The right to work: Linking human rights and employment policy

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Abstract: This article outlines various explanations for singling out the right to work from the roster of human rights, and emphasizes the dilemmas associated with regulating the labour market as a barrier to the development of the right. It compares two frameworks that address these concerns from the contrasted perspectives of human rights and employment policy – namely, the General Comment of the Committee on Economic, Social and Cultural Rights, and the European Employment Strategy. While these approaches are not natural allies, they can complement each other and construct an institutional system guided by the right to work as a superordinate norm.

Work and human rights seem to be a perfect match. Such a relationship can be identified, albeit with some difficulty, in the context of the freedom of association (Macklem, 2005). Arguably, the broad list of labour standards contained in the Conventions and Recommendations of the International Labour Organization (ILO) is also related to human rights. The subject of work also appears in numerous international documents on human rights, as well as in state constitutions and regional instruments such as the European Social Charter. Together these examples seem to confirm an intuition about the centrality of work in the individual and collective experiences of people. Work is about income, about individual fulfilment, about the constitution of one’s identity, about social inclusion (Arendt, 1958; Murphy, 1993; Phelps, 1997; Solow, 1998; Schultz, 2000; Beck, 2000; Muirhead, 2004). It surely should be recognized as belonging to the sphere of human rights.

Yet the implementation of the right to work is weak, almost non-existent. A few indirect examples can be found in some States, but none of them suggests

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a consistently solid agenda. Some practice of review has been established in various international forums, such as the ILO, the United Nations Committee on Economic, Social and Cultural Rights, and the Council of Europe. Beyond the freedom of association, however, there is hesitation – not to say outright criticism – about the inclusion of work in human rights, suggesting that work and human rights may be more alien to each other than one might expect.

A closer look reveals that although the spheres of labour and human rights are not foreign to each other, they do remain separate: slavery is more of a concern for human rights activists; fair wages, for trade unions. Discrimination in employment is a major concern for human rights groups, but from the point of view of actors engaged in collective bargaining it is sometimes seen as a constraint. Temporary work agencies and subcontracting arrangements that deny workers a sense of security are a matter for employment regulation but not really part of the human rights discourse. If there is any logic in this division of labour, it is not rooted in an analytical distinction of relevant content. As the definition of slavery is expanded, the borderline between various forms of servitude and subcontracting blur. When slavery is viewed as the denial of choice, it may encompass a broad list of labour market practices. When one takes into account the low wages paid in such arrangements, the absence of protection from dismissal, and the de facto barriers to workers' access to justice, the border between human rights and employment issues continues to dissolve. The over-representation of women, migrants, minorities, older persons and the young in atypical forms of employment is a further indication that human rights and employment issues are difficult to separate.

The distinction that has evolved between human rights and employment issues can perhaps best be explained from a sociological perspective. There is no internal contradiction between the two spheres, but they are not natural allies either. Despite the fact that both labour and human rights are considered to be on the "social side" of law, they have developed along separate paths and do not necessarily intersect. Virginia Leary observed a "regrettable paradox: the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet" (1996, p. 22). Several reasons help explain the emergence and development of these parallel tracks.

Labour and human rights are legal fields that emerged in response to different types of problems. The formative years of human rights law came after the Second World War, just as labour and welfare matters were being stabilized by the Fordist regime of production. However, human rights developed at the international level, whereas labour policy is strongly rooted in domestic traditions. Moreover, a distinct legal culture developed in labour law, particularly in countries where there are specialized labour courts and tribunals. Human rights issues, by contrast, are often debated in international forums and constitutional courts. Different tribunals also imply different procedures, claims and remedies. The institutional differences between these two fields also reflect different discursive settings. Labour law often draws on local experience and is concerned with balancing fairness and power, whereas human
rights jurisprudence develops according to the guidelines of dignity, liberty, autonomy and equality, in an attempt to create narratives that are removed from the trivialities of everyday life. The first benefits in its development from the is, the latter benefits from the ought.

These different perspectives also point to the divergent and sometimes conflicting histories of the labour and human rights movements. Labour unions have not always sought to advance human rights, and some unions have taken part in nationalist projects that disregard human rights. Similarly, human rights organizations have not always been concerned with socio-economic matters; in developed countries in particular they often have advocated a preference for civil and political rights and a disregard for the social and economic. Although these are not universal truths, it is clear that the labour movement and human rights organizations have not forged a strong alliance or a shared agenda.

In sum, human rights law and labour law are best seen as sub-systems of the legal system. They are conveyed through different forms of communication, which are shaped, inter alia, by the separate identities of the actors, the distinct venues for law-making, the difference between the localism of labour and the internationalism of human rights. At the same time, each system realizes the existence of the other. Human rights have seeped into the discourse of labour law, both as a mode of legitimizing certain forms of regulation and as a strategic argument about empowerment (favouring either the workers or the employers). Talk of rights has a special power that is readily acknowledged by labour advocates, employers, courts and policy-makers. Similarly, the logic of labour and social policy has gradually emerged on the human rights agenda, both in order to legitimate the human rights project and to respond to the criticism that human rights are a matter for affluent citizens of developed countries. Nonetheless, an impressionistic assessment suggests that, despite a growing mutual awareness of the sub-systems within the legal system, their projects remain separate.

The topic of this article is the human right to work, which also encompasses rights at work. Despite the frequent mention of the right to work in human rights documents and state constitutions, it rarely has been translated into practice. In the first part, I introduce the gap between the prevalence of the right to work in international and national legal instruments, and its weak implementation. Some of the arguments against the right to work are concerned with the general claim that social rights are difficult to implement, while others focus on a particular ambivalence towards work. These claims emphasize problems in the sphere of human rights, and have been responded to in various writings. In this article I would like to highlight yet another problem, which touches more directly on employment policy. Specifically, it is argued that the right to work is too vague a guiding value given the growing uncertainty surrounding the regulation of labour markets. In the second part, I consider two legal methods that can address such ambiguity. The recent General Comment on the right to work, by the United Nations Committee on Economic,
Social and Cultural Rights, is a response from the human rights sphere, while the European Employment Strategy (EES) is a response from the sphere of employment policy. The comparison between the two highlights the possibility of bridging the human rights sphere with that of employment policy, but also its limitations.

The right to work – between recognition and implementation

This part is divided into three sections. The first of these is devoted to the manifold appearances of the right to work. Despite recurring formal recognition of this human right, it has yet to gain a standing as an important instrument. The reasons why it is difficult to implement the right to work are rooted in both human rights and employment policy. The arguments from within the human rights sphere, which have been discussed in other writings, will be summarized in the second section. Those from the field of employment policy will be discussed in more detail in the third. This section will also assess whether the critique from the sphere of employment policy is fatal to the implementation of the right to work.

The many faces of the right to work

The right to work is everywhere, yet nowhere. It appears in numerous international documents and in quite a few state constitutions. Yet it has hardly affected constitutional discourse in nation states and has been criticized by both proponents and opponents of economic and social human rights. Consequently, its breadth and scope must be gleaned first and foremost from its typically laconic mention in human rights documents. However, even such basic texts reveal that the right to work is actually composed of multiple layers and more particular rights that are intertwined and inseparable.

There are three basic components in the right to work. The first is the liberty component, which includes references to the right to work as a liberty or as the freedom of occupation without governmental intrusion. The flip side

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For state constitutions and bills of rights, see, for instance: Netherlands (article 19); Belgium (article 23(3)); Finland (section 18); Portugal (article 58); Greece (section 22(2)); Argentina (section 14); Denmark (section 75); Ireland (article 45(2)); Spain (article 35(1)); and India (article 41). Also see Mayer (1985).
of the freedom to work is the guarantee against coerced work, namely, slavery. The liberty component is the least objectionable aspect of the right to work. Usually there are no arguments against this dimension of the right (ILO, 2005). Yet, if a constitution stops here in defining the dimensions of this right, it is actually rejecting recognition of the right to work in its broader sense.

The second and third components emphasize the positive dimensions of the right. At the heart of the right to work is its most controversial component: the right to have work and the corresponding duty of the State or of employers to provide work to individuals. Although some claim that this component does not grant individuals a subjective right that is enforceable in court, it is generally thought that the right to work is not only a moral right but also one that can place an obligation on the State, and perhaps even on private employers. Many argue that this component lies beyond the State’s reach (Elster, 1988; Standing, 2002); others respond to this criticism by pointing to very concrete measures that can be taken to advance full employment (Harvey, 2002). Compromising formulations that discuss, say, the right to an opportunity to gain work are merely suggestive of possible solutions but do not resolve the dilemma of how to place this right on a continuum going from the moral claim to the individual, subjective claim.

An important criticism that is made against the positive component of ensuring access to work is that it emphasizes a quantitative benchmark – getting more people into a job – without tying the experience of “being on the job” to the moral foundations of the right to work. The right to work must therefore be strongly tied to the right to dignified work. This is indeed the third component comprising the general concept of the right to work. Some constitutions include a general guarantee of “fair working conditions” among the human rights they list. A few even provide particular constitutional guarantees for remuneration, leisure and occupational health and safety, while prohibiting child labour and even addressing matters of profit-sharing and co-management. Many constitutions also give protection to the closely related freedom of association.

At the international level, there have been various attempts to carve out a substantive approach between the quantitative right to work and qualitative rights at work. Examples include the ILO’s adoption of a short list of “core labour rights” (Langille, 2005; Alston, 2004; Mundak, 2004); the integration of the right to work into the overarching right to development; and the middle road taken by the ILO’s concept of “Decent Work” and the corresponding project on global employment (ILO, 1999 and 2001).

Beyond the three components discussed above, it is important to emphasize that the right to work is inseparable from several other rights: the right to

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2 ILO Declaration on Fundamental Principles and Rights at Work (1998).
3 The Declaration on the Right to Development (1986); Vienna Declaration on Human Rights (1993).
equality in general and in the context of employment in particular, the right to free artistic expression and creation and the right to social security, as well as broad rights, such as the right to human dignity.

The diverse references to the right to work in international and state laws have been presented here to demonstrate that this right is already recognized as a human right. At the same time, as noted, there is very little jurisprudence on the right to work, either at the state level or at the international level. It is not a living body of law that is dynamically developing from one case to the next, with cross-references among constitutional courts in different countries and mutual learning that bridges the state and international levels. It is at most a reference to fulfil reporting requirements at the ILO (although here it is not necessarily framed as a human right), at the United Nations (in the review of countries' implementation of the International Covenant on Economic, Social and Cultural Rights) and in regional jurisdictions, such as the Council of Europe. To understand the gap between the recognition of the right as a human and constitutional right and its weak implementation, it is necessary to analyse how the right has been critiqued from within the discursive spheres of human rights and employment policy.

The general critique from the sphere of human rights

Two types of critique have been made against the right to work from within the sphere of human rights. The more general critique holds that the right to work, like all economic and social rights, cannot be implemented in the way that civil and political rights can. The more specific critique holds that, unlike other economic and social rights, the right to work guarantees a good that is different from other social goods, such as education and health, and therefore should not be elevated to the sphere of human rights. Both of these arguments have been discussed in the literature. I will briefly summarize them, as well as the responses which have been made. The purpose of this brief summary is to bracket these concerns and concentrate instead on the arguments from within the sphere of employment policy.

The argument against economic and social rights generally holds that such rights are not practical, cannot be enforced and should therefore be seen at most as non-justiciable "ideological" claims, not as fully fledged human rights. These arguments and the responses made to them are by now well rehearsed in the literature (Fabre, 2000; Davis, Macklem and Mundlak, 2002; Bilchitz, 2007).

The easiest argument to tackle is that social rights generally – and the right to work is no different – are positive rights. Unlike negative liberties, positive rights require the State to act and hence extend beyond the natural limits of constitutional review. This positive/negative dichotomy has often been met with the observation that the boundaries are hardly clear (Shue, 1979; Fabre, 2000). Moreover, nor is it clear why positive claims should be barred from the sphere of human rights (Berlin, 1969).
The argument against the implementation of social rights becomes more challenging once it abandons jurisprudential classifications. The argument is that it is unclear what is the depth and scope of the right, and what is the threshold of state action or inaction that triggers an infringement of the human right. Furthermore, it is argued that when general policy is at stake, the State cannot be held responsible for all labour market conditions. The State did not generate unemployment in itself, so it cannot be held solely responsible for curing it. Finally, the judiciary is not the branch of government in charge of correcting all social problems; other branches of government and non-legal responses are available to address what some may view as inadequate policy outcomes.

Taking the arguments apart and responding to each is a relatively simple task. Social rights are no more ambiguous than civil liberties, and the relative clarity of the scope of civil liberties is often the result of ongoing judicial attention and interpretation, rather than of some natural lucidity. The multiple causes of unemployment do not undermine the State's responsibility. The economy is not a deus ex machina, and state inaction is hardly a neutral state of affairs. A plaintiff need not ask the State to halt globalization, just as the State did not create terrorist threats to individual security or technological threats to privacy. The State is required to do what is possible within its budgetary constraints, and sometimes even to reconsider those constraints, that is, to allow for a progressive realization of the right. Similarly, the court need not open the budget and trace the appropriate budget lines, thereby overriding democratically elected branches of government. The court has many options available to order other branches to reconsider their policy, to annul a policy without suggesting alternatives or to establish guidelines for the appropriate interests that should guide a new policy. To aid in constructing the right to work, like other social rights, a jurisprudential toolbox is now available. This can be found, for example, in the Draft Optional Protocol to the ICESCR, in the guidelines for the implementation of social rights and in the General Comment on the right to work, which will be discussed in the second part of this article.

The tools developed for the review of social rights in general seek to construct a discourse that can help in the judicial review of social matters. The toolbox is not confined only to social rights. Indeed, it is based on the assumption that all rights can benefit from certain distinctions, namely: between the duties to respect, protect and fulfil social rights; between core violations and

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the requirement of progressive realization of the right; between the actual duty and justified economic constraints; between violations by acts of commission and acts of omission. The guidelines for implementing social rights acknowledge the margins of discretion accorded to the State in deciding how to advance social rights. None of the above distinctions provides an algorithm to resolve the problems underlying the implementation of human rights. They are legal instruments that aid courts, legislatures, human rights organizations and international institutions in expressing how to draw the line between the mandate of human rights and general policy preferences. They aid in operationalizing the values underlying the roster of human rights. Jurisprudential developments can make such distinctions clear over time and also open them to criticism in an ongoing dialogue between the various branches of government, the general public and civil society actors.

Another type of argument put forth against the right to work does not dispute the claim that social rights can be operationalized, but is concerned solely with work as an end. In its extreme form, this argument holds that work (or employment or labour) is not a good to strive for because the contract of employment is exploitative by nature. The human rights agenda regarding the right to work is therefore not only oblivious to the exploitative nature of all wage-earning labour, but actually creates an incentive to extend exploitation. It requires increasing employment levels – a goal that can be achieved, inter alia, by lowering employment standards. Thus, while the emphasis on wage-earning labour is based on values such as individual autonomy, dignity, equality and solidarity, it undermines them all.

A different type of critique holds that the right to work seeks to integrate workers into the labour market (i.e. “get a job”). Even assuming that the right is constructed so as to emphasize the need to match individuals with dignified jobs, the resulting construct of work is still typically limited to paying jobs. Other types of work are generally excluded. In particular this argument points to the marginalization of care work within the household (typically and almost exclusively provided by women), community work (done by volunteers) and artistic expression.

Finally, a third line of critique holds that although the subject of inquiry is a right to work, policy measures aimed at increasing employability and labour market participation are in fact experienced by many individuals as a duty to work. The application of a rights discourse is therefore, once again, a way of justifying the imposition of social values on individuals and channeling them into the normative social order. This critique of work as a duty is particularly acute when integrated into the previous two critiques. First, the mere provision of “work” without further specifying its type and quality is not enough, in itself, to promote the positive values associated with work. Moreover, an exclusive focus on work as wage-earning labour exerts institutional as well as psychological pressures on those outside the labour market and depreciates other forms of social contribution. The slippage from a right to a duty is most easily observable in various labour market activation programmes that seek to
boost the integration of the unemployed into the labour market, but often through social security sanctions (so-called welfare-to-work programmes).

I am much more sympathetic to this line of argumentation than to the general jurisprudential critique of social rights as human rights. Responding to these arguments in detail goes beyond the scope of this article and has been done elsewhere (Mundlak, 2007). In a nutshell, while these arguments are valid, they can be addressed by emphasizing that the right is to dignified work. Moreover, there is nothing intrinsic in the right to work that denies recognition of non-waged forms of work. The right does not promote work as a physical act of labour, but promotes a fuller range of values that are applicable to different types of work. The problem of duty merits a similar response. The notion of duty is not part of a human rights discourse. Despite the coupling of duty and right in welfare-to-work programmes, the right to work is actually a safeguard from social coercion – not the basis of its legitimacy. Common to all of these responses is the assumption that the right to work need not accept a simple liberal reading that accords to individuals the right to take part in the market, regardless of market conditions. Within the right to work one can identify a different proposition about access to voluntary participation in a meaningful economic, social and political life.

That human rights can sustain different meanings and be used as means of coercion is not specific to the right to work (Kennedy, 2004, pp. 3–35). However, tossing out the right to work from the roster of human rights because of work’s potential degrading effects is an extreme position that has an effect similar to the liberal reading that motivated it. It hinders the development, complicated as it may be, of the more inclusive and fulfilling nature of work.

The critique from the sphere of employment policy

The critique from the sphere of labour law and employment policy raises a different type of argument against the right to work. In short, this argument claims that the difficulty of regulating the labour market turns the right to work into an empty shell. The question is not whether human rights can obligate governments to act (they can) or whether work is a desirable good (it is, when properly defined), but whether the right to work actually indicates some policy preferences over others. This argument is based on the indeterminate fate of labour law and regulatory regimes at present.

Labour policy has indeed become increasingly indeterminate over the past few decades. In developed countries the fundamental concepts of modern labour law and employment policy evolved in tandem with welfare policy during the first decades of the twentieth century. Their design became relatively stable after the Second World War, and has been sometimes described as the Fordist model. The objective of full employment prescribed a relatively clear policy benchmark. Rights at work were guaranteed in part through statutory labour standards and, more importantly, through a system of collective bargaining. Social security covered life-cycle benefits, temporary aid in times of
unemployment or disability for participants in the labour market and a welfare safety net for those who were permanently out of work. Of course, there were significant variations in the particular schemes of the developed countries (Esping-Andersen, 1990; Hall and Soskice, 2001). Moreover, a grave discrepancy existed between developed and developing countries, as welfare provisions, labour standards and collective bargaining were significantly underdeveloped in the latter. The Eastern Bloc presented yet a third model, with its comprehensive, state-managed social sphere in which work and welfare were a right and a duty.

Although this article focuses on the developed and rapidly developing countries, it should be noted that each of the three models has experienced shocks and transformations. The Communist model is gradually disappearing even in its last strongholds. The underdeveloped model persists in some countries and unfortunately may continue as long as economic development remains weak, though in other countries an extensive process of industrialization and modernization, induced by globalization, is forging a new set of rules. In developed countries the Fordist welfare-state model has been significantly reshaped. The causes and symptoms of this development are too numerous to list here (see Standing, 1999; Stone, 2004). It is, however, important to distinguish between the ethical, policy and institutional factors that have led to the current search for a new model in labour law and employment policy.

Over time, and particularly through the influence of the human rights movement, various premises of the Fordist regime have been questioned on moral grounds. Perhaps the most significant example of such questioning is the realization that the model had an exclusionary effect on women and minorities (Conaghan, 2006). In addition, the rapid process of globalization – viewed as a vice by many trade unions in developed countries – has shown that employment losses and gains need to be assessed in global context, not just domestically (Hepple, 2005; Langille, 1998). From a policy perspective, assumptions of full employment and Keynesian demand-based responses have given way to liberal supply-side approaches (Standing, 1999). The welfare state, originally based on the premise of universal entitlements associated with social citizenship, is now defined in terms of incentives – positive and negative alike – in an attempt to realign individual and social preferences (Handler, 2004). From an institutional perspective, various ideas and institutions that were developed in the Fordist-welfarist heyday, such as the concept of “employee” and comprehensive bargaining pacts, have been found to be ill suited to the inclusion of all those who must be covered by both labour standards and welfare provisions (Supiot, 2001).

In efforts to reconstruct a “model” on top of the Fordist-welfarist ruins, employment policy has encountered many open questions along the way. The assumption of full employment is no longer taken for granted (Harvey, 2002). There are views that argue for the efficiency of unemployment (at least at a certain level) even beyond the level of frictional unemployment. Moreover, the diminishing power of the State to control the labour market in a globalized
environment, as well as the futility of creating jobs in the era of “the end of work”, is being used to justify high levels of unemployment (Rifkin, 1995; Bix, 2000; Supiot, 2001). As for rights at work, flexibility is the new orthodoxy, and although flexibility may mean various things, it is often used to justify deregulation (Standing, 1999). In addition, there has been a burst of new regulation on discrimination, privacy, temporary workers, subcontracting, the rights of workers in mergers and acquisitions and a host of other issues that did not appear on the legislative docket in the past (Supiot, 2001; Stone, 2004). The welfare state is eroding, and retrenchment is the key; yet at the same time numerous programmes seek to reintegrate the unemployed into the labour market (Handler, 2004).

These relatively familiar trends point to the fundamental dilemma of labour market regulation and employment policy. On the one hand, there is a sense of a growing social deficit, characterized by a high level of unemployment, dwindling coverage of labour standards, the withdrawal of welfare rights, and growing disparity and inequality. On the other hand, there are arguments that the State can no longer be responsible for social policy, that it does not have the tools to be so and that, in a globalized environment, markets should be further strengthened and deregulated and the welfare state should be privatized.

In these conflicting perspectives and arguments, there are three separate distributional axes that merit attention: labour–capital, public–private, and insiders–outsiders. For each of these axes, a distinction can be drawn between two types of arguments. The first type of argument objects to extension of coverage and improvement of standards because these will adversely affect the rent-seeking interests of those making this argument (employers, the State or insiders, i.e. key players in the labour market). The second objects to extension of coverage or improvement of norms because there is a need to improve the lot of someone else (e.g. employees, taxpayers and citizens, workers at the periphery of the labour market or the unemployed). The first type of argument is therefore self-serving (for the agents making the claim) and the second, “others-serving”.

The labour–capital axis
The most obvious reason for slack standards is employers’ resistance to regulatory improvements in labour standards and their coverage. Organized labour’s diminishing power in many States strengthens employers’ influence over the regulatory agenda. To the extent that some employers’ practices are held to be morally abusive, legislatures and courts may seek to curb them even without consulting trade unions and other pro-labour associations (Edwards, 1993). For example, reliance on child labour and lack of concern for health and safety issues in developing countries have stirred a surging interest in remedying deficient employment standards at the global level (Elliott and Freeman, 2003).
Were it merely a problem of employers’ abuse of rights in order to make company profits, then the consequences of the decline of organized labour’s power would at least have set out a clear agenda of what is the right thing to be done in moral terms. Employers’ claims are, however, more complicated and controversial, and are commonly supported by the State. On the one hand, employers are interested in increasing their share of the profits (the self-serving argument). On the other, it is claimed that only aggregate economic growth – and not employment standards – can improve the welfare of all. This assumption has been the basis for arguments in favour of a culture of entrepreneurship and flexibility. This often takes the form of legal rules that make the mobility of workers (both voluntary and coerced) much easier, corporate restructuring less hampered by statutory protections, and employment relationships less standard and more open for what used to be deemed “atypical” contracts and arrangements (e.g. fixed-duration contracts, part-time work, work-sharing and work through temporary agencies). It is argued, in the spirit of the human-resources school, that a symbiotic relationship exists between employers and workers. Consequently, arguments in favour of business and entrepreneurial activity allegedly seek improvement in the interest of workers as well (and are, therefore, “others-serving”). Naturally, this type of “trickle-down” effect argument has become more popular as the size and scope of global economic activity have increased.

The public–private axis
In liberal and corporatist welfare regimes that were coupled with the Fordist regime of production, the fundamental assumption was that social security was linked to work. As the stable employment relationships of the Fordist regime declined, the role of public institutions in guaranteeing social and economic security had to increase. In all welfare regimes, rising unemployment, and the extent of publicly funded activation measures to prevent it, required the State to assume a growing responsibility for both employment and welfare provision. Where the State did not take up this role, the number of working poor has increased, as has that of the long-term unemployed, who are gradually being excluded not only from the labour market but also from social and political life. Whereas the first category (the working poor) may create an incentive for the State to raise the level and scope of employment standards, thereby relieving itself of the responsibility for poverty, the second category (unemployed persons) often gives rise to the opposite incentive. For the State to relieve itself of its obligations to the unemployed, it is best to push the unemployed back into paying jobs on the labour market. In economic terms, the State can thus reduce public expenditures on welfare (the self-serving argument), and in moral terms it is said to be the “right thing to do” in the best interests of the unemployed (the others-serving argument). Reintegration policies are easy to defend not only in terms of cutting high public expenditures but also in terms of unemployed people’s dignity and worth.
Like the entrepreneurial culture which supports reducing both welfare levels and the scope of employment standards, the reintegration programmes of the new “third way” present a similar prescription. Trial contracts with low wages, community work in exchange for welfare and paternalistic measures to help people do away with their alleged addiction to idleness and poverty traps are all methods that are said to increase inclusion, income and dignity – not take them away. More generally, the distinctions that were central to labour policy in the past – that the public is social and the private, economic; that the public is for the benefit of workers and the private, for the benefit of employers – have become blurred. Social measures of reactivation are increasingly appropriating instruments of the private sphere, and remaining on the public welfare support scheme is seen as detrimental to workers.

The insiders-outsiders axis
Not only do employers and the State argue in favour of reducing the coverage, scope and level of employment standards, but even labour sometimes does. Labour regulation prescribes not only the rights and duties of workers vis-à-vis employers, but also the distribution of employment opportunities and benefits among the workers themselves (Offe and Wiesenthal, 1985; Lindbeck and Snower, 2002). The rights of workers at the periphery of the labour market, migrant workers, people employed by temporary employment agencies, older workers, volunteers and women engaged in domestic household work may be downplayed to benefit employers and “core” workers alike (Atkinson, 1984; Kalleberg, 2000). Some examples are particularly illustrative of these trade-offs. Two-tiered collective agreements maintain the rights and privileges of some workers, but compromise the rights of future generations of workers. Increased numerical flexibility may secure the rights of core long-term workers at the price of diminishing rights for peripheral workers. The entry of migrant workers may sometimes increase aggregate employment, but other times it may have a substitution effect on the employment of domestic workers. Affirmative action, particularly through quotas, also has a clear distributive impact on hiring opportunities. A raise of the minimum wage may increase equality, but it may also have repercussions for low-wage workers, especially the young in entry-level positions. Consequently, most regulatory arrangements can be defended by arguing for strong protection of the entitlement of insiders (a self-serving argument) or, alternatively, relaxing these very same standards may be justified by the need to extend partial protection to outsiders (an others-serving argument).

The three axes of distribution are interrelated and can all be embedded in the same policy issues. For example, unemployment is generally perceived as an undesirable status, but there is an economic argument that certain levels of unemployment are healthy because they act as a “productivity whip” over workers. From the employers’ perspective, such levels of unemployment reduce
monitoring costs, but they also may improve the wages of the workers, particularly because the discounted monitoring costs are shared and because “efficient wages” are higher than the market wage in a state of full employment (Shapiro and Stiglitz, 1984). From the State’s point of view, the costs of reducing unemployment below a certain level are likely to be very high – arguably higher than the marginal benefits. Moreover, those who are employed and who push for an increased minimum wage or living wage may be satisfied with higher wages even at the cost of some unemployment. Of course, the opposite arguments are also made, particularly on behalf of the State, which may seek to attenuate in this way the problem of the working poor (shifting the burden from the public to the private), as well as by workers and communities that may view higher standards as a means of preserving community standards (Luce, 2004). Consequently, to extend the coverage of employment standards such as the minimum wage to more categories of workers, to increase the minimum wage itself or otherwise to tweak the wages/employment nexus by means of regulation are all options that span the three distributive dimensions and for which we seek both empirical and value-laden criteria. Given the moral, policy and institutional factors alluded to earlier, it can no longer be assumed that the State’s responsibility for more wages, more employment and more welfare serves as the benchmark for the “right thing to do”.

In order to evaluate whether or not one should accept or reject self-serving or others-serving arguments, two types of assessment must be made. The first focuses on the ethical level: on the one hand, self-interest is acknowledged by law, for example in the recognition of the corporation’s utility function to generate profits for its shareholders; on the other hand, there are competing moral arguments, such as those favouring a stakeholder approach, that uphold the workers’ claim to profits. The second type of assessment that is required is an empirical one (Addison and Hirsch, 1997; Esping-Andersen, 2000). This must look at the growth of the social pie, at its distribution and at the interaction between the two (Freeman and Lazear, 1995). It is therefore uncertain whether there is a need to relax employment standards and coverage to enable a greater absorption of workers in the private labour market, and whether flexible employment standards and reduced welfare provisions will benefit those who are excluded. To separate fact from fiction, and hence the self-serving from the others-serving, one has to scrutinize and question values and facts – something that human rights jurisprudence often finds difficult to do.

The “easy cases” are when labour regulation must respond to highly objectionable practices that benefit only some producers, unequivocally hurt workers and impose severe negative externalities on society. But what should be done when other considerations are at stake? When data and research are ambivalent and values are dialectical and fuzzy, when we lose a clear sense of the “right” and “wrong” to which policy-makers should aspire? How, then, can the easy and hard cases be distinguished?

The quest for dignified work for all, which was shown to be at the core of the emerging human rights agenda, can serve as a guiding norm for the formu-
lation of socio-economic policy. The benefits that can be anticipated from a constitutional norm on a right to dignified work highlight the role of such a norm as a proactive measure: it can be used to give voice to concerns and values otherwise marginalized by the economic interests that dominate current changes in industrial policy. The norm would be relatively insignificant if it merely provided static protection against changes from the status quo, because the status quo itself should be challenged. It must have both a positive and a negative dimension. It must be continuously considered by – and, if necessary, forced upon – the makers of law (i.e. legislatures and courts), but it must also be considered at the meta-national level (international or regional).

Yet placing a big bet on the right to work may seem odd. First, when one considers the reply to the critique from the human rights sphere, it seems that the right to work should be a multi-tiered, finely nuanced right, that side steps the traps of exploitation and duty to work. Second, the right does not require simply spending the state budget on eliminating unemployment. It provides a more careful and balanced prescription to respect, protect and fulfil the many dimensions of the right to work. On top of that, it requires public intervention that walks the thin line marked out by competing value-laden claims and empirical disagreements. Is it possible that raising the minimum wage will be in compliance with the right to work just as much as lowering it would be? Are public absorption plans that accommodate the long-term unemployed into public sector jobs a means of fulfilling the right to work or a violation of the duty to respect it? More generally, it may be that the dialectical effects of labour market regulation turn the right to work into an all-encompassing instrument that allows everyone to promote their own interests and position on the labour market. As such, this free-for-all hardly matches the belief that a human right demarcates the border between legitimate and illegitimate measures. The right to work ceases to function as a human right; instead it provides a legal shell for conflicting pleas for judicial interference in the distributional consequences of any policy.

Institutional methods of advancing the right to work

Looking for the impact of the right to work in constitutional courts or international forums may be like searching for a needle in a haystack. The discussion thus far may have provided a good explanation for the dull performance of this right. Moreover, it demonstrates that the coupling of employment policy and human rights may still be embryonic. Is there a way forward?

The first section of this part looks at the achievements of the recent General Comment on the Right to Work, as an example of an effort from within the human rights sphere to invigorate the right. The second section looks at the European Employment Strategy as a way of advancing the right from within the employment policy sphere. While a comparison between these two approaches can indicate the hurdles ahead, it also suggests a feasible integration of the two as a means of progress.
A human rights response: The General Comment on the Right to Work

In November 2005, after several years of deliberations, the United Nations Committee on Economic, Social and Cultural Rights issued a General Comment on Article 6 of the Covenant concerning the right to work.\(^6\) Like other General Comments (Craven, 1998), its purpose is to “lay down specific legal obligations, rather than philosophical principles”.\(^7\) It refers to the need for progressive realization and for a list of core obligations. It distinguishes between the duties to respect, protect and fulfil rights, and identifies infringements of omission and commission. Most of these distinctions conform to the general jurisprudence of previous General Comments as well as the general guidelines that are used for implementing economic, social and cultural rights.\(^8\)

These partial solutions touch upon dilemmas that have been designated earlier in this article as the “general arguments from within the sphere of human rights”, on which the General Comment provides some guidance. It emphasizes the social dimension of the right to work, side by side with its economic dimension. It underscores that rights at work and decent work are interdependent with the right to work itself. At the same time, the General Comment takes sides against the critics of the right and does not extend recognition to non-waged forms of labour such as household work. The General Comment also avoids reference to the possibility of slippage from right to duty.

How does the General Comment address the problems deriving from the three axes of distribution described above? The answer is that it hardly does. The General Comment emphasizes relatively non-controversial claims regarding the prohibition of slavery, the problem of labour market discrimination and the need to develop supportive labour market institutions that can advance labour market mediation and activation. Beyond these concerns, the General Comment stops at rather vague, albeit just, statements, such as “States parties are obliged to ... recognize the right to work in national legal systems and to adopt a national policy on the right to work as well as a detailed plan for its realization. The right to work requires formulation and implementation by States parties of an employment policy with a view to ‘stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment’” (paragraph 26, quoting the ILO’s Employment Policy Convention, 1964 (No. 122)).

Avoiding engagement with the distributional axes is at the basis of the General Comment’s strengths and weaknesses. On the one hand, it provides the first systemic analysis of the right to work and seeks to justify its inclusion

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\(^6\) Committee on Economic, Social and Cultural Rights, General Comment No. 18, The Right to Work (adopted 24 November 2005).


\(^8\) Such as the Limburg Principles (see note 5 above).
among the economic and social rights. Like other General Comments of the Committee on Economic, Social and Cultural Rights, it tries to structure a workable jurisprudence around the right and, at the same time, to leave a broad sphere of discretion for each State to adapt the right to its political economy. On the other hand, the desire to elevate the right from the contested terrains of employment policy may secure its unique standing as a human right, but at the price of losing its instructive role in remedying the “economization” of labour market policy.

A residual feature of the General Comment that may remedy its avoidance of employment policy guidance lies in its procedural guidelines. The General Comment calls for devising national plans of action, numerical targets, benchmarking and means of monitoring and ensuring compliance. It also calls for the involvement of civil society and collective bargaining. While these requirements do not readily acknowledge the trade-offs imposed by the distributional axes, they constitute a guideline for the progressive realization of an employment policy that conforms to the positive values underlying the right to work. This is where the General Comment merges with another model for advancing the right to work – the open method of coordination used by the European Employment Strategy.

An employment policy response: The European Employment Strategy

The European Union’s Charter of Fundamental Rights, which marks out the “traditional” sphere of human rights in the Union, upholds primarily the “liberty” and “labour standards” components of the right to work. The right to access work is relegated to the more general sphere of employment policy, which is purposefully removed from the field and practice of human rights. The European Employment Strategy (EES) is based on a relatively new mode of governance known as the open method of coordination, in which a deliberative process among States and social partners leads to the development of morally binding guidelines (as opposed to legally binding ones) (Zeitlin and Pochez, 2005; Borrás and Jacobsson, 2004). In turn, these guidelines must be translated into National Action Plans (NAPs) in each and every Member State. Drawing on experimentation and mutual learning, the guidelines are then used to guide future development and further experimentation according to dynamically changing goals and objectives. Thus, the primary characteristic of the EES is that it is process-oriented. Moreover, the employment strategy is not “hard law” but rather “soft law” (Trubek and Trubek, 2005; O’Hagan, 2004; Kenner, 1999). There are no sanctions for a NAP that does not conform to the guidelines; Member States’ consent to the process is deemed to be enough to ensure their compliance. Consequently, some view this arrangement as wholly extra-legal.

Despite the fact that the strategy is not explicitly embedded in a familiar constitutional framework, it has been considered and analysed in constitutional
terms (de Búrca and Zeitlin, 2003). Its unique feature is precisely that it does not adopt the traditional human-rights "violations approach", in which compliance is monitored _ex post_. Instead, it seeks to influence employment policymaking _ex ante_. It therefore presents an innovative challenge when considering alternative means of forging a fusion of human rights concepts in policymaking (Ashiagbor, 2005; Goetschy, 2003; Trubek and Mosher, 2003).

The EES is a shell for a dynamically changing policy devised at multiple levels and in several stages. Its substantive guidelines are derived from the process itself. The Lisbon summit stressed the need to coordinate between goals of competition and those of social cohesion in order to preserve a European model. It was emphasized that the two strands need not be viewed as opposites, but rather as complementary. The integration of the two was translated into three broad objectives: full employment, quality and productivity at work, and social cohesion and inclusion. These were then detailed in a host of guidelines and measured by numerous benchmarks.

A comparison of the EES and the General Comment suggests that while the two forms of governance reflect very different conceptions of how to advance the right to decent work, they both have in common the search for a practical compromise. The General Comment seeks to provide a relatively hard guideline, at the price of conflating the many trade-offs that are embedded in the right to work. The EES proceeds from the recognition of trade-offs, the need for experimentation, a moral debate and multiple labour market institutions competing against each other. The price of this recognition is the strategy's reliance on a soft-law method of guidance and institutional learning.

While at first it would seem that the two institutions presented here are wholly divergent from one another, it is possible to reconcile them when observing the General Comment's emphasis on procedural safeguards. While the General Comment denies the validity of some practices by means of hard law, these practices fall into the category of the "easy cases" mentioned earlier — those abusive to workers, costly to the public and morally unjustified. This short list of practices, however, is not enough to uphold the unique standing of the right to work in the roster of human rights. The right to work will be strengthened only if it can also guide the positive development of employment policy. In other words, it should guide decisions when the rights of some may be compromised by those of others; when social experiments might undermine access to dignified work by imposing bad jobs on more workers, or when the division of profit between workers and employers, or the division of investment between the private and the public sectors could be affected. These cardinal decisions must indeed be guided by the values of dignified work for all.

Can the open method of coordination be used to advance the right to work? The lessons drawn from the EES may be instructive but they are not unequivocal (Trubek and Mosher, 2003; Watt, 2004; Trubek and Trubek, 2005). It is difficult to decipher the effects of the EES, because promoting a policy of enhanced employability should not be measured solely in terms of employment targets. Human rights generally and the right to work in particu-
lar cannot guarantee the attainment of a predefined outcome (Daintith, 2004). The important question is whether the outcomes would have been different had the open method of coordination not been used. Of course, this question might require one to devise a counterfactual scenario, which is methodologically rather impossible. Consequently, the findings are ambiguous. The EES strengthens the role of the social partners at the state level (Iversen et al., 2000). In addition, the NAPs have brought somewhat greater public attention to the topic of employment policy. At the same time, some have argued that the NAPs have become a ritual, rather than a meaningful practice. Others have argued that the NAPs are merely a description of annual economic policies in so far as they pertain to the labour market (Barbier, 2005). And others still have noted the social partners' complaints about limited opportunities for meaningful participation (EIRO, 2005). These opposing claims can be seen to result from the process-based mode of review and the absence of clear substantive expressions regarding just and unjust trade-offs.

Another way of assessing the EES's outcomes is to examine the content of the European employment guidelines themselves. These seem to deal mostly with employability and efforts to increase labour market participation. Although the new guidelines do contain some references to the quality of jobs, these are not intended to promote quality as a good in itself, but rather as a trait that is instrumental to "adaptability and mobility". The quality of work is mainly portrayed as necessary for the economy, but not for individuals' self-worth, dignity, income, qualitative participation or for any other value that cannot be readily attached to profits or the economy. Again, it may be claimed that the EES does not succeed in presenting a real countervailing force against the guideline of economic necessity.

A third viewpoint on the open method of coordination is that, unlike the General Comment, it gives an institutional stage to the trade-offs embedded in the development of employment policy. Thus, whereas the General Comment seeks to present a well-ordered world in which right and wrong are relatively easy to identify, the open method of coordination is based on acknowledging the plurality of views, empirical uncertainties and the need for experimentation. This strategy of admitting trade-offs has its price. For example, the High Level Group established by the European Commission in 2004 noted that the breadth of the policy prevents the formulation of precise targets and goals. Moreover, the large number of benchmarks ensures that each country performs well in some areas and poorly in others. To quote from the Group's report: "The problem is ... that the Lisbon strategy has become too broad to be understood as an interconnected narrative. Lisbon is about everything and thus about nothing. Everybody is responsible and thus no one. The end result of the strategy has sometimes been lost. An ambitious and broad reform agenda needs a clear narrative, in order to be able to communicate effectively.

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about the need for it. So that everybody knows why it is being done and can see the validity of the need to implement sometimes painful reforms. So that everybody knows who is responsible.”

Placing the General Comment and the open method of coordination side by side

Can the European dialogue on employment policy serve, with some adaptations, as a model for guiding employment policy by the value of dignified work for all? Making dignified work available should serve as a moral guideline for policy-makers, and this can serve as a potential remedy for the increasing imbalance between the strong institutionalization of economic concerns and the weak institutionalization of social aims. Recognition of the right to work places the values associated with work on an equal footing with other human rights, including – when relevant – common law rights of freedom of contract and property. Furthermore, it places the right to work above other general social interests.

To translate the right to work from a human right into a constitutional right that can be litigated in constitutional courts and international forums, its institutional form must be embedded in the national (or international) constitutional culture. If the right to work is distinct from other human rights, it will in all likelihood be viewed as less important. This is particularly true in light of its weak position at present and of the stronger emphasis that is placed on judicial deference to the State’s choice of employment policy and to the economy as a force that resists judicial review. It is important to ask questions such as who can make a claim (only individuals whose rights were directly violated or, as in some States, non-governmental organizations as well)? To which actors can such claims be addressed (only public actors, or private ones too)? Who may be consulted or allowed to take part in the process (experts and amici curiae)? What are the available remedies (nullification of legislation, judicial recommendations or pecuniary awards to those adversely affected by an exclusionary policy)?

The model of human rights guidance embodied in the General Comment may seem to be worlds apart from the employment policy model of the EES. However, the two approaches can also complement one another. “Easy cases” or core violations of the right to work can be guided by the General Comment and addressed by the conventional mode of constitutional review. This approach would apply, say, where the State refuses to let ethnic minorities use its employment offices. However, stopping at the “easy cases” may turn the right to work into a weak right that is often made redundant by other rights such as the general rights to liberty and equality. Recognizing that beyond the

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clear-cut cases lies a world of dialectical effects, a fusion of self-serving and others-regarding arguments that are empirically and morally contested, need not undermine the strength of the human right. Some issues will require a judicial approach that is more in line with the open method of coordination. In these cases the courts may ask the State (or a private actor) for a detailed explanation of policy. They may ask whether it has devised benchmarks according to which outcomes are monitored. It may request the parties to report on problems after some time has passed. In these cases, courts (or other forums that are entrusted with the responsibility for overseeing compliance with human rights) should act as mediating agents that bring the actors together and seek to ensure (a) that the appropriate values have been taken into consideration and weighed in the preparation of policy, and (b) that policy has been rationally tailored to fit these values.

The distinction between core cases and those that can only be addressed by highlighting trade-offs should be kept “open” and not set in advance. Keeping the process open implies that the process itself has an inherent distributive impact and therefore should be open to challenges. Openness should also apply to benchmarking, as what may seem to be technical measures often conceal value-laden preferences. Statistics, measurements and data are not neutral just because they are “scientific” and should therefore not be exempt from scrutiny. Moreover, to provide an effective setting for what may seem to be a chaotic free-for-all in which both the substantive policies and the rules of the game are challenged, many interested parties should be allowed to participate. Given the multiple distributional dimensions of employment policy and regulations, any predetermined design of interest representation – e.g. everyone is represented either as an employee or as an employer – conceals the voices of those who pay the price of any given policy.

In sum, procedural review of the right to work is based on a single anchor: the acceptance of dignified work for all as a guiding norm. This proposed coupling of a human rights umbrella with the development of employment policy has the advantage of acknowledging the distributional axes and uncertainty of devising employment policy and drawing on human rights for guidance. However, it is also vulnerable to objections from both the human rights and the employment policy spheres.

From the human rights perspective, it may be argued that a process-based review may save the right to decent work from the argument of infeasibility, but at the price of highlighting its internal contradictions. For example, a minimum wage may be argued to cause unemployment, yet its absence may be argued to infringe on the need to ensure dignified work. Thus, according to this argument, the right to work has no added value. Such an argument can be translated into two options. Either we dismiss the right altogether, or we argue that it should be turned into a “hard norm” that resonates better with the discourse of human rights. Simply stated – drop it, or do it properly.

The argument is valid but the two options – dismissing the right or turning it into a “hard norm” – are all-or-nothing options that present a worse alter-
native. To dismiss the value of dignified work for all because of the ambiguity of the right is to admit that it is removed from the roster of human rights and highly vulnerable to the supremacy of other rights and interests. It is indeed difficult to see how removing the right to work from human rights could radicalize the moral claim for dignified work for all, rather than suppress it. At present, there is no constitutional statement, other than the right to work, that emphasizes the centrality of work in human experience.

At the same time, just as in previous decades, work remains a substantial problem. Not all work is dignified, nor all conditions decent, nor all forms of work socially valued and recognized. Yet, even if the values are agreed upon, the right policy for making dignified work available to all is yet unknown, and its intrinsic trade-offs can never be made to disappear. Process-based review of employment policy therefore seeks to preserve some guidance from values that should inform experimentation in devising labour market policy (Supiot, 2003; Morgan-Foster, 2003; Scheppele, 2004). At the same time, the approach accepts internal conflicts and contradictions. Rather than resolving them, it seeks to open up questions, raise doubts and invite criticism. It signals that where labour market regulation comes into play one should perhaps no longer look for the ultimate solution and instead begin to search for value-informed experimentation, while being aware of the fact that the solutions adopted at one stage may cease to be relevant, sufficient or even morally appropriate a decade later. An examination of the complexity of values and means should not be confused with nihilism.

From the sphere of employment policy, a different concern emerges. This concern is the problem of “juridification” – that the legal sphere will overtake all other social spheres (Mundlak, 2001). If employment policy embodies multiple distributive dimensions, which raise empirical and moral concerns that cannot always be refereed in a binary fashion, then a belief in process may require that the process take place outside the courtroom. Juridification has intrinsic limitations that undermine macro-social processes: the need to translate all interests into the language of law, the time and expense consumed, and the alienation between the judicial system and the many people affected by it. An expansion of law’s scope and a belief in legal imperialism – i.e. for every social problem there is an appropriate legal solution – are not, in my view, virtues.

Ceteris paribus, the formulation of employment policy guided by the higher norm of dignified work for all is best served by extra-legal measures. This statement is, however, true of all human rights. Freedom of speech is also best served by state and private actors that look for ways to promote an active exchange of opinions in which all citizens are included. Constitutional remedies can amend a very particular and well-defined infringement of human rights, but they are less effective in spontaneously transforming the social order. The translation of social arguments into legal rhetoric can sometimes provide legitimacy and respect, but it also can remove social claims from the broader public discourse. The impact of law is therefore not one-sided.
The assumed impact of procedural constitutional review – to force a more democratic, open, rational and questioning process of employment policy-making – may respond in part to concerns about juridification. The proposed process-based review of the right to work seeks to remind everyone that dignified work should be accepted as a human right. It also contributes to the constitution of a civil society engaged in policy issues, through trade unions and interests groups of all sorts, which are better suited to bridge values, institutions and implementation. The non-binding, learning and deliberative process that is imposed by the EES is not undermined when the process is embedded in formal human rights review processes.

Conclusion: Working out the right to work

Can employment policy and human rights cohabitate in a single legal project? It may be difficult, both on the left and on the right of the political map, to accept the right to work as a superordinate norm. For some it is best to leave employment for ordinary politics and markets. Yet, one of the most important reasons for acknowledging human rights is that they represent values that are otherwise vulnerable to competing interests and rights. The current conceptual framework that guides the design of employment policy insists on economic variables and accepts the market as a governing institution that determines distributional outcomes. The proposed constitutional process does not undermine the political and economic nature of employment policy. It seeks to force the State to adapt, learn and make sure that political claims have an empirical and ethical merit. These features prescribe the role of law in guiding employment policy. The right to work should serve as a fixed reminder that the economic was designed to serve the person, and not vice versa.

For others, the problem with securing human rights in a process-based review is that it does not succeed in distinguishing right from wrong. Human rights should be reserved for dealing with the worst atrocities and not with minimum wages or workfare recipients (Ignatief, 2003). Yet human rights have long abandoned the confines of “worst atrocities against human kind”. Second- and third-generation rights have extended the scope of human rights, which now structure a shared understanding of a just society. It is clear that there are controversies within the human rights agenda, and that the direction suggested by human rights is not unequivocal. Human rights no longer need designate only consensual, universal and absolute truths. They have a broader objective, which is to enforce values otherwise downplayed by majorities and hegemonic interests. As Donnelly (2003, p. 202) has suggested in the context of economic rights, “free markets are an analog to a political system of a majority rule without minority rights”. It is therefore more acceptable to view human rights as a mode of communication, as an instrument for voice (Unni, 2004), as a way of tying theory to strategy (Deakin, 2004) and as a strategic interaction that places some debates and values at the centre (Luce, 2004). Human rights are therefore best understood as a reflexive body of law, rather than as a
prescription for a universal Magna Carta. In this more ambitious space created for human rights, the currently nebulous right to work must and can present a stronger statement.

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