

## **Are Labour Rights Human Rights?**

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*Forthcoming in the 2012 [European Labour Law Journal](#)*

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## 1. Introduction

Are labour rights human rights? This question has attracted much interest in recent years among lawyers, academic scholars, trade unionists and other activists, and has given rise to heated debates. In human rights law and labour law scholarship, some endorse the character of labour rights as human rights without hesitation, while others view it with scepticism and suspicion.

This article finds that there are in fact three different approaches in the literature that examines labour rights as human rights, which are not always distinguished with sufficient clarity. First, there is a positivistic approach, according to which a group of rights are human rights insofar as certain treaties recognise them as such. The question whether labour rights are human rights is uncomplicated on this approach, which is often found in international law scholarship. A response to it comes through a survey of human rights law. If labour rights are incorporated in human rights documents, they are human rights. If they do not figure therein, they are not human rights. A second way in which the question of this article is approached is an instrumental one that looks at the consequences of using strategies, such as litigation or civil society action, which promote labour rights as human rights. This is the most common way in which labour law scholars analyse the problem in question. If strategies are, as a matter of social fact, successful, the question is answered in the affirmative; if not, scepticism is expressed.

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The third approach to the question whether labour rights are human rights is a normative one. It examines what a human right is, and assesses, given this definition, whether certain labour rights are human rights. This path is the one that has been least taken in the literature, but is an important one and has implications for the previous two approaches.

This article maps out the three approaches above, addresses the main arguments advanced in scholarship and explores their implications.

## **2. Labour rights as human rights: three approaches**

A definition of labour rights is necessary before moving on. Labour rights are entitlements that relate specifically to the role of being a worker. Some of these rights are exercised individually and others collectively. They can include a right to work in a job freely chosen, a right to fair working conditions, which may encompass issues as diverse as a just wage or protection of privacy; a right to be protected from arbitrary and unjustified dismissal; a right to belong to and be represented by a trade union; a right to strike. These rights may be based on different foundations, such as freedom, dignity or capability. This article will not discuss the justification of labour rights, but it has to be noted that the foundation of rights is crucial when considering their interpretation.<sup>1</sup>

### **a. The positivistic approach**

The most straightforward answer to the question whether labour rights are human rights comes from a positivist perspective, and is often found in international law literature. A

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<sup>1</sup> See the discussion in ACL Davies, *Perspectives on Labour Law*, CUP, 2009, 2<sup>nd</sup> edition, pp 50-51. There is literature that examines the foundations of labour rights. On democratic theory as a justification of collective labour rights, see A Bogg, *The Democratic Aspects of Trade Union Recognition*, Hart, 2009. On a Rawlsian account, see H Collins, 'Theories of Rights as Justifications for Labour Law', in Davidov and Langille (eds), *The Idea of Labour Law*, OUP, 2011, p 137. For a justification of protection from unfair dismissal, see H Collins, *Justice in Dismissal*, OUP, 1992, pp 15-21. On the theory of capabilities developed by Sen and Nussbaum as a justification, see S Deakin, 'Social Rights in a Globalized Economy', in Alston (ed), *Labour Rights as Human Rights*, OUP, 2005, p 25; S Deakin and F Wilkinson, *The Law of the Labour Market*, OUP, 2005, chapter 5. On freedom as non-domination, see V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', (2008) 71 *Modern Law Review* 912. On citizenship as a justification, see G Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages', (2008) 8 *Theoretical Enquiries in Law* 531.

positivist lists human rights treaties protecting labour rights, or other documents explicitly recognising labour rights as human rights as a starting point, and is satisfied that the answer is positive, if it is sufficiently supported in law.<sup>2</sup> Looking at the Universal Declaration of Human Rights (UDHR), which is a non-binding but enormously influential document, the positivist finds that several labour rights are human rights: article 4 of the UDHR prohibits slavery and servitude; article 23 provides that everyone has the right to work and that everyone should work in a job freely chosen; that everyone should receive equal pay for equal work; that everyone should get decent remuneration for work performed, which should guarantee a dignified life for herself and her family; and that everyone has a right to form and join trade unions; article 24, in turn, guarantees a right to rest and leisure, including reasonable limitations of working hours, as well as holidays with pay. Listing these provisions, a positivist is satisfied that not only are labour rights human rights, but that there is an extensive list of these rights in human rights law.

The positivist would describe the legal protection that the international community affords labour rights, and would find that it decided to divide human rights in categories, recognising them varying degrees of protection. Treaties that followed the UDHR separated certain labour rights from some others, classifying a group of them as civil and political rights in the International Covenant on Civil and Political Rights (1966), and others as economic and social rights in the International Covenant on Economic, Social and Cultural Rights (1966). In a way that mirrors the separation of human rights into the two UN Covenants, at a regional level the Council of Europe and the Organisation of American States separated civil and political rights, and economic and social rights, in two documents: in the former case the European Convention on Human Rights (ECHR, 1950) and in the latter the European Social Charter (ESC, 1961), and the American Convention on Human Rights (1978) – containing some more extensive socio-economic guarantees than its European counterpart – and the San Salvador Additional Protocol in the Area of Economic, Social and Cultural Rights (1999).

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<sup>2</sup> See, for instance, K Drzewicki, 'The Right to Work and Rights in Work', in Eide et al (eds) *Economic, Social and Cultural Rights*, Kluwer, 2001, 2<sup>nd</sup> edition, p 223; M Ssenyonjo, 'Economic, Social and Cultural Rights: An Examination of State Obligations', in Joseph and McBeth (eds), *Research Handbook on International Human Rights Law*, Edward Elgar, 2010, p 36.

Rights that are found in social rights treaties were weakly worded and monitored. From early on in the history of the UN, the ICCPR recognised a right to individual petition before the Human Rights Committee in an additional protocol. The ICESCR, on the other hand, is only monitored through reporting procedures.<sup>3</sup> At regional level, the European and American systems have opted for a model similar to the UN. The ECHR provides for a right of individual application before the European Court of Human Rights (ECtHR). The ESC has a procedure for reporting to the European Committee of Social Rights, and since 1998 a Protocol that recognises a right of collective complaints by certain non-governmental organisations, trade unions and other groups. The American Convention on Human Rights, in a similar vein, is monitored by the Inter-American Court of Human Rights, where individuals can lodge an application for an alleged violation of rights under the Convention, while the San Salvador Protocol in the Area of Economic, Social and Cultural Rights, which was adopted in 1988 and provides for a right to individual petition on the right to education and trade union rights, is not yet operational.

Against this background, rights such as the right to form and join a trade union and the right to privacy were categorised as civil and political rights, and rights such as the right to work, the right to decent working conditions or the right to strike, were categorised as social and economic rights. The implication of this was that some of these were viewed as real human rights, while others were presented as aspirational goals.<sup>4</sup>

To find an answer to the question whether labour rights are human rights, a positivist might also turn to the International Labour Organisation (ILO), the expert branch of the UN in the field of labour rights.<sup>5</sup> The ILO predates all the human rights treaties and organisations (having been founded in 1919), which shows that labour issues became a matter of international concern before human rights. Does the ILO view labour rights as human rights? For many decades, the ILO did not explicitly present the documents

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<sup>3</sup> The ICESCR now has an optional Protocol on individual petition, which is not yet operational.

<sup>4</sup> See the discussion in D Barak-Erez and AM Gross, 'Introduction: Do We Need Social Rights?', in Barak-Erez and Gross (eds), *Exploring Social Rights*, Hart, 2007, p 1 at 4. See also V Mantouvalou, 'In Support of Legalisation' in Gearty, Mantouvalou, *Debating Social Rights*, Hart, 2011, pp 90-98.

<sup>5</sup> See, for instance, L Swepston, 'The International Labour Organization's System for Human Rights Protection', in Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement*, Unesco/Ashgate, 2003, p 91.

adopted under its auspices as human rights documents.<sup>6</sup> It adopted binding conventions that incorporated labour standards, and non-binding recommendations that further detailed this list of standards.

In recent years the ILO endorsed a list of labour rights as human rights. In 1998, it adopted the Declaration of Fundamental Principles and Rights at Work.<sup>7</sup> The Declaration binds all ILO Member States, irrespective of whether they have ratified the relevant conventions, and contains four core rights: freedom of association and the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in employment. By listing these rights as fundamental human rights, the ILO left a number of other labour rights outside the scope of the Declaration, and this is important, not only symbolically, but also because the Declaration's Follow-up procedure requires States to report on their obligations under the core Conventions that they have not ratified.

Another recently drafted human rights document, on the other hand, the European Union Charter of Fundamental Rights (EUCFR), which has been made legally binding with the Lisbon Treaty of 2009, contains a list of labour rights as human rights, such as a right to information and consultation, protection from unfair dismissal and the prohibition of forced labour.<sup>8</sup>

The positivist would list all these documents, and would claim that labour rights are human rights sometimes, in some jurisdictions.

### *Implications*

However the above situation does not provide clear answers to our question, and may be troubling. Which labour rights are human rights? Those included in the UDHR or those protected in the ICESCR? The minimal list of rights of the ILO Declaration or the

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<sup>6</sup> There is some literature that from early on approached certain ILO Conventions as human rights conventions. See CW Jenks, *Human Rights and International Labour Standards*, Steven and Sons, 1960.

<sup>7</sup> For a brief presentation of the Declaration and its follow-up procedure see H Kellerson, "The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future", (1998) 137 *International Labour Review* 223.

<sup>8</sup> On labour rights under the EU Charter, see J Hunt, 'Fair and Just Working Conditions', in Hervey and Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart, 2003, p 45; and B Ryan, 'The Charter and Collective Labour Law', in the same collection, p 67.

extensive list of the ESC? To illustrate the problem, the decision of the ILO to pick four labour rights only as fundamental human rights, while leaving others outside the scope of the Declaration, was criticised for excluding traditional and important socio-economic rights, such as the right to a minimum wage,<sup>9</sup> and gave rise to very heated debates in academic literature.<sup>10</sup> The positivist will be unable to contribute to these debates or explain the relative neglect of some labour rights in law.

The positivistic approach addresses questions such as these: which labour rights did the drafters of a particular human rights document deem important and which of these rights survived political negotiations? Human rights treaties, like all treaties and legislation, are subject to compromise. They may contain provisions on which the drafters easily agreed, while leaving out others for the sole reason that there was little consensus in political debates at a given moment in history. The fear of communism in the aftermath of the second World War, for instance, played an important role in the separation between civil and social rights, a point that is illustrated in the work of one of the staunchest opponents of social rights. Criticising the inclusion of social rights in the UDHR, Cranston said: ‘What the modern communists have done is to appropriate the word “rights” for the principles that *they* believe in’.<sup>11</sup> Cranston’s statement encapsulates well the climate of the Cold War that continues to haunt social and labour rights. The response of the positivist to whether labour rights are human rights will depend on what the drafters of a particular document decided, and will vary from one country or one region to the other.

The positivist may also look at judicial decisions or other authoritative interpretations of human rights documents, and may have difficulties in resolving conflicts, which courts and other bodies sometimes have to address.<sup>12</sup> The answer to the question whether

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<sup>9</sup> P Alston and J Heenan, ‘Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?’, (2004) *NYU Journal of International Law and Policy* 221.

<sup>10</sup> See P Alston, ‘Core Labour Standards and the Transformation of the International Labour Rights Regime’, (2004) 15 *European Journal of International Law* 457; and B Langille, ‘Core Labour Rights – The True Story (Reply to Alston)’, (2005) 16 *European Journal of International Law* 409.

<sup>11</sup> M Cranston, *Human Rights To-day*, Ampersand, 1962, pp 38-39.

<sup>12</sup> For an example of problems that can emanate from conflicting interpretations, see G Morris, ‘Freedom of Association and the Interests of the State’, in Ewing, Gearty and Hepple (eds), *Human Rights and Labour Law*, Mansell, 1994, p 28. See also P O’Higgins, ‘The Interaction of the ILO, the Council of Europe and

labour rights are human rights may differ within the same region where different documents are applicable and their monitoring bodies have overlapping jurisdictions. The European Union is one such example. The main human rights documents in Europe are the ECHR, which is a Council of Europe document, and the EUCFR, which is a document of the EU. These contain very different lists of labour rights, as was explained earlier. How can conflicts be resolved when the two documents set different priorities? The positivist does not have the tools to address problems such as this, and may have difficulties when it comes to interpretation of rights more generally.

### **b. The instrumental approach**

The positivistic path is not the one that is most taken in labour law literature, even though positive law is the starting point for those taking the most common approach in labour law scholarship, the instrumental approach. The roots of the instrumental approach lie in the Marxist tradition.<sup>13</sup> On this analysis, '[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.'<sup>14</sup> Scholars adopting this approach examine which labour rights are human rights according to the relevant documents, and assess how institutions and civil society organisations fare in protecting them, so as to assess 'whether labour rights really are promoted under the rubric, or within the framework, of human rights'.<sup>15</sup> Following this analysis, the character of labour rights as human rights is endorsed if either state and international institutions, like courts, or civil society organisations, like trade unions and NGOs, are successful in promoting them as such. This approach started to emerge in the

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the European Union Labour Standards', Hepple (ed) *Social and Labour Rights in a Global Context*, CUP, 2002, p 55 at 67.

<sup>13</sup> See, for example, K Marx, 'On the Jewish Question', in *Early Writings*, Penguin, 2000, p 211, (originally published in 1843). On the Marxist approach towards legal rights, see H Collins, *Marxism and the Law*, OUP, 1982, p 142 ff.

<sup>14</sup> C Fenwick & T Novitz, 'Conclusion: Regulating to Protect Workers' Human Rights' in Fenwick and Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation*, Hart Publishing, 2010, pp 587-588.

<sup>15</sup> P Alston, 'Labour Rights as Human Rights: The Not So Happy State of Art', in Alston (ed), *Labour Rights as Human Rights*, OUP, 2005, p 3. See also P Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?', in Alston (ed), *Labour Rights as Human Rights*, p 61.

1970s, as Davies has pointed out, when '[c]ommentators began to realise that collective bargaining could not provide all the protection workers needed'.<sup>16</sup> The question that many of the scholars following this analysis seek to address is: 'does the new rhetoric of social rights – as embodied in instruments such as the ILO Declaration of Fundamental Principles and Rights at Work (1998) and the EU Charter of Fundamental Rights (2000) – match the reality of the new world of market regulation and growing global inequality?'<sup>17</sup> The responses to the question are mixed, as the literature that will be discussed in this section shows by looking at first the role of courts and then the role of civil society organisations.

### *Courts*

In literature from different jurisdictions, scholars and activists assess the interplay between labour rights and human rights by exploring how courts fare in their protection.<sup>18</sup> Whether these scholars and activists endorse or reject labour rights as human rights depends on judicial attitudes towards these claims. The ECtHR and the surrounding debates serve as an example that illustrates this trend. The ECHR, is a traditional liberal human rights document that protects rights such as the right to private life,<sup>19</sup> freedom of expression,<sup>20</sup> the right to form and join a trade union,<sup>21</sup> and prohibits slavery, servitude, forced and compulsory labour,<sup>22</sup> but leaves other labour rights, such as the right to strike or the right to decent working conditions, for the ESC, its counterpart in the area of social rights.

The ECtHR was in the past reluctant to uphold workers' claims. In a line of cases decided in the 1970s, it rejected the right to strike or the right to consultation as

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<sup>16</sup> ACL Davies, *Perspectives on Labour Law*, CUP, 2<sup>nd</sup> edition, 2009, p 38. For further discussion see p 5 ff. This book insightfully presents two distinct perspectives on labour law: an economics perspective and a human rights perspective.

<sup>17</sup> B Hepple, 'Introduction', in Hepple (ed) *Social and Labour Rights in a Global Context*, CUP, 2002, p 1 at 2.

<sup>18</sup> For an overview from several different jurisdictions, see T Novitz and C Fenwick (eds), *Human Rights at Work*, Hart, 2010. On international institutions, see P Alston (ed), *Labour Rights as Human Rights*, OUP, 2005. See also J Fudge, 'Constitutionalizing Labour Rights in Europe', in Campbell, Ewing and Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, OUP, 2011, p 244.

<sup>19</sup> Article 8 of the ECHR.

<sup>20</sup> Article 10 of the ECHR.

<sup>21</sup> Article 11 of the ECHR.

<sup>22</sup> Article 4 of the ECHR.

components of freedom of association.<sup>23</sup> Even more strikingly for labour law scholars, the Court gave priority to individual rights when they conflicted with the interests of trade unions in case law involving ‘closed shop’ arrangements. Closed shops are agreements whereby an individual must become member of a particular trade union in order to access or retain her job. While trade unions favour closed shops, the ECtHR regularly upheld individual claims against compulsory union membership.<sup>24</sup> For this reason, labour lawyers suggested that human rights law undermines the interests of labour, criticising Strasbourg case law for being disappointing,<sup>25</sup> ‘individual and formalistic’,<sup>26</sup> and for also showing ‘limited enthusiasm for the protection of trade union rights’ and ‘a greater interest on the defence of individual autonomy than collective solidarity’.<sup>27</sup> In the US too, judicial approaches to the issue of closed shops is frequently used as an example where human rights harm collective interests.<sup>28</sup>

The case law of the ECtHR has in recent years been receptive to workers’ claims in a development that led labour law scholars to change their position towards labour rights as human rights. The Court extended the principles of the Convention in the employment sphere through the adoption of an ‘integrated approach’ to interpretation.<sup>29</sup> The integrated approach is an interpretive technique that reads certain social and labour rights in the provisions of the ECHR. In the important case *Sidabras and Dzijauntas v*

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<sup>23</sup> *Schmidt and Dahlstrom v Sweden*, App no 5589/72, Judgment of 6 February 1976; *National Union of Belgian Police v Belgium*, App no 4464/70, Judgment of 27 October 1975.

<sup>24</sup> See *Young, James and Webster v UK*, App Nos 7601/76 and 7806/77, Judgment of 18 October 1982; more recently see *Sorensen and Rasmussen v Denmark*, App Nos 52562/99 and 52620/99; Judgment of 11 January 2006. For analysis of the compatibility of closed shops with human rights law, see V Mantouvalou, ‘Is There a Human Right not to Be a Trade Union Member?’ in Novitz and Fenwick (eds), *Human Rights at Work*, Hart, 2010, p 439.

<sup>25</sup> KD Ewing, ‘The Human Rights Act and Labour Law’ (1998) 27 *Industrial Law Journal* 275.

<sup>26</sup> Lord Wedderburn, ‘Freedom of Association or Right to Organise? The Common Law and International Sources’ in Wedderburn (ed), *Employment Rights in Britain and Europe*, Lawrence and Wishart, 1991, p 138 at 144.

<sup>27</sup> Novitz, T, *International and European Protection of the Right to Strike*, OUP, 2003, 238.

<sup>28</sup> See the discussion in A Santos, ‘Three Transnational Discourses of Labor Law in Domestic Reform’, (2010) 32 *University of Pennsylvania Journal of International Law* 123 at 142-144.

<sup>29</sup> See V Mantouvalou, ‘Work and Private Life: *Sidabras and Dzijauntas v Lithuania*’, (2005) 30 *European Law Review* 573.

*Lithuania*,<sup>30</sup> for instance, 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 fulfilment of his or her personality’,<sup>31</sup> the Court went on to 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’, creating ‘serious difficulties [...] in terms of earning [a] living, with obvious repercussions on the enjoyment of [...] private lives’.<sup>32</sup> The Court recognised that the right to private life under article 8 may encompass a right to work.

Another labour right, the right to work in decent conditions, was upheld in the landmark judgment *Siliadin v France*,<sup>33</sup> where the Court ruled that conditions of ‘modern slavery’ impose a duty to enact legislation criminalising the conduct of the employers. In *Rantsev v Cyprus and Russia*<sup>34</sup> it added that enactment of legislation on human trafficking for sexual exploitation is not sufficient; the authorities also have a duty to make the legislative measures operational. There are several other examples where the ECtHR has extended the principles of the Convention in the employment sphere.<sup>35</sup>

Turning to collective labour rights cases, in a series of judgments since 2002, the Court started being receptive to trade union claims. *Wilson and Palmer v UK*<sup>36</sup> held that providing financial incentives to individuals that cease to be represented by unions for the purposes of collective bargaining violates article 11 of the ECHR. This was the first time that the Court ruled in favour of trade unions in its case law, in a development that was

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<sup>30</sup> *Sidabras and Dziantas v Lithuania*, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004.

<sup>31</sup> See *Sidabras*, para 43.

<sup>32</sup> *Sidabras*, para 48.

<sup>33</sup> *Siliadin v France*, App No. 73316/01, Judgment of 26 July 2005. For analysis see V Mantouvalou, ‘Servitude and Forced Labour in the 21<sup>st</sup> Century: The Human Rights of Domestic Workers’, (2006) 35 *Industrial Law Journal* 395.

<sup>34</sup> *Rantsev v Cyprus and Russia*, App No 26965/04, Judgment of 7 January 2010.

<sup>35</sup> On private life, see *Pay v UK*, App No 32792/05, Admissibility Decision of 16 September 2008. For analysis, see H Collins and V Mantouvalou, ‘Private Life and Dismissal: *Pay v UK*, (2009) 38 *Industrial Law Journal* 133. See further *Schuth v Germany*, App No 1620/03, Judgment of 23 September 2010; *Obst v Germany*, App No 425/03, Judgment of 23 September 2010; *Smith and Grady v UK*, App Nos 33985/96, 33986/96, Judgment of 27 September 1999; *Vogt v Germany*, App No 17851/91, Judgment of 26 September 1995. For a discussion of case law on the right to a fair trial under article 6, see A Sanders, ‘A Right to “Legal” Representation (in the Workplace) During Disciplinary Proceedings’, (2010) 39 *Industrial Law Journal* 166.

<sup>36</sup> *Wilson and Palmer v UK*, App Nos 30668/96, 30671/96 and 30678/96, Judgment of 2 July 2002.

welcomed by labour law scholars who had been traditionally sceptical about the impact of human rights in their field.<sup>37</sup> *Wilson* was followed by more cases that protected labour rights,<sup>38</sup> in a manner that in the words of Collins ‘revealed a profound reorientation in the ECHR’s interpretation of Convention rights in the context of the workplace and employment relations’.<sup>39</sup>

It should not come as a surprise, following the change of the stance of the ECtHR, that in 2010 Ewing and Hendy, who are leading proponents of trade union rights and had been critical of human rights law in the past,<sup>40</sup> celebrated the judgment *Demir and Baykara v Turkey*,<sup>41</sup> which recognised a right to collective bargaining as a component of the right to form and join a trade union. They said that in this decision ‘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’.<sup>42</sup>

#### *Civil society organisations*

Another line of thinking that takes the instrumental approach and explores the usefulness of strategies promoting labour rights as human rights, looks at activities of non-governmental organisations. Virginia Leary, for instance, wrote that ‘workers’ rights are human rights, yet the international human rights movement devotes little attention to the rights of the workers’.<sup>43</sup> She went on to explain that NGOs, labour advocates and human rights scholars have paid insufficient attention to workers’ rights that we find in

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<sup>37</sup> K Ewing, ‘The Implications of *Wilson and Palmer*’, (2003) 32 *Industrial Law Journal* 1.

<sup>38</sup> For a detailed presentation of case law under article 11, see F Dorsemont, ‘The Right to Form and to Join Trade Unions for the Protection of his Interests under Article 11 ECHR’, (2010) 1 *European Labour Law Journal* 185. For a discussion of Strasbourg and UK case-law on strikes, see N Countouris and M Freedland, ‘Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK’, (2011) *European Labour Law Journal* 489. For an overview of issues arising in the context of the protection of civil and social rights in the workplace, see H Collins, *Employment Law*, 2<sup>nd</sup> edition, OUP, chapters 10 and 11.

<sup>39</sup> H Collins, ‘The Protection of Civil Liberties in the Workplace’, (2006) 69 *Modern Law Review* 619 at 627.

<sup>40</sup> See, for example, K Ewing, ‘The Unbalanced Constitution’, in Campbell, Ewing, Tomkins (eds), *Sceptical Essays on Human Rights*, OUP, 2001, p 103.

<sup>41</sup> *Demir and Baykara v Turkey*, App No 34503/97, Grand Chamber Judgment of 12 November 2008.

<sup>42</sup> K Ewing, J Hendy, ‘The Dramatic Implications of *Demir and Baykara*’, (2010) 39 *Industrial Law Journal* 2 at 47-48.

<sup>43</sup> VA Leary, ‘The Paradox of Workers’ Rights as Human Rights’, in Compa and Diamond (eds), *Human Rights, Labour Rights and International Trade*, University of Pennsylvania Press, 2003, p 22.

international human rights documents, viewing this as a shortcoming, which can, and should, be addressed. Several proponents of labour rights as human rights have stressed that human rights can have a motivating and empowering function. Compa suggested that ‘workers are empowered in campaigns when they are themselves convinced – and convincing the public – that they are vindicating their fundamental human rights, not just seeking a wage increase or more job benefits’.<sup>44</sup> He supported this with evidence from trade union action that has been successful through human rights strategies.<sup>45</sup> Looking at the interplay between human and labour rights organisations in Israel, Guy Mundlak presented areas where their aims converge and where they diverge, as well as aspects where there is potential for co-operation.<sup>46</sup>

Yet the positive stance towards labour rights as human rights in civil society action is not endorsed unequivocally. Some scholars express scepticism too. This was illustrated in a piece called ‘Labour Rights Are not the Same as Human Rights’, where Jay Youngdahl said that ‘the replacement of solidarity and unity as the anchor for labor justice with “individual human rights” will mean the end of the union movement as we know it. This is true tactically, strategically, and philosophically. Rights discourse individualizes the struggle at work. The union movement, however, was built on and nourished by solidarity and community. The powerless can only progress their work life in concert with each other, not alone. Fighting individually, workers lose; fighting together workers can win’.<sup>47</sup>

Looking at the example of the US but drawing more general conclusions, Kevin Kolben noted that the action of the human rights and labour rights movements meets more often than in the past, and presented several examples of co-operation between human and labour rights organisations.<sup>48</sup> However, he urged labour rights activists to refrain from such strategies, because human and labour rights differ conceptually, and the organisations promoting them have very different goals. The human rights movement is characterised by ‘legalism, elitism’, as well as an ‘individualist and philanthropic frame’ towards workers’ rights, so Kolben warned against reliance by labour activists on human

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<sup>44</sup> L Compa, ‘Solidarity and Human Rights’, (2009) 18 *New Labour Forum*, p 38 at 42.

<sup>45</sup> Compa, as above, p 42 ff.

<sup>46</sup> G Mundlak, ‘Why the Tracks Don’t Meet’, (2012) *Comparative Labor Law and Policy Journal*, forthcoming.

<sup>47</sup> J Youngdahl, ‘Solidarity First: Labor Rights Are Not the Same as Human Rights’, (2009) 18 *New Labor Forum* 31, at 31-32.

<sup>48</sup> K Kolben, ‘Labor Rights as Human Rights?’, (2010) 50 *Virginia Journal of International Law* 449 at 468 ff.

rights discourse.<sup>49</sup>

### *Implications*

It emerges from the above that advocates of the instrumental approach often claim that there are significant conceptual differences between labour rights and human rights.<sup>50</sup> Is this correct? The position that there is a sharp division between the two groups of claims has been criticised in literature on social rights more generally, so this article will not discuss it at length. Suffices to say that civil and political, economic and social rights do not differ conceptually, contrary to what was suggested in the past, because all rights can impose positive and resource-demanding duties.<sup>51</sup>

Turning to objections that involve labour rights more specifically, these are said to differ for the reason that typically human rights involve state power and not private economic power. This is not necessarily correct, though: human rights do not only impose duties on the state. The misconception may be explained because the main body of international human rights law was first developed as a bulwark against totalitarian regimes of the 20<sup>th</sup> century, and imposed duties on state authorities only. Yet in recent years several courts, such as the ECtHR, have consistently ruled that private power can be as harmful as public power, and interpreted human rights documents in ways that mirror this, recognising positive state obligations to regulate the private sphere, including the employment relationship.<sup>52</sup> The Court has repeatedly extended ECHR principles beyond state action, and developed a positive rights jurisprudence in the employment context. This provides a response to the view that human rights and labour rights are fundamentally different because of the duty-bearer (state/private actors) or because of the supposed different sources of power that the two bodies of rules aim to limit (political/economic power).

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<sup>49</sup> Kolben, as above, p 484.

<sup>50</sup> For further discussion of similar objections, see HW Arthurs, 'The Constitutionalization of Labour Rights', available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1531326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531326).

<sup>51</sup> See, for instance, S Fredman, *Human Rights Transformed*, OUP, 2008; M Langford, 'The Justiciability of Social Rights: From Theory to Practice', in Langford (ed), *Social Rights Jurisprudence*, p 3 at 30-31; V Mantouvalou, 'In Support of Legalisation', in Gearty, Mantouvalou, *Debating Social Rights*, Hart, 2011, pp 109-116.

<sup>52</sup> This occurred in case law discussed earlier. See, for instance, *Rantsev, Wilson, Siliadin*; see also *Palomo Sanchez v Spain*, App Nos 28955/06, 28957/06 and 28964/06, Grand Chamber Judgment of 12 September 2011.

On the argument that human rights are individualistic, a characteristic which creates a sharp line that distinguishes them from labour rights, it should be said that certain labour rights, such as the right to strike, can only be exercised through collective action. Yet other labour rights are individual rights, which are mainly exercised individually (though they can also be promoted through collective action). The prohibition of slavery and forced labour, the right to work or the right to privacy, exemplify this point. Moreover, there are traditional civil and political rights, which can only be exercised collectively: the right to freedom of assembly and association, for example, can only be exercised by groups. There is nothing, in other words, in the nature of human rights that should make us view them as necessarily atomistic, as Robin West has argued: 'Rights could as readily be grounded in a view of our nature that both respects our individuality and also gives full recognition to our social nature: our extended periods of biological dependence on caregivers, the resulting dependence of those caregivers on the support of others, our obligations to our communities and neighborhoods, our civic and charitable duties to others, and our responsibilities to engage in civic life'.<sup>53</sup> To this list we could add: our lives spent at work.<sup>54</sup> If the claim that human rights are individualistic refers to the fact that they are protected by individual petition in law, it should be said that claims for alleged human rights violations can be brought not only by individuals, but by trade unions or non-governmental organisations too. The ECtHR and the ECSR, where trade unions and other organisations can bring claims or otherwise participate in the legal process (through making third-party submissions), also show that human rights litigation is not only about individual petition.

Leaving the conceptual issues aside, in the literature that looks at attitudes of courts and civil society organisations in order to develop strategies that promote workers' interests, the question whether labour rights are human rights very often becomes an empirical one. Whether the observations made in sceptical scholarship are correct or not depends on the outcomes achieved: the success of a strategy leads to endorsement, the failure leads to rejection of labour rights as human rights. If a strategy fails, the so-called 'human

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<sup>53</sup> R West, *Re-Imagining Justice*, p 86. On the social dimension of rights, see also DM Davis, P Macklem and G Mundlak, 'Social Rights, Social Citizenship and Transformative Constitutionalism: A Comparative Assessment', in Conaghan, Fischl and Klare (eds), *Labour Law in an Era of Globalization*, OUP, 2002, p 511.

<sup>54</sup> On the importance of work for social life, see V Schultz, 'Life's Work', (2000) 100 *Columbia Law Review* 1881.

rights discourse' is rejected altogether.<sup>55</sup> The costs of abandoning rights as a discourse, however, are not always carefully considered. These include a loss in aspirational standards and impoverishment in normative legal scholarship.<sup>56</sup>

It is also important to be mindful of possible shortcomings in the instrumental use of human rights in order to advance strategic goals: first, if a strategy fails, it may create a precedent that a particular labour right is not a human right, which may be hard to reverse. This becomes evident when thinking about the case law of the 1970s and 1980s on collective labour rights under the ECHR. Second, (admittedly a remote concern at this stage) if a strategy is successful, it may lead to an inflation of rights and build stringency in claims that may not carry this stringency. A very expansive interpretation of existing provisions may reduce the moral weight of human rights claims, and may in this way be counterproductive in the long run.

In any case, and perhaps most importantly, the fact that the law and the judiciary may sometimes not be protective of labour rights as human rights should not be seen as a reason to reject the character of certain labour rights as human rights. What it means is that both the law and the attitude of the judiciary should change if labour rights are human rights at a normative level, which is the question that the section that follows addresses.

### **c. The normative approach**

The third approach to the question whether labour rights are human rights, views it as a theoretical (rather than positivistic and instrumental) and normative (rather than descriptive) issue. It does not necessarily engage with positive law or activists' strategies, (though it has implications for the law, its development and its interpretation), but examines the issue as a matter of moral truth.

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<sup>55</sup> For a typical example of scepticism towards the human rights movement, see D Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2001) *European Human Rights Law Review* 245.

<sup>56</sup> See the excellent discussion in R West, *Re-Imagining Justice*, Ashgate, 2003, pp 86-92.

This line of thinking is the one least taken in labour law scholarship and in human rights theory, but literature on it has started to appear in recent years.<sup>57</sup> The emerging scholarship questions the nature of labour rights as human rights. This view was usefully summarised in a recent piece by Hugh Collins, which can serve as a starting point for the present discussion. Collins examined possible justifications for labour law in human rights theory,<sup>58</sup> and defined human rights as rights that are accorded to all human beings by virtue of their humanity. These are ‘universal and imperative, with a special moral weight that normally overrides other considerations’.<sup>59</sup> Collins accepted that labour rights do not have some key characteristics of human rights that we find in this definition, and should therefore not be categorised as such.<sup>60</sup> Four arguments were said to support this position.

The first argument against labour rights as human rights is that they do not represent the same urgent and compelling moral claims (the ‘non-compellingness thesis’). The second argument is that labour rights are not universally applicable as other human rights (the ‘non-universality thesis’). According to the third argument, labour rights do not embody standards that are strict enough (the ‘non-strictness thesis’). The final argument is that labour rights evolve over time, while universal human rights embody timeless, fundamental needs (‘the non-timelessness thesis’). On this view, because labour rights are not human rights, we should not be seeking a justification for labour law in human rights theory, meaning most probably the natural law tradition. This does not mean that we cannot turn to other justifications in liberal political theory where there may be potential to give a certain degree of priority to labour law issues in developing a theory of justice.<sup>61</sup>

Is it correct to say that labour rights are not human rights?

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<sup>57</sup> J Nickel, *Making Sense of Human Rights*, Blackwell, 2007; on the right to work, see J Nickel, ‘Is There a Human Right to Employment?’, (1978-1979) *Philosophical Forum* 149; M Risse, ‘A Right to Work? A Right to Leisure? Labor Rights as Human Rights’, (2009) 3 *Law and Ethics of Human Rights* 1.

<sup>58</sup> H Collins, ‘Theories of Rights as Justifications for Labour Law’, in Davidov and Langille (eds), *The Idea of Labour Law*, OUP, 2011, p 137.

<sup>59</sup> Collins, as above, p 140.

<sup>60</sup> See Collins, as above, pp 140-144. However, Collins goes on to explore labour rights as liberal (political) rights.

<sup>61</sup> Collins explores this argument in the essay.

### *Labour rights as compelling claims*

One of the key characteristics of human rights is that they are claims that prohibit grave moral wrongs.<sup>62</sup> In this sense, at least certain labour rights are compelling and qualify as claims that prohibit such moral wrongs. A number of examples can be used to show this. A human right that is compelling and absolute is the prohibition of torture. The right not to be tortured and ill-treated, frequently presented as a paradigm of a universal human right, is an extremely compelling moral claim. There is something deeply demeaning in suffering emotional humiliation and physical pain, and a right to be protected from this conduct can readily be recognised as an essential in a catalogue of human rights.

There is similarly something deeply degrading and humiliating in being ill-treated by an employer, and examples of serious abuse in the workplace exist the world over. The living and working conditions of domestic workers in the UK, for instance, can exemplify this. In a recent report by Kalayaan, an NGO working on migrant domestic workers in the UK, it was said that in 2010, 60% of those who registered with it were not allowed out unaccompanied, 65% had their passport withheld, 54% suffered psychological abuse, 18% suffered physical abuse or assault, 3% were sexually abused, 26% did not receive adequate meals, and 49% did not have their own room. Their working conditions were exploitative: 67% worked seven days a week without time off, 58% had to be available 'on call' 24 hours, 48% worked at least 16 hours a day, 56% received a weekly salary of £50 or less.<sup>63</sup> It should not come as a surprise that abusive working conditions such as these have been classified as instances of 'modern slavery' in scholarship, documents of governmental and non-governmental organisations, and case law of courts,<sup>64</sup> in a manner that illustrates how compelling the underlying interests of those affected can be.

The right to privacy, to bring another example, is a human right of central importance, which entails, at the least, a right to be left alone by the authorities in order to act and develop relations that each person finds meaningful, without external interference.

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<sup>62</sup> J Tasioulas, 'On the Nature of Human Rights', in Ernst and Heilinger (eds), *The Philosophy of Human Rights*, Gruyter, 2011, p 17 at 22.

<sup>63</sup> M Lalani, *Ending the Abuse*, Kalayaan, 2011, p 10.

<sup>64</sup> See the discussion in V Mantouvalou, 'The Many Faces of Slavery: The Example of Domestic Work', forthcoming in (2012) Winter/Spring *Global Dialogue*.

Similarly, protection of workers' privacy against employer interference is an equally compelling claim. Dismissal because of private activities – intimate relationships, for instance – leads to a loss of dignity and a stigma that does not differ much from the loss suffered when the state monitors the intimate relations of citizens and punishes them for such relations. It is a mistake to think that the right to privacy against state interference is more fundamental than the right to privacy against employer interference.<sup>65</sup>

At the same time, it may be said that the right to deny the Holocaust, which has been recognised as an aspect of freedom of expression, is not a claim of great moral urgency – and in fact is of less importance if compared to a right to paid holidays that is used as an example of a non-urgent labour right.<sup>66</sup> On this point, it should be noted that the fact that the right to paid holidays is included in the UDHR does not necessarily mean that it is a human right in the sense discussed in this section. Equally, it is important to add that the importance of a right to paid holidays should not be underestimated. For people living in poverty and working very long hours with very low pay, having no holidays with pay might mean having no time-off work at all, since they would not be able to afford it. Leisure is essential for a worker, though, and being unable to rest is exhausting. As Jack Donnelly underlines in response to Cranston, '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'.<sup>67</sup> It would also be a serious denial of freedom. Work is a key means to earn one's living, and resources are inextricably linked to freedom.<sup>68</sup> Holidays without pay could lead to unfreedom for the neediest.

### *Labour Rights as Universal Claims*

The second argument, namely that labour rights are not universal because they apply only to workers and not to everyone, is again prone to criticism. That a right is

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<sup>65</sup> For analysis, see V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', (2008) 71 *Modern Law Review* 912.

<sup>66</sup> M Cranston, *What are Human Rights?*, The Bodley Head Ltd, 1973, pp 66-67.

<sup>67</sup> J Donnelly, *Universal Human Rights*, Cornell University Press, 2<sup>nd</sup> ed, 2003, p 28.

<sup>68</sup> On the links between freedom and property, see GA Cohen, 'Freedom and Money', available at <http://www.howardism.org/appendix/Cohen.pdf>. See also J Waldron, 'Homelessness and the Issue of Freedom', in *Liberal Rights – Collected Papers*, CUP, 1993, p 309.

conditional upon a particular status does not mean that it is not a human right. The corresponding duties may be conditional upon a certain status, as Tasioulas has argued.<sup>69</sup> The example of migrants' rights can illustrate this point. It is a well-established principle in human rights and refugee law, for instance, that states should not extradite foreign nationals to countries where they may be subjected to torture.<sup>70</sup> The fact that the right-holder is a migrant in this example, namely someone who resides outside her home country, and not each and every person at any time, does not make it any less of a universal human right. What it means is that the corresponding duties will come into existence when a person becomes a migrant. The same can be said about the rights of prisoners. That these rights are attached to the status of someone as an imprisoned person does not mean that they are not universal human rights. What makes them universal human rights is that if and as soon as any person is found in this position – becomes a worker, a migrant, or is imprisoned – that person will be entitled to be treated with the respect that universal human rights require.

At this point, it should be said that not all conditions in the specification of duties that correspond to human rights are acceptable. Making the prohibition of torture conditional upon citizenship status, for instance, would be inappropriate. Certain constraints on conditions may be appropriate then.<sup>71</sup> The status of someone as a worker, though, cannot be regarded as an inappropriate condition for the classification of labour rights as human rights, because it is 'not unduly remote for all human beings given the socio-historical conditions to which the existence of the right has been indexed'.<sup>72</sup> To conclude this section, it can be said that every human being's relevant rights should be protected, as soon as she has a particular status. Every human being's labour rights should be protected, as soon as she becomes a worker. It is in that sense that labour rights can be seen as universal human rights.

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<sup>69</sup> Tasioulas, above n 62, p 37.

<sup>70</sup> *Chahal v UK*, App No 22414/93, Judgment of 15 November 1996.

<sup>71</sup> Tasioulas, above, n 62, pp 38-39.

<sup>72</sup> Tasioulas, as above, p 39.

### *Labour Rights as Stringent Claims*

The third characteristic that is supposed to differentiate labour rights from human rights – the non-strictness of labour rights – can also be questioned. The argument is that the content of labour rights, such as a right to minimum pay, varies from one country to the other, and is therefore dependent on what each society can afford. It is not a stringent entitlement of an absolute minimum that all countries ought to respect. It should be noted that if this argument is correct, it would mean that other social rights, like a right to basic subsistence or housing, are not human rights for the very same reason, namely because their precise content may vary depending on a country's resources.

Yet human rights are normative standards on the analysis of this section. The fact that a particular society at a given point in time is incapable of complying with a right, such as the right to housing, because of resource-constraints, does not imply that the right is not stringent. There is a stringent normative standard towards which this society ought to strive.

In law, the way in which compliance with duties that involve resources should be assessed, has been illustrated by the UN Committee on Economic Social and Cultural Rights, which provides authoritative interpretations of the UN Covenant on Economic, Social and Cultural Rights. The Committee explained that while the fulfilment of social rights depends on the availability of resources, some of the corresponding duties, such as the prohibition of discrimination, are immediately effective. This is true with certain labour rights too, such as the prohibition of discrimination in the workplace: certain of the obligations that they impose are immediate.

Moreover, the steps towards the 'progressive realisation' of social rights, when there are resource implications, ought to be taken immediately, and be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'. Legislation might be essential in order to fulfil the relevant obligations; yet the state should also take all other appropriate measures. Finally, there is always a minimum core of social rights that the authorities ought to protect, which is described as follows in General Comment No. 3:

10. [...] a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number

of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant [...]

In assessing whether the state complies with its minimum core obligations, the Committee pays attention to resource constraints, but in order for a country to blame scarce resources for its failure to comply with the minimum core, it has to show that it has made very serious effort to address its minimum core duties.<sup>73</sup> The fact that certain labour rights may require resources and may, for this reason, face challenges in implementation when resources are scarce, is not a characteristic that necessarily distinguishes them from other human rights.

It should be added that resource constraints may also affect the application of rights that are universal on the classification that Collins puts forward. All rights can have positive and resource-demanding aspects, and if we only recognized negative aspects, our conception of rights would be impoverished and would not capture crucial instances of rights violations. This point becomes evident both in literature and in case law discussed earlier.<sup>74</sup> For example, in order to comply with the prohibition of torture, inhuman and degrading treatment, prison conditions ought to be decent. That states may blame limited resources for inhuman conditions, does not render these conditions compatible with human rights principles. This was exemplified in the recent judgment of the ECtHR *M.S.S. v Belgium and Greece*,<sup>75</sup> which involved, among other issues, the living conditions of an asylum seeker who was destitute because of lack of state support. The Court rejected the argument that economic considerations have a role to play in assessing the compatibility of state conduct with article 3 of the ECHR that prohibits inhuman and degrading treatment.<sup>76</sup>

That certain labour rights depend on resources, then, should not be seen as an argument against their classification as human rights. It can be said that when resources are limited,

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<sup>73</sup> For further discussion, see M Craven, *The International Covenant on Economic, Social and Cultural Rights*, OUP, 1995, chapter 3.

<sup>74</sup> S Holmes, C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, Norton, 1999; V Mantouvalou, in Gearty, Mantouvalou, *Debating Social Rights*, Hart, 2011, pp 111-113; S Fredman, *Human Rights Transformed*, OUP, 2008; R West, *Re-Imagining Justice*, Ashgate, 2003, chapter 3.

<sup>75</sup> *M.S.S. v Belgium and Greece*, App No 30696/09, Grand Chamber judgment of 21 January 2011.

<sup>76</sup> *M.S.S.*, as above, paras 223-224.

rights that depend on resources, such as minimum pay, impose an obligation of conduct and not always an immediate obligation of result. By accepting that they are human rights, though, what we mean is that all societies, even the poorest ones, ought to strive to achieve them.

### *Labour Rights as Timeless Entitlements*

The fourth and final objection that is used to support the claim that labour rights are not human rights is the variability over time. The argument is that ‘labour rights may evolve according to the system of production, the forms of work, and the division of labour’,<sup>77</sup> while other human rights are timeless. It should be said at this point that timelessness has been rejected in some scholarship looking at the normative core of human rights.<sup>78</sup> If we accept that it is a key feature, though, following the literature discussed in this section, we can question whether this characteristic is apposite to labour rights. To take another human right as an example, the fact that technological advancements may make the protection from invasions of privacy more complex than in the past does not mean that the right to the protection of a person’s privacy is not a timeless claim. The claim is timeless but its particular expression changes depending on external factors. Similarly, labour rights such as the right to decent working conditions and the prohibition of slavery present abstract claims, which do not vary overtime: ‘slavery is prohibited’, for instance. Some of their more specific requirements, though, will depend on the system of production and will vary over time. Some of these more specific rights might be classified not as human rights but as a separate category, that of ‘labour standards’, which will be discussed later on. Importantly, though, certain labour rights are human rights, which are viewed as abstract normative standards, and these claims are timeless.

In fact, it can be said that the character of human rights as abstract standards makes them particularly appropriate for providing the fundamentals of the employment relation. This is because labour rights that attain the status of human rights do not have to be revised when the system of production changes. They entail abstract principles that are always applicable, irrespective of the historic circumstances. It is this abstract

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<sup>77</sup> Collins, above n 58, pp 142-143.

<sup>78</sup> See Tasioulas, above n 62, p 35.

normative standard that is timeless, and against which the actual working conditions in different periods of time should be assessed.

Theoretical literature that questions the nature of labour rights as human rights seems to have overstated the differences between the two groups of claims. The answer to the question whether labour rights are human rights is probably more complex and subtle.

#### *A case study*

What emerges from the above is that certain labour rights are not necessarily and by definition different in nature to other human rights. It can, therefore, be said that some labour rights are human rights on the normative analysis, while there are others that involve the detailed regulation of the employment relation, and these can be called 'labour standards'.<sup>79</sup> What is the relationship between labour rights as human rights and other more detailed labour standards? These are not mutually exclusive and can complement each other, as a recent example from the ILO exemplifies.

On the 100<sup>th</sup> session of the International Labour Conference, in June 2011, the ILO adopted Convention No 189 and supplementing Recommendation No 201 regulating the terms and conditions of work for domestic workers.<sup>80</sup> In regulating the work of domestic workers, the Convention adopts a human rights approach. Already from its Preamble it makes reference to numerous international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 3(1) states that Member States 'shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in this Convention' and Article 3(2) highlights the importance of freedom of association, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination. It also places emphasis on private life rights of domestic workers (article 6) and the potential for abuse in the privacy of the employers' household (article 5). These provisions reflect the special challenges of the public/private divide that characterise the domestic labour relation. The Convention expresses desirability for state intervention in a location that is at the time

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<sup>79</sup> The ILO uses the term labour standards.

<sup>80</sup> This section draws on E Albin, V Mantouvalou, 'The ILO Convention of Domestic Workers: From the Shadows to the Light', (2012) *Industrial Law Journal* (forthcoming). The piece contains detailed analysis of the new Convention.

the domestic worker's workplace, but also the employers' and the workers' home (when they are live-in domestic workers).

The human rights provisions set in the ILO document highlight the universal entitlements of these workers, who are often excluded from protective labour legislation. At the same time, both the Convention and the Recommendation contain a list of detailed labour standards, which aim at addressing the special challenges faced by workers in this sector of the labour market. Article 10 of the Convention and paragraphs 8-13 of the Recommendation address the issue of work time, which is one of the defining elements of domestic workers' sectoral disadvantage,<sup>81</sup> resulting from their work within the household establishment and the personal relationship they have with those receiving their care. The provisions aim to limit the constant availability of workers to their employers and better manage their work hours. Another example is Article 13 of the Convention that addresses health and safety regulations noting that these should be taken, 'with due regard to the specific characteristics of domestic work'. This will ultimately require further development of the hazards that domestic workers face. A further example of a more detailed labour standard is paragraph 14 of the Recommendation aimed at dealing with the consequences of living in and with deductions of accommodation and food.

The methodology of the ILO in the Domestic Workers' Convention that ties a human rights approach in the regulation of domestic labour to concrete principles that target the problems of a specific sector exemplifies how labour rights as human rights can be intertwined with labour standards in law. The human rights approach recognises the universality, and the moral weight and urgency of domestic workers' claims. The labour standards (or sectoral) approach offers a focus on the particular challenges that workers in a specific sector face, making the general human rights principles more subtle and precise.

### *Implications*

The position that certain labour rights are human rights seems to be the one that has primacy, and also has implications for the future development of the law and activists'

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<sup>81</sup> On the term 'sectoral disadvantage', see E. Albin, *Sectoral Disadvantage: The Case of Workers in the British Hospitality Sector*, Oxford, DPhil dissertation, 2010, introduction and chapter 1.

strategies in both previous approaches: the positivist and the instrumental. Some implications will be discussed in this section, though there is much scope for further analysis. First, that certain labour rights are human rights means that if courts do not fare well in their protection, or if constitutions and human rights treaties do not incorporate them, the law should change in order to comply with human rights as normative standards. Legal change should be the aim of supporters of workers' interests.

Second, human rights are stringent entitlements, which resist trade-offs.<sup>82</sup> A key debate in labour law revolves around its purpose as a body of rules that promotes workers' dignity, on the one hand, or economic efficiency, on the other. Some scholars suggest that the competing interests are irreconcilable, while others argue that protection of workers leads to a more efficient labour market.<sup>83</sup> By accepting that certain labour rights are human rights, we endorse the view that labour law is governed by various human rights principles that by definition are immune from arguments of economic efficiency. Treating workers below a basic level of protection because it is economically advantageous is inconsistent with the realisation that labour rights are human rights. The recognition that certain labour rights are as stringent as other individual rights necessarily implies that any trade-offs with economic efficiency goals ought to be scrutinised very strictly.

Third, the position that some labour rights are human rights also becomes important when considering the personal scope of labour rights. Looking at migrant workers that are unlawfully employed in case law from various jurisdictions, courts have ruled that when someone is an irregular migrant, the employment contract is unlawful. Labour rights are tied to citizenship or regular residence, on this view, so anyone that lacks this status is not a right-holder.<sup>84</sup> If some labour rights are viewed as human rights, this position is put into question. The Inter-American Court of Human Rights addressed the issue of the rights of undocumented migrants in a landmark Advisory Opinion, which examined rights, such as the prohibition of forced and child labour, fair working conditions, and freedom of association. It stated that:

‘The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their

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<sup>82</sup> J Griffin, *On Human Rights*, OUP, 2008, p 76.

<sup>83</sup> See, for instance, S Deakin and F Wilkinson, ‘Rights v Efficiency? The Economic Case for Transnational Labour Standards’ (1994) 23 *Industrial Law Journal* 289.

<sup>84</sup> See, for instance, the notorious *Hoffman Plastic Compounds v NLRB*, 535 US 137 (2002).

migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>85</sup>

Fourth, the endorsement of the view that certain labour rights are human rights can have implications when considering the question of the waiver of rights, which is critical in labour law.<sup>86</sup> A key concern for this field of study is the inequality of bargaining power between the employer and the worker.<sup>87</sup> As a result of this inequality of power, the employment contract is most of the times subject to little negotiation. It is drafted by the employer, and given to the worker on a ‘take it or leave it’ basis.<sup>88</sup> This contract may contain terms that are unfair, to which the worker would not have agreed had it not been for the power imbalance and the economic dependency. For example, it may include provisions that exclude important rights involving working conditions, such as the right to privacy in the workplace. By recognising that certain labour rights are human rights, agreement to waive them must be closely scrutinised.

### 3. Conclusion

This article examined three approaches to the question whether labour rights are human rights, which are usually not distinguished in literature. The underlying belief is that even though all three approaches can be valuable, it is important to realise that they are separate. The positivistic approach identifies the key legal documents and rights as protected therein, but does not have the tools to address discrepancies and problems in interpretation. The instrumental approach – no doubt a very important one – examines the strategies that those that are committed to workers’ interests can use with success, as well as the possible drawbacks in pursuing each of these strategies. A possible shortcoming of it is that its proponents are sometimes disappointed when courts or other governmental or non-governmental organisations fail in the protection of labour rights as human rights, and this leads them to a rejection of human rights as fundamental

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<sup>85</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, Inter-AmCtHR (Ser A) No 18 (2003).

<sup>86</sup> See G Morris, ‘Fundamental Rights: Exclusion by Agreement?’, (2001) 30 *Industrial Law Journal* 49.

<sup>87</sup> P Davies and M Freedland, *Kahn-Freund’s Labour and the Law*, Stevens, 1983, p 18.

<sup>88</sup> See the discussion in H Collins, *Employment Law*, 2<sup>nd</sup> ed, OUP, 2010, pp 6-7.

principles altogether. Importantly, though, failures in the practical achievements of judicial bodies, as well as the human and labour rights movements, are not determinative. This is because human rights are, primarily and above all, normative standards, and certain labour rights, as it was argued in the third section, are human rights. Certain labour rights are compelling, stringent, universal and timeless entitlements, as much as rights such as the prohibition of torture or the right to privacy. If the law falls short of their protection, the response should be that the law ought to change. The recognition that certain labour rights are human rights, to conclude, does not imply that human rights exhaust labour law as a field of study. What it implies is that some labour rights are stringent normative entitlements, and this should be reflected in law.