

Labour Law and Human Rights

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Abstract

This article examines the relationship between human rights and labour law. It first explores the reasons for the resistance to examining labour rights as human rights. Second, it turns to European human rights developments in order to assess the case law of the European Court of Human Rights in this context. It presents an interpretive technique adopted by the Court, the integrated approach, which takes note of social and labour rights in the interpretation of civil and political rights. The article argues that the integrated approach to interpretation needs firm theoretical grounding, and the third part suggests that the prohibition of workers' exploitation is an important underlying principle that should guide our understanding of labour rights as human rights. It develops a definition of workplace exploitation on the basis of theoretical literature, and suggests some of its implications for the adoption of the integrated approach to interpretation.

Key words

Human rights, labour rights, integrated approach, European Convention on Human Rights, exploitation.

Introduction

Some view labour law as a subfield of contract law. On this view, the employment relationship must be regulated by principles of contract law because the employment contract is no different to other contracts. Others believe that "labour is not a commodity".¹ Workers and their labour are not like other things that you buy and sell; workers have dignity and rights, so the employment relationship must be regulated by principles of human rights law, rather than contractual rules. Human rights law developed exactly in order to protect human dignity, and there is no reason to think that the protection of dignity and rights should stop at work. In the last few years, the argument that labour law and human rights are interconnected has gathered momentum in scholarship and judicial decision-

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¹ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), adopted 10 May 1944. See analysis in Hugh Collins *Employment Law* (2nd ed, Oxford University Press, 2010) at ch 1, and see also Paul O'Higgins "Labour Is Not a Commodity" (1997) 26 *Ind Law J* 225, particularly at 230.

making.² It has been argued that human rights law can offer important insights to the critical development of labour law.³

In the sections that follow, I first examine the reasons for the resistance to examining labour rights as human rights. Second, I turn to European human rights developments in order to assess the case law of the European Court of Human Rights in this context. The third part suggests that we need a deeper understanding of labour rights as human rights that is grounded on the prohibition of workers' exploitation.

Labour Rights as Human Rights

It has been said that human rights “has become the lingua franca of global moral thought”.⁴ There is a proliferation of literature that discusses their legal protection, some scholarship that discusses the relationship between their philosophical foundations and their legal protection,⁵ as well as an abundance of governmental and civil society organisations that aim to protect human rights on the ground. When referring to human rights, a good starting point is the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations in 1948.⁶ The Declaration is not a legally binding document, but it is extremely influential. The Declaration protects rights such as freedom of expression,⁷ the right to life⁸ and the prohibition of torture,⁹ and also includes labour rights, such as the right to work, the right to free choice of employment, the right to fair remuneration ensuring a life with dignity, the right to form and join

² Some examples include: Keith Ewing and John Hendy “The Dramatic Implications of *Demir and Baykara*” (2010) 39 Ind Law J 2; Bob Hepple “Introduction” in Bob Hepple (ed) *Social and Labour Rights in a Global Context* (Cambridge University Press, 2002) 1 at 16; Colin Fenwick and Tonia Novitz “Conclusion: Regulating to Protect Workers’ Human Rights” in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010) 587–588; Virginia Leary “The Paradox of Workers’ Rights as Human Rights” in Lance Compa and Stephen Diamond (eds) *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press, 2003) 22; Virginia Mantouvalou “Are Labour Rights Human Rights?” (2012) 3 ELLJ 151; Guy Mundlak “Labor Rights and Human Rights: Why Don’t the Two Tracks Meet?” (2012) 34 Comp Lab L & Pol’y J 237; Lance Compa “Solidarity and Human Rights” (2009) 18 New Labour Forum 38.

³ Hugh Collins and Virginia Mantouvalou “Human Rights and the Contract of Employment” in Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, 2016) at 188.

⁴ Michael Ignatieff “Human Rights as Idolatry” in Amy Gutmann (ed) *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) at 53.

⁵ James Nickel *Making Sense of Human Rights* (2nd ed, Wiley-Blackwell, 2007); George Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007); Allen Buchanan *The Heart of Human Rights* (Oxford University Press, 2013).

⁶ GA Res 217A, A/810 (1948).

⁷ Article 19.

⁸ Article 3.

⁹ Article 5.

trade unions,¹⁰ as well as the right to rest and leisure including reasonable working hours and holidays with pay.¹¹

The Declaration was criticised by some at the time that it was adopted for including rights such as holidays with pay alongside other liberal rights. Maurice Cranston said: “[w]hat the modern communists have done is to appropriate the word ‘rights’ for the principles that *they* believe in”.¹² But Cranston’s critique has been addressed. David Luban said persuasively that those who criticise art 24 of the UDHR who probably:¹³

...include academic critics writing during their sabbaticals – have not considered seriously what a working life would be for someone whose day-to-day survival depends on a regular paycheck and who must work at a grinding job fifty-two weeks a year from age fifteen until premature death at fifty.

As Jack Donnelly underlines in response to Cranston:¹⁴

...the full right recognized is a right to “rest, leisure, and reasonable limitation of working hours and periodic holidays with pay”. Denial of this right would indeed be a serious affront to human dignity; it was, for example, one of the most oppressive features of unregulated nineteenth century capitalism.

However, human rights treaties adopted after the UDHR divided rights into two categories: civil and political rights (such as freedom of expression and the right to life) were protected in documents such as the European Convention on Human Rights (ECHR), while economic and social rights (such as the right to housing, the right to work and the right to decent working conditions) were included in treaties such as the European Social Charter (ESC). Civil and political rights were protected through the courts (the European Court of Human Rights (ECtHR) in the case of the ECHR), and individual petition procedures, while economic and social rights were monitored by committees (the European Committee of Social Rights in the case of the ESC) through reporting mechanisms and sometimes collective complaints procedures.¹⁵

The development of labour law in the United Kingdom, Europe and elsewhere was relatively resistant to framing workers’ claims as human rights. Courts were often

¹⁰ Article 23.

¹¹ Article 24.

¹² Maurice Cranston *Human Rights To-day* (Ampersand Books, London, 1962) at 38–39.

¹³ David Luban “Human Rights Pragmatism and Human Dignity” in Rowen Cruft, S Matthew Liao and Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 263 at 276.

¹⁴ Jack Donnelly *Universal Human Rights* (2nd ed, Cornell University Press, New York, 2003) at 28.

¹⁵ For an overview, see Virginia Mantouvalou “In Support of Legalisation” in Conor Gearty and Virginia Mantouvalou *Debating Social Rights* (Hart Publishing, Oxford, 2011).

reluctant to protect collective labour rights. For this reason, there was in the 1990s a trend in academic literature suggesting that human rights norms and adjudication would not only not help workers, but might even harm their interests.¹⁶ There are many reasons why labour law has been relatively insular, some of which are grounded in historical circumstances, but most of which are normative, in the sense that those who developed the arguments had a normative view about how the employment relationship should be regulated. It is also important to appreciate that the resistance to human rights law reflected beliefs from different ends of the political spectrum – both the left and the right.

Private Law for Private Power

Labour law is primarily a discipline that involves private relations; the employer is a private entity most of the time, and the workers are private individuals. For this reason, it has been suggested that the regulation of the employment relationship requires the application of private law rules: contract law and tort law.¹⁷ Typically, contract law regulates relations between private individuals.

On the most traditional analysis, the purpose of any contractual rule should be to protect freedom and individual autonomy. On a libertarian account of contractual freedom applied to the employment relationship, Richard Epstein argued for a contract at will with as little external intervention as possible.¹⁸ The definition of contract at will used by Epstein is as follows:¹⁹

...men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

For authors like Epstein, legal intervention could disturb contractual freedom of both the employer and the worker. For other authors, the contract of employment can be a legal mechanism that helps rebalance the inequality of bargaining power between the worker and the employer and correct the distributional implications of a labour market that may be unjust. Scholars that view the contract of employment as a central regulatory tool of the employment relationship recognise that it has a welfare role too.²⁰

¹⁶ Keith Ewing “The Human Rights Act and Labour Law” (1998) 27 Ind Law J 275; Tonia Novitz, “Negative Freedom of Association: *Gustafsson v Sweden*” (1997) 26 Ind Law J 79.

¹⁷ Paul Davies and Mark Freedland “The Impact of Public Law on Labour Law, 1972-1997” (1997) 26 Ind Law J 311.

¹⁸ Richard Epstein “In Defence of the Contract at Will” (1984) 51 U Chi L Rev 947.

¹⁹ Epstein’s definition, quoted in his article, above n 20, at 947–948, is from *Payne v Western & Atlantic Railroad Co* 81 Tenn 507, 518–519, 1884 WL 469.

²⁰ Hugh Collins *Regulating Contracts* (Oxford University Press, 1999).

With scholarship focusing on the contract of employment as a private law instrument, human rights were in the past either absent or had a relatively marginal role in the literature, with very few exceptions.²¹ Human rights were traditionally viewed as part of public law, which regulates the relationship between the individual and the state, rather than between private individuals.

Litigation

A second reason why human rights had a limited effect on labour law was that when human rights were invoked, typically litigation and judicial intervention (rather than other types of civil society activism) came to lawyers' minds.²² Legal scholars and activists used to be skeptical about the effect of litigation in this field. The main reason for this was that the judiciary has been viewed as conservative in many legal orders, including the United Kingdom.²³ Values such as freedom of contract, individualism and property rights have been regarded as "traditional judicial values",²⁴ so the courts have been presented as a "deeply regressive force in the regulation of employment".²⁵

The judiciary at a national and supranational level in many legal orders may have been reluctant to protect workers' rights because these have traditionally been classified as social rights in human rights law, as explained above.²⁶ The ECtHR itself was often criticised for not protecting workers' claims under the ECHR.²⁷

Trade Unions

A third reason why labour law was relatively resistant to human rights law probably stems from the role of trade unions and the importance attached to union power in the employment sphere. In the United Kingdom in the 20th century, collective labour relations were predominantly organised around a system that Kahn-Freund famously described as collective *laissez-faire*.²⁸ In this system it was collective actors, namely employers and trade unions, which negotiated and agreed upon working conditions. For scholars in this tradition, state intervention was desirable only to the extent that it facilitated collective negotiations. When human rights were invoked in this setting, it was mainly in order to stress the importance

²¹ See, for instance, Hugh Collins *Justice in Dismissal* (Oxford University Press, 1992) at ch 6.

²² See, for instance, Hugh Collins *The Law of Contract* (Oxford University Press, 1986) at 44.

²³ Anne Davies "Judicial Self-Restraint in Labour Law" (2009) 38 *Ind Law J* 278 at 287.

²⁴ Davies, above n 26, at 278.

²⁵ Alan Bogg "Only Fools and Horses: Some Skeptical Reflections on the Right to Work" in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* at 175.

²⁶ See Virginia Mantouvalou "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation" (2013) 13 *HRLR* 529. The article includes an overview of the case law.

²⁷ See Keith Ewing, above n 18; Tonia Novitz, above n 18.

²⁸ Otto Kahn-Freund "Legal Framework" in Allan Flanders and Hugh Clegg (eds) *The System of Industrial Relations in Great Britain* (Blackwell, Oxford, 1954).

of workers' right to organise.²⁹ Apart from that, non-intervention by the state was what both employers and workers sought.³⁰

In recent years, with the decline of union membership, trade unions and workers in the United Kingdom and elsewhere seem to have made a strategic decision to turn to human rights as a tool to advance their interests.³¹ Human rights litigation emerged as an avenue to make the claims of workers heard, in a way that more traditional union activities did not achieve. The strategic decision to turn towards human rights may have also been triggered by a perception that unions promote their members' economic interests, rather than all workers' human rights or the economy more generally.³² As Kolben put it:³³

Framing labor rights as human rights thus shifts the labor discourse from economics and special interest politics to ethics and morality. In other words, activists and labor law scholars seek to harness the hegemonic status of human rights discourse in order to gain public support for a number of legal, political, and strategic objectives.

By putting claims of workers in the language of human rights, these claims appear morally compelling, as well as universal and inalienable, which are key features of human rights. Human rights are strict entitlements that are resistant to trade-offs, so managerial interests in business efficiency no longer have primary weight when there is a conflict with workers' rights.

The decline in union power is one of the reasons why even some of the staunchest trade union advocates, like Hendy and Ewing, have turned to human rights law in order to find a voice for workers and their unions.³⁴ Human rights law that once appeared irrelevant to trade union struggles slowly emerged as one of the few opportunities to challenge the employer and be heard.

The international trade union movement has also endorsed the idea that trade union rights are part of human rights. For instance, the International Trade Union Confederation (ITUC), which is a coalition of trade unions, places trade union and human rights at the core of its activities. This has been described as an indication of a "global shift in labor movements, which are beginning to conceive of themselves as part of the international human rights movement".³⁵

²⁹ See, for instance, Bill Wedderburn *The Worker and the Law* (3rd ed, Penguin Books, Harmondsworth) at 276–277.

³⁰ Wedderburn, above n 32, at 16.

³¹ See, for instance, Ewing and Hendy, above n 2; Lance Compa "Trade Unions and Human Rights" in Cynthia Soohoo, Catherine Albisa and Martha Davis (eds) *Bringing Human Rights Home: A History of Human Rights in the United States* (University of Pennsylvania Press, 2007) at 209.

³² See Judy Fudge "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 *Dalhous Law J* 601 at 607; Kevin Kolben "Labour Rights as Human Rights?" (2009) 50 *VJIL* 449 at 461.

³³ Kolben, above n 35, at 462.

³⁴ See Ewing and Hendy, above n 2.

³⁵ Kolben, above n 35, at 457.

Politics

Human rights were also approached with scepticism because labour law, probably more so than any other area of private law, is viewed as a deeply political subject. It relates to economic power and to what many view as the struggles of the working class. Political parties take different approaches to labour law, and often base their political agenda on reforming labour relations. As it is such a political subject, some critics view human rights, with their appeal across the political spectrum, as potentially depoliticising. In addition, some argue that human rights have a confrontational edge that can erode the solidarity between workers.³⁶ They can be divisive, because they are individualistic by nature, while the interests of labour are collective and must be collectively pursued.

Economic Efficiency

A further reason why there has been resistance to human rights in the labour relationship is that, according to a neoclassical economic analysis, state intervention in the labour market would hamper its efficient functioning.³⁷ This is because employers will incur transaction costs that make them less competitive both on a local and global level. An inefficient labour market is undesirable both for employers and workers, because it would harm the economic interests of both. As human rights involve interventions in the market through law, they might render it inefficient. The issue of legal intervention and economic efficiency is an empirical point, which can be disputed. In any case, there is a different economic framework that is again concerned with economic efficiency but which supports regulation as being essential to correct “market failures”.³⁸ It is also important to note, however, that it has been argued that labour rights may promote economic efficiency.³⁹

The Tracks Starting to Meet⁴⁰

The picture has changed in recent years. Academic scholars have been searching for a new framework for labour law in the context of economic globalisation, the increase of non-standard contracts of employment and the decline of union

³⁶ Bogg, above n 28, at 167.

³⁷ See Anne Davies *Perspectives on Labour Law* (Cambridge University Press, 2004) at 27.

³⁸ At 29.

³⁹ Simon Deakin and Frank Wilkinson “Rights vs Efficiency? The Economic Case for Transnational Labour Standards” (1994) 23 *Ind Law J* 289.

⁴⁰ Leary, above n 2, at 22.

power.⁴¹ Against this background, several authors have turned to human rights law as a new avenue for workers' voice.⁴²

Integrated Approach

In this context, the ECtHR (and other courts) have started to take what has been described as an integrated approach to the interpretation of the ECHR, which grants some protection to social and labour rights through the machinery of civil and political rights documents.⁴³ The ECHR is a traditional civil and political rights treaty that also contains two labour rights: the prohibition of slavery, servitude, forced and compulsory labour (art 4) and freedom of association, including the right to form and join unions (art 11). In the interpretation of these and other Convention rights, and in contrast to its past stance, the ECtHR has begun to take note of materials of the International Labour Organisation (ILO), the ECSR and other social rights bodies, which served as a source of inspiration and a way to understand more deeply the object and purpose of rights guaranteed by the Convention. By adopting an integrated approach to interpretation, the Court became more receptive to workers' claims and appeared to recognise that some labour rights are human rights, and that the dividing line of civil and political, on the one hand, and economic and social rights, on the other, was not as clear as had been assumed in the past.

Some of the landmark cases where the Court demonstrated its openness to workers' claims raised issues under art 4 of the ECHR. *Siliadin v France*⁴⁴ involved a Togolese national who was brought to France to work and be educated, but was instead kept at home as a domestic worker. She had to clean the house and the employer's office, to look after three children; she slept on the floor in their room; she rarely had a day off; she was almost never paid. When she escaped her employers, she was faced with the fact that French law did not criminalise their conduct. The Court had to assess whether her situation could be classified as slavery, servitude, forced or compulsory labour. In this context, it interpreted art 4 of the ECHR taking ILO materials into account, and for the first time in its history it ruled that the provision had been violated. It found that the applicant was held in servitude, and that France had an obligation under the Convention to criminalise the employer's conduct. *Rantsev v Russia and Cyprus*⁴⁵ addressed trafficking for sexual exploitation for the first time. The Court again took an integrated approach to the interpretation of the ECHR, and ruled that sex trafficking was prohibited under art 4 of the Convention. In these cases, art 4 was interpreted in light of materials of specialist bodies, such as the ILO, and a domestic worker and a sex worker won in Strasbourg.

⁴¹ There is much scholarship on these issues. See, for instance, Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, 2011); Joanne Conaghan, Richard Fischl and Karl Klare (eds) *Labour Law in an Era of Globalization* (Oxford University Press, 2002).

⁴² See above n 2.

⁴³ Mantouvalou, above n 29.

⁴⁴ *Siliadin v France* (2006) 43 EHRR 16 (Section II, ECHR).

⁴⁵ *Rantsev v Cyprus and Russia* (26965/04) Section I, ECHR 7 January 2010.

Sidabras and Dziautas v Lithuania,⁴⁶ to give another example, involved the applicants' dismissal and ban from access to work in the public and many parts of the private sector, because they were former KGB members. The Court recognised that dismissal and a ban from access to work created "serious difficulties [...] in terms of earning [a] living, with obvious repercussions on the enjoyment of [...] private lives".⁴⁷ It classified the claim as falling within the right to private life under art 8 of the ECHR, and concluded that the employer's conduct violated art 8, read in conjunction with the prohibition of discrimination in art 14. It is important to note that the Court here placed special emphasis on right to work rulings of the ECSR. It underlined that:⁴⁸

[It] attaches particular weight in this respect to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights [...].

This ECtHR analysis is a good example of the adoption of an integrated approach to interpretation of the ECHR, which integrates civil and social rights into the scope of the Convention in the context of the right to work.⁴⁹

Labour law scholars also celebrated a line of collective labour rights cases. In 2001, the Court in *Wilson and Palmer* for the first time in its history ruled that there had been a breach of art 11 of the Convention in favour of workers.⁵⁰ Later, *Demir and Baykara*⁵¹ was viewed as a paradigm of the integrated approach.⁵² Here, the respondent Government challenged the use of ILO materials in the interpretation of art 11 of the ECHR because it had not signed up to them. The Court was firm:⁵³

The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

These sources are used in order to find the object and purpose of the Convention provisions, to which Member States have signed up.⁵⁴

⁴⁶ *Sidabras and Dziautas v Lithuania* (2006) 42 EHRR 6 (Section II, ECHR). For analysis of the case, see Virginia Mantouvalou "Work and Private Life: *Sidabras and Dziautas v Lithuania*" (2005) 30 ELR 573.

⁴⁷ At [48].

⁴⁸ At [47].

⁴⁹ Mantouvalou, above n 29.

⁵⁰ *Wilson and Palmer v United Kingdom* (2002) 35 EHRR 20 (Section II, ECHR). See Keith Ewing "The Implications of *Wilson and Palmer*" (2003) 32 Ind Law J 1.

⁵¹ *Demir and Baykara v Turkey* (2009) 48 EHRR 54 (Grand Chamber, ECHR).

⁵² Ewing and Hendy, above n 2.

⁵³ At [78].

⁵⁴ At [76].

Following *Demir and Baykara*, Ewing and Hendy said that in this decision:⁵⁵

...human rights have established their superiority over economic irrationalism and 'competitiveness' in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers.

The adoption of the integrated approach meant that the separation between civil and social rights had started to become blurred, which could have important positive implications for the protection of workers' rights.

Uncertainty

The protection of workers' rights through the ECHR has not been entirely consistent. The enthusiasm inspired particularly by *Demir and Baykara* may have been premature; in more recent case law, the Court seems to have returned to its previous reluctant stance. In *Palomo Sanchez v Spain*,⁵⁶ for example, delivery workers employed by an industrial bakery company brought proceedings against the company claiming that they should be recognised as employees rather than self-employed or non-salaried workers. They set up a trade union to promote their interests. In the context of their dispute, the trade union newsletter published a cartoon that depicted the human resources manager of the company receiving sexual gratification for favours he had done for some workers. The newsletter also contained other critical passages. The workers were subsequently summarily dismissed. In Strasbourg, the applicants claimed that their dismissal violated their freedom of expression protected in art 10 of the ECHR, which should in this case be read in light of their right to freedom of association in art 11. The claim was that free speech rights should be contextualised and given special protection in the trade union context. The majority of the ECtHR ruled that the dismissal did not violate the Convention.

However, a powerful dissent argued that the majority did not sufficiently appreciate the particularities of the trade union context. In order to do so, the dissenting judges said that the majority should have paid more attention to the context, which it could have achieved to a certain degree if it had adopted an integrated approach.⁵⁷

...trade-union freedom of expression is unanimously regarded as an essential and indispensable aspect of the right of association, it being a prerequisite to the fulfillment of the goals of associations and trade unions, as is quite clear from the documents of the International Labour Organization and the case-law of the Inter-American Court of Human Rights cited by the Grand Chamber as relevant material.

⁵⁵ Ewing, and Hendy, above n 2, at 47–48.

⁵⁶ *Palomo Sanchez and Others v Spain* (28955/06, 28957/06, 28959/06) Grand Chamber, ECHR 12 September 2011.

⁵⁷ At [5] (dissent).

The dissent in *Palomo Sanchez* indicates that the ECtHR may have an insufficient grasp of the effect of restrictions on free speech for a trade union in the context of a labour dispute. It may also indicate a broader lack of understanding of the special function and role of human rights against employer interference.

More recently, a case on the right to strike further illustrated challenges in the developing case law on workers' rights as human rights, despite the fact that the applicants argued very strongly for the adoption of an integrated approach to the interpretation of the ECHR. In *RMT v United Kingdom*,⁵⁸ the Court addressed the issue of secondary action, which is banned in English law. The applicant union of transport workers suggested that the ban violated their rights under art 11 of the Convention. The applicants were all members of the union RMT. They were initially employed by a company called Jarvis, and were then transferred to a smaller company, Hydrex. Their terms and conditions were at first kept as they were, according to a legal requirement, but deteriorated later on. Industrial action by Hydrex employees only would not be effective, so RMT sought to organise industrial action at the bigger company, Jarvis. As English law does not protect secondary action, it was not possible to do this. The Court accepted that secondary action falls within the scope of art 11.

The trade union relied heavily on ILO and ECSR materials, which were critical of United Kingdom law with regards to secondary actions. When examining materials of expert bodies in interpreting the ECHR, the Court often seeks to establish whether there is an emerging international or European consensus on the topic in question.⁵⁹ In *RMT*, the applicants invoked numerous international and regional materials in support of their claim,⁶⁰ and the Court said that these might indeed be relevant, but were not decisive because the nature of review in Strasbourg is different to the supervision by the ILO and the ECSR.⁶¹

...the Court considers that the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.

Although it seems that the Court seeks to find consensus by looking at a range of materials,⁶² it is both questionable what weight it should give to such consensus

⁵⁸ *RMT v United Kingdom* (31045/10) Section IV, ECHR 8 April 2014. See Alan Bogg and Keith Ewing "The Implications of the *RMT* Case" (2014) 43 Ind Law J 221.

⁵⁹ *Demir and Baykara*, above n 57, at [85].

⁶⁰ *RMT*, above n 67, at [57].

⁶¹ At [98].

⁶² See *Demir and Baykara*, above n 57.

generally,⁶³ and unclear how it should use any established consensus. Here, turning to the permitted limitations to the right, it found that the restriction of sympathy action was legitimate. The limitation pursued the aim of protecting the rights of those who are not parties to the dispute, and was proportionate to the aim pursued. This is because in sensitive matters of labour and social policy, such as a secondary strike, the Court will allow a wide margin of appreciation.⁶⁴ In this case, it preferred to recognise discretion to state authorities, rather than challenge English law on industrial action.

The Court's uncertainty regarding the guiding principles for applying the Convention to issues involving workers' rights also emerged in a case on prison work, *Stummer v Austria*.⁶⁵ Mr Stummer spent approximately 28 years in prison. During this time, he worked for long periods in the prison kitchen or the prison bakery without being affiliated to the old age pension system. When he applied for an early retirement pension, his application was rejected because he had not accumulated the required amount of insurance months. The reason why no contributions were made for Mr Stummer during the full period of his employment was that the prison authorities kept 75 per cent of his pay, so his salary did not suffice for pension contributions. It should be added that work is compulsory in prison: refusal to work while in prison carries penalties, such as withdrawal of certain rights, and may even amount to solitary confinement.

The applicant claimed that prison work without affiliation to an old age pension system should not be viewed as ordinary in the course of detention, so it violated art 4, as well as art 1 of Protocol 1 (property) together with art 14 (discrimination). The majority of the Court rejected Stummer's claims. However, a strong dissenting opinion suggested that his treatment was a violation of the Convention. The distinction between prisoners and other workers "produces a long-term effect going well beyond the legitimate requirements of serving a particular prison term",⁶⁶ and violates the prohibition of discrimination in conjunction with the right to property. In a further dissenting opinion, moreover, Judge Tulkens argued that "work without adequate social cover can no longer be regarded as normal work",⁶⁷ and suggested that in this instance there was also a violation of the prohibition of slavery, servitude, forced and compulsory labour.

Recent case law on the protection of workers' rights under the ECHR suggests that, even though the tracks of human rights and labour law have started to meet, there

⁶³ George Letsas "The ECHR as a Living Instrument: Its Meaning and its Legitimacy" in Andreas Ulfstein, Geir Follesdal and Birgit Peters (eds) *Constituting Europe – The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 106.

⁶⁴ On the margin of appreciation, see Dean Spielmann "Whither the Margin of Appreciation?" (2014) 67 CLP 49; and George Letsas "Two Concepts of the Margin of Appreciation" (2006) 26 OJLS 705.

⁶⁵ *Stummer v Austria* (37452/02) Grand Chamber, ECHR 7 July 2011.

⁶⁶ At [11] (dissent).

⁶⁷ At [8] (Judge Tulkens' partly dissenting opinion).

is still uncertainty as to the application of human rights in the employment context. The ECtHR has sometimes been willing to seek inspiration in materials of expert bodies, such as the ILO and the ECSR, but in other instances it has decided to leave workers' rights unprotected, even in the face of strong evidence that bodies with expertise had taken a different approach to the problem in question.

Exploitation

The inconsistencies in the ECtHR case law should probably not come as a surprise. After all, the Court has only recently started to engage with workers' rights (since the early 2000s). At the same time, in recent years it has faced persistent political pressure by the United Kingdom Government, which has threatened to withdraw from the Convention because it views the Strasbourg Court as having gone too far in protecting human rights.⁶⁸

How should the Court be approaching workers' rights in the ECHR? In order to address this question and the current uncertainty, I will examine a possible justification for workers' rights as human rights on the basis of an idea that is underexplored in labour law and human rights literature: exploitation.

The prohibition of exploitation is not of course explicitly included in the Convention or in other human rights documents. Human rights law does not contain a right not to be exploited as such, however the concept of exploitation has figured in case law and has been linked to slavery and human trafficking. The ECtHR refers to exploitation when examining art 4 in the *Siliadin* case, discussed earlier, and exploitation was further mentioned in *CN v United Kingdom*.⁶⁹ In *CN*, which involved a migrant domestic worker in the United Kingdom, the Government argued that English law contained effective legislation on trafficking, and claimed that, for the purposes of s 4 of the Asylum and Immigration (Treatment of Claimants) Act, "exploitation meant behaviour that contravened article 4".⁷⁰ The Equality and Human Rights Commission, intervening as a third party in the case, pointed to the low number of prosecutions under the Act, despite the fact that a far larger number of individuals had been recognised as victims of trafficking. It stated that there was a need for clarity in English law as to "what amounted to forced labour as distinct from exploitation".⁷¹ The ECtHR said in turn:⁷²

⁶⁸ See Anushka Asthana and Rowena Mason "UK Must Leave European Convention on Human Rights, Says Theresa May" (25 April 2016) *The Guardian* <www.theguardian.com>. See also High Level Conference on the Future of the European Court of Human Rights (the Brighton Declaration), adopted 19–20 April 2012, referring to the margin of appreciation.

⁶⁹ *CN v United Kingdom* (2013) 56 EHRR 24 (Section IV, ECHR).

⁷⁰ At [57].

⁷¹ At [63].

⁷² At [80].

...domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another.

When examining art 4, the United Kingdom Supreme Court has also said that “[f]orced labour is not fully defined and may take various forms, but exploitation is at its heart”.⁷³

The Court generally interprets art 4 by taking account of international and European law on human trafficking, where labour exploitation is described as follows:⁷⁴

Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

Even though the above are simply examples of exploitation and not a definition of the concept, it is clear that art 4 case law refers to exploitation as a moral wrong, which the Convention can address. The term is used when a worker is found in a situation akin to slavery, which violates art 4. The elements upon which the ECtHR relies to determine whether there is such severe exploitation include: no pay for work performed, isolation, confiscation of legal documents, deception, and background conditions of poverty. The combination of these individual and structural factors may lead to a finding that the worker is faced with serious coercion and hence is in a situation of slavery or servitude.

The classification of some instances of abuse of workers’ rights as exploitative and hence in breach of art 4 is a welcome development, for it demonstrates the recognition and protection of workers’ dignity in human rights law. Yet it is too narrow. Is it correct to only protect workers from exploitation when they are faced with the most extreme forms of it?

Modern accounts of political theory attempt to explain what is wrong with exploitation.⁷⁵ These accounts may help to shed light on our understanding of exploitation in law. The starting point is usually that exploitation occurs when

⁷³ *Reilly & Anor, R (on the application of) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2013] 3 WLR 1276 at [81].

⁷⁴ Article 2, paragraph 3.

⁷⁵ Andrew Reeve (ed) *Modern Theories of Exploitation* (Sage Publications, London, 1987); Robert Goodin *Reasons for Welfare* (Princeton University Press, 1988); Alan Wertheimer *Exploitation* (Princeton University Press, 1999); Ruth Sample *Exploitation: What It Is and Why It's Wrong* (Rowman & Littlefield Publishers, Lanham (MD), 2003).

someone takes unfair advantage of someone else.⁷⁶ Exploitation of a person occurs when someone takes advantage of that person's vulnerability.⁷⁷ Someone may take advantage of another's various kinds of vulnerability, his or her needs or desires, but this will not always be classified as wrongful exploitation in the sense discussed here. However, when someone's vulnerability is due to a significantly weaker bargaining position than the other, and the stronger party uses this vulnerability, then a situation of exploitation is present.⁷⁸ It has been argued that "those who depend upon particular others for the satisfaction of their basic needs are rendered, by that dependency, susceptible to exploitation by those upon whom they depend".⁷⁹

For exploitation to be objectionable, on Goodin's influential view, a person in "an especially strong position vis-à-vis another" must take advantage of the other's vulnerability.⁸⁰ Goodin argues that such extreme vulnerability may consist of asymmetry of power between the parties, the possession by the powerful of what the weaker party needs, a monopoly of the powerful over what the other needs, and control of this object by the powerful. Even though this account contains important insights, such as the role of need and asymmetry of power, it is narrow, particularly because it requires a monopoly of the powerful. As Sample puts it, this account is "not merely taking advantage, but kicking a person when he is down".⁸¹

What emerges is that, in modern political thought, exploitation is analysed as a wrong, and significant attention has been paid to what may constitute exploitation, namely taking unfair advantage of vulnerability. Vulnerability may consist of someone's need. Most people work because with the income gained through work they can satisfy their basic needs: without this income, most people would be destitute.⁸² For this reason, workers are always in a position of need and are therefore prone to exploitation. At the same time, workers are in a weak bargaining position in relation to their employers. They need their job, and they depend upon their employer because there is a scarcity of jobs. Employers may impose working conditions that are exploitative exactly because they know there is job scarcity and they are likely to be able to replace workers without much difficulty. It is clear, in other words, that workers are vulnerable to exploitation. Migrant workers in particular may be especially prone to exploitation, because

⁷⁶ Wertheimer, above n 87, at 10; Robert Goodin "Exploiting a Situation and Exploiting a Person" in Andrew Reeve (ed) *Modern Theories of Exploitation* (Sage Publications, London, 1987) at 171; Matt Zwolinski "Structural Exploitation" (2012) 29 Soc Philos Policy 154 at 156.

⁷⁷ Allen Wood "Exploitation" in Kory Schaff (ed) *Philosophy and the Problems of Work: A Reader* (Rowman & Littlefield Publishers, Maryland, 2001) 141 at 147.

⁷⁸ Wood, above n 89, at 148.

⁷⁹ Goodin, above n 87, at 121.

⁸⁰ Goodin, above n 87, at 125.

⁸¹ Sample, above n 87, at 31.

⁸² People, of course, work for other important reasons too. See Hugh Collins "Is There a Human Right to Work?" in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, Oxford, 2015) 17.

their immigration status may depend on being employed more generally, or even on being employed by a particular employer.⁸³

At the same time, for exploitation to occur there does not need to be a situation akin to slavery. There are other forms of exploitation that involve violations of workers' rights. For instance, there are many situations where employers underpay or do not pay their employees if they are undocumented workers. In these instances, the employers are often aware that the workers are particularly vulnerable because if they go to the authorities they are likely to be arrested and deported. Employers take advantage of this vulnerability by underpaying them or not paying them at all, and sometimes the law in certain jurisdictions, such as the United Kingdom, does not protect workers from such exploitation. Workers do not have a right to be paid for work performed under an illegal contract.⁸⁴ The ECHR does not contain a right to a minimum wage, but it can fairly be argued that situations such as this violate the right to property, which is protected in art 1 of Protocol 1 of the Convention, possibly together with the prohibition of discrimination.⁸⁵ The prohibition of exploitation can serve as a guiding principle in the interpretation of the ECHR on issues such as this.

As discussed earlier, the Convention is a traditional civil and political rights document, which only contains few labour rights. However, this does not mean that the ECtHR cannot interpret the existing provisions in ways that protect workers from exploitation. The prohibition of exploitation can ground rights, such as a minimum wage, as well as trade union rights that strengthen the vulnerable position of workers. The adoption of an integrated approach, as described above, provides the Court with certain tools that enable it to interpret the Convention in a way that prohibits exploitation. To return to the case law, *Stummer*, the prison worker, was exploited by the prison authorities because they took advantage of his vulnerability: as a prisoner, he was not free to not work or to work for a different employer. There are many instances of exploitation of prison workers,⁸⁶ and it is unfortunate that the majority of the Court did not take the opportunity to acknowledge exploitation in this case. The dissenting judges, on the other hand, rightly stated that his treatment constituted a violation of the Convention.

In collective labour law cases, the idea of exploitation as a guiding principle of the Court's case law suggests that there is very little scope for a margin of

⁸³ See Virginia Mantouvalou "Am I Free Now? Overseas Domestic Workers in Slavery" (2015) 42 J Law & Soc 329.

⁸⁴ *Hounga v Allen & Anor* [2014] UKSC 47, [2014] 1 WLR 2889; Alan Bogg and Sarah Green "Rights Are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts" (2015) 44 ILJ 101; Virginia Mantouvalou "The Right to Non-Exploitative Work" in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, Oxford, 2015) 39.

⁸⁵ Mantouvalou, above n 84.

⁸⁶ Richard Lippke "Prison Labour: Its Control, Facilitation, and Terms" (1998) 17 Law Philos 533; Howard League for Penal Reform *Business Behind Bars: Making Real Work in Prison Work* (2012) <www.howardleague.org>.

appreciation to national authorities when the state or employers interfere with freedom of association. Workers' organisations have the counteraction of the inequality of bargaining power between employers and workers as their main purpose. In this way they help to address workers' vulnerability to exploitation. For this reason, workers' collective labour rights must be given strong protection against employers. In *Palomo Sanchez*, the background dispute about whether the workers were self-employed indicates that the workers may have been exploited. That the Court was unwilling to give their right to free speech strong protection in the context of this dispute did not help to address their vulnerability in bargaining with their employer. As famously stated in *Handyside*, the Convention protects views that shock or disturb the State or a part of the population,⁸⁷ and this protection should extend to the trade union context. Similarly, the unwillingness of the ECtHR to protect sympathy industrial action in *RMT* did little to counteract the inequality of power that leads to vulnerability and exploitation, despite strong indications in ILO and ECSR materials of the importance of such action in the labour context.

Conclusion

Human rights law plays an increasingly important role in the employment relationship context. An examination of the ECtHR and its case law shows that there is some willingness to protect workers' rights through an integrated approach to interpreting the Convention. The Strasbourg Court often takes note of materials of the ILO and the ECSR in order to interpret the ECHR, which has been celebrated in labour law scholarship.⁸⁸ Yet the ECtHR is a supranational body and is sometimes faced with hostility by national authorities. Workers' rights, and other social rights, were until recently viewed as non-justiciable through individual petitions before human rights bodies. The employment relationship was also typically viewed as an area that must be regulated through contract and other private law rules, rather than through public law. For reasons such as these, there is much uncertainty as to the future direction of the protection of workers' rights as human rights.

This article suggests that the ECtHR has opened the door to the protection of workers' rights both by taking note of findings of the ILO and other expert bodies, and by protecting certain applicants from forms of exploitation that are akin to slavery and servitude. Yet the approach of the Court thus far appears to be both uncertain and narrow. This paper therefore argues for the recognition of a different account of exploitation, which consists of taking account of someone's vulnerability. Human rights law can, in turn, address exploitation by safeguarding workers' rights, such as a minimum wage, and by strengthening workers' bargaining power through protection of collective labour rights. The prohibition of exploitation can serve as a guiding principle in Strasbourg case law, as well as the

⁸⁷ *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECHR) at [49].

⁸⁸ Mantouvalou, above n 26; Ewing and Hendy, above n 2.

case law of other bodies that explore the legal protection of workers' rights as human rights.

Human rights can provide an important critical perspective for labour law, as well as an important tool for the protection of workers' rights. "The importance of human rights [...]", as Joseph Raz puts it in a recent essay:⁸⁹

...is in affirming the worth of all human beings, and in distributing power away from the powerful to everyone, including any group or association willing to advocate and promote the interests of ordinary people.

One way in which human rights can achieve this rebalancing of power is through the protection of workers from exploitation. The prohibition of exploitation is one, but not the sole, justification for conceptualising workers' rights as human rights.⁹⁰ However, a modern understanding of the prohibition of exploitation in the workplace can be an important guiding principle in achieving dignity of workers against employer abuse.

⁸⁹ Joseph Raz "Human Rights in the Emerging World Order" in Rowan Cruft, S Matthew Liao, Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 217 at 226.

⁹⁰ I have previously examined the theory of capabilities as a foundation of workers' rights. See Mantouvalou, above n 26.