Introduction

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Is there a human right to work? If so, is it a universal right that everyone should have or is it only a right of citizens within and against a particular state? There is also disagreement about what duties the right entails. Does it encompass a positive right to obtain the job of one's choice or a negative right not to be forced to work? Is exploitative work compatible with it? Against whom is the right held: an employer, the state, trade unions? And what types of conflicts does it generate with other rights? This book investigates questions such as these in light of both law and philosophy. Whether there is a right to work at a moral level is to a certain degree a different enquiry from whether there is a right to work in various legal orders, and particularly how it is and how it should be protected there: through legislation, constitutions, international treaties or soft law. But the legal and philosophical analyses inform each other. By combining legal and philosophical perspectives, this book explores both the nature of the right and its normative implications.

I Why the Right to Work?

Most people will agree that work is a crucial good. It is valuable because productive labour generates goods that each person needs for him or herself, as well as for those for whom he or she cares: 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 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, self-esteem, as well as the esteem of the others. Through work people also develop social relationships. The possibility of developing such relations, then, is another reason why most people value work. Work brings both material and non-material benefits.

Yet two key paradoxes emerge when thinking about a right to work. First, work, unlike other basic goods such as housing or health care, is not something that everyone desires to have. Many people would rather not work, in order to have more time for other activities that they value, such as spending time with their friends, attending artistic events, playing sports and other such things. What kind of right is this, if many people do not want to have it? Is there a hidden agenda, namely a duty to work in disguise, because of the need for productive labour in a market economy?[1] The second paradox involves the idea of full employment. The example of former communist regimes shows that it is unsustainable to provide jobs for everyone because this system would be very inefficient. So, many would think that we should not talk about a right to work at all. 'It would be a splendid thing for everyone to have a job',[2] but there can be no such human right. To say that there is such a right would be to 'remove whatever follows from the region of what is immediately and unequivocally compelling into that of distant aspiration'.[3]

Despite these paradoxes, the Universal Declaration of Human Rights of 1948 (UDHR) placed the right to work and other social rights, such as housing and education, next to civil and political rights, like the right to life and freedom of expression. Article 23(1) of the UDHR states: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. Later on, though, the international community and some national legal orders decided to separate the two groups of entitlements. The UN included civil and political rights in the International Covenant on Civil and Political Rights (ICCPR, 1966), and economic and social rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). The Council of Europe and the Organization of American States adopted a similar approach, drawing a sharp dividing line between categories of human rights. The right to work was classified as a social right by the international community.

The classification of the right to work as a social right had implications both for its symbolism and for its legal protection. Social rights were viewed as different in nature from civil and political rights. They were typically presented as positive, resource-demanding and vague, and these supposed features were said to distinguish them from civil and political rights. Today it is well established that social rights have much more in common with civil and political rights than was once suggested, and that there is no sharp division between the two groups of entitlements.[4] Social rights were also typically presented as rights of secondary importance, which is something that the wording of the Treaties that protect them

[1] 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, 356.

[2] Here I am paraphrasing Maurice Cranston, *Human Rights To-day* (London, Ampersand, 1962) 44.

[3] ibid, 45.

[4] See V Mantouvalou, 'In Support of Legalisation' in C Gearty and V Mantouvalou, *Debating Social Rights* (Oxford, Hart Publishing, 2010); B Hepple (ed), *Social and Labour Rights in a Global Context* (Cambridge, Cambridge University Press, 2002); S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press, 2008).

reflects.[5] Most importantly, the monitoring machinery of social rights has traditionally been weaker than that of civil and political rights which are generally enforceable by individual petition and justiciable in courts. Against this background, the right to work was insufficiently analysed by monitoring bodies.

A few decades ago, leading law and philosophy scholars started to examine the human right to work. More than 30 years ago, Bob Hepple published an essay on the legal right to work, which explored its meaning as a right against the state, an employer and trade unions in English law.[6] 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 it is a social right, which is and must be treated differently from civil and political rights,[7] and Jon Elster critically examined some possible justifications of the right.[8] In recent years, efforts to develop a justification and explore the content of the right to work have been relatively scarce.[9] For this reason, the analysis of the right to work that this book attempts is a genuine intellectual enquiry. Like other areas of human rights, which are frequently invoked by activists and others in everyday discourse, but infrequently analysed in depth, the right to work needs to be investigated.

But, in addition to the intellectual merit of the endeavour, it is particularly timely to analyse the right to work today for strategic reasons. Following 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. At times of high levels of unemployment in Europe and elsewhere, and 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 purpose of this book is to reclaim the right to work and, hopefully, develop a research agenda for the future.

II Why Legal and Philosophical Perspectives?

I have argued elsewhere that there are three approaches to the question whether labour rights are human rights, which are sometimes conflated in the literature: a positivistic approach, an instrumental approach and a normative approach.[10] This division of perspectives captures the analysis of the right to work, as well as other

[5] cp Art 2(1) ICCPR with Art 2(1) ICESCR.

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

[7] J Nickel, 'Is there a Human Right to Employment?' (1978–79) X *Philosophical* Forum149.

[8] 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.

[9] With some notable exceptions: see particularly G Mundlak, 'The Right to Work – The Value of Work', above n 1; 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 & Urban Policy* 8.

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

labour rights. On the view of the positivists, the right to work is a human right if it is protected as such in human rights documents. On the view of the instrumentalists, the right to work is a human right if courts or civil society organisations are successful in using it in order to promote their goals. Finally, on the normative approach, the right to work is a human right if there is a sufficiently strong justification for it to be treated as such.

The positivistic, the instrumental and the normative approach to the question whether the right to work and other labour rights are human rights, are all valuable. The positivistic approach not only serves as a starting point in the analysis of the legal protection of human rights, it may also reflect democratic legitimacy, if a democratically elected body has decided to include the right to work in a legal document. The instrumental analysis reflects a neo-Marxist approach to human rights,[11] which seeks to utilise legal tools in order to promote aims that its proponents deem valuable. Finally, the normative analysis is the one that brings the legal and philosophical discussions together most. This is because it assesses the theoretical justification of the right to work and has implications for its legal protection.

The view taken in this book, which explores legal and philosophical perspectives next to each other, is that these should both be assessed separately, but above all should inform each other. It rests on the belief that lawyers and philosophers exploring the questions have shared concerns. It is based on the idea that if there is a moral right to work, this should inform what the law provides and how it should be interpreted.

The range of jurisdictions covered in the book is broad – from the Council of Europe and the European Union (Freedland and Kountouris, Mantouvalou, Mundlak, O'Cinneide, Rittich); to the United States (Mantouvalou, Stone); Japan (Arita); Australia (Howe); the United Kingdom (Bogg, Collins, Howe, Mantouvalou); the international human rights system (Albin, Arita, Collins, Mantouvalou, Nickel, O'Cinneide); as well as other international law regimes (Mundlak, Rittich). Even though several legal orders are covered, the book is by no means exhaustive. It contains certain common law legal orders and certain civil law legal orders; certain legally binding documents (European Convention on Human Rights, European Social Charter, American Convention on Human Rights, International Covenant on Economic, Social and Cultural Rights) and certain soft law systems (European Union Open Method of Co-Ordination). There is no chapter that compares the different jurisdictions, so the readers can draw their own conclusions. What emerges, though, is that the right to work has a legal effect both when it is explicitly mentioned in a legal document, and when not explicitly mentioned, through interpretation of other human rights.

The range of theoretical analyses is also broad, reaching from ancient Greek philosophy (Wiggins, Penner); to liberal political theory (Albin, Bogg, Nickel,

[11] On the Marxist approach towards legal rights, see H Collins, *Marxism and Law* (Oxford, Oxford University Press, 1982) 142 ff.

Paz-Fuchs, Penner, Stone); Marx (Collins, Mantouvalou); critical theory (Albin, Rittich); deliberative democratic theory (Mundlak); labour and industrial relations theory (Arita, Stone). What is common in all the analyses, both those that explicitly rely on philosophical texts and those that do not do so, is that they are normative throughout. The authors develop normative concerns that are, in most contributions, used to assess the position of the law.

III The Value of Work – The Right to Work

The value of work cannot be underestimated, and David Wiggins explores the ethical meaning of work in chapter one, 'Work, its Moral Meaning or Import'. He begins from Aristotle's account of the conceptual connection between human happiness, virtue and ergon. Encouraged by the etymology and semantic affinities of the Greek word traditionally translated as 'function', he makes the case for understanding ergon as 'work', and aligns the Aristotelian position that results with the thoughts about work that he finds in some subsequent philosophers. Yet he leaves open the question whether there is a *right* to work.

A right exists when an aspect of the individual's circumstances is such that it imposes duties on others. A possible justification for the right to work is explored in the contribution of Hugh Collins. Having addressed the challenges faced by the proponents of the right to work – challenges such as imprecision and impracticability of the right and the duties that it imposes – he turns to the value of self-realisation, examines the meaning of it and explores what aspects of the right to work it supports (chapter two). Following this, my analysis rests on the belief that if the right to work is to be a valuable addition to a list of human rights, it must be viewed as a right to non-exploitative work. I take the example of the right to work of undocumented migrants, and develop a conception of exploitation that captures their situation, to explore whether human rights law tolerates their treatment (chapter three). An alternative justification of the right to work, based on equality and dignity, is offered by Einat Albin who investigates the right to work in the United Nations Convention on the Rights of Persons with Disabilities. She explores the question whether the approach of this Convention to the right to work should also be adopted in other human rights documents, and grounds her analysis on critical disability studies and the theory of human capabilities (chapter four). James Penner looks at how valuable social activity, including work, is remunerated. He draws on Arendt's distinction between labour, work and action, which he considers against the background of Western societies, and suggests that the way that we think about remuneration reflects on the way that we think about work itself (chapter five).

The right to work is protected in international human rights documents, such as the ICESCR, and the European Social Charter (ESC) of the Council of Europe. By way of an example, Article 6(1) ICESCR provides:

> 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.

The monitoring bodies of the ICESCR and the ESC, namely the Committee of Economic, Social and Cultural Rights and the European Committee of Social Rights respectively, have their own, detailed jurisprudence, which sheds light on components of the right to work. Colm O'Cinneide presents and critically analyses these rulings in his contribution, including General Comment No 18 on 'The Right to Work' of the Committee on Economic, Social and Cultural Rights. He emphasises that these materials are 'highly authoritative' and play a role also in the interpretation of other documents, such as the European Convention on Human Rights (chapter six).

Many of the authors in this volume admit that different components of the right to work may be in tension with each other, an issue that is not always sufficiently acknowledged. Tensions and conflicts between rights or components of the same right are not unique in the right to work. In the context of the right to work, the matter is of fundamental importance because it highlights, among other issues, conflicts that may arise *between* workers or between the workforce and the unemployed. This is particularly discussed in the piece by Mark Freedland and Nicola Kountouris, who explore the right to work at the level of the European Union. They stress that international human rights law does not always appreciate conflicts between the right to work and rights to decent working conditions. The tensions that they analyse are particularly complex and acute, because they sometimes involve cross-border situations of the kind that we find at EU level. The authors urge us to think carefully about the application of aspects of the right beyond its declaratory framings, in the 'real world' (chapter seven).

Revisiting the right to work almost 40 years after he published his seminal essay, James Nickel diagnoses and explains that the right to work viewed as a right to access employment, has failed. He expresses scepticism both about the theoretical justification of the right and its legal protection in the ICESCR, and considers the question whether, as an alternative, we should view 'work' as a goal, rather than a legal right. Yet Nickel explains that his analysis of the right to work should not be taken as a rejection of the whole category of social rights (chapter eight). Further sceptical reflections are offered by Alan Bogg who does not question the nature of the right to work as a moral and legal right. He analyses duties of governments to promote decent work, which are not grounded on the right to work, but on the general duties of governments to promote human well-being. Bogg raises concerns about the effect of the legal right to work on workers' solidarity and distributive justice. Yet his main scepticism revolves around the role of the judiciary, particularly given common law approaches to the right to work in the United Kingdom that have, on his analysis, failed to address the complexities that arise (chapter nine).

Rights are correlative to duties. Human rights law, which traditionally imposed obligations on states, has over the years developed so as to impose direct or indi-

rect obligations on private individuals too.[12] All chapters in the volume that examine the right to work reflect on the duties that governments, employers, trade unions and others may have. Yet there is another way in which the right to work brings about questions of duties, and this has to do with welfare-to-work programmes. In modern societies, welfare support is sometimes made conditional on a duty to accept suitable work. As Amir Paz-Fuchs explains, the right to work becomes a duty to work in this way. The unemployed have a duty to work in order to be entitled to welfare support. Is this justified on the basis of human rights theory? In addressing this question, Paz-Fuchs explores the theoretical conflation of rights and duties. He then turns to justifications of the right to work (citizenship and individual well-being), and finds that these do not necessarily ground a legal duty to work (chapter ten). The duty to work is also touched upon in several other chapters of the book on national law and on theory.

Some national legal orders protect the right to work explicitly in their constitutions (France and Japan, for instance). The interpretation of the right to work by French courts is developed by Sophie Robin-Olivier, who notes that the constitutional right to work is frequently invoked in French courts, and has an effect on judicial decision-making. Her analysis of French law presents the impact of the constitutional provision, the delicate balance of powers (between the judiciary and legislature in particular) and the conflicts of the right with the right to free enterprise. It examines both the challenges and limitations of the provision (chapter eleven). The Constitution of Japan also contains explicit recognition of the right to work. Against this background, there has been considerable academic debate on the meaning of the constitutional provision, which we find in the chapter by Kenji Arita. Arita first presents and analyses right to work theories in Japan, before comparing these approaches with theories on the right to work in other national and international legal orders (chapter twelve).

The United Kingdom, with a common law tradition and no written constitution or Bill of Rights, does not contain explicit protection of the human right to work. In the chapter on the United Kingdom, Hugh Collins revisits the questions asked by Bob Hepple in 1981 and traces elements of the right to work in both transnational sources of labour law that are binding on the United Kingdom (the European Convention on Human Rights that has been incorporated in national law through the UK Human Rights Act, the EU Charter of Fundamental Rights and other areas of EU law), and goes on to examine several areas of national law, such as hiring decisions and termination of employment, to assess whether they are compatible with the right to work (chapter thirteen).

If a right to work were explicitly included in the European Convention on Human Rights, the European Court of Human Rights might rule that a right to reinstatement in cases of unfair dismissal would be an essential component of it, for it would provide an effective remedy for the person whose right has been violated. The remedy of reinstatement would make the right to work 'practical and

[12] I use the terms 'duties' and 'obligations' interchangeably.

effective'. In his 1981 essay, Bob Hepple argued that the right to work must encompass a right to be reinstated in cases of unfair dismissal. Joanna Howe builds on this aspect of Hepple's analysis, and assesses the protection of the right to work in Australia and in the United Kingdom, in light of how often employees return to their jobs. She finds that the remedy is very rarely used nowadays, explores the reasons why this is happening and compares the current situation with the past, before suggesting ways to improve the use of this remedy in the future (chapter fourteen).

The US approach to the right to work is, famously, the opposite from other jurisdictions. Right-to-work laws are used there to outlaw 'closed shop' arrangements, namely agreements between an employer and one or more unions, according to which an individual needs to become a member of a particular union or unions, in order to obtain or retain his or her job. Yet the contribution from the United States by Katherine Stone leaves aside this 'misleadingly termed' right to work, and takes a different line of enquiry, exploring visions of the right to work in US industrial relations theory and policymaking. Building on these insights, Stone develops a normative proposal for the right to work today, as a right to livelihood security, which should encompass a right to be supported during transitions (chapter fifteen).

The final two chapters examine the right to work against the background of globalisation, on the one hand, and economic crises, on the other. Having presented established territory on the right to work and its interpretation, Guy Mundlak explores the extent to which process-based, deliberative, approaches to constitutional review are appropriate in dealing with it at national level. Turning to the globalised legal order and the challenges that it sets to the right to work – challenges such as the distribution of jobs – he suggests that cosmopolitan approaches are needed, and process-based solutions are the way forward in order to maintain the right to work on the political agenda in the context of globalisation (chapter sixteen). Kerry Rittich, finally, views the right to work as the end product of changing processes and circumstances. She places it in the post-war social contract to assess how it has been shaped, explores the effects on it of ideologies and policies of labour market flexibility, as well as the recent financial crises and examines the challenges ahead. In doing so she stresses that the right to work cannot do all the work that progressive scholars may expect it to do, when confronted with today's context of international economic and financial institutions, and emphasises that consideration of the links between the law, the power of the market and the dynamics of the labour market is also essential (chapter seventeen).

This volume does not exhaust the potential for an analysis of the right to work, nor does it conclude the debates around it. At the same time, the analysis of the right to work or rights at work does not exhaust the domain of labour law, just as human rights and the duties that they impose do not exhaust the domain of morality.[13] An inflation of rights can harm the ideals to which their supporters are

[13] J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986) 194 ff.

committed.[14] Yet human rights, including the right to work, incorporate moral and legal claims of high priority, and the purpose of this book is to highlight areas of importance and themes that need to be further explored. There is no doubt, for instance, that there are legal orders that are not discussed here, which can offer further insights on the interpretation of the right and the institutions that are appropriate for its monitoring. Further theoretical analysis of the justification and content of the right is also needed. Specific areas, like domestic work or the right to work of asylum seekers, are particularly challenging. The tensions between components of the right need to be further carefully analysed. This book seeks to underline areas of importance and suggest further avenues for research.

[14] O O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427.