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The Protection of the Right to Work Through the European Convention on Human Rights

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Abstract

The right to work was until recently under-explored in academic literature and judicial decision-making. Classified often as a social right, it was viewed as a non-justiciable entitlement. Today, as the right to work is sometimes used as a slogan in favour of deregulation of the labour market, as well as a slogan against immigration and unionisation, the analysis of the right to work as part of a labour law agenda is crucial. Against this background, this chapter examines the right to work in the European Convention on Human Rights. Even though the right to work is not explicitly protected in the ECHR, the chapter identifies in the case law of the European Court of Human Rights certain principles that underpin the right to work, which can serve as guidance in the interpretation of existing provisions of the Convention.

I. INTRODUCTION

THE VALUE OF work cannot be underestimated in today's world. Work is instrumentally valuable, as productive labour generates: goods needed for survival, like food and housing; goods needed for self-development, like education and culture; and other material goods that people wish to have in order to live a fulfilling life. In a market economy, productive labour benefits not only those who produce goods by bringing them income, but also those who purchase and consume these goods. But

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work is not only valuable for the income that it generates. It is crucial for a person's feeling of membership in society. In addition, a job generally inspires a sense of achievement and self-esteem, as well as the esteem of the others.[1] Through work people develop relationships with others. The possibility to develop social relations, then, is another reason why most people value work. Work brings both material and non-material benefits. Given its importance, do we have a human right to work?

Until recently, the right to work was relatively under-explored in academic literature and judicial decision-making.[2] More than 30 years ago Bob Hepple published a seminal essay on the topic, which explored the meaning of a legal right to work, enforceable against the state, the employer and trade unions in English law.[3] At about the same time, James Nickel analysed the right to work as a philosophical issue, addressing in particular the objection raised in scholarship that the right to work is a social right, which is and must be treated differently to civil and political rights,[4] and Jon Elster critically examined some possible moral justifications of the right.[5] Today, during times of economic crisis and high levels of unemployment in Europe and elsewhere, the right to work has to be revisited.[6]

Against this background, in this chapter I explore the right to work in European law with a focus on the European Convention on Human Rights (ECHR or the Convention).[7] Even though the right to work is not explicitly protected in the ECHR, this chapter identifies in the case law certain principles that underpin the right to work, which can serve as guidance in the interpretation of existing provisions of the Convention. It is important

[1] For some literature on these issues, see JB Murphy, *The Moral Economy of Labour* (New Haven CT, Yale University Press, 1993); H Arendt, *The Human Condition* (Chicago IL, University of Chicago Press, 1996 [first published in 1958]) distinguishing between work and labour; R Sennett, *The Craftsman* (London, Penguin, 2009); J Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge MA, Harvard University Press, 1995).

[2] For some recent literature on the right to work, see V Mantouvalou (ed), *The Right to Work—Legal and Philosophical Perspectives* (Oxford, Hart Publishing, 2014, forthcoming), cited as *The Right to Work*. See also G Mundlak, 'The Right to Work—The Value of Work' in D Barak-Erez and A Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Oxford, Hart Publishing, 2007) 341; G Mundlak, 'The Right to Work: Linking Human Rights and Employment Policy' (2007) 146 *International Labour Review* 189; V Schultz, 'Life's Work' (2000) 100 *Columbia Law Review* 1881; P Harvey, 'The Right to Work and Basic Income Guarantees: Competing or Complementary Goals?' (2005) 2 *Rutgers Journal of Law and Urban Policy* 8.

[3] B Hepple, 'A Right to Work?' (1981) 10 *Industrial Law Journal* 65.

[4] J Nickel, 'Is There a Human Right to Employment?' (1978–79) X *Philosophical Quarterly* 149. On social rights, see C Gearty and V Mantouvalou, *Debating Social Rights* (Oxford, Hart Publishing, 2011).

[5] J Elster, 'Is There (or Should There Be) A Right to Work?' in A Gutmann (ed), *Democracy and the Welfare State* (Princeton NJ, Princeton University Press, 1988) 53.

[6] For an overview of problems at work in Europe, see N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge, CUP, 2013). On the right to work, see Mantouvalou, *The Right to Work* (n 2 above).

[7] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 194.

to consider the right to work in the context of the ECHR both because the European Court of Human Rights (ECtHR or the Court) has already examined cases that address aspects of it,[8] and because in its case law the Court integrates within the scope of the Convention certain rights that have traditionally been viewed as socio-economic.[9]

The structure of the chapter is as follows: Section two introduces the debate on labour rights as human rights and places the right to work in its context. Section three explores the right to work in positive law. From this analysis, I conclude that aspects of the right to work are protected in various legal instruments. The fourth section of this chapter identifies certain normative principles that underlie the right to work, as they emerge from case law of the ECtHR. It focuses in particular on the values of dignity, non-exploitation, self-realisation and non-domination. Section five concludes.

II. THE RIGHT TO WORK AND LABOUR RIGHTS AS HUMAN RIGHTS

In recent years, academic scholars have been searching for a new framework for the idea of labour law in the context of economic globalisation, the increase of non-standard contracts of employment and the decline of union power.[10] Against this background, some authors have turned to human rights law as a new avenue for workers.[11] Human rights, incorporated in Constitutions, Bills of Rights or international treaties, seemed promising, because they are stringent normative standards that resist trade-offs with other goals, and the rights of workers, on the view of many, should be viewed and protected as such.

In addition to the proliferation of literature on labour rights as human rights, there is also scholarship that questions this move, either at a theoretical

[8] See R O'Connell, 'The Right to Work in the ECHR' [2012] *European Human Rights Law Review* 176.

[9] V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *Human Rights Law Review* 529.

[10] There is much scholarship on these issues. See, for instance, G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011); J Conaghan, RM Fischl and K Klare (eds), *Labour Law in an Era of Globalization* (Oxford, OUP, 2002).

[11] Some excellent examples include K Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2; B Hepple, 'Introduction' in B Hepple (ed), *Social and Labour Rights in a Global Context* (Cambridge, CUP, 2002) 1, at 16; C Fenwick and T Novitz, 'Conclusion: Regulating to Protect Workers' Human Rights' in C Fenwick and T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Oxford, Hart Publishing, 2010) 587–88; VA Leary, 'The Paradox of Workers' Rights as Human Rights' in L Compa and S Diamond (eds), *Human Rights, Labour Rights and International Trade* (Philadelphia PA, University of Pennsylvania Press, 2003) 22; G Mundlak, 'Labor Rights and Human Rights: Why Don't the Two Tracks Meet?' (2012) 34 *Comparative Labor Law and Policy Journal* 237; L Compa, 'Solidarity and Human Rights' (2009) 18 *New Labor Forum* 38.

level or because of its implications.[12] In response to arguments made in that scholarship, in a previous article I argued that there are in fact three approaches to the question whether labour rights are human rights, which are often conflated in the literature.[13] The point can be exemplified by looking at the right to work, which is the subject of this chapter. First, there is a positivistic approach, according to which the right to work is a human right if it is explicitly mentioned in human rights documents. Public international lawyers sometimes adopt this approach.[14] Secondly, there is an instrumental approach, according to which the right to work is a human right if courts protect it as such or if civil society organisations succeed in using it strategically to promote the relevant goals. Labour lawyers are typically instrumentalists when discussing labour rights as human rights.[15] Finally, there is a normative approach, according to which a labour right is a human right, if there is a sufficiently strong justification for it at a theoretical level. On this analysis, the right to work is a human right if there are certain human interests of sufficient importance that ground it and impose duties on others.[16] In a way, this approach takes priority over the other two. If the right to work is a human right at a moral level, which can be determined by considering its justifications,[17] the real question is how to best protect it in law.

It should be acknowledged at this point that there may be risks in framing workers' rights (and the right to work) as human rights, including the empowerment of the judiciary, that may be hostile to the interests of workers.[18] Yet this chapter rests on the belief that the analysis of the right to work as a human right is important both as a genuine intellectual enquiry and as a strategic goal. After the fall of communism in Europe, it is crucial to assess the meaning of the right to work afresh, as part of a unified list of human rights. As the right to work is sometimes used as a slogan in favour of deregulation of the labour market, as well as a slogan against immigration

[12] H Collins, 'Theories of Rights as Justifications for Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 137; K Kolben, 'Labor Rights as Human Rights?' (2010) 50 *Virginia Journal of International Law* 449; J Youngdahl, 'Solidarity First: Labor Rights Are Not the Same as Human Rights' (2009) 18 *New Labor Forum* 31.

[13] V Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

[14] For an example of the positivistic approach, see M Ssenyonjo, 'Economic, Social and Cultural Rights: An Examination of State Obligations' in S Joseph and A McBeth (eds), *Research Handbook on International Human Rights Law* (Cheltenham, Edward Elgar, 2010) 36.

[15] See the literature in nn 11–12 above.

[16] J Raz, *Morality of Freedom* (Oxford, OUP, 1986).

[17] On justifications of the right, see the literature above, nn 1, 2 and 5.

[18] H Arthurs, 'Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging' (2009–10) 15 *Canadian Labour and Employment Law Journal* 373; A Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in *The Right to Work* (n 2 above).

and unionisation, the analysis of the right to work as part of a labour law agenda is crucial.

III. THE RIGHT TO WORK IN POSITIVE LAW

The ECHR, as a traditional liberal document adopted in the aftermath of the Second World War, does not explicitly recognise the right to work. It only contains a limited number of labour rights, namely the prohibition of slavery, servitude, forced and compulsory labour,[19] and freedom of association, including the right to form and join a trade union.[20] To these, we can add the prohibition of discrimination,[21] which is not a free-standing right, but can only be violated in conjunction with some other Convention provision. Even though there is no right to work as such in the ECHR, there is case law and literature on human rights in the workplace, including protection from unfair dismissal for activities outside work,[22] health and safety at work,[23] collective labour rights,[24] religion and dismissal,[25] and protection against slavery and servitude.[26]

This chapter focuses upon the Convention.[27] However, to illustrate the extent to which the right to work enjoys legal protection, I refer to some other documents at European and international level that contain explicit references to it. It is important to note that the documents in question, to which I now turn, are generally social rights documents and do not have the binding force and effective monitoring mechanism that the ECHR enjoys.[28]

[19] Art 4.
[20] Art 11.
[21] Art 14.
[22] H Collins and V Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 73 *Modern Law Review* 909; V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912.
[23] *Vilnes and Others v Norway*, App Nos 52806/09 and 22703/10, Judgment of 5 December 2013.
[24] Ewing and Hendy, above n 11; N Countouris and M Freedland, 'Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK' (2011) *European Labour Law Journal* 489.
[25] H Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 *Modern Law Review* 619; R McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77 *Modern Law Review* 277.
[26] V Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers' (2006) 35 *Industrial Law Journal* 395.
[27] For further analysis of the right to work under the ESC and the EUCFR, see D Ashiagbor, 'The Right to Work', in G de Búrca, B de Witte (eds), *Social Rights in Europe* (Oxford, OUP, 2005) 241; C O'Cinneide, 'The Right to Work in International Human Rights Law in Mantouvalou, *The Right to Work*, n 2 above, for detailed analysis of the ESC and the International Covenant on Economic, Social and Cultural Rights.
[28] On the monitoring mechanisms and procedures of social rights documents, see M Langford (ed), *Social Rights Jurisprudence—Emerging Trends in International and Comparative Law* (Cambridge, CUP, 2008).

The right to work is protected in the International Covenant on Economic, Social and Cultural Rights,[29] Article 6, which states in its first paragraph: 'The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'. Article 7 of the Covenant protects the right to fair and just conditions of work, and Article 8 protects trade union rights. The Committee on Economic, Social and Cultural Rights (CESCR) issues periodic reports, examines individual communications and provides authoritative interpretations of the Covenant through its General Comments.[30] It has issued General Comment 18 on the Right to Work. In this General Comment, the Committee explained that the right to work should be read holistically: Articles 6–8 are interdependent, and the right to work should be viewed as a right to decent work.[31]

The European Social Charter (ESC)[32] is the counterpart of the ECHR in the area of social rights. It is monitored by the European Committee of Social Rights through periodic reports and collective complaints.[33] The ESC includes a right to work. In Article 1 it states:

> With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:
> 1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
> 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
> 3. to establish or maintain free employment services for all workers;
> 4. to provide or promote appropriate vocational guidance, training and rehabilitation.

Other ESC work-related rights include Article 2 on the right to just working conditions, Article 3 on health and safety at work, Article 4 on the right to fair remuneration, and Articles 5 and 6 on the right to organise and to collective bargaining.

[29] International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3.

[30] See, generally, M Langford and J King, 'Committee on Economic, Social and Cultural Rights' in M Langford (ed), *Social Rights Jurisprudence* (Cambridge, CUP, 2008) 477.

[31] UN Committee on Economic, Social and Cultural Rights, General Comment No 18 (E/C.12/GC/186) February 2006, paras 7–8.

[32] Council of Europe, European Social Charter of 1961, CETS No 35; Revised European Social Charter of 1966, CETS No 163.

[33] See, generally, P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory Mechanism' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford, OUP, 2005) 45.

The EU Charter of Fundamental Rights (EUCFR) that protects both civil and political and socio-economic rights, also contains a right to work, which has been made legally binding through the Lisbon Treaty.[34] In article 15, we find the freedom to choose an occupation and the right to engage in work:

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 30 of the EUCFR protects against unfair dismissal, Article 31 guarantees fair working conditions and Article 32 prohibits child labour and protects young people at work. The right to work is also protected in several European national Constitutions, such as the Constitutions of Italy, Greece and France.[35]

In positive law, then, at European and international level, we find a legal right to work in documents that enjoy varying degrees of effectiveness. The right to work includes a right to access a job, which translates into a government duty to take steps towards promoting full employment, the protection from forced labour, as well as a right to fair and just working conditions. But that the right to work or some components of it are protected in positive law does not tell us much about its interpretation. Does a right to work require that the state create job opportunities for everyone? Or does it simply mean that there should be no discrimination in access to existing jobs? To what extent does it protect from unfair dismissal? Questions of this kind remain unanswered. The positivistic approach to the right to work serves as a useful starting point, but it does not address the hard questions that have been identified in the literature.

[34] See, generally, S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights—A Commentary* (Oxford, Hart Publishing, 2014).

[35] On the Italian approach, see M D'Antona, 'The Right to Work in the Italian Constitution and in the European Union', Centro Studi di Diritto del Lavoro Europeo 'Massimo D'Antona', Working Paper No 1/2002, available at: http://aei.pitt.edu/606/1/n1_dantona.pdf. On the French approach, see SR Olivier, 'The French Approach to the Right to Work: The Potential of a Constitutional Right in Ordinary Courts' in *The Right to Work*, n 2 above.

IV. NORMATIVE PRINCIPLES UNDERLYING THE RIGHT TO WORK IN ECHR JURISPRUDENCE

Given that a detailed overview of ECtHR case law on the right to work is provided elsewhere in the literature,[36] I do not intend to address it in similar detail here. I instead attempt to distill from the case law some interests that underpin the right to work. These are important for understanding the normative significance of the right.

The sections that follow show that even though the ECtHR does not protect the right of everyone against the state to obtain a job in order to make a living, it recognises the following important normative principles that support the right to work: First, the Court accepts that livelihood gained through work is essential for human dignity;[37] it supports a principle of non-exploitative work;[38] it underlines the importance of work for self-fulfillment;[39] and it protects the worker against the employer's domination.[40] A principle of equality and non-discrimination is also fundamental in the case law on workplace rights, but this is a topic that will not be addressed in detail in this chapter.

It should be said from the outset that the fact that we can identify the values of human dignity, non-exploitation, self-fulfillment and non-domination underlying the right to work in the ECHR does not mean that whenever these are at stake there is a violation of the Convention. Arguing otherwise could lead to an inflation of rights, which could be damaging to the values that the supporters of human rights endorse.[41] Moreover, rights are often in conflict, and even aspects of the right to work can conflict with each other.[42] For example the right of a group of workers to obtain a job may be in conflict with the existing working conditions of another group of workers. Judicial decision-making involves complex considerations and difficult trade-offs between important interests. Yet it is important to

[36] See the references above nn 17–19. See also O'Connell, above n 8; and F Dorssemont, K Lorcher and I Schomann (eds), *The European Convention on Human Rights and the Employment Relation* (Oxford, Hart Publishing, 2013).

[37] See, for instance, *Sidabras and Dziautas v Lithuania*, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004, discussed below (text to n 54).

[38] See, for instance, *Siliadin v France*, App No 73316/01, Judgment of 26 July 2005, discussed below.

[39] See, for instance, *Niemietz v Germany*, App No 13710/88, Judgment of 16 December 1992, discussed below (text to nn 88–89).

[40] See, for instance, *IB v Greece*, App No 552/10, Judgment of 3 October 2013, discussed below.

[41] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, OUP, 2009) 126 ff. See also O O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427.

[42] M Freedland and N Kountouris, 'The Right to Decent Work in a European Comparative Perspective' in *The Right to Work*; A Bogg, 'Only Fools and Horses: Some Skeptical Reflections on the Right to Work' in *The Right to Work*, n 2 above.

appreciate that dignity, non-exploitation, self-fulfillment and non-domination, which are associated values, exist in the reasoning of the Court, and to explore their normative implications for the protection of the right to work.

Before moving on, a preliminary issue needs to be addressed: a traditional international lawyer may question the applicability of the Convention as a whole in the private sphere, which is where the employment relationship typically operates. Human rights law, such as the ECHR, has traditionally addressed the conduct of state authorities, rather than private individuals (employers in this case). Yet human rights law over recent years has been found to give rise to positive state obligations to regulate private conduct in several jurisdictions.[43] Positive obligations can be imposed when there is imbalance of power between private parties, and state authorities know or ought to have known that one of the private actors abused the position of power.[44] The imbalance of power between parties that requires positive intervention is very familiar in labour law, where it is used to justify unionisation or legislative intervention.[45] But the existence of positive obligations does not mean that an individual who has a claim under the Convention can turn against another individual directly. The horizontal effect of the ECHR is indirect, grounded on Article 1 of the Convention:[46] it is the state that may be liable for failing to protect individuals from abuse by other individuals. The Court has frequently ruled that human rights are applicable in the employment relationship because of lack of legislation to protect vulnerable groups or because of judicial decisions (actions of state organs) that misapplied or did not take account of Convention rights.[47]

A. Livelihood for Dignity

In considering the normative issues underlying the right to work, I will start with the most basic but fundamental function of work, namely that it provides the means by which most people earn their income. Thanks to the income generated through work, people have access to basic material conditions, such as nutrition and housing. In modern societies, it is through work that most people meet their basic needs. At the same time, the income

[43] For analysis of positive obligations under the ECHR, see A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004).

[44] See, for instance, *Rantsev v Cyprus and Russia*, App No25965/04, Judgment of 7 January 2010.

[45] P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (London, Stevens, 1983) 18.

[46] Art 1 of the ECHR provides as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[47] *Wilson and Palmer v United Kingdom*, App Nos 30668/96, 30671/96 and 30678/96, Judgment of 2 July 2002; *IB v Greece*, App No 552/10; Judgment of 3 October 2013.

generated through work helps people access other benefits that they value, like arts or sports for example. Self-sufficiency reached through paid work brings satisfaction, which provision through social support does not bring. The instrumental value of work as a means of income is linked to the value of dignity. Without the income gained through work, most people are unable to live a dignified life,[48] for they will not have the essentials with which to satisfy their basic needs. Welfare-dependence, on which some unemployed people rely to satisfy their basic needs, often has a stigma attached to it.[49]

People who work are seen as citizens who make a valuable contribution to the community in which they live, and this is again linked to their dignity. Discussing American citizenship, Judith Shklar argued that the right to work is one of its central elements (together with the right to vote). 'The dignity of work and of personal achievement', Shklar said, 'and the contempt for aristocratic idleness, have since colonial times been an important part of American civic self-identification'.[50] This is true for many countries, perhaps particularly in Europe and the Western world. But it is interesting to note that Shklar presents 'work' as one of two fundamental aspects of American citizenship under the heading 'Earning' (alongside 'Voting'). Work and earning are inextricably linked on this analysis of citizenship.

The ECtHR recognises the importance of work in order to make a living. The case *Young, James and Webster v UK*,[51] in 1981, highlighted this. The case addressed 'closed shop' agreements, which are agreements between employers and trade unions, which make access to work or retention of a job conditional upon membership of specific unions. The applicants, who did not wish to be union members, claimed that these agreements violated the negative aspect of the right to organise, under article 11 of the ECHR. The Court upheld their claim, saying that compulsion to join a union with

> a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.[52]

[48] On basic material conditions and the prohibition of inhuman and degrading treatment under the Convention, see, for instance, *MSS v Belgium and Greece*, App No 30696/09, Grand Chamber Judgment of 21 January 2011. See further F Tulkens, 'The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis' (2013) 2 *Cyprus Human Rights Law Review* 122.

[49] See R Sennett, *Respect* (London, Penguin, 2003) ch4, 'The Shame of Dependence'.

[50] J Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge MA, Harvard University Press, 1995) 1.

[51] *Young, James and Webster v United Kingdom*, App Nos 7601/76, 7806/77, Judgment of 13 August 1981.

[52] *Young, James and Webster*, ibid, para 55. This has been repeated in subsequent case law. See *Sorensen and Rasmussen v Denmark*, App Nos 52562/99 and 52620/99, Judgment of 11 January 2006.

That the applicants would lose their jobs and livelihoods, played a fundamental role in assessing the proportionality of the restriction of freedom of association. It was a significant factor that led the Court to conclude that closed shops violate the ECHR. It is interesting to note at this point that in the United States, right-to-work laws are used to outlaw closed shop arrangements. The right to work there has famously the opposite meaning to other jurisdictions.[53]

The importance of work in order to make a living has been repeated in several cases that discuss dismissal in breach of Convention rights. The landmark case *Sidabras and Dziautas v Lithuania*,[54] for example, involved the applicants' dismissal and ban from access to work in the public and many parts of the private sector, for the reason that they were former KGB members. The Court recognised that dismissal and ban from access to work created 'serious difficulties … in terms of earning [a] living, with obvious repercussions on the enjoyment of … private lives'.[55] It classified the claim as falling within the right to private life under Article 8 of the ECHR, and concluded that it violates Article 8, taken in conjunction with the prohibition of discrimination in Article 14. It is important to note that the Court here placed special emphasis on right to work rulings of the European Committee of Social Rights that monitors compliance with the ESC. It underlined that '[i]t 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'.[56] This analysis of the Court is a good example of the adoption of an 'integrated approach to the interpretation' of the ECHR, which integrates civil and social rights within the scope of the Convention in the context of the right to work.[57]

The Convention does not explicitly protect salaries as such. It does not contain a provision on a right to a minimum wage[58] or a right to a decent wage. In light of the importance that the Court recognises to work in order to make a living, though, it should not come as a surprise that it has classified salaries as 'possessions'. In this way salaries may fall in the scope of

[53] See further, KVW Stone, 'A Right to Work in the United States: Historical Antecedents and Contemporary Possibilities' in *The Right to Work*, n 2 above.

[54] *Sidabras and Dziautas v Lithuania*, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004. For analysis of the case, see V Mantouvalou, 'Work and Private Life: *Sidabras and Dziautas v Lithuania*' (2005) *European Law Review* 573.

[55] *Sidabras*, ibid, para 48.

[56] Ibid, para 47.

[57] Mantouvalou, above n 9.

[58] On minimum wage, see *Nerva and Others v United Kingdom*, App No 42295/98, Judgment of 24 September 2002.

Article 1 Protocol 1 of the Convention that protects the right to peaceful enjoyment of one's possessions.[59]

Income generated through work is essential not only for its role while someone is employed. It is also essential for it leads to rights to an old-age pension. The Court has examined workers' pensions in the case *Stummer v Austria*,[60] a particularly complex case (with an unfortunate outcome), which involved prison labour. The case examined the exclusion of the applicant from the Austrian state pension system, despite the fact that he had worked in the prison kitchen and bakery for long periods of time during his 28-year imprisonment. Before the ECtHR, he argued that the fact that he was not affiliated to a pension system while he performed work in prison amounted to a breach of Article 4 (forced labour). The majority of the Court accepted that 'prison work differs from the work performed by ordinary employees in many aspects. It serves the primary aim of rehabilitation and resocialisation',[61] yet it is also similar to other employees, in the sense that it should also provide for old age.[62] Despite that, the majority ruled that his exclusion from a pension was compatible with the Convention.

However, in a forceful and convincing dissenting opinion, Judge Tulkens disagreed with the view of the majority, saying that today 'prisons have gradually opened up to fundamental rights'.[63] Prison work without affiliation to an old-age pension scheme is not ordinary work, as Judge Tulkens argued. In an important passage in the dissenting opinion, it was recognised that not only is work of fundamental importance for reintegration; but also the old-age pension for work performed has a special role for human dignity. In the words of the dissenting judges,

> neither the emergency relief payments nor the social assistance can be compared to an old-age pension granted on the basis of the number of years worked and the contributions paid. The former constitute assistance, whereas the latter is a right. *The difference is significant in terms of respect for human dignity*. Social security forms an integral part of human dignity.[64]

In cases such as the above, the majority of the Court or individual judges either protected workers' income generated through work directly in

[59] See, for instance, *Evaldsson and Others v Sweden*, App No 75252/01, Judgment of 13 February 2007. See further P Herzfeld Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights' in Dorssemont et al (eds) *The European Convention on Human Rights and the Employment Relation* (Oxford, Hart Publishing, 2013) 381 at 400 ff; and T Novitz, 'Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions?' (2012) 41 *Industrial Law Journal* 136.

[60] *Stummer v Austria*, App No 37452/02, Grand Chamber Judgment of 7 July 2011.

[61] *Stummer*, ibid, para 93.

[62] *Stummer*, ibid, para 95; dissenting opinion, para 1.

[63] Judge Tulkens, dissenting opinion, para 7.

[64] Joint partly dissenting opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popovic, Malinverni and Pardalos, para 10.

the Convention, or placed emphasis on it in examining restrictions to Convention rights through a test of proportionality. Against this background, the ECtHR has endorsed the importance of earning through work for human dignity, and incorporated it in the material scope of Convention rights.

B. Non-Exploitation

A second normative concern underlying the right to work that emerges from the case law of the ECtHR is non-exploitation.[65] As was said earlier in this chapter, the CESCR General Comment on the Right to Work views decent working conditions as an essential aspect of the right to work. In this way, the right to work is not only a right to fair access to the labour market, but also a right to non-exploitative work.

The concept of exploitation is contested and has been analysed in scholarship.[66] In many writings exploitation is discussed against the background of the theory of Karl Marx. In the technical sense developed by Marx, exploitation occurs when one class of non-workers appropriates the surplus product of a class of workers.[67] On this analysis, exploitation is a condition that always exists in a capitalist society. For Marx, a right to work would probably be an oxymoron, for it would be the equivalent to a right to be exploited.[68] In a liberal society, a person exercising free will should probably be free to be exploited, if she so wishes.[69] Yet this is not what we have in mind when we talk about a human right to work. This section does not use the Marxist conception of exploitation, even though the present analysis has elements in common with the Marxist account.

For present purposes, exploitation is the abuse of a person's vulnerability, which may be due to the law or other factors, in order to make profit.[70] So this conception of exploitation has three central elements: (a) vulnerability of a worker; (b) abuse of this vulnerability that consists

[65] I develop this further in V Mantouvalou, 'The Right to Non-Exploitative Work' in *The Right to Work* (n 2 above).

[66] As a starting point, see Alan Wertheimer and Matt Zwolinski, 'Exploitation', *The Stanford Encyclopedia of Philosophy* (Spring 2013 edn), Edward N Zalta (ed), plato.stanford.edu/archives/spr2013/entries/exploitation/ See also A Wertheimer, *Exploitation* (Princeton NJ, Princeton University Press, 1996).

[67] See K Marx, *Capital—A New Abridgment* (Oxford, OUP, 1999) 183 ff. See also GA Cohen, 'Karl Marx and the Withering Away of Social Science' (1972) 1 *Philosophy and Public Affairs* 182; J Wolff, 'Marx and Exploitation' (1999) 3 *Journal of Ethics* 105.

[68] See the discussion in G Mundlak, 'The Right to Work—The Value of Work' in Barak-Erez and Gross (eds), *Exploring Social Rights* (Oxford, Hart Publishing, 2010) 341 at 345.

[69] There are limitations to this freedom. See, for instance, MJ Radin, *Contested Commodities* (Cambridge MA, Harvard University Press, 2001).

[70] This is further developed in V Mantouvalou, 'The Right to Non-Exploitative Work' in *The Right to Work* (n 2 above).

in the violation of labour rights and other human rights (c) with an aim to make a profit. Because this analysis of exploitation is based on taking advantage of someone's vulnerability, it is always a moral wrong that the law should not permit.

In the Convention, the prohibition of workers' exploitation (particularly its gravest forms) underlies Article 4, which prohibits slavery, servitude, forced and compulsory labour, and emerges in the relevant case law. Looking at the provision, the UK Supreme Court recognised that '[f]orced labour is not fully defined and may take various forms, but exploitation is at its heart'.[71]

The first case where the ECtHR ruled that there had been a violation of Article 4 because of a worker's exploitation was *Siliadin v France*.[72] In this case, the Court examined the situation of a migrant domestic worker, who lived and worked in appalling conditions. Being a minor at the time that she was brought to France from Togo, Siliadin had to work almost 15 hours a day, seven days per week. She had not chosen to work for her employers, she had no resources, was isolated, had no money to move elsewhere, and 'was entirely at [the employers'] mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred'.[73] Her exploitation was such that the Court was prepared to classify it as servitude, finding for the first time in its history that there was a breach of Article 4 of the Convention.

The *Siliadin* case has been followed by more case law on domestic work[74] and sex trafficking,[75] which shows how migrant workers with restrictive visa regimes or those that are undocumented are particularly vulnerable and prone to exploitation.[76] This is not tolerated by the European human rights system. Looking at domestic servitude, in *CN v UK*, for example, the Court stressed that the authorities should not underestimate that there are both 'overt and more subtle forms of coercion', and 'many subtle ways an individual can fall under the control of another'.[77] These overt and subtle forms of coercion make migrant workers prone to exploitation, not only because of the economic imbalance that typically characterises the employment relationship, but also because of immigration rules that create what can be called 'legislative precariousness',[78] namely vulnerability created

[71] *R (on the application of Reilly and Another) v Secretary of State for Work and Pensions* [2013] UKSC 68 (30 October 2013), para 81.
[72] *Siliadin v France*, App No 73316/01, Judgment of 26 July 2005.
[73] *Siliadin*, ibid, para 126.
[74] *CN v United Kingdom*, App No 4239/08, Judgment of 13 November 2012.
[75] *Rantsev v Cyprus and Russia*, App No 25965/04, Judgment of 7 January 2010.
[76] B Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment and Society* 300.
[77] *CN*, above n 74, para 80.
[78] V Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Workers' (2012) 34 *Comparative Labor Law and Policy Journal* 133.

or exacerbated by law. Labour law or criminal law also create legislative precariousness, and make workers prone to exploitation.[79]

Legislative precariousness is not the only type of vulnerability that can be abused by employers. There are other types of vulnerability that stem from physical or mental characteristics of the worker, or other external reasons such as poverty. Against this background, and under Article 4, the Court has examined the issue of workers' exploitation in the context of workfare schemes. Workfare schemes are schemes that make social benefits, like a jobseeker's allowance, conditional upon acceptance of suitable work.[80] According to the Court's case law, for a form of labour to be considered forced, it must be imposed against the will of the person and under the threat of a penalty.[81] The ECtHR has said that it may be legitimate for the government to ask that someone who claims an unemployment benefit has first tried to obtain a job. When a state has a welfare system, it is entitled to set conditions on the receipt of benefits: a condition that one seeks 'generally accepted employment' is not unreasonable.[82] This is particularly so when there is a possibility to reject work that is socially unacceptable or the possibility of conscientious objection.[83] That the Court has not found that there has been a breach of Article 4 in cases that it has examined thus far does not mean that workfare schemes are never exploitative (because they lead to taking advantage of individuals' material need) and in breach of the Convention. There may be circumstances in which someone is exploited under these schemes, and can be a victim of a violation of Article 4 of the Convention.[84]

The ECHR captures aspects of the right to work that are supported by the principle of non-exploitation. The Convention does not protect against all forms of labour exploitation, particularly if we adopt a Marxist definition of the concept of exploitation.[85] This is because the Convention is a liberal document, and free-market economy is the system that is compatible

[79] On the role of labour law in creating legislative precariousness, see Mantouvalou, ibid; on the role of criminal law, see D Guilfoyle, 'Transnational Criminal Law as a Governance Strategy in the Global Labour Market: Criminalizing Migration from Below' (2010) 29 *Refugee Survey Quarterly* 185.

[80] See generally, A Paz-Fuchs, *Welfare to Work—Conditional Rights in Social Policy* (Oxford, OUP, 2008); A Paz-Fuchs, 'A Right to Work—A Duty to Work' in *The Right to Work* (n 2 above).

[81] *Van der Mussele v Belgium*, App No 1989/80, Judgment of 23 November 1983.

[82] *Schuitemaker v Netherlands*, App No 15906/08, Decision of 4 May 2010.

[83] ibid.

[84] See further, E Dermine, 'Activation Policies for the Unemployed and the International Human Rights Case Law on the Prohibition of Forced Labour' [2013] *European Journal of Human Rights* 746.

[85] On the Marxist approach towards legal rights more generally, see H Collins, *Marxism and the Law* (Oxford, OUP, 1982) 142 ff.

with it.[86] However, Article 4 in particular addresses the gravest forms of labour exploitation, and imposes on authorities positive obligations to investigate, legislate and enforce the legislation. A right to non-exploitative work can, therefore, be said to be present in case law of the ECtHR.

C. Self-Realisation

As Hugh Collins has argued, work can be an important source of self-realisation. On this analysis, self-realisation is a justification of aspects of the right to work. Collins says:

> Animals such as bees also co-operate in their relations of production, but they function like cogs in a machine, whereas human beings form social relationships through work, making choices, agreements, plans, friends, and organisations. As social animals, human beings create their society around their work relations. So we might say that human beings find meaning for their lives through work, not just from the achievements of what is produced, but also, and importantly, from the establishment of social relations with colleagues, which is also a vital part of our 'species-being'.[87]

Collins developed the value of self-realisation as a basis of the positive aspects of the right to work. Even though the Convention does not explicitly guarantee such a positive right, the value of work for self-realisation is not foreign in the case-law of the ECtHR. For example, the Court has emphasised the function of the workplace as a place where people flourish by developing social relationships. This was recognised in case law on Article 8, the right to private life. In the much-cited *Niemietz v Germany* case,[88] the Court said insightfully:

> Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.[89]

In *Sidabras*, having recognised that the right to private life 'secures to the individual a sphere within which he or she can freely pursue the development and fulfillment of his or her personality',[90] the Court went on to

[86] For example, the narrow formulation of the right to property in Art 1 of Protocol 1 and the prohibition of discrimination in Art 14 both suggest this.
[87] H Collins, 'Is there a Human Right to Work?' in *The Right to Work*, n 2 above.
[88] *Niemietz v Germany*, App No 13710/88, Judgment of 16 December 1992.
[89] *Niemietz*, ibid, para 29.
[90] See *Sidabras*, n 54 above, para 43.

state that the wide ban on access to employment can affect the 'ability to develop relationships with the outside world to a very significant degree'. The right to private life under Article 8 creates a space for self-development and self-fulfillment, and work is part of this space that should be protected from intrusion.[91]

A point made earlier in this contribution should be emphasised again at this stage: the fact that the Court recognises the value of self-realisation through work does not mean that individual applicants who do not have sufficient opportunities of self-realisation in the workplace can bring a successful complaint to Strasbourg. It indicates, though, that the Court may view as problematic the arbitrary exclusion of someone from work not only because it deprives the person of the opportunity to earn income, but also because it deprives him or her of the opportunity to self-realisation.

D. Non-domination

A final element emerging from Convention case law, which supports aspects of the right to work, is the principle of non-domination. For the right to work to be effectively protected, and for a worker to achieve self-realisation at work, as discussed above, she has to be protected from domination in the workplace. The power to dominate is probably most clearly expressed through the ability of the employer to dismiss the worker. According to Philip Pettit, domination exists when someone has the capacity to interfere with another person's choices on an arbitrary basis.[92] Of course, the employment relationship in general is a relationship of subordination[93] because of the economic dependence of the worker on the employer, which creates an imbalance of power. Yet if the employer can dismiss an employee 'as whim inclines him and hardly suffer embarrassment for doing so',[94] the employment relationship is not just one of subordination, but one of domination, for the employer may be able to control all aspects of the worker's life.

It should not come as a surprise that the case law that best reflects the value of non-domination involves dismissal for activities outside work. Individuals who have been dismissed from their jobs because of their personal preferences and activities outside the workplace and working time have brought claims to Strasbourg, arguing that their Convention rights are infringed. The Court has ruled that dismissal that interferes with Convention rights must be assessed for its fairness, so if a person is dismissed, there has

[91] See also *Campagnano v Italy*, App No 77955/01, Judgment of 23 March 2006.
[92] P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 52.
[93] Davies and Freedland, above n 45.
[94] Pettit, above n 92, 57.

to be some independent assessment of the employer's decision.[95] There is a long line of cases on dismissals that interfere with Convention rights. For example, the ECtHR has protected workers' intimate sexual life and their political views against employer interference. In *Smith and Grady v UK*,[96] it found that the applicants' discharge from the military because of their sexual orientation was in breach of the Convention. In *Schüth v Germany*,[97] the applicant, a church worker, was dismissed for having an extramarital affair, and the Court ruled that his dismissal violated his right to private life. In *Vogt v Germany*,[98] the Court found that the dismissal of the applicant, a school teacher, because of her political views, violated her freedom of expression, particularly because there was no evidence that she used her position as a teacher to indoctrinate the pupils. In *Redfearn v UK*,[99] it held that the applicant's dismissal from his job as a bus driver because of his membership of an extreme-right political party violated his freedom of association.

The problem of domination through dismissal was probably most dramatically illustrated in the case *IB v Greece*,[100] which concerned the dismissal of an HIV-positive individual, for the reason that his co-workers objected to working with him because of his status. This case highlights how the stigma that comes with the specific reason of the dismissal (HIV/AIDS)[101] has very wide implications for the person's private life, which raise issues under the Convention. The Court accepted that the stigma attached to dismissal because someone is HIV-positive is such that this dismissal falls within the ambit of his right to private life. It also placed emphasis on the uncertainty faced by the applicant in his search for a new job, namely the implications of dismissal because of positive HIV-status, which would mean that his right to access a job could be affected significantly. It held that the dismissal of IB violated the prohibition of discrimination together with the right to private life.

In jurisprudence on dismissal because of lifestyle choices and other aspects of the worker's private life, the Court has been sensitive towards the employer's power to dominate the worker. The principle of non-domination, which underlies this line of cases, supports protection from

[95] See *Redfearn v United Kingdom*, App No 47335/06, Judgment of 6 November 2012.

[96] *Smith and Grady v United Kingdom*, App Nos 33985/96, 33986/96, Judgment of 27 September 1999. See also *Lustig-Prean and Beckett v United Kingdom*, App Nos 31417/96 and 32377/96, Judgment of 27 September 1999.

[97] *Schüth v Germany*, App No1620/03, Judgment of 23 September 2010. Cf *Obst v Germany*, App No 425/03, Judgment of 23 September 2010.

[98] *Vogt v Germany*, App No 17851/91, Judgment of 2 September 1996.

[99] *Redfearn v United Kingdom*, App No 47335/06, Judgment of 6 November 2012.

[100] *IB v Greece*, App No 552/10, Judgment of 3 October 2013.

[101] On HIV/AIDS stigmatisation at work, see the ILO Recommendation Concerning HIV and AIDS and the World of Work (2010), No 200, which the ECtHR took into account in its ruling. See also *Hoffmann v South African Airways*, CCT17/00, [2000] ZACC 17.

unfair dismissal in circumstances when Convention rights are implicated and forms the basis for a right to be protected from unfair dismissal, which is a component of the right to work.

V. CONCLUSION

The ECHR does not impose duties on the state to promote full employment. Such duties might even be incompatible with a liberal human rights document. In any case, the lack of this type of duty is unsurprising, given that the Convention is a justiciable treaty that is protected through individual petition. This type of mechanism may not be appropriate for certain positive aspects of the right to work.

Yet it is important to appreciate that the ECtHR case law guarantees important principles that underlie the right to work. To return to a distinction introduced earlier, in the literature on whether labour rights are human rights, sometimes three different approaches are conflated: the positivistic, the instrumental and the normative one. From the discussion on the right to work, to a positivist,[102] we can say that even if a right is not explicitly mentioned in a specific human rights treaty, such as the ECHR, it can still be derived from the case law on other provisions through interpretation. An approach that is merely positivistic, in other words, will fail to capture in any depth the important role of judicial interpretation.[103]

In the context of judicial interpretation of the ECHR by the Court, we identified some normative principles that underlie the right to work, and which have supported aspects of it in the case law. The ideas of dignity, non-exploitation, self-fulfillment and non-domination are either openly invoked or, more often, implied in decisions of the Court. Even though these normative principles were here addressed separately, this does not mean that they are not linked. For instance, work with fear of dismissal because of private activities may be exploitative work. Exploitative work cannot be self-fulfilling. Exploitative work can also violate human dignity. But there is a value in addressing them separately and exploring their implications both in the context of a legal document and as a theoretical matter.

It is also important to re-iterate that the fact that these normative principles emerge from Convention case law does not mean that whenever they are invoked, there will always be a violation of the Convention. In fact, some aspects of the right to work are sometimes in conflict with other aspects of it,[104] and this problem will no doubt have to be addressed at

[102] See above n 14.

[103] See G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, above n 41.

[104] Freedland and Kountouris; Bogg in *The Right to Work* (n 2 above).

some point by the ECtHR.[105] Workers themselves sometimes have conflicting interests, which labour law attempts to address.[106] Some workers' rights to access a job may conflict with other workers' rights to fair working conditions. Conflicts between rights or aspects of them are not unique to the right to work. Rights are often in conflict, and the ECtHR and human rights scholars develop normative theories to address such conflicts.[107] However, exploring these normative principles is important as it highlights key interpretative values that can guide the Court's task.

To the instrumentalists then, this contribution does not suggest that the right to work as an individual human right (directly or indirectly protected) will help address all injustices at work. Labour protective legislation or associational activity through unions and other organisations are also fundamental means by which workers' rights are protected. It also does not suggest that the ECtHR alone is the appropriate forum for the protection of workers' rights. European human rights law does not and cannot address structural injustices in the workplace, such as unemployment, as Hepple rightly argued in his 1981 essay.[108] However, there may be circumstances that an individual is unfairly deprived of a job or exploited at work, in which the ECHR will give that person voice. This should not be underestimated.

[105] The Court of Justice of the EU has had to address this type of issue in the *Viking* and *Laval* line of cases. See C Barnard, '*Viking* and *Laval*: An Introduction' (2007–08) 10 *Cambridge Yearbook of European Legal Studies* 463; ACL Davies, 'One Step Forward Two Steps Back? The Viking and Laval cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; T Novitz, 'A Human Rights Analysis of the *Viking* and *Laval* Judgments' (2008) 10 *Cambridge Yearbook of European Legal Studies* 541.

[106] G Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 315; ACL Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 269.

[107] G Letsas, 'Rescuing Proportionality' in R Cruft, SM Liao and M Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford, OUP, 2014, forthcoming).

[108] Hepple, above n 3, 82–83.