation of legal sources suggests that, even in those jurisdictions where it emerged as a cornerstone of labour laws, the erosion of

23. References also in French Cass Soc., 27 March 2001, n° 98-44.292. French Conseil d'Etat, 8 July 1994. French Conseil d'Etat 27 July 2001.
24. French Conseil Constitutionnel 13 January 2003, n° 2002-465.

the favour rule has rendered it a "false friend" or perhaps rather a friend that isn't around enough. As such, the favour rule seems to have lost its function as a fundamental tenet of labour law, which requires careful consideration when assessing the fragmentation of labour legislation.

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