Labour Rights

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Abstract: What is the role of labour rights in human rights law? This chapter considers this question. It addresses the normative grounding of labour rights and their legal protection through human rights law, but also considers objections to pursuing workers' claims through human rights law. It proposes that this legal approach is compatible with collective goals promoted by trade unions and other workers' organisations and further explains that it can be particularly important for precarious workers who are under-unionised and under-represented in politics. Workers, trade unions, and other organisations need to pursue several different avenues to achieve justice at work. The legal protection of labour rights as human rights by national and international bodies, and their vindication by workers, trade unions, and other civil society organisations can help address injustices that affect everyone, and particularly some of the most disadvantaged groups.

Keywords: labour rights, human rights, workers' rights, trade unions, precarious work, exploitation.

1. Introduction

Work is a central element of people's lives in the modern world. Through work they make a living, develop social relations, and gain self-respect and the respect of others. Work is an important good and the workplace can be a site of human flourishing for these reasons. However, it can also be a site of devastation.[1] The employment relationship is characterised by inequality of bargaining power because of the economic structure of the market that creates dependency, making workers vulnerable to exploitation. This is why it is typically characterised as a relation of submission and

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1. Vicki Schultz, "Life's Work," *Columbia Law Review* 100, 7 (2000): 1881-1964.

subordination,[2] while the authority that employers exercise in the workplace is such that it has also been described as 'private government."[3] Certain groups of workers, such as migrant workers or others in precarious working arrangements, are even more vulnerable than others as they are systematically excluded from protective norms that others enjoy, while also being under-unionised and under-represented in politics.[4] Labour rights, namely rights that relate specifically to the role of being a worker, aim to challenge workplace inequality and exploitation of all workers, and can be especially valuable for those who are most disadvantaged and under-represented in politics and in the workplace.

This chapter examines the protection of labour rights in human rights law, exploring their meaning as they sit at the intersection between civil and political, and economic and social rights, and highlights their importance for some of the most precarious workers. It asks four questions which structure it. First, how can labour rights be justified in theory as human rights? The justification of labour rights as human rights emphasises their universal nature and determines their scope. Second, how are labour rights recognised and interpreted in human rights instruments at supranational level? This question is crucial as some labour rights are classified as civil and political, and others as economic and social rights. Third, what are the typical objections to the human rights approach in labour law? Scholars and activists need to be aware of these objections as they highlight potential unintended consequences of employing human rights law to protect the rights of workers. Finally, what are the implications of protecting labour rights through human rights law for the most precarious and under-unionised workers? The chapter suggests that framing labour rights as human rights in law can provide an important platform for workers' claims and give voices to some of the most disadvantaged workers.

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2. Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (London: Stevens and Sons, 1983), 18. For analysis see Hugh Collins, "Is the Contract of Employment Illiberal?," in *Philosophical Foundations of Labour Law*, eds. Hugh Collins, Gillian Lester and Virginia Mantouvalou (Oxford: OUP, 2018), 48-67.

3. Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about it)*, (New Jersey: Princeton University Press, 2019).

4. Virginia Mantouvalou, *Structural Injustice and Workers' Rights*, (Oxford: OUP, 2023).

2. Foundations and justifications

Labour rights are often grounded in theoretical scholarship on values that ground other human rights. These values include the value of dignity, which also figures in the preambles of many human rights treaties and declarations.[5] Labour rights can further be understood as welfare-oriented in the sense that they relate to provisions that are highly valuable for workers' welfare; as freedom-oriented for they ensure that individuals are free to exercise their agency; and as fairness-oriented because they promote fairness and equality at work.[6] Several different values can be analysed as foundations of labour rights, in other words, and these also ground other human rights.

The endorsement of a foundational value, or set of values, that underpin labour rights as human rights has normative power and implications.[7] It elucidates questions, such as which labour rights should be understood as human rights and how they should be protected by legal institutions that interpret their meaning and personal scope, namely who is covered by legal protection. If labour rights are contingent on holding the legal status of citizenship, for instance, only a country's nationals will be entitled to them. Human rights, though, are typically grounded on universalistic values, such as human dignity. This means that labour rights that are classified as human rights are universal entitlements.

When examining the substance of labour rights in human rights law, we can consider the prohibition of exploitation as a central foundational value. It is central because, for example, exploitative treatment may violate human dignity, agency, or freedom. The next challenge is how we define exploitation.[8] We can take Marx as a starting point. Marxian exploitation has been defined as "the unequal exchange of labour for goods: the exchange is unequal when the amount of labour embodied in the goods which the

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5. See, for instance, the Preamble of the Universal Declaration of Human Rights and that of the Charter of the Fundamental Rights of the European Union. For analysis of dignity as a foundation of labour rights, see Pablo Gilabert, "Labor Human Rights and Human Dignity," *Philosophy and Social Criticism* 42, (2016): 171. See also Joe Atkinson, "Human Rights as Foundations for Labour Law," in *Philosophical Foundations of Labour Law*, eds. Hugh Collins, Gillian Lester and Virginia Mantouvalou (Oxford: OUP, 2018), 122-138.

6. For the typology, see James Nickel, this volume.

7. Nickel explains this in his contribution.

8. Jonathan Wolff, "Structures of Exploitation," in *Philosophical Foundations of Labour Law*, eds. Hugh Collins, Gillian Lester and Virginia Mantouvalou (Oxford: OUP, 2018), 175–187.

worker can purchase with his income … is less than the amount of labour he expended to earn that income."[9] For Marx, all employment relations in a capitalist society are exploitative. Exploitation defined in Marxian terms will support a long list of labour rights for all workers, but Marxian thinking may also lead to a rejection of the employment of legal mechanisms to challenge the structure of capitalism as inadequate.

Alternatively, we could take a narrow definition of exploitation, such as the one that we find in the international law of human trafficking. This definition is narrow because it is primarily concerned with state duties to criminalise the relevant conduct. In this context, exploitation is equated to the worst forms of ill-treatment and abuse. For instance, one of the human trafficking instruments, the EU Human Trafficking Directive, criminalises trafficking "for the purpose of exploitation."[10] On the meaning of exploitation, the Directive explains:

> 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.[11]

If we define the concept as narrowly as that, only the gravest forms of ill-treatment of workers would be considered to constitute a violation of labour rights. This can be justified if the focus is on criminalising the most abusive employers. However, the protection of the rights of workers cannot be achieved through employers' criminalisation; it requires broader change. The list of labour rights to be protected as human rights on this narrow basis would be limited to forced labour and other forms of serious abuse. There is a tendency to adopt such a limited definition of exploitation when people refer to "modern slavery" as the main human rights issue faced by workers

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9. John Roemer, "Should Marxists Be Interested in Exploitation," *Philosophy and Public Affairs* 14, 1 (1985): 30-65.

10. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 (EU Human Trafficking Directive) art 2 para 1.

11. ibid art 2 para 3.

in our times. Yet this account has been criticised as an unsuitable foundation of labour rights as human rights.[12]

Finally, we could take a different view on the meaning of exploitation as a foundation of labour rights, which is somewhere in between the Marxian account and the narrow account of exploitation that we find in the law of human trafficking. For the purposes of considering which labour rights are human rights and how they should be interpreted, we could say that it is exploitative when employers take advantage of the vulnerabilities of workers in order to make a profit.[13] The focus on background factors that create vulnerability to exploitation highlights the role of the market and the unequal power between employers and workers. This analysis can be particularly suitable for labour rights as we find them in law, which I discuss below, for it takes account of both individual vulnerabilities and the structure of the market in understanding and addressing injustice at work. It is built on Marxian insights, and particularly the idea that in a free market economy there are structural factors that create vulnerability of workers to exploitation, and can help develop an account of human rights law that challenges aspects of this situation. However, we do not have to take the broad view of Marxian thinkers and conclude that all employment relations are exploitative. This analysis supports labour rights that we find in both civil and social rights documents, as we see below, including a right to fair and just working conditions, the right to form and join a trade union, a right to collective bargaining and strike and the right to equality at work.[14]

3. Legal Protection

Labour rights were recognised in the international human rights system from its inception, in the 1948 Universal Declaration of Human Rights (UDHR). In this context,

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12. I discuss this approach taken by the UK Government in Virginia Mantouvalou, "The UK Modern Slavery Act Three Years On," *Modern Law Review* 81, 6 (2018): 1017-1045.

13. For an overview of theories of exploitation, see Virginia Mantouvalou, "Legal Construction of Structures of Exploitation'," in *Philosophical Foundations of Labour Law*, eds. Hugh Collins, Gillian Lester and Virginia Mantouvalou (Oxford: OUP, 2018),188-204.

14. See James Nickel, this volume. For further discussion of socialism and rights, see Tom Campbell, *The Left and Rights* (New York: Routledge, 1983). Other possible justifications include the theory of human capabilities: see ed. Brian Langille, *The Capability Approach to Labour Law*, (Oxford: OUP, 2019).

they are framed as universal entitlements and contain both individual and collective elements. Article 23 of the UDHR is a good starting point. It provides that:

> (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
> (2) Everyone, without any discrimination, has the right to equal pay for equal work.
> (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
> (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Labour rights also figure in other UDHR provisions. Article 24 protects the right to rest and leisure, reasonable working time, and holidays with pay. Article 4 prohibits slavery and servitude.

The UDHR was criticised for including the right to holidays with pay in its scope. Cranston, one of the most famous opponents of social rights, said that "w]hat the modern communists have done is to appropriate the word "rights" for the principles that *they* believe in".[15] In response, Donnelly explained that "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."[16]

Leisure, including paid holidays as provided as a right in the UDHR, is essential for people, and most will not be able to exercise their right to rest and leisure unless they

15. Maurice Cranston, *Human Rights To-day,* (London: Ampersand Books, 1962), 38–39.
16. Jack Donnelly, *Universal Human Rights*, 2nd ed. (Cornell: Cornell University Press, 2003), 28.

are paid during their leave.[17] The necessity of a right to leisure explains why Luban suggested that those who criticise Article 24 of the UDHR probably:

> …include academic critics writing during their sabbaticals – [who] 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.[18]

Understood in this way, it emerges that Article 24 does not protect a right to a restful and luxurious life. The wrong that it aims to address is that of labour exploitation, including exploitation of the most severe form. It is increasingly highlighted that employers, including large multinational corporations, do not respect the right to rest and leisure of workers who are employed in poor working conditions with severe implications for their health and well-being.[19] Being unable to rest is exhausting and can be destructive.[20] These working conditions can violate Article 24 of the UDHR while also posing threats to other human rights such as the right to health and safety and even the right to life. Criticisms of the provision are misleading, for critics misunderstand the serious affront to dignity and well-being that is posed by labour exploitation at work.

The UDHR was not the first document to protect labour rights as human rights at international level. This occurred a few decades before, in 1919, with the formation of the International Labour Organization (ILO), the specialist branch of the United Nations in the field. The 1944 Declaration of Philadelphia outlined the fundamental

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17. On the value of leisure, see Kryzstof Pelc, "Why your Leisure Time is in Danger," *The Atlantic*, 17 July 2021, https://www.theatlantic.com/ideas/archive/2021/07/stop-treating-leisure-as-a-productivity-hack/619467/.

18. David Luban, "Human Rights Pragmatism and Human Dignity," in *Philosophical Foundations of Labour Law*, eds. Hugh Collins, Gillian Lester and Virginia Mantouvalou (Oxford: OUP, 2018), 263.

19. See, for example, the analysis on working conditions in James Bloodworth, *Hired – Six Months Undercover in Low-Wage Britain*, (London: Atlantic Books, 2018).

20. For an overview of the issues, see Jeremy Snyder, "Exploitation and Sweatshop Labor: Perspectives and Issues," *Business Ethics Quarterly* 20, 2 (2010): 187-213.

principles of the ILO, emphasising that 'labour is not a commodity'.[21] This has become a central slogan of the organisation, and can also be understood as a demand for the protection of human rights that are grounded on the status of being human, and not a commodity. The Declaration also underlined the importance of freedom of expression and association for progress, which are traditional civil and political rights, and the threat of poverty to prosperity.[22] The ILO has over the decades adopted a number of detailed Conventions and Recommendations on workers' rights, some of which refer to human rights explicitly.[23] These are supervised primarily through a complex machinery of state reports to a committee of independent experts (Committee of Experts on the Application of Conventions and Recommendations) and special procedures on freedom of association (by the Committee on Freedom of Association). In addition, there are constitutional procedures, whereby workers' or employers' organisations can submit complaints, as well as procedures whereby state members can file complaints against other state members of the ILO.[24] The jurisprudence of the ILO bodies is voluminous, covering both collective and individual labour rights. In this context, freedom of association and collective bargaining are typically described as 'enabling rights' for all other workers' rights.[25]

In 1998 the ILO adopted the Declaration of Fundamental Principles and Rights at Work, which identified the following rights as fundamental: a) freedom of association and the right to collective bargaining; b) the elimination of all forms of forced and compulsory labour; c) the effective abolition of child labour and d) the elimination of discrimination at work.[26] The Declaration was amended in 2022 to include a right to a safe and healthy working environment.

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21. ILO Declaration of Philadelphia – Declaration Concerning the Aims and Purposes of the International Labour Organisation (10 May 1994), Article I(a).

22. ILO Declaration of Philadelphia (10 May 1994), Article I(b) and I(c).

23. See, for instance, the ILO Convention on Domestic Workers No 189 (16 June 2011).

24. For an overview, see Colin Fenwick, "The International Labour Organisation: An Integrated Approach to Economic and Social Rights," in *Social Rights Jurisprudence*, ed. Malcolm Langford (Cambridge: CUP, 2008), 591-612.

25. See, for instance, eds. Karen Curtis and Oksana Wolfson, *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather* (ILO, 2022); and ILO Protection of Workers' Personal Data Code of Practice (1 January 1997).

26. For a criticism of the Declaration, see Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime," *European Journal of International Law* 15,

After the adoption of the UDHR, labour rights have mostly been found in social rights documents. When the international community adopted legally binding instruments, they placed few labour rights in civil and political rights treaties, and many more of these in economic and social rights ones. For instance, in the International Covenant on Civil and Political Rights (ICCPR) we have rights such as the right to form and join trade unions in Article 22 and the prohibition of slavery, servitude and forced labour in Article 8. In the International Covenant on Economic, Social and Cultural Rights (ICESCR), we find a broader set of rights such as the right to work in Article 6, the right to just and favourable working conditions in Article 7 and a range of collective labour rights in Article 8. This separation is mirrored at regional level, in Europe and America,[27] but not in the African Charter on Human and Peoples' Rights or the Charter of Fundamental Rights of the European Union.

The problem with the separation of labour rights in civil and social rights treaties is that rights found in social rights documents, including the majority of labour rights, are generally monitored through mechanisms that are not as effective as those of civil and political rights.[28] This created a hierarchy between labour rights themselves. Some rights, such as the right to form and join a trade union for the protection of workers' interests and the prohibition of slavery, servitude, forced and compulsory labour, were included side by side with civil and political rights and were therefore examined extensively through individual petitions and judicial mechanisms. Rights such as the right to fair and just working conditions and the right to strike were included in economic and social rights documents, which were monitored through weaker machineries. In this way, their development through interpretation has been much more

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3 (2004): 457-521; Brian Langille, "Core Labour Rights – The True Story (Reply to Alston)," *European Journal of International Law* 16, 3 (2005): 409-437. For criticism, see also Fenwick, as above, 596.

27. See the Council of Europe's documents, ECHR (1950) and European Social Charter (1961). In the ECHR we find labour rights such as the prohibition of slavery, servitude, forced and compulsory labour (Article 4) and the right to form and join a trade union (Article 11). The ESC protects rights such as the right to work (Article 1), the right to just conditions of work (Article 2), the right to organise (Article 5) and the right of migrant workers to protection and assistance (Article 19). The revised version of the Charter, which entered into force in 1999 and is gradually replacing the 1961 document, contains a number of new social rights and keeps labour rights as its centrepiece. See also the Organisation of American States with the American Convention on Human Rights (1978) on the one hand and the San Salvador Additional Protocol in the Area of Economic, Social and Cultural Rights (1999) on the other.

28. For an overview in several legal orders, see Malcolm Langford, *Social Rights Jurisprudence* (Cambridge: CUP, 2012). For a debate on the legal protection of social rights, see Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2010).

limited, as there have been fewer opportunities for monitoring bodies to scrutinise state compliance with them. For many decades, the enforcement of labour rights in international human rights law was wanting. In the context of globalisation, further questions were raised about the best institutional arrangements to protect them.[29]

The consequences of this artificial hierarchy between labour rights was evident in the past reluctance of courts and other monitoring bodies to adjudicate on questions that touched upon social rights. For instance, in a line of cases that were decided in the 1970s, 1980s, and 1990s, looking at trade union rights, the European Court of Human Rights (ECtHR) repeatedly ruled that when a right can be classified as social and is protected in the European Social Charter (ESC) or in instruments of the ILO, it ought to be excluded from the scope of the European Convention on Human Rights (ECHR). When applicants alleged that Article 11 of the ECHR (the right to form and join a trade union), encompasses a right to strike, for instance, the claim was rejected.[30] Similarly, the right to consultation and the right of a union to be recognised for the purposes of collective bargaining were not regarded as essential components of Article 11.[31] This was called a 'ceiling effect';[32] the ceiling being, in this context, the ICESCR and the ILO.

What was also remarkable in this context was that at the same time as the ECtHR was reluctant to protect trade union rights, it was willing to recognise the rights of individuals who refused to be trade union members. This occurred in a line of cases on 'closed shop' arrangements, namely arrangements of compulsory union membership.[33] The decisions of the ECtHR in these cases led scholars to argue that it shows "a greater

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29. See Philip Alston, *Labour Rights as Human Rights* (Oxford: OUP, 2005); Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, *Global Justice and International Labour Rights* (Cambridge: CUP, 2016).

30. *Schmidt and Dahlstrom v Sweden* A 21; 1 EHRR 637.

31. *National Union of Belgian Police v Belgium* A 19; 1 EHRR 578.

32. Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights," *Human Rights Quarterly* 21, 3 (1999): 633-660.

33. *Young, James and Webster v UK*, App Nos 7601/76, 7806/77, judgment of 13 August 1981.

interest on the defence of individual autonomy than collective solidarity",[34] and that "from a trade union point of view, Article 11 was showing a debit balance."[35]

The picture changed in more recent years, with courts and other bodies opting for what has become known as an "integrated approach" to the interpretation of civil and political rights treaties.[36] This is an interpretive technique whereby bodies protecting civil and political rights take note of economic and social rights materials.[37] With respect to labour rights, courts gave in this way indirect legal effect to materials of the ILO which would not have otherwise been justiciable. This can be illustrated through case law of the ECtHR but we can also see it in other legal orders.

The ECtHR protected elements of the right to work as part of the right to private life that is guaranteed in Article 8 of the ECHR in *Sidabras and Dziautas v Lithuania.*[38] This case 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 accessing several forms of work created "serious difficulties […] in terms of earning [a] living, with obvious repercussions on the enjoyment of […] private lives."[39] It classified the claim as falling within the ambit of the right to private life, having placed special emphasis on right to work rulings of the European Committee of Social Rights. It underlined that[40] "[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 […]."

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34. Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford: OUP, 2003), 238.

35. Keith Ewing, "The Implications of Wilson and Palmer," *ILJ* 32, 1 (2003): 4.

36. The term was used by Martin Scheinin, "Economic and Social Rights as Legal Rights," in eds. Eide, Krause, and Rosas, *Economic, Social and Cultural Rights* (Leiden: Martinus Nijhoff, 2002), 32.

37. Virginia Mantouvalou, "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation," *Human Rights Law Review* 13, 3 (2013): 529-555; Keith Ewing and John Hendy, "The Dramatic Implications of *Demir and Baykara,*" *Industrial Law Journal* 39, 1 (2010): 2-51; Tzehainesh Teklè, "Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination," *Industrial Law Journal* 49, 1 (2020): 86-112.

38 *Sidabras and Dziautas v Lithuania* (2006) 42 EHRR 6. See Virginia Mantouvalou "Work and Private Life: *Sidabras and Dziautas v Lithuania,*" *European Law Review* 30 (2005): 573-585 .

39 At [48].

40 At [47].

In *Siliadin v France*[41] the ECtHR held that extremely harsh working conditions, such as those faced by the applicant migrant domestic worker, should be classified as servitude, forced and compulsory labour that is prohibited under Article 4. In ruling this, the Court relied on several ILO materials. In *Demir and Baykara v Turkey*,[42] which involved collective bargaining as an element of the right to form and join a trade union, the Court analysed extensively this interpretive technique, explaining that it "has never considered the provisions of the Convention as the sole framework of reference"[43] for its interpretation.

The approach of the Inter-American Court of Human Rights has also evolved in a similar way over the years, increasingly protecting labour rights that were in the past classified as social rights. The American Convention of Human Rights (ACHR) contains provisions such as the prohibition of discrimination (Articles 1 and 24), freedom from slavery (Article 6), the prohibition of child labour (Article 19), and freedom of association (Article 16). Moreover, Article 26 of the ACHR provides that states should adopt measures to achieve 'the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Organisation of American States Charter as amended by the Protocol of Buenos Aires'.

Against this background, the Inter-American Court of Human Rights has protected labour rights in different ways. For instance, in *Abril Alosilla v Peru,*[44] the Court stated that workers' remuneration is part of the right to private property in Article 21 of the ACHR. In *Hacienda Brasil Verde Workers v Brazil*[45] it examined working conditions that constituted severe labour exploitation. The lack of state measures to protect workers from a disadvantaged background from severe labour exploitation constituted a violation of Article 6(1) that prohibits slavery, servitude and human trafficking, in relation to Article 1(1) of the Convention that prohibits discrimination in the enjoyment of Convention rights. Moreover, the Court relied on Article 26 and ruled that it has

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41 *Siliadin v France* 2005-VII DR; 43 EHRR (2006) 287.

42 *Demir and Baykara v Turkey*, App No 34503/97, Grand Chamber Judgment of 12 November 2008.

43 At [65].

44 *Abril Alosilla v Peru*, Judgment of 4 March 201, [77]-[85].

45 *Hacienda Brasil Verde Workers v Brazil*, 20 October 2016.

competence to interpret and apply economic and social rights directly. This led to decisions involving rights such the right to work and job security,[46] and the right to fair and just working conditions.[47] The reliance on Article 26 particularly has been viewed as a significant development because it meant that the Court would implement economic and social rights documents directly.[48]

Over the decades, human rights monitoring bodies became more receptive to workers' claims, including claims by workers belonging to vulnerable groups, such as migrant workers or others who are excluded from the protective scope of labour law. This position was celebrated by scholars committed to the protection of workers' rights.[49] Elements of labour rights that were in the past viewed as social and hence non-justiciable, became in this way indirectly justiciable either through civil and political rights case law or directly by examining economic and social rights documents.

4. Objections to Legalisation

Yet advocates of workers' rights sometimes express concerns over the role of human rights law in protecting the interests of labour.[50] Is it an effective tool to safeguard these? Or could this move undermine collective values of solidarity that are central in the union movement? In this section I discuss and address these objections.

A line of thinking in labour law scholarship that has its roots in the Marxist tradition raises questions regarding the role of human rights law in this context.[51] For Marx, the basis of society is its economic structure, the relations of production. On his analysis, the economic structure determines the superstructure, including the law that is part of

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46. *Lagos del Campo v Peru*, Case No. 12.795, Judgment of 31 August 2017.

47. *Spoltore v Argentina*, 9 June 2020.

48. Renan Kalil and Mauro Pucheta, "Argentina: The Right to Fair and Satisfactory Working Conditions through the Lens of the Inter-American Court of Human Rights," *Comparative Labor Law and Policy Journal* 32 (2021):

49. See, for instance, Ewing and Hendy, as above n 37.

50. For a good illustration of some of the debates, see Jay Youngdahl, "Solidarity First: Labor Rights are Not the Same as Human Rights," *New Labor Forum* 18, 1 (Winter 2009): 31-37; Lance Compa, "Solidarity And Human Rights: A Response to Youngdahl," *New Labor Forum* 18, 1 (Winter 2009): 38-45; Virginia Mantouvalou, "Are Labour Rights Human Rights?," *European Labour Law Journal* 3, 2 (2012): 151-172.

51. On the Marxist approach towards legal rights, see the discussion in Hugh Collins, *Marxism and the Law* (Oxford: OUP, 1982), 142.

it.[52] Scholars who endorse this view understand human rights instrumentally rather than as abstract moral principles, and may question whether human rights law is a potentially useful tool for the protection of workers' interests. For those theorists:

> …[t]he imperative to present [workers'] claims as human rights comes from the desire to utilise the potentially powerful legal methods of securing advantage to pursue their claims, and also from the perceived need to respond to employers' willingness to use these arguments and tools themselves.[53]

It is at least clear that certain legal rights, such as the right to join political associations, may be useful for the promotion of the interests of workers, and the need to recognise these rights is endorsed by Marxian thinkers.[54] Indeed, scholars whose work has been influenced by the Marxian tradition have celebrated rulings that protected collective labour rights. The case *Demir and Baykara,* which recognised a right to collective bargaining as a component of the right to form and join a trade union in Article 11 of the ECHR, was described as a case where "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".[55]

A related concern stemming from the character of human rights as individual rights is grounded on the belief that workers' interests can only be effective when exercised collectively, in solidarity with others.[56] This feature is said to distinguish labour rights from many human rights that are individual and are typically also exercised individually. The distinction between individual and collective rights is exaggerated. Some human rights monitoring mechanisms, such as the ECtHR, oversee applications

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52. Ibid.

53. Colin Fenwick and Tonia Novitz, "Conclusion: Regulating to Protect Workers' Human Rights." in eds. Colin Fenwick and Tonia Novitz, *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart Publishing, 2010), 587-588.

54. Ibid.

55. Ewing and Hendy, n 35; Keith Ewing and John Hendy, "Article 11(3) of the European Convention on Human Rights," *European Human Rights Law Review* 4 (2017): 356 -375.

56. Jay Youngdahl, "Solidarity First – Labour Rights are not the Same as Human Rights," *New Labour Forum* 18, 1 (2009): 31-37.

from individuals, and the decisions of courts and other monitoring bodies address these individual cases. However, applications are also submitted by trade unions and other civil society organisations, and not just by individual workers. Other mechanisms, such as the European Committee of Social Rights monitoring compliance with the European Social Charter, examine collective complaints and state reports.[57] Are these mechanisms suitable for the protection of workers' rights and effective?

Making general empirical assessments about whether human rights law is effective in practice is difficult. Effectiveness depends on a variety of factors (different actors of the state, non-state actors, differences from one field of activity to another, as well as differences between countries and regions of the world).[58] However, some general remarks can be made that illustrate that the effectiveness of human rights law is not limited to compliance with a specific judgment. In relation to the ECHR, for instance, it has been argued that the system may act as a disincentive for states that would otherwise take action that violates human rights.[59] Moreover, when there is a ruling that finds a violation, respondent states may go beyond offering an individual remedy. The effects of judgments can be broader, and may include changes in laws that were at stake in the judgment, changes in state policy and practice, as well as broader cultural change. Strategic litigation can have a particularly important role to play when individuals and organisations collaborate to challenge laws that impact many.[60] Legal reform can be an important step towards structural change. In addition to removing legal barriers from

57. Urfan Khaliq and Robin Churchill, "The European Committee of Social Rights," in ed. Malcolm Langford, *Social Rights Jurisprudence* (Cambridge: CUP, 2012), 428-452.

58. Kathryn Sikkink, *Evidence for Hope—Making Human Rights Work in the 21st Century* (New Jersey: Princeton University Press, 2018); Grainne de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford: OUP, 2021).

59. For discussion of different aspects of the value of this human rights system, see Merris Amos, "The Value of the European Court of Human Rights to the United Kingdom," *European Journal of International Law* 28, 3 (2017): 770ff.

60. On the effects of strategic human rights litigation, see Helen Duffy, *Strategic Human Rights Litigation—Understanding and Maximising Impact* (Oxford: Hart Publishing, 2018), ch 4. An excellent example of strategic litigation for workers' rights is *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission Intervening)* [2017] UKSC 51. For analysis, see Alan Bogg, "The Common Law Constitution at Work: *R (on the Application of UNISON) v Lord Chancellor*," *Modern Law Review* 81, 3 (2018): 509-526; Michael Ford, "Employment Tribunal Fees and the Rule of Law: *R (UNISON) v Lord Chancellor in the Supreme Court*," Industrial Law Journal 47, 1 (2018): 1-45.

access to rights, it can also inspire debate, raise awareness, and motivate other actors to engage with problems that lie in the roots of the injustice.[61]

Decisions or reports of other monitoring bodies may not lead to immediate legal change, and levels of compliance may be low. However, they are often used by civil society organisations campaigning for legal change, by national human rights institutions, and by courts interpreting legal documents.[62] They can therefore feed into reform processes in these and many other ways. Moreover, the existence of strong civil society organisations and trade unions is a significant factor that can drive and improve compliance with human rights obligations.[63]

It is also important to appreciate that it is impossible to separate labour rights from other human rights. The ILO itself has underlined that trade union rights cannot be effectively protected without strong protection of civil and political rights. For example, in a 1970 Resolution on trade union rights and civil liberties, it emphasised the value of freedom of expression for trade union rights, "in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." In an ILO Report of 1994, it was said that an 'essential aspect of trade-union rights is the right to express opinions through the press or otherwise. The full exercise of trade-union rights calls for a free flow of information, opinions and ideas, and workers, employers and their organisations should enjoy freedom of opinion and expression at their meetings, in their publications, and in the course of their other activities'. Human rights defenders who are killed or have disappeared are often trade union leaders.[64] Trade union rights are inextricably linked to civil and political rights.

A final issue to consider is whether identifying certain labour rights as human rights places limitations to the material scope of labour rights, which is more capacious than

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61. See the discussion in Sally Haslanger, "Culture and Critique," *Aristotelian Society Supplementary Volume* 91, 1 (2017): 149-173.

62. As we saw in what was earlier described as an integrated approach to the interpretation of human rights.

63. Kevin L Cope, Cosette D Creamer, and Mila Versteeg, "Empirical Studies of Human Rights Law," *Annual Review of Law and Social Science* 15 (2019): 171.

64. See Amnesty International, "Deadly but Preventable Attacks: Killings and Enforced Disappearances of those Who Defend Human Rights," ACT 30/7270/2017 (2017): 13.

what can be identified as falling within the scope of human rights law. Indeed, this concern may have underlined aspects of Alston's critique of the ILO Declaration: a worry that seeking minimum standards can distract from, and even undermine, a broader labour rights agenda.[65] This worry does not seem well-founded. In relation to the ILO in particular, even after the Declaration, we witnessed the adoption of many Conventions and Recommendations developing international labour standards further. In the European context, there is no evidence to support the argument that when rights of workers are protected through the ECHR and the Euroepan Social Charter, this reduces broader protections at national level in different legal orders. Elements of labour rights that are protected as human rights can be an important and evolving floor,[66] and should not be understood as a ceiling when examining and developing further their content through legislation or collective bargaining.

All this goes to show that the separation of human rights and labour rights in law is not watertight conceptually or practically, and that human rights mechanisms can be useful in the protection of workers' individual and collective interests. This is also evident if we look at the constitutional protection of social and labour rights in many legal orders. Through this protection, we are now in a much better position than in the past to analyse the components of labour rights, and identify patterns in judicial approaches.[67] Case law from national legal orders exemplifies both that the judicial protection of labour rights is as possible and crucial as other human rights, and that courts can be a forum that may help give voice to workers and bring about change.

65. See above n 26.

66. Evolving in the sense that their content is not static, but develops to address present-day challenges and conditions. See the discussion in George Letsas, "The ECHR as a Living Instrument: Its Meaning and its Legitimacy," in eds. Andreas Føllesdal, Birgit Peters, and Geir Ulfstein, *Constituting Europe*, (Cambridge: CUP, 2013), 106-141.

67. For an overview of the protection of labour rights in national and supranational legal orders, see Malcolm Langford, *Social Rights Jurisprudence* (Cambridge: CUP, 2012); Malcolm Langford and Evan Rosevear, "Economic and Social Rights", in eds. David S. Law, Holning Lau, & Alex Schwartz, *Oxford Handbook of Constitutional Law in Asia* (Oxford: OUP, 2022), ch 48.

5. Human Rights for Precarious Workers

The legal protection of labour rights as human rights has important strategic and normative implications, some of which were discussed in the previous section.[68] A further strategic implication is that human rights claims have strong moral force. Citizens, civil society organisations, and politicians are more likely to be interested and mobilised to pursue labour interests if these are understood as human rights.[69] Some human rights organisations indeed use the strategy of presenting labour exploitation in human rights terms.[70] Expressing workers' rights in human rights terms also opens up legal avenues to challenge violations of these rights through existing legal mechanisms. In what follows, I focus on the special value of this approach for precarious workers who are under-represented in politics and in the workplace.

Human rights are typically viewed as universal entitlements that are attached to the status of being human, as mentioned earlier. For this reason, they have potential to protect people who are excluded from labour rights in national legal orders because of their status as migrants workers, working prisoners, or immigration detainees, and other such reasons.[71] These groups of workers are often under-unionised and under-represented in politics. Article 1 of the UDHR says that '[a]ll human beings are born free and equal in dignity and rights' and Article 2 provides that everyone is entitled to the rights of the Declaration without any distinction of any kind. The rights of the ECHR are also protected for everyone within the contracting parties' jurisdiction.[72] The Convention does not distinguish on the basis of nationality or immigration status. Even though the personal scope of the European Social Charter, which includes many labour rights, is more restrictive,[73] the European Social Committee has interpreted it broadly

68. For further examples of these implications, see Filiz Kahraman, "A New Era for Labor Activism? Strategic Mobilization of Human Rights against Blacklisting," *Law & Social Inquiry* 43, 4 (2018): 1279-1307; Hugh Collins and Virginia Mantouvalou, "Human Rights and the Contract of Employment," in ed. Mark Freedland, *The Contract of Employment* (Oxford: OUP, 2016, 188-208.

70. See, for example, Human Rights Watch Report, "'As If I am not Human'– Abuses Against Asian Domestic Workers in Saudi Arabia," (2008).

71. I discuss all these exclusions in Mantouvalou, above n 4.

72. Article 1 of the ECHR.

73. Appendix of the ESC.

to protect undocumented migrants in certain circumstance.[74] The American Convention on Human Rights also has a universal scope.[75]

The universal scope of labour rights, if understood as human rights, has implications for the protection of the rights of marginalised and precarious workers. We have seen this in the case of undocumented migrant workers. If labour rights are protected as human rights, these workers should be entitled to them on an equal basis as nationals of a country because the status that grounds these rights is not that of a citizen, but that of a human being who is also a worker. This consequence was confirmed by the Inter-American Court of Human Rights in a landmark advisory opinion on the *Legal Condition and Rights of Undocumented Migrant Workers*.[76] In the opinion, the Court held that making the right to be awarded compensation for dismissal conditional upon the status of someone as lawfully resident in the country, and therefore excluding undocumented migrants, breaches the American Convention on Human Rights. It stated:

> If undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers. This is of maximum importance, since one of the major problems that come from lack of immigration status is that workers without work permits are hired in unfavourable conditions, compared to other workers.

Along this line of thinking, institutions that protect labour rights as human rights should scrutinise closely legal exclusions of categories of workers from protective norms that apply to other workers.

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74 See *International Federation of Human Rights Leagues (FIDH) v France*, Complaint No 14/2003, Decision of 8 September 2004 and *Defence for Children International (DCI) v Netherlands*, Complaint No 47/2008, Decision of 20 October 2009.

75. See Article 1 of the American Convention on Human Rights.

76. Inter-American Court of Human Rights, *Legal Condition and Rights of Undocumented Migrant Workers*, Advisory Opinion OC-18/03, 17 September 2003.

The ECtHR has also examined the labour rights of undocumented migrant workers or workers under very restrictive visa schemes. The landmark case *Siliadin v France*[77] involved a migrant domestic worker who was brought to France from Togo at the age of fifteen years and seven months and was even more vulnerable because of her age. She had been promised that she would work, be sent to school, and that her immigration status would be regularised, but was instead kept as a domestic worker for many years and was never sent to school. She worked for fifteen hours a day with no pay and no day off, she slept on the floor in the children's room, and her passport was withheld. Her immigration status was never regularised. The Court recognised that the vulnerability of the applicant was partly due to her immigration status[78] and imposed a duty on the authorities to legislate in order to criminalise this treatment by the employers. This case has been followed by a line of applications which involved serious abuse and exploitation of migrant domestic workers. In *CN v UK*,[79] for instance, the Court explained specifically that "domestic servitude [...] involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance", which requires "an understanding of the many subtle ways an individual can fall under the control of another."[80] Domestic workers have succeeded in other supranational and national legal orders too. [81]

To give some further examples, working prisoners and working immigration detainees are also explicitly excluded from labour protective norms in many legal orders, such as the right to a minimum wage or working time protections. These

77. *Siliadin v France*, App No. 73316/01, Judgment of 26 July 2005.

78. Ibid, para 126.

79. *CN v UK*, App No. 4239/08, Judgment of 13 November 2012.

80. Ibid para 80.

81. See *CJ v Tesorería General de la Seguridad Social (TGSS),* Case C-389/20, 24 February 2022; Elisa Chieregato, "The First CJEU Decision on Domestic Workers: The Role of EU Equality Law in Challenging Unjustified Exclusions from Labour Rights and Social Protections," *European Law Blog*, 8 March 2022, https://europeanlawblog.eu/2022/03/08/the-first-cjeu-decision-on-domestic-workers-the-role-of-eu-equality-law-in-challenging-unjustified-exclusions-from-labour-rights-and-social-protections/. See also *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; Shreya Atrey, "Beyond Discrimination: *Mahlangu* and the Use of Intersectionality as a General Theory of Constitutional Interpretation," *International Journal of Discrimination and the Law* 21, 1 (2021): 168-178; Virginia Mantouvalou and Natalie Sedacca, "The Human Rights of Domestic Workers: *Mahlangu v Ministry of Labour* and the Transformative Nature of the South African Constitution," *UK Labour Law Blog*, 11 December 2020, https://uklabourlawblog.com/2020/12/11/the-human-rights-of-domestic-workers-mahlungu-v-ministry-of-labour-and-the-transformative-nature-of-the-south-african-constitution-by-virginia-mantouvalou-and-natalie-sedacca/.

exclusions may have been deemed acceptable in the past,[82] but they are not acceptable anymore. It is very questionable whether their exclusion is compatible with human rights standards. This was highlighted in a dissenting opinion in a judgment of the ECtHR, which explained that "[n]owadays, work without adequate social cover can no longer be regarded as normal work. […]. *Even a prisoner cannot be forced to do work that is abnormal*."[83]

In judgments and opinions such as the above, we can see that workers that are excluded from labour protections that others enjoy can find a voice through human rights law. This by no means implies that this is a panacea or that such claims will always be successful. The argument is based on legal developments but is also a normative argument about how human rights law should be interpreted. If interpreted in this way, human rights can provide an important avenue for justice for disadvantaged workers, raise awareness about exclusions and contribute towards legal reform.

6. **Conclusion**

The recognition of labour rights as human rights can play an important role against a background of increasing inequality and the exclusion of some of the most precarious workers from protective norms. By recognising the importance of labour rights and their character as human rights, we can demand their equal protection to other human rights, insist on their universal coverage, and resist some of the inherent elements of the employment relation as one of submission and subordination. Workers, trade unions and other organisations can put these claims forcefully when expressed as human rights. They can also pursue legal avenues that would not have otherwise been open to them.

Justice at work cannot be attained only through human rights law of course. Workers and their organisations need to pursue many different avenues to promote their aims. In addition, workers' exploitation is often due to other deep structural factors, such as race and gender that cannot only be resolved through treaty ratification, judicial, or other legal routes. However, the legal protection of labour rights at national and

82. See, for instance, *Van Droogenbroeck v Belgium*, App No 7906/77, Judgment of 24 June 1982.
83. Dissenting opinion of Judge Tulkens in *Stummer v Austria*, App No 37452/02, Judgment of 7 July 2011, [8]. See also the judgment of the Constitutional Court of Germany on pay for work in prison, BVerfG, 2 BvR 166/16, 20 June 2023.

supranational level helps identify principles, give voice to individuals and groups for issues that they might have not otherwise been able to raise, and underline demands for legal reform.

Further Suggested Reading

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