
1. Perspectives on labour and human rights

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1 INTRODUCTION

Virginia Leary once observed a curious phenomenon: that labour law and human rights law are on parallel tracks that rarely cross.¹ This phenomenon is unexpected because some of the most obvious violations of individuals' human rights, for instance, slave labour or child labour, occur when they are working. But until recently many human rights scholars veered off and focused on civil and political rights, all but ignoring rights that are violated when people are working. It is as if individuals, when they are viewed as workers, are compartmentalized, sealed off and cast to the side in human rights scholarship. This may result from the fact that some see labour law as governing work relationships and fail to consider the human rights dimensions of the employment or work arrangement. It may also result from the fact that those human rights scholars who focus on civil and political rights tend to see the State as the actor who violates the human rights of individuals, either directly or by failing to enforce the law or remedy violations. This is a very public law focus, and most employment and work relations are the subject of private law.

Except when considering the most blatant situations (such as slavery), human rights scholars typically overlook how human rights guarantees affect people at work.² This lack of consideration may be related to the fact that most employment and work relationships flow from an agreement by the worker to perform work in return for compensation. As such it is an economic transaction, and if it is to be regulated, many would consider that the domain of labour law regulation. Moreover, many theories on the foundation or function of labour law are based on this premise, positioning it against the background of contract law, property rights, corporate law, etc.³ Having this mental construct of a binary categorization (human rights law or labour law) often blinds the scholar from considering whether the worker in an economic system somehow has his or her human rights infringed, for instance, by the employer's offering female workers terms and conditions of work that are less favourable than

¹ V. Leary, 'The Paradox of Workers' Rights as Human Rights' in L. Compa and S. Diamond (eds), *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press 2003) 22.

² For a notable exception, see P. Alston (ed.), *Labour Rights as Human Rights* (OUP 2005).

³ Cf G. Davidov, *A Purposive Approach to Labour Law* (OUP 2016); S. Fredman, 'The Ideology of New Labour Law' in C. Barnard, S. Deakin, and G.S. Morris (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Hart Publishers 2004), in which she points out that (in the UK) the Third Way ideology is easily corrupted due to a focus on neoliberal concepts, which kept being questioned by Sir Bob Hepple by the language of human and social rights (see at 39).

those offered to men with similar qualifications.⁴ Because an economic transaction is involved in most work situations, there also seems to be an implicit acceptance of the notion that a person can waive his/her human rights in return for compensation despite the fact that the persons most likely to do so are those who are economically vulnerable. This position is underlined by the contributions of Valerio De Stefano and Antonio Aloisi, who discuss the position of platform workers, and of Christina Hiesl and Jaewook Nahm, who discuss the phenomenon of indirect employment in the shipbuilding industry in Korea.

If labour law and human rights law were on parallel tracks that rarely crossed, this was due not only to the trajectory of human rights scholars. Until the 1990s, labour law scholars rarely focused on human rights. This changed, in part because of the anti-globalization demonstrations of the 1990s. This anti-globalization movement revealed the widely held perception that free trade was not fair trade because companies sourcing goods from low wage countries were not only benefiting from low wages but often they also benefited from workers not having certain rights or not being able to have those rights enforced. As Judy Fudge has noted, this led to a 'renewed emphasis on social rights ... as part of the movement to recognize the social dimension of globalization'.⁵

In 1998, the International Labour Conference adopted a Declaration on Fundamental Principles and Rights at Work. While the four principles listed in the 1998 Declaration on their face state human rights principles, the term 'human rights' does not appear in the 1998 Declaration. In June 2000, the UN Secretary General's office issued the UN Global Compact with the aim of having businesses voluntarily commit to align their operations with human rights principles. The first principle expressly states that 'businesses should support and respect the protection of internationally proclaimed human rights'.⁶ Yet, in a section simply headed 'Labour', which contains the exact same four principles as the 1998 International Labour Organization (ILO) Declaration, the term 'human rights' is not used, thus giving the impression that these labour principles may express labour rights but that they do not express human rights. However, in June 2011, the UN Human Rights Council adopted Guiding Principles on Business and Human Rights (UNGP). In calling on business to 'respect' human rights, in the context of due diligence,⁷ the UNGP did state what must be deemed as being included within the meaning of human rights. Included in the list were the four principles from the ILO's 1998 Declaration and the eight linked ILO core conventions. Thus, as of June 2011, workers' rights, or at least some part of the corpus of workers' rights, were recognized as human rights. Using Virginia Leary's analogy, the parallel tracks of labour law and human rights law had now crossed.

⁴ According to OECD Statistics on the gender wage gap, on average women earn 14 percentage points less than men in the OECD countries. Among the countries with the lowest wage gaps included in this *Research Handbook* we find Italy (5.7 percentage points) and among the biggest are Japan (24.5 percentage points) and Korea (34.6 percentage points). Cf <https://data.oecd.org/earnwage/gender-wage-gap.htm> (accessed on 2 November 2018).

⁵ J. Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29(1) *Comparative Labor Law and Policy Journal* 29–66, at 30.

⁶ This point is elaborated in Chapter 21 by Janice Bellace in this volume.

⁷ Nicolas Bueno discusses the due diligence requirement in Chapter 22 in this volume.

2 DETERMINING THE CONTENT OF HUMAN RIGHTS AT WORK

While the parallel tracks of labour law and human rights law crossed in 2011, there is still much confusion about what exactly are the human rights of persons when they are viewed as workers.

Since 1998, coincident with the emerging notion that somehow labour law is in decline,⁸ there has been a noted uptick in labour law scholars considering how human rights law might apply to work.⁹ Academic commentary on this question is often limited to one country, or one region, such as Europe.¹⁰ Yet businesses with their global supply chains operate in many countries. Now obliged to respect workers' human rights, managers search for some agreed upon list of human rights that apply at work, or a standardization of the meaning of workers' human rights.¹¹ In this volume we have aimed to consider the perspectives of scholars from around the world regarding this question. Their contributions reveal a diversity of opinion.

Age does not seem to make a difference. One might think that younger scholars, having been raised in a post-1945 world where people have human rights and people can assert these rights in court, would accept that workers' rights are human rights. The more senior scholars, accustomed to thinking in labour law terms, might be more cautious about this. But this does not seem to be the case. While younger scholars, such as Valerio De Stefano and Attila Kun, appear to take it as a given that labour rights are human rights, their views vary little from more senior scholars, such as Matthew Finkin and Manfred Weiss, who sometimes quibble at the distinction. Generally, national perspectives and specific issues prominent at the moment in a given country have greater influence on the thinking of scholars.

Although there is a diversity of opinion, some generalizations can be made. One overriding difference relates to constitutional guarantees contained in a national constitution that directly or indirectly relate to labour. Where these exist, the label 'human rights' appears not to be used;¹² rather, 'fundamental rights' is the term more often used. Manfred Weiss' chapter for example, is titled 'Fundamental rights and German labor law'. In Japan, constitutional rights related to labour are labelled as fundamental freedoms and social rights, not human rights.¹³ When asked about human

⁸ The various sources of distress are canvassed in *The Idea of Labour Law* (G. Davidov and B. Langille (eds) OUP 2011) and commented on by M. Finkin, 'Review Essay: The Death and Transfiguration of Labor Law' (2011) 33 *Comparative Labour Law and Policy Journal* 171.

⁹ See e.g. C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010).

¹⁰ See e.g. T. Novitz and D. Mangon (eds), *The Role of Labour Standards in Development: From Theory to Sustainable Practice?* (OUP 2011); and A.C.L. Davies, *Perspectives on Labour Law* (2nd edition, CUP 2009).

¹¹ See e.g. L. Fransen, *Corporate Social Responsibility and Global Labor Standards – Firms and Activists in the Making of Private Regulation* (Routledge 2012), in which Fransen's research illustrates that there is a convergence of labour standards.

¹² The South African Constitution seems to be an exception to this. See Chapter 10 by Darcy du Toit and Mariam Sirkhotte.

¹³ See Chapter 5 by Takashi Yonezu.

rights at work, scholars in these countries immediately respond that yes, of course, these ‘fundamental’ rights exist. Almost reflexively, they use the term that appears in the national constitution. An exemplar of this is Edoardo Ales’ contribution about the right to work as a ‘foundational value’ of the Italian Constitution and of which the nature is defined as a freedom right, social right, and workers’ right, underpinned by the principle of ‘equal social dignity’. Similarly, Filip Dorssemont’s reference to ‘labour rights’ does equate them with fundamental rights.

A major difference occurs between civil law and common law countries. In the former, courts may apply fundamental rights proclaimed in the constitution to the private employment relationship through the technique of horizontal direct effect. The underlying notion that judges articulate is that if a value is fundamental in the society, then it must apply in a private employment relationship unless there is strong evidence to the contrary.¹⁴ This technique features prominently in the chapter by Manfred Weiss on German law. Yet this technique of horizontal direct effect appears to be virtually unknown in common law countries.¹⁵

Another difference is whether national courts look to sources outside their jurisdiction for guidance, such as the rulings of supranational bodies, for example, the European Court of Human Rights, or instruments of international organizations, for example, the UN or the ILO. In Germany, for example, the Federal Constitutional Court ruled that the Constitution is to be interpreted in a manner that is consonant with international law, consequently, the influence of international human rights and social rights have been of significant influence on German labour law. Another example can be found in the Inter-American Court, which relies for certain interpretations of freedom of association on the so-called ‘soft law jurisprudence’¹⁶ of the supervisory bodies of the ILO.¹⁷ The impact of regional and international bodies can be significant, especially when the supranational body or court recognizes a human right as applying in a work situation where heretofore national law had not recognized this right, or whether it has a broader interpretation of a right such as privacy or freedom of association.¹⁸

¹⁴ This approach has also been used by the Court of Justice of the European Union. See e.g. M. de Mol, ‘The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?’ (2011) *Maastricht Journal of European and Comparative Law*.

¹⁵ For a discussion, see J. Hendy, ‘Procedure in the European Court of Human Rights (with a Particular Focus on Cases Concerning Trade Union Rights)’ in F. Dorssemont, K. Lörcher, and I. Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart 2013).

¹⁶ Soft law jurisprudence is a term introduced by Claire La Hovary as an indication of how the conclusions of the Committee of Experts and the Committee on the Freedom of Association are perceived in practice: C. La Hovary, ‘The ILO’s Supervisory Bodies’ “Soft Law Jurisprudence” in A. Blackett and A. Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 316–28.

¹⁷ See Chapter 18 by Miguel Canessa Montejo.

¹⁸ An example, not further discussed in this book, would be Canada. In *Saskatchewan Federation of Labour v Saskatchewan*, [2015] 1 SCR 245, a group of unions argued that a statute enacted by the provincial government limiting strikes in essential services infringed Canada’s Charter of Rights and Freedoms guarantees of freedom of association. In deciding that the right

It should be noted, however, that labelling labour rights as human rights can be used for another reason. In transition economies, where private enterprise and free market mechanisms are being heralded, emphasis is often placed on economic rights usually to the detriment of workers. To resist this, some label labour rights as human rights to establish a countervailing weight against the economic rights of employers. The chapter by Nikita Lyutov and Elena Gerasimova delineates this tension between economic and labour rights in Russia.

In view of the above, the question becomes how the concept of ‘human rights’ can advance workers’ rights where the national constitution does not proclaim rights applicable to labour, and/or where constitutional rights have not been applied to labour.¹⁹

3 THE POST WORLD WAR II EMERGENCE OF HUMAN RIGHTS TERMINOLOGY

Human rights as a term was virtually unknown in the first part of the twentieth century. Events during the fascist period and during World War II led to the realization that conditions under which workers labour cannot be viewed in isolation from the overall societal treatment of individuals. This view, set forth in the ILO’s 1944 Declaration of Philadelphia, anticipated by four years the orientation of the Universal Declaration of Human Rights (UDHR). Adopted on 10 December 1948, the UDHR, which took the position that individual persons have rights that transcend the power of states over them, was the first major international document to use the term ‘human rights’. This may be why many legal scholars do not look for human rights statements from before 1948. But, as Alan Supiot points out, the ILO’s 1944 Declaration of Philadelphia must be deemed a human rights document even if it did not expressly use that term.²⁰ Moreover, the ILO acted on the conviction that all human beings possess certain rights, and that these rights apply at work even before the UDHR was adopted. For instance, the first of the major human rights conventions of the ILO, Convention No. 87, Freedom of Association, was drafted in 1947 and adopted in July 1948. Even more striking, Convention No. 29, Forced Labour, dates back to 1930. Although the guarantee in Convention No. 29 is timeless and is a profound expression of the dignity and autonomy of the person,²¹ those who adopted it did not consciously view it as a

to strike is an integral part of collective bargaining, and noting Canada’s international obligations, the Court considered the views of international bodies and of scholars on the meaning of freedom of association in international instruments. See more generally on the effect of, for example, the Inter-American Court, Chapter 18 by Miguel Canessa Montejo and Chapter 17 by Filip Dorsemont about the European Convention on Human Rights.

¹⁹ See e.g. Chapter 8 by Amanda Reilly and Jonathan Barrett.

²⁰ Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Market* (Verso 2012, translation Saskia Brown).

²¹ Article 2(1) defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. Article 1(1) stated that every ratifying member state ‘undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period’.

'human rights' convention but rather as a labour standard aimed at ending the appalling treatment of workers in many colonies.

Since the founding of the ILO in 1919, there has been widespread recognition that working persons should be entitled to minimum standards of employment. The initial approach utilized the technique of drafting conventions that set forth specific minimum standards, with the aim of having governments voluntarily commit to applying those standards. The impetus for this was a commitment to social justice for working persons.²² Whether this is something different from human rights is debatable. Some have posited that in 1919 what might be called 'rights' language, for instance, as found in the Treaty of Versailles, referred to territorial rights and the sovereign rights of states and that the modern conception of 'human rights' did not arise until after World War II.²³ Whether 'social justice' is something different from human rights likewise is debatable. It may be broader, implying policy choices that governments make to establish social and economic conditions conducive to a just and stable society, but it certainly would include items that today we deem human rights.

Alain Supiot observes that Part XIII of the 1919 Treaty of Versailles, setting up the ILO, did not proclaim values; rather, it described issues needing urgent attention.²⁴ This may have created the impression that the ILO fixed problems by setting specific standards which in turn lead to national labour regulation. Perhaps this conditioned the world community to view ILO conventions as agreed upon policy choices relating to labour rather than a statement of fundamental rights or an expression of values. The standards themselves, however, often could be seen as the practical implementation of values. For instance, if women are equal to men at work, then there must be job security at the point in time when women give birth or else women will lose their place in the labour market. Thus, Convention No. 3 (1919) regarding maternity protection might be considered merely a standard, or it can be viewed as a critical component of gender equality.

Prior to World War II, the language of the ILO tended to be restrained, with the standards laid down in conventions often expressed in narrow and specific language rather than as the proclamation of a worker right. The resulting product, a convention or recommendation, was called a 'labour standard', a term which conveyed the notion of a narrowly tailored regulation.²⁵ The result of the unrestrained fascism of the 1930s and the devastation of a world war led top officials of the ILO to reconsider the purpose of the Organization's work. It also led to a different way of drafting conventions as it

²² See e.g. G. Rodgers, E. Lee, L. Swepston and J. Van Daele, *The ILO and the Quest for Social Justice, 1919–2009* (ILO 2009). See also Chapter 16 by Lee Swepston.

²³ Rodgers et al. (n 22) 38–9.

²⁴ Supiot is correct in that the items needing urgent attention were placed in the Preamble to Part XIII and that in the years immediately following the signing of the Treaty, those at the International Labour Conference focused on those items. However, in Section II of the Treaty, Article 427 does list eight principles of 'special and urgent importance'. Many of these reflect the items needing urgent attention, but not all. In particular the first principle states that 'labour should not be regarded merely as a commodity or article of commerce'.

²⁵ In 1919, the two official languages of the ILO were English and French. From the beginning there was some discussion of how to translate certain terms. It can be debated whether the French term, 'norme', has the exact same connotation as a labour 'standard'.

was recognized that certain concepts of social justice could not be expressed as specific standards but rather required a broad statement of rights. Thus, Convention No. 87, Freedom of Association and Protection of the Right to Organize (1948), contains no statement defining what 'freedom of association' means or encompasses. Similarly, Convention No. 100, Equal Remuneration (1951), guarantees equal remuneration for work of equal value, but contains no clause setting out how the value of a job should be gauged.²⁶

4 THE EMPLOYMENT PARADOX

Matthew Finkin²⁷ observes that the 'discourse of human rights rests on an axiom: that every person is born free, equal, and the bearer of innate inviolate dignity that must be respected' but highlights that the employment relationship is one of extreme inequality, with the employee in a position of subordination. Thus, discussing human rights at work presents the employment paradox: the employer and employee are equal, but the employee is subordinate to the employer by the very nature of the relationship.

When American undergraduate students in a course are asked if they have human rights, they all quickly say 'yes, of course'. When the professor then asks if they have these rights 24/7, the students hesitate briefly, before saying 'yes'. At this point, the students might comment that of course if one has human rights, one has them all the time. But when the professor asks, 'Do you have these human rights at work, or do you leave them in your briefcase outside the door to the workplace?' the students hesitate. Without knowing much law at all, they somehow realize that when one is an employee, that person is in a different position and perhaps one not protected by law. The students often have been employed only in summer jobs, but even from that limited work experience they know that in the United States one typically is an employee at will, capable of being terminated at any time for good reason, bad reason or no reason at all. They are vaguely aware that there may be some statutory grounds for challenging a dismissal, for instance, a race or gender discriminatory dismissal. But without knowing the law, they correctly perceive that the reach of human rights law may not extend into the private sector workplace.

This may be a solely American reaction as Matthew Finkin points out, a reaction which is the result of the narrow view American courts have regarding the applicability of human rights guarantees to employment and to the silence of the United States Constitution on rights that are applicable to private sector employment. An example might be freedom of speech or freedom of association, both of which are set forth in the First Amendment of the US Constitution. Yet the articulation of those rights is that 'no state' may deny any person these rights. The courts have never held that this First Amendment right applies to private sector employers; in other words, a private sector

²⁶ Generally a company will look at what other firms are paying for the same job when determining what the 'going rate' in the labour market is for a given job. But in 1951 in most countries jobs were sex segregated so that companies would not have been able to use this method of determining market value.

²⁷ See Chapter 7 by Matthew Finkin.

employer may deprive a person of the right of freedom of association (absent some statutory prohibition). In contrast, the US Constitution does guarantee property rights, and in an employment relationship, this typically works to the advantage of the property owner, the employer.

Traditionally, the common law has focused on individual rights, with an emphasis on property rights. The United States may be at one end of the spectrum with regard to its non-recognition of international human rights, but it is not alone. Amanda Reilly and Jonathan Barrett comment that the New Zealand Constitution does not contain a bill or charter of rights against which other laws can be benchmarked. Moreover, the New Zealand Human Rights Act is simply that, a statute which can be repealed or amended at any time and which does not have the effect of a constitutional guarantee of rights.²⁸

Common law countries have ratified major international human rights instruments, and thus have treaty obligations. But in common law countries, international and domestic law are conceived of as discrete bodies of law, with international law generally not applying domestically unless the legislature has taken action to make this happen.²⁹ As might be expected, legislatures sometimes fail to take action or they may enact legislation but the statutory expression of the human right is not as broad as in the international instrument.

Common law countries, however, are not destined to ignore or be hostile to the incorporation of human rights into notions of fundamental fairness. Guy Mundlak notes that the Israeli Supreme Court has used an analogy that is strikingly similar to the classroom question posed to American undergraduates above. Rejecting the notion that employees deposit their human rights in the locker room when they arrive at work, the Supreme Court took the position that they take their backpack, fully stocked with their human rights, when they move from the public sphere into the private sphere of the workplace.³⁰ Under the Israeli courts' reasoning, the question that arises relates to the implications of how these rights apply at work and to the extent of protection on which workers can rely.

In some common law countries, the constitution does proclaim human rights guarantees, with South Africa being the most prominent example. As Darcy du Toit and Mariam Sirkhotte point out, not only was South Africa's 1994 Constitution drafted with close attention to international law, but courts were directed to interpret the Constitution's provisions with reference to international law. In addition, every labour statute has clauses stating that the statute's provisions should be interpreted to give effect to the Constitution and to South Africa's international law obligations.³¹ As a result,

²⁸ See Chapter 8 by Amanda Reilly and Jonathan Barrett.

²⁹ An example would be the United Kingdom which acceded to the European Convention on Human Rights in 1951 but did not incorporate it into domestic law until the 1998 enactment of the Human Rights Act.

³⁰ Tel Aviv District Court, 1285/89 *Tzukerman v Morgenstern* (14.9.1999), wherein the court cited Justice Barak of the Supreme Court laying down the principle that individuals' privacy rights move with them from place to place even when the individual has no property rights at a given physical location. Supreme Court CA 8954/11 *Doe v Roe* (24.4.2014).

³¹ See Chapter 10 by Darcy du Toit and Mariam Sirkhotte.

among common law countries the posture of South Africa's courts with reference to the impact of international law domestically is the polar opposite of the United States.³²

Many civil law countries have a monist legal system³³ whereby the country's ratification of an international treaty often gives rise to the obligations undertaken being automatically incorporated into national law.³⁴ But as the Israeli example demonstrates, courts in dualist legal systems can make use of international labour instruments. When those in dualist systems do so, it is more likely that they will view the international instrument as laying down a fundamental right and not a mere standard.³⁵ In both systems, however, the relevant question then becomes how this internationally recognized human right is understood by national courts.

5 RIGHTS IN A MARKET ECONOMY

In most countries the issue of worker rights arose in the context of industrialization. Prior to this most persons worked on the land. If they were not landowners, their status determined how they would be compensated for their work; for instance some would be permitted to inhabit a dwelling while they worked and would share the crops they harvested with the landowner. Similarly, domestic servants might be given a room in which to sleep in the master's house or a 'tied' cottage. Master-servant law laid down the duties and obligations of masters and servants. Industrialization changed that with workers being deemed employees who had freely entered into a contract of employment with an employer.³⁶ Regardless of the validity of this legal construct, it does highlight that modern labour law arose in the context of the market economy. In the early stages of industrialization, when labour standards legislation did not exist, workers joined together to seek better terms and conditions of employment but generally employers resisted because higher labour costs would make the company less competitive. As such, labour struggles in most countries prior to 1919 took place against the backdrop of a capitalist society with the courts often called to enforce the rights of capital (the employer) against labour. Typically, the national legislature at some point intervened and granted labour certain rights, but always within the context of a capitalist society where rights of groups operating in a market were weighed against each other. Thus the struggle for worker rights occurred in a capitalist society often at a time when limitations on the power of the State were not yet recognized,

³² It should be noted that South Africa's legal system is hybrid, interweaving both common law and Dutch-Roman law traditions, reasoning and approaches.

³³ Italy may be an exception on this.

³⁴ V. Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation in National Legal Systems* (Springer 1982).

³⁵ C. Thomas, M. Olez and X. Beaudonnet, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications' in R. Jean Dupuy (ed.), *Mélanges en honneur de Nicolas Valticos* (Edition Perrone 1999) 249–85.

³⁶ See for a more elaborate account of the historical development towards employment contracts and employees: R. Knegt, 'Regulation of Labour Relations and the Development of Employment' in R. Knegt (ed.), *The Employment Contract as an Exclusionary Device: An Analysis on the Basis of 25 Years of Development in The Netherlands* (Intersentia 2008) 13–46.

such that the State was free to make choices on how to achieve the balance between groups it felt was appropriate.³⁷ But as discussed above, subsequently there was an acceptance that the State must recognize the human rights of individuals, including individuals as workers.

In some countries, however, industrialization came later and at a point when the country was not capitalist. There were no private sector employers and there was no belief that private employers had rights, either based on property or on the needs of a market economy. Rather, the State acted in the name of workers. While the State may have accepted certain international labour standards, for instance with regard to working hours and social insurance, the notion of human rights transcending the power of the State over individuals was an alien concept. Moreover, the State had no experience in balancing the demands of private employers with the demands of workers. But, since the 1980s several formerly communist countries and even some communist countries have encouraged private enterprise in a desire for economic growth and inevitably conflict between capital and labour has occurred. Chapters 11 and 12 on rights in China and Russia respectively highlight the difficulty of considering how human rights apply in labour situations in countries still in the early stages of grappling with balancing the rights of private sector employers with the rights of workers. Likewise, the experience of the Asian Tigers,³⁸ such as Korea, discussed in Chapter 20, highlights the pattern of an autocratic State strongly favouring employers and suppressing labour rights as part of a strategy of economic development but eventually having to confront conflict when the society becomes more prosperous and better educated.

Even in countries with a long history of balancing the needs of capital and the needs of labour, circumstances change. The market is dynamic, competition may become more intense, and views may change as to the appropriate balance with a resulting diminution of rights labour had taken as settled. For those countries whose constitution does guarantee fundamental rights relating to labour, resort to a human rights basis may seem unnecessary. But in light of events of the last decade subsequent to the 2008 financial crisis, some courts have weighed the exercise of labour rights against the need for market flexibility during an era of austerity measures, with a resultant severe impact on fundamental labour rights, such as freedom of association.³⁹ As such, even in countries with such guarantees there has been a tendency for those supporting workers' rights to move them into the inviolable category of human rights.

How rights or standards can be set and maintained in a market economy is not a new question. It was asked a century ago and a technique pioneered to tackle the challenges. In the first decades of the twentieth century, national legislation could have set a standard but national legislators hesitated to do this because if their country had better

³⁷ In many countries later there was an acceptance that the State must recognize the human rights of individuals, including individuals as workers.

³⁸ This label is commonly used to apply to those countries which experienced high rates of economic growth between 1965 and 1990; namely, Hong Kong, Taiwan, Korea and Singapore.

³⁹ S. Sciarra, *Solidarity and Conflict: European Social Law in Crisis* (CUP 2018). See Chapter 4, which assesses social rights and economic freedoms, and Chapter 5, which considers regional courts' and international organizations' views on freedom of association with regard to specific conflicts.

standards than a competitor country, their companies' products would suffer in the marketplace. Recognizing this conundrum, Edward Phelan,⁴⁰ the primary drafter of Part XIII of the Treaty of Versailles, conceived of an international organization whose members would agree to a specific standard which would be embodied in a convention and the organization's member states would ratify the convention and apply the standard in the national setting. If all the countries trading with each other accepted the standard, that item would be taken out of competition. This technique more or less worked for decades but it began to break down in the 1980s with the globalization of trade.

6 GLOBALIZATION AND THE DRIVE TO RECOGNIZE WORKERS' HUMAN RIGHTS

Technically, trade had been global before the last decades of the twentieth century. But in earlier eras, less developed countries supplied the raw materials, spices and minerals that were utilized by the richer countries where manufacturing enterprise occurred. This changed after the 1970s as companies in rich countries began making or buying manufactured goods from less developed countries. Important countries where production was occurring either did not accept the standard or they lacked the capacity or will to enforce the standard. Thus countries with higher standards found they could not compete with those with lower standards. Companies in the higher standard countries found it advantageous to move production to countries with lower standards, especially as the proliferation of free trade agreements since the 1990s made it possible to import the goods made more cheaply into the higher standard countries.

The globalization of trade and the development of global supply chains cast a spotlight on the vulnerable link in the ILO technique. Since 1919 companies had been expected to abide by national law but there was and is no hard international labour law. In their global supply chains, companies were not violating any national laws. Often they were not the direct employers of those making the goods they were buying. For labour supporters, the question became how to challenge companies who were buying goods from vendors in countries lacking effective labour rights. The focus on the duty of business to respect human rights began to emerge. As Virginia Mantouvalou has observed, this may be an instrumental approach but this does not diminish the validity of the argument that there is a human rights basis for many labour rights.⁴¹

By using the language of human rights, claims to a worker right are morally compelling. Since human rights are universal and inalienable, it removes the claim from the debate on balancing workers' rights against business efficiency and the needs of the economy. Moreover, the State is obligated to protect human rights, and this

⁴⁰ For Phelan's own recollections of events of 1918–1919, see 'The Birth of the International Labour Organization', Chapter 6 in *Edward Phelan and the ILO: The Life and Views of an International Social Actor* (International Labour Office 2009) 138–41.

⁴¹ V. Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) *European Labour Law Journal* 151–72. See also K. Kolben, 'Labor Rights as Human Rights?' (2010) 50(3) *Virginia Journal of International Law* 449–84.

becomes especially important when the traditional groups protecting workers' rights – unions – have declining power.⁴² Thus those advocating for labour rights have increasingly invoked human rights as the basis for their position. Although hard international law has not yet emerged, the impact of this evolution from guidelines to global compacts to guiding principles, has affected business.⁴³ Whereas once company codes of conduct rarely mentioned the ILO's four fundamental principles, today nearly all company codes contain all four.⁴⁴ Similarly, in the twenty-first century, the ILO's four fundamental principles appear in the labour chapter of nearly all free trade agreements.

7 CONCLUSION

Many would deem dignity and equality the core concepts of the post-World War II human rights movement. If one looks back to 1919, the first principle expressed in the Treaty of Versailles relating to labour was that labour should not be regarded merely as a commodity or an article of commerce. In other words, a worker is a person and not a thing to be paid for, to be bought and sold. This is an enormous advance from the notions of master-servant or the landless peasant tied to the owner's land and subject to his rules. It is a recognition that the worker has dignity and rights. This expression of value was repeated in 1944, once again, as the first principle proclaimed in the Declaration of Philadelphia: labour is not a commodity. As Supiot comments, '[i]n the Philadelphia Declaration ... the economic and financial realms are explicitly *means* to man's ends' and he decries today's 'process of globalization ... guided by quite the opposite goals'.⁴⁵ He concludes that '[i]nstead of indexing the economy to human needs, and finance to the needs of the economy, the economy obeys the demands of finance and human beings are treated as "human capital" at the disposal of the economy'.⁴⁶ If this analysis is correct, the guiding principle of a century ago, that labour is not a commodity,⁴⁷ has been completely reversed.

Yet what might also be occurring in the twenty-first century is a re-play of the early twentieth century with labour seeking a declaration of rights as it struggles to achieve dignity and a degree of autonomy in the face of powerful capital, then capital at national level and now global capital. Moreover, in the twenty-first century there is an increasing awareness that many working persons are not covered by their country's twentieth-century labour laws. Capital has somehow structured its relationship with labour such that these persons are deemed non-standard workers, or atypical workers,

⁴² See on this particular topic Chapter 12 by Nikita Lyutov and Elena Gerasimova.

⁴³ See about this in the Asian Pacific region Chapter 24 by Ingrid Landau and John Howe, and within the context of the EU Chapter 23 by Beryl ter Haar and Attila Kun.

⁴⁴ See B. ter Haar, 'Love, Flirt or Repel: Hybrid Global Governance of the ILO Core Labour Standards' (June 2013) 2 *European Journal of Social Law* 68–102.

⁴⁵ Supiot (n 20) at 14 (emphasis original).

⁴⁶ *Ibid.*

⁴⁷ The Versailles Treaty, June 28, 1919: Part XIII, Labour. Section II. General Principles, Article 427.

or even 'independent contractors' whereas the reality is that they are workers who have not been able to acquire the labour law status of 'employee'.

Writing shortly after China joined the World Trade Organization (WTO), Sir Bob Hepple concluded that transnational labour regulation does matter⁴⁸ because it promotes sustainable development through fundamental human rights at work.⁴⁹ Through this lens, the UNGP, which draw in the ILO's Fundamental Principles and Rights at Work and its eight linked core conventions, brings us full circle back to 1919 when the signatories to the Treaty of Versailles declared that universal peace can only be established if it is based on social justice.⁵⁰ If we explore more deeply the values underlying labour law and specific labour standards, we find that many align with human rights concepts; that is, they express values that apply universally and are normative entitlements. As such, labour law becomes the means for enabling the human right to have definite legal status in the national legal system. Over the past century, the terminology may have changed, from labour standards to labour rights to human rights, but the values are timeless.

⁴⁸ B. Hepple, *Labour Laws and Global Trade* (Hart 2005). Professor Hepple used the term 'transnational labour regulation' to refer to 'hard and soft rules and procedures which apply across national boundaries', at 4.

⁴⁹ *Ibid.*, 24.

⁵⁰ The Versailles Treaty, June 28, 1919: Part XIII, Labour. Section 1 (Preamble).