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# Vulnerable Workers, Precarious Work and Justifications for Labour Law: a Comparative Study

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## 1. Introduction

Traditionally, justification for labour law centres on either (economic) efficiency or social justice arguments. Labour law based on economic efficiency attempts to address market failures, to tackle the problems of the governance of the contract of employment and to create a “well coordinated flexible division of labour”<sup>1</sup>. Intervention here tends to promote “good faith” dealing between the employer and the employee and, more lately, to encourage investment in innovation and skills. By contrast, labour law based on social justice arguments aims towards a fairer distribution of wealth, power or other goods in society<sup>2</sup>. As a rule, social justice arguments have been associated with the promotion of collective bargaining to boost labour power, or the imposition of basic labour standards. More recently, there has been a focus on the notion of work quality: that through work, workers should be able to gain the satisfaction of their wants and needs (so far as these are not outweighed by the wants of others). This is a development of the idea that labour is more than (or is not) a “commodity” that can be bought and sold on the labour market;

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<sup>1</sup> H. Collins, *Theories of Rights as Justifications for Labour Law*, in G. Davidov, B. Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, 137.

<sup>2</sup> H. Collins *op. cit.*, 137.

social justice demands that each person should be able to gain a sense of dignity and personal well-being through work<sup>3</sup>.

To these two justificatory elements must now be added arguments based on human rights. Here it is argued that labour rights are “fundamental rights” and that they therefore should have a “trumping” effect over other efficiency or welfare considerations<sup>4</sup>. These kinds of arguments have been made in particular in relation to anti-discrimination rights on the basis that they are analogous to “civil” and “political” rights, which tend to have high standing in the human rights regime<sup>5</sup>. They are more problematic in relation to labour rights which look more like “social rights” (the right to work or the right to just and favourable conditions at work for example). Social rights have a much lower status in human rights theory, and some authors argue that these rights are not “human” rights at all<sup>6</sup>. Problems arise over how to reconcile the redistributive role of the state required by the demands of social rights with the liberal foundations of human rights theory, and also where social rights stand in terms of the law<sup>7</sup>. However, the case is increasingly being made that the position of labour rights as “social rights” should be improved, on the basis that social rights share the same foundations as human rights and/or that the hierarchy between civil and political and economic and social rights is artificial and cannot be sustained<sup>8</sup>.

There are certainly complementarities between these three approaches to labour law regulation and all three justificatory elements can be discerned in the academic literature and in political discussion concerning the regulation of workers at the “bottom of the labour market”<sup>9</sup>. To a certain extent, this is a reflection of the global hegemony of liberal democratic thinking: all justificatory elements must show compatibility with liberalism

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<sup>3</sup> Theories of social justice have an extremely long history and have been used in support of a wide range of different policies. A good discussion of the origins of the idea of social justice is presented in R. Pound, *Social Justice and Legal Justice*, *Central Law Journal* 75, 1912, 455-463.

<sup>4</sup> R. Dworkin, *Taking Rights Seriously*, *New Impression with Reply to Critics*, G Duckworth and Co. Limited, 2009, 191.

<sup>5</sup> A.C.L. Davies, *Perspectives on Labour Law*, Cambridge University Press, Cambridge, 2009, 42.

<sup>6</sup> G. Letsas, *A Theory of the Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, 2007, 130.

<sup>7</sup> J. Fudge, *The New Discourse of Labor Rights: from Social to Fundamental Rights?*, *Comparative Labour Law and Policy Journal*, 2007-2008, 29, 35.

<sup>8</sup> C. Gearty, V. Mantouvalou, *Debating Social Rights*, Hart Publishing, Oxford, 2011, 98.

<sup>9</sup> J. Fudge, *Beyond Vulnerable Workers: towards a New Standard Employment Relationship*, in *Canadian Labour and Employment Law Journal* 12, 2005, 151-176.

in order to gain legitimacy. However, on closer scrutiny, there are contradictions which run through and between the three justificatory positions, meaning that in reality, human rights are poor mechanisms for achieving social justice, economic efficiency creates rather than reduces the inequalities which social justice tries to tackle, and finally, any expansive version of human rights (including social rights) presents a major challenge to efficiency arguments. As a result, there has necessarily developed a split between attempts to regulate for “precarious work” which concerns the demand side of the employment relationship and focuses on human rights and social justice in the context of economic efficiency, and regulation for “vulnerable workers” which focuses on workers’ characteristics and status and tends to start from the human rights position.

This is not to suggest that the approach towards precarious work as opposed to vulnerable workers is always consistent either in theory or in practice. Theoretically, the terms “vulnerable” and “precarious” have been used interchangeably. Theory on precarious work has considered the vulnerability of the workers involved, and the consideration of vulnerable workers has made recourse to the difficult economic conditions in which these workers find themselves<sup>10</sup>. Theoretical inconsistency is inevitable given the inherent contradictions in the justificatory approaches. There is also the problem that none of the different justifications mentioned above represent a perfect fit for labour law, and can be used in order to dismantle as well as to enhance specific rules relating to employment. Furthermore, different approaches have been taken at different geographical levels. Although “vulnerable workers” have been mentioned in specific national contexts (the UK and Canada being prominent examples), the term “vulnerable workers” has not been used at EU level (the focus here has been on precarious work). At international level, there is a concern both with vulnerable workers and with precarious work, most consistently expressed through the concept of “decent work”. This inconsistency in practice only serves to reinforce the theoretical inconsistencies and uncertainties identified above.

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<sup>10</sup> In particular the work of G. Rodgers straddles a consideration of both precarious work and vulnerable workers by looking not only at employment forms, but also the “dimensions of precariousness” which expose any worker to employment instability. G. Rodgers, *Precarious Work in Western Europe: the State of the Debate* in G. Rodgers, J. Rodgers (eds), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe*, Geneva, ILO, 1989, 3.

The aim of this article then, is not to argue that the regulation of the labour market on the basis of “vulnerable workers” and “precarious work” represents a consistent and final solution. Rather, it is to identify that this separation makes some sense in theoretical terms, but that each concept has its own flaws and reveals weaknesses in each of the different theoretical justifications, particularly in their application to labour law. It reveals that neither of these concepts has truly transformative power, because both are wedded to the global hegemony of liberalism, but nevertheless represent an interesting moment in the theorisation and justification for labour law.

## 2. Precarious Work

### 2.1. *Economic Foundation*

In both the academic and political literature concerning precarious work, the starting point appears to be economic change brought about by “globalisation”. The argument is that the process of globalisation has led to the disintegration of the old industrial model of employment based on the “standard employment relationship” (full time year-round employment for a single employer)<sup>11</sup>. This standard employment relationship along with a number of other key institutions – the “vertically integrated enterprise, the industrial union, the male breadwinner family and the state and employer as provider of services”<sup>12</sup> – provided a basis for a coherent set of social policies which “incorporated a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability and economic growth” in the West around the middle of the last century<sup>13</sup>. However, these institutions have been undermined by economic processes associated with globalisation. The manufacturing sector in developed industrial economies has declined, and the “vertically integrated enterprise” has given way to the decentralisation of production and vertical disintegration. At the same time, the rise of information

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<sup>11</sup> J. Fudge, *op. cit.*, 169.

<sup>12</sup> S. Deakin, *Renewing Labour Market Institutions*, International Labour Office, Geneva, 2004, 1-2.

<sup>13</sup> G. Rodgers, *op. cit.*, 1.

technologies has given birth to a new “knowledge” economy which emphasises flexibility in the labour market and new employment norms<sup>14</sup>. On the one hand, this flexibility has been presented as a new basis for economic efficiency and social compromise<sup>15</sup>. It is argued that flexibility delivers benefits for employers because they are able to “adapt their workforce to changes in economic conditions, and are able to “recruit staff with a better skills match, who will be more productive and adaptable leading to greater innovation and competitiveness”<sup>16</sup>. At the same time, employees benefit from the ability to better manage their work-life balance and to move easily from one job to another<sup>17</sup>. On the other hand, it has been argued that “flexibility”, in certain forms, can be damaging to employees. A distinction is made here between functional flexibility, which allows employers to require employees to change their skills to match changes in technology or workload and “numerical” flexibility which involves “adjusting labour inputs to meet fluctuations in employers needs”<sup>18</sup>. The latter type of flexibility is associated with the use of part-time, temporary, and agency workers and also altering the working-time patterns of shift or full time workers, or contracting out<sup>19</sup>. It has been suggested that it is this numerical flexibility which leads to precarious work, which is “characterised by low pay, low status, and little by way of job security, training, or promotion prospects”<sup>20</sup>. The challenge presented by precarious work therefore, is how to provide support to those workers displaced by the economic forces of globalisation, whilst still maintaining economic efficiency and growth. Three main ways of achieving this balance have been suggested in the (academic and political) literature. The first is to bring “precarious work” within the scope of traditional labour law rights. This involves either a reaffirmation of “core” rights which should apply to all labour contracts (which has been evident at ILO level) and/or an expansion of labour law

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<sup>14</sup> J. Fudge, *op. cit.*, 169.

<sup>15</sup> H. Collins, *Regulating the Employment Relation for Competitiveness*, in *Industrial Law Journal* 30, No. 1, 2001, 17-32.

<sup>16</sup> European Commission, *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security*, Office for the Official Publications of the European Communities, Luxembourg, 2007, 4.

<sup>17</sup> European Commission, *op. cit.*, 4.

<sup>18</sup> S. Fredman, *Precarious Norms for Precarious Workers*, in J. Fudge and R Owens, (eds.), *Precarious Work, Women and the New Economy: the Challenge to Legal Norms*, Hart, Oxford, 2006, 177.

<sup>19</sup> *Ibid.*, 177.

<sup>20</sup> *Ibid.*, 177.

concepts in order to include work traditionally outside its scope. The second is to create new rights covering work which is viewed as precarious. This has been the position adopted in the EU, with the creation of the Directives on part-time<sup>21</sup>, fixed term<sup>22</sup> and temporary work<sup>23</sup>. The third category, which is aspirational rather than factual, suggests tying labour law more closely to economic processes to achieve “regulation for competitiveness”. The idea here is that companies are given incentives to reduce precarious work by investment in training and skills and other “supply-side” features of the employment relationship. This tends to follow the new institutional economic perspective, that “smart” regulation can achieve the most efficient economic outcomes<sup>24</sup>. In this section, the focus will be on the first two of these positions. The EU’s position will be presented first, as it is the most distinct and contained of the three categories in dealing with “precarious work”. It demonstrates quite clearly a number of issues arising from the attempt to wed economic efficiency and human rights approaches, and also makes reference to social justice by the inclusion of “quality” elements into its legislative provisions. The ILO’s perspective will then be introduced, an approach which suggests that economic, human rights and social justice justifications can be used in concert to produce the best outcome for the elimination of precarious work. The third approach, which suggests that regulation should be tailored more closely to economic processes, will not be considered here. This is because the development of this approach has been in the direction of the designation of worker “capabilities” as the key to a well functioning economy. This fits most closely with the “social rights” positions adopted within the theorisations of vulnerable workers rather than precarious work. These positions are considered later in this article.

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<sup>21</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9.

<sup>22</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L 175/43.

<sup>23</sup> Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9.

<sup>24</sup> A. C. L. Davies, *op. cit.*, 29.



## 2.2. *Precarious Work in the EU*

Arguably, the idea that economic efficiency and “rights” are mutually reinforcing and can be developed together is central to the ethos of the EU. Article 2 of the EU Treaty states that the Union is founded on the “values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”, whilst Article 3 expresses the commitment of the EU to a “highly competitive social market economy” arising from “balanced economic growth and price stability”. In the context of labour law, the combination of economic efficiency and “rights” initially proceeded on the basis that regulation for (sex) equality would promote economic integration by creating a level playing field for actors and prevent unfair business competition<sup>25</sup>. This integrationist logic is clearly stated in the early equality Directives: the primary objectives of both Directives 75/117 on equal pay<sup>26</sup> and Directive 76/207 on equal treatment<sup>27</sup> were stated as the “harmonization of living and working conditions while maintaining their improvement”<sup>28</sup>. Arguably, there has now been a shift away from this integrationalist logic and towards the idea that it is in the “balance” between worker protection and economic freedom that lies the most efficient functioning of the EU (i.e. worker protection is valuable in its own right)<sup>29</sup>. But there remains a belief in the mutually reinforcing nature of economic efficiency and rights.

The atypical work Directives<sup>30</sup> are a good example of this attempt to marry economic efficiency and rights. On the one hand, the Directives are designed to further the principles of “flexicurity”, a major element of EU employment policy which attempts to combine “flexibility” for businesses with “security” for workers<sup>31</sup>. The flexibility element of this concept

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<sup>25</sup> M. Bell, *Between flexicurity and fundamental social rights: the EU Directives on atypical work*, *European Law Review*, 37 No. 1, 2012, 31-48.

<sup>26</sup> OJ [1975] L45/19.

<sup>27</sup> OJ [1976] L39/40.

<sup>28</sup> This quotation appears in the Preamble to Directive 76/207 on equal treatment. The wording in the Preamble to Directive 75/117 on equal pay is slightly different but of the same effect: the Directive is “aimed at making it possible to harmonize living and working conditions while the improvement is being made”. For further information see L. Rodgers, *Labour Law and the Public Interest: Discrimination and Beyond*, *European Labour Law Journal*, 2, No. 4, 2011, 302-322.

<sup>29</sup> M. Bell, *op cit.*, 31.

<sup>30</sup> The Part-time Work Directive, the Fixed-Term Work Directive and the Temporary Agency Work Directive: see footnotes 21-23.

<sup>31</sup> European Commission, *op. cit.*, 5.

speaks directly to the furtherance of economic efficiency. The idea is that the promotion of the flexible organisation of work in the EU (by the encouragement of atypical work) increases competitiveness by allowing businesses to respond to the pressures brought by the globalisation of production. At the same time, workers benefit from “new” kinds of “security” which are compatible with and enhance this kind of flexibility. The notion of “job” security (ability to stay in one job) is abandoned and replaced with the notion of “employment” security (the “protection” of workers from the difficulties of job transitions that flow from a flexible economy)<sup>32</sup>. This “employment security” is achieved through providing workers with the training they need to keep their skills up to date, and providing them with adequate unemployment benefits for periods of unemployment. The result is a win-win situation in which both workers and businesses can take the benefits flowing from a well functioning global and flexible economy<sup>33</sup>.

In fact, the effectiveness of “flexicurity” as a means to enhance worker protection has been brought into question, as it has tended to be used as a tool to further economic efficiency at the expense of worker rights<sup>34</sup>. Of course, the atypical work Directives include specific rights (the right to equal treatment) which should provide a boost to worker protection and neutralise some of the negative effects of the flexicurity agenda. The extent of this “boost” however, depends on the status that these “rights” have in the EU legal order. On the one hand, these rights can be seen as simply improving the weight of the security elements in the balance between flexibility for businesses and security for workers. On the other hand, if the right to equal treatment in the atypical work Directives achieves “human rights” status (as a fundamental social right which is at the same standing as other human rights) then this implies that these rights have a “trumping” effect over other efficiency considerations. On this basis, the question is not one of balance between competing interests, but of the absolute status of equal treatment as a fundamental right<sup>35</sup>.

There is also the question of the aim of the atypical work Directives to increase the “quality” of atypical work. All three of the atypical work Directives cite improving the quality of atypical work as an aim alongside the principle of non-discrimination. The Fixed-Term Work Directive

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<sup>32</sup> European Commission, *op. cit.*, 6.

<sup>33</sup> European Commission, *op. cit.*, 38.

<sup>34</sup> R Huiskamp, K. J. Vos, *Flexibilization, Modernization and the Lisbon Strategy*, *International Journal of Comparative Labour Law and Industrial Relations*, 23, No. 4, 2007, 587- 599, 593.

<sup>35</sup> M. Bell, *op. cit.*, 32.

(FTWD) sees the application of the principle of non-discrimination as the major way to achieve this aim, as well as establishing a framework for the prevention of abuse arising from the use of successive fixed-term contracts<sup>36</sup>. The Part-Time Work Directive (PTWD) also cites quality alongside the non-discrimination aim<sup>37</sup>, whilst the Temporary Agency Work Directive (TAWD) sees the quality of this kind of precarious work as improved not only through the principle of non discrimination but also “by recognising temporary work agencies as employers”, and hence allowing these workers to fall within domestic definitions of “employees” or “workers” and qualify for wider employment rights<sup>38</sup>. As has been mentioned, the promotion of work quality can be seen as an attempt to further social justice; the introduction of the requirement that work quality should proceed alongside the promotion of atypical work contracts, can be seen as an attempt to ensure a fair social distribution of costs and benefits amongst workers. The question is whether this social justice aim is compatible with the other stated (and arguably dominant) aims of the Directives, namely to ensure the protection of anti-discrimination rights for atypical workers, as well as maintaining economic efficiency and growth for the countries of the European Union.

How far the principle of non discrimination can improve work quality will depend on the strength of the *application* of this principle. The weak application of this principle implies that anti-discrimination provisions are subject to wide derogation, resulting from a wide margin of appreciation granted to member states in the application of flexicurity principles (employment policy being deemed outside EU competence and a matter for member states). This inevitably means that (economic) efficiency arguments tend to defeat the anti-discrimination provisions, putting work quality at risk. By contrast, the “strong” application of these rights will mean that they have a “trumping” effect over other efficiency considerations and will therefore be able to have a greater role in maintaining work quality. Furthermore, it is worth noting that in terms of the relationship between economic efficiency and social justice (work quality), economic and social justice do not necessarily proceed hand in hand<sup>39</sup>. In fact, economic efficiency as represented by the principles of flexicurity, is potentially detrimental to work quality. This is because, as an

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<sup>36</sup> Clause 1 FTWD.

<sup>37</sup> Clause 1 PTWD.

<sup>38</sup> Art. 2 TAWD.

<sup>39</sup> G. Rodgers, E. Lee, L. Swepston, J. van Daele, *The ILO and the Quest for Social Justice 1919-2009*, International Labour Office, Geneva, 2009, 95.

element of EU employment policy, job creation tends to be promoted at the expense of job quality, meaning that recourse to atypical work can equate with more “bad” jobs<sup>40</sup>.

An investigation of the case law at EU level gives some insight into how these conflicts are currently resolved. A number of different positions have been presented. The weak application of the non-discrimination provisions is evidenced by the case of *Mangold v Helm*<sup>41</sup>. In this case, the Claimant challenged a German law<sup>42</sup> which provided that the rules requiring “objective justification” for the conclusion of fixed-term contracts did not apply if, when starting the fixed-term work the employee had reached a certain age (52 for the purposes of the case), unless there was a close connection between that contract and a previous permanent contract with the same employer<sup>43</sup>. The Claimant argued that the reduction in protection resulting from these provisions breached the non-regression clause (Clause 8 (3) FTWD) which provides that the FTWD “shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement”. The Court of Justice came to the bizarre conclusion that although the German law did constitute a reduction in protection for a group of workers, it was not contrary to the non-regression clause because the law was not connected to the “implementation” of the FTWD. Rather, the German government had decided “autonomously to reduce the protection in this area afforded to older workers” even before the implementation of the Directive<sup>44</sup>. Furthermore, this reduction in protection was on the basis of the need to encourage the employment of older workers, which was a valid aim outside the scope of the FTWD because it was an element of employment policy (and so could override the anti-discrimination provisions)<sup>45</sup>.

On the other hand, there is evidence that the Court of Justice has restricted the margin of appreciation granted to member states, on the basis that the EU should promote “strong” anti-discrimination rights. In *Del Cerro Alonso*<sup>46</sup> the Court stated that as the FTWD concerned non-discrimination, then as a “principle of Community social law” the

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<sup>40</sup> European Parliament, *Report on Common Principles of Flexicurity*, 2007/2209(INI), 6.

<sup>41</sup> [2006] 1 CMLR 43.

<sup>42</sup> Par. 14 (3) Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung unter Aufhebung arbeitsrechtlicher Bestimmungen December 2000 (as amended).

<sup>43</sup> Initially this age was set at 58 but was later amended to 52, thereby bringing the Claimant, who was 56 within its scope.

<sup>44</sup> *Mangold*, *op. cit.*, [2006] 1 CMLR 43 par. AG76.

<sup>45</sup> *Ibid.*, par. 53.

<sup>46</sup> C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 54.

derogations had to be interpreted restrictively (and the discrimination provision given wide scope). Indeed, the test that the court used, first stated in the case of *Adeneler*<sup>47</sup>, was that applied in indirect discrimination cases: namely that the objective reasons used (by member states) to derogate from anti-discrimination provisions must respond to a genuine need, be appropriate for pursuing the objective pursued and necessary for achieving that purpose<sup>48</sup>. Furthermore, those objective reasons must refer to precise and concrete circumstances, and be capable in a particular context of justifying recourse to successive fixed-term contracts. They must not be general and abstract provisions<sup>49</sup>. In *Del Cerro Alonso*, this was interpreted to mean that the Spanish government could not rely on a statute which restricted a set of “length-of-service allowances” to permanent staff. This was a “general and abstract” provision which could not justify the difference in treatment in this case.

This “strong” approach to the anti-discrimination provision of the atypical work Directives was also adopted in *Bruno and Pettini*<sup>50</sup> where the Court found that this provision was “simply a specific expression of one of the fundamental principles of EU law, namely the general principle of equality”<sup>51</sup>. Moreover, in the case of *Bruno and Pettini*, the Court of Justice found that not only were the anti-discrimination provisions of the atypical work Directives fundamental, the quality objectives of the atypical work Directives were also “fundamental” because they concerned the “improvement in living and working conditions” and “proper social protection” for workers<sup>52</sup>. Indeed, not only were the provisions on anti-discrimination and work quality (social justice) given similar weight, they were also presented as mutually reinforcing and the one necessary for the achievement of the other. Specifically, the Court found that Italian statutory rules that qualification for pension rights depended on length of service constituted both discriminatory practice and also created obstacles to part-time work, because the rules made part-time work less attractive. The arguments of the Italian government, that part-time workers and full-time workers were not in comparative situations in relation to pensions,

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<sup>47</sup> C-212/04 *Adeneler v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057.

<sup>48</sup> C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 55.

<sup>49</sup> *Ibid.*, 54.

<sup>50</sup> Cases C-395/08 and C396/08 *INPS v Bruno and Pettini, INPS v Lotti and Mattencchi* [2010] 3 CMLR, 45.

<sup>51</sup> *Ibid.*, 58.

<sup>52</sup> *Ibid.*, 30.

and the difference in treatment could be objectively justified were given short shrift by the Court<sup>53</sup>.

At EU level therefore, the Court of Justice has found ways of presenting human rights and social justice (in terms of work quality) as essentially compatible. However, there are a number of points to make at this juncture. Firstly of all, the decision in *Bruno and Pettini* could be limited quite easily to its facts, given the wide margin of appreciation usually granted to member states. It seems a step too far to suggest that relating human rights and social justice in this way is the “new” position of the Court of Justice. Secondly, the mutually reinforcing nature of human rights and social justice relies on a very narrow reading of the latter’s scope, and there are a number of ways in which these two elements could conflict. The relationship is not too controversial when social justice is related to civil rights (such as anti-discrimination). The difficulty is maintaining this relationship when other areas of work quality are considered which go beyond civil rights and inch into the realm of “social rights” (the right to work, the right to minimum income and so forth). Some commentators argue that to extend human rights theory and practice in this way disrupts the whole human rights regime<sup>54</sup>. Thirdly, the presentation of human rights and social justice as mutually reinforcing can be seen merely as a political tool which serves to take power away from the most at risk in society. It operates by creating a narrative which because it is essentially “legal” is beyond reproach, but which misunderstands the need for those most at risk to build social justice themselves (through collective action for example)<sup>55</sup>.

Finally, it is worth noting that the compatibility of human rights and social justice relies on a particular reading of economic efficiency and flexicurity which may not necessarily be reproduced. Essentially encouraging atypical work and quality work can be seen as compatible with flexicurity, in so far as a reduction in the quality of atypical work would hinder employment security and therefore make it less easy for workers to move in and out of those jobs. On the other hand, such an interpretation of the atypical work Directives could be seen as hindering the processes of flexicurity by privileging security over flexibility. A commitment to quality jobs necessarily involves investment in jobs (at the bottom end of the market)

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<sup>53</sup> Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Matteucci* [2010] 3 CMLR , par. 71.

<sup>54</sup> Letsas, *op. cit.*, 130.

<sup>55</sup> A. C. Hutchinson, P. J. Monahan, *Law, Politics and the Critical Legal Scholars: the Unfolding Drama of American Legal Thought*, *Stanford Law Review*, 36, 1984, 199-246, 209.

which may not meet the expectations of employers, or allow them to respond adequately to changing business needs or conditions.

### 2.3. *The ILO and Precarious Work*

The notion of social justice lies at the very heart of the ILO Constitution. The Preamble to the Constitution states that many labour conditions involve “such injustice, hardship and privation” that social justice (and lasting peace) will only be achieved if there is an improvement in global labour conditions<sup>56</sup>. According to the original text of the Constitution, the achievement of this social justice must be based on the “guiding principle” that “labour should not be regarded merely as a commodity or article of commerce”<sup>57</sup>. This is a reference to the Marxian notion that, under capitalism, labour becomes a commodity. However, it is the conviction of the ILO that this connection is not inevitable and that “all forms of work can, if they are adequately regulated and organized, be a source of personal well being and social integration”<sup>58</sup>. Thus there is no inherent contradiction between economic efficiency and work quality; social justice and globalisation processes are essentially compatible. Increasingly, human rights at work are also being promoted as essential to the achievement of social justice (and not incompatible with economic efficiency). This is evident in the Decent Work agenda (the ILO’s major work on how to tackle precarious work) and in the attempts to restate the guiding principles of the ILO in the modern era<sup>59</sup>.

Prior to the Decent Work agenda, the ILO did attempt to address the issue of precarious work in a similar way to the EU: by the introduction of specific standards relating to atypical work. In 1994, the ILO introduced the Part Time Work Convention<sup>60</sup> followed by the Convention on Home Work<sup>61</sup> and the Private Employment Agencies Convention in 1997<sup>62</sup>. However, the ILO’s Constituents disagreed on the value of these

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<sup>56</sup> The text of the ILO Constitution is available at [www.ilo.org](http://www.ilo.org) (Last accessed 13 July 2012).

<sup>57</sup> Art. 427 Treaty of Versailles. Part XIII of the Treaty of Versailles was the original location of the Constitution and is available at [www.ilo.org](http://www.ilo.org) (Last accessed 13 July 2012).

<sup>58</sup> G. Rodgers, *op. cit.*, note 39, 7.

<sup>59</sup> F. Maupain, *New foundation or new facade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation*, in *European Journal of International Law*, 20, No. 3, 2009, 823-852.

<sup>60</sup> Convention 175, June 24, 1994.

<sup>61</sup> Convention 177, June 20, 1996.

<sup>62</sup> Convention 181, June 19, 1997.

Conventions. Whilst they were largely well received by worker groups and some governments, they were considered a restraint on economic efficiency, growth and employment creation by many other government and employer organisations. By 2008, the Part Time Work Convention had received only 11 ratifications, and the Convention on Home Work just 5. The Private Employment Agencies Convention was also poorly ratified<sup>63</sup>. As a result, these concerns have been incorporated and subsumed within the broader Decent Work agenda, for which there is much wider political consensus and agreement.

The starting point of the Decent Work agenda, introduced at the turn of the century, was the need to respond to the “transformation of the economic and social environment brought about by the global economy”<sup>64</sup>. There was a concern that the social dimension of globalisation should be given particular attention, and that there should be a “human face” to the global economy<sup>65</sup>. In promoting “decent work”, the ILO stated that globalisation should not just mean the creation of jobs, but “the creation of jobs of acceptable quality”<sup>66</sup>. In this context, the form of work was important (work should not be precarious), conditions of work should be improved and workers should be able to gain “feelings of value and satisfaction” from work<sup>67</sup>. This is not to say that security should be promoted above economic efficiency, but rather that the two should proceed in tandem: “The need today is to devise social and economic systems which ensure basic security and employment whilst remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market”<sup>68</sup>.

The human rights element of the Decent work agenda was to be delivered by the ILO *Declaration on Fundamental Principles and Rights at Work*<sup>69</sup> (the “Declaration”). This Declaration introduced a set of Core Labour Standards, consisting of freedom of association, freedom from forced labour, freedom from child labour and non-discrimination in

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<sup>63</sup> ILO, *Decent Work*, Report of the Director General, International Labour Conference, 87<sup>th</sup> session, Geneva, 1999. Available at [www.ilo.org](http://www.ilo.org) (Last accessed 10 July 2012), 4.

<sup>64</sup> *Ibid.*, 4.

<sup>65</sup> ILO, *op. cit.*, 5.

<sup>66</sup> *Ibid.*, 7.

<sup>67</sup> *Ibid.*, 7.

<sup>68</sup> *Ibid.*, 7.

<sup>69</sup> ILO, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*. International Labour Office, Geneva, 1998.



employment<sup>70</sup>. The idea was that concentration on a “small and eminently manageable set of standards” would elevate the status of these rights and create a new impetus and focus for the ILO, whilst the procedural nature of these standards would maintain the ILO’s commitment to worker empowerment and social justice (the “*de facto* privileging of the right to freedom of association”)<sup>71</sup>. It was hoped that the association of these standards with human rights norms would help to establish them as “fundamental international norms” which would promote both the ILO and worker protection worldwide. At the same time, the Core Labour Standards were not “rights” which meant that they could be introduced outside of the ILO’s traditional supervisory machinery. This meant that they were “much more palatable to many governments and many employers in a world of ever increasing capital mobility”<sup>72</sup>.

In fact, the Core Labour Standards have been criticised on the basis that they weaken the idea of (all) labour rights as human rights. First of all, the Declaration selects only civil and political labour rights, and excludes social and economic rights from consideration. This is compatible with (liberal) human rights discourse, but does not present the fairest outcome for workers<sup>73</sup>. It is also unfaithful to the commitment to social justice in the ILO constitution which contains reference to a whole range of social and economic rights<sup>74</sup>, and it suggests that job quality is fulfilled if human rights abuses are avoided, as “bad jobs” are only those which include some element of forced labour, child labour etc<sup>75</sup>. This demonstrates a very restrictive view of social justice for workers. Secondly, it has been argued that the Declaration takes value away from other elements of the Decent Work agenda.<sup>76</sup> In terms of other work rights, it is argued that

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<sup>70</sup> P. Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, in *European Journal of International Law*, 15, No. 3, 2004, 457-521, 458.

<sup>71</sup> *Ibid.*, 460.

<sup>72</sup> Alston, *op. cit.*, 458.

<sup>73</sup> *Ibid.*, 460.

<sup>74</sup> The Preamble to the Constitution states that social justice requires “the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures”.

<sup>75</sup> L. Vosko, *Decent Work: the Shifting Role of the ILO and the Struggle for Global Social Justice*, in *Global Social Policy*, 2002, 2 No. 1, 19-46, 30.

<sup>76</sup> P. Alston, *op. cit.*, 489.

they “were inevitably relegated to second-class status”, and also that the other aims of the Decent Work agenda were watered down (for example those regarding social protection and social dialogue)<sup>77</sup>. This concern is reflected in the provisions of the recent “Declaration on Social Justice for a Fair Globalisation” produced by the ILO<sup>78</sup>. This 2008 Declaration applies a mechanism of cyclical reviews of worker rights outside the “fundamental” rights with the aim of reassuring the international community of the ILO’s commitment to those rights beyond the Core Labour Standards<sup>79</sup>.

In one sense the question which arises from the renewed commitment in the 2008 Declaration to all work rights in the name of social justice, is how that promotion aligns itself to the promotion of economic efficiency (as well as human rights). It is possible to argue that social justice and economic efficiency go hand in hand and that “the very sustainability and survival of the global economy may be imperilled [...] if the ILO perspective in globalisation is not promoted”<sup>80</sup>. However, there are many conflicts between economic efficiency and a concept of social justice which goes beyond the promotion of the very basic “unfreedoms”. From experience, it is clear that improvements in productivity do not necessarily lead to improvements in work quality; economic pressures can serve to create and drive down the quality of (atypical) work. Furthermore, the decline in the extent of trade union coverage and the power of trade unions has often stemmed from economic arguments about promoting efficiency<sup>81</sup>.

### 3. Vulnerable Workers

#### 3.1. Personal Starting Points

The first starting point as far as the literature on vulnerable workers is concerned, is that not all non-standard workers are vulnerable. This is

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<sup>77</sup> *Ibid.*, 488.

<sup>78</sup> ILO, *Declaration on Social Justice for a Fair Globalisation*, available at [www.ilo.org](http://www.ilo.org) (Last accessed 10 July 2012).

<sup>79</sup> F. Maupain, *op. cit.*, 842.

<sup>80</sup> F. Maupain, *op. cit.*, 833.

<sup>81</sup> A. Pollert, *The Unorganised Worker: the Decline in Collectivism and New Hurdles to Individual Employment Rights*, in *Industrial Law Journal*, 34, No. 3, 2005, 217-238, 142.

perhaps best demonstrated by the worker profiles of those engaged in agency work. On the one hand, agency workers may be engaged in poorly paid, low skilled jobs associated with strategies of cost-saving and numerical flexibility. On the other hand, certain workers are able to exploit non-standard work practices for their own benefit. These “gold-collar” workers are able to attract high salaries for their specialist skills and could not be considered vulnerable given their labour market power<sup>82</sup>. The point is that the experience of each worker is individual; the focus is on the vulnerable *worker* rather than precarious work. The second point to make about the focus on vulnerable workers, is that the personal characteristics of those workers become particularly important. At international level, the ILO identifies a number of categories of vulnerable workers: women, older workers and disabled workers<sup>83</sup>. In the same way, national studies point to the concentration of worker vulnerability amongst certain groups. For example, a Canadian study conducted in 2005 concluded that women, less-educated and young workers were more likely to be vulnerable than men, those that were highly educated or older workers<sup>84</sup>. Finally, the focus on vulnerable workers tends to emphasise the extreme experience (or extremely bad experience) of certain actors in the labour market. This is evident in the UK’s policy on vulnerable workers which referred to the actions of employers as “abuse”<sup>85</sup>, and the vilification of “rogue” employers in “dark corners” of the labour market<sup>86</sup>. All of these features of vulnerable workers accord well with a human rights approach. The human rights approach is by necessity focused on individual circumstances rather than collective experience. Indeed, the individualised nature of the human rights approach is central to its legitimacy<sup>87</sup>. The human rights approach is also distinctly compatible with the consideration of individual personal characteristics, and protection from discrimination based on certain characteristics is an established human right which has been recognised in the labour law context. This is

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<sup>82</sup> P. Leighton, M. Syrett, R. Hecker, P. Holland, *Out of the Shadows: Managing Self-employed, Agency and Outsourced Workers*, Butterworth-Heinemann, 2007, 19.

<sup>83</sup> ILO, *op. cit.*, 33.

<sup>84</sup> R. Chaykowski, *Non-standard Work and Economic Vulnerability*, Vulnerable Worker Series – No 3, CPRN, Ottawa, 2005, [www.cprn.org](http://www.cprn.org) (Last accessed 13 July 2012).

<sup>85</sup> DTI, *Protecting Vulnerable Workers, Supporting Good Employers*, March 2006, [www.bis.gov.uk](http://www.bis.gov.uk), 17 (Last accessed 16 July 2012).

<sup>86</sup> BERR, *Vulnerable Worker Enforcement Forum – Final Report and Government Conclusions*, August 2008, [www.bis.gov.uk](http://www.bis.gov.uk), 28 (Last accessed 18 July 2012).

<sup>87</sup> C. H. Wellman, *Liberalism, Communitarianism, and Group Rights*, *Law and Philosophy* 18, No. 1, 1999, 13-40, 13.

well demonstrated at EU level by the design and wording of Directive 2000/78/EC<sup>88</sup>, which outlaws discrimination in employment on the grounds of religion or belief, disability, age and sexual orientation. The Preamble refers to such protection from discrimination as a “universal right” and cites the inclusion of protection from discrimination in a number of international human rights instruments<sup>89</sup>. Moreover, the human rights approach is particularly useful when the extremes of worker treatment are being considered. This is because at these margins, the treatment of workers enters into the abuse of personhood or humanity, which is the classic area of human rights concern. An example of the enactment of human rights principles for extreme worker abuse is evident in cases at EU level concerning the “slavery” of domestic workers. Here, a number of cases have considered whether the treatment of domestic workers amounts to slavery or forced labour under Article 4 of the European Convention on Human Rights<sup>90</sup>.

However, there are limitations to the human rights approach in the context of vulnerable workers. Perhaps the most severe of these limitations is that the human rights approach obscures any argument that labour market and regulatory failure may be systemic. Modern human rights are both a product of and implicated in the globalisation project, and cannot be separated from it<sup>91</sup>. It would therefore be theoretically inconsistent to challenge globalisation through recourse to human rights. However, as we have seen, globalisation has been a factor in contributing to increased earnings inequality and the *production* of vulnerable workers. It has also been associated with labour market deregulation with the result that “[T]he rising tide of economic prosperity has lifted only the few people who are fortunate enough to have found a safe berth in yachts”<sup>92</sup>. Furthermore, the human rights project is extremely sceptical of the value of collective action. Human rights are presented as individual rights, because this accords with the foundational liberal values of individual self-determination and justice<sup>93</sup>. This conflicts with the traditional understanding of *social* justice in labour law, that the best way to

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<sup>88</sup> OJ [2000] L 303/16.

<sup>89</sup> Directive 2000/78/EC, *op. cit.*, Preamble, par. 4.

<sup>90</sup> See *Siliadin v France* (73316/01) (2006) 43 EHRR 16 (ECHR); *R v K* (S) [2011] EWCA Crim 1691.

<sup>91</sup> M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, 2001, p. 7.

<sup>92</sup> J. Fudge, *op. cit.*, 172.

<sup>93</sup> C. H. Wellman, *op. cit.*, 13.

counteract vulnerability is to allow workers to join forces to boost their labour market power<sup>94</sup>.

### *3.2 Vulnerable Workers and the UK*

One of the potential benefits of the focus on vulnerable workers is the opportunity for the production of targeted initiatives which actually reach those particularly at risk in the labour market. The UK policy on vulnerable workers, which was introduced in 2006 by the then Labour government, is a good example<sup>95</sup>. It consisted of three main elements. The first was a crackdown on “bad” employers who were failing to comply with existing legal rights<sup>96</sup>. The second involved a strengthening of the legislative provision and enforcement mechanisms for agency workers, who were identified as particularly vulnerable in the labour market<sup>97</sup>. Finally, there were a number of pilot projects set up to try to mobilise local authorities, trade unions, employers, voluntary and community agencies to come together to support vulnerable workers. For example, there was the Vulnerable Workers Project in London which focused on the building services sector in the City of London and Tower Hamlets. This project introduced an employment rights advice centre to enable workers to access information and advice on employment law matters. It also promoted trade union membership and established an independent worker group which functioned to provide support and advice to these vulnerable workers<sup>98</sup>.

However, the legacy of the vulnerable worker policy was much more modest than might have been hoped. In the UK, trade union membership continues to decline<sup>99</sup>, and there remain many gaps in the enforcement of

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<sup>94</sup> O. Kahn-Freund in P. Davies and M. Freedland, (eds.), *Kahn-Freund's Labour and the Law*, Stevens and Sons, 1983, 19.

<sup>95</sup> DTI, *op. cit.*, 1.

<sup>96</sup> BERR, *op. cit.*, 3.

<sup>97</sup> *Ibid.*, 4.

<sup>98</sup> Details of this project are available in TUC, *Vulnerable Workers Project Final Report. Informing Strategies for Vulnerable Workers*, April 2009, [www.vulnerableworkersproject.org.uk](http://www.vulnerableworkersproject.org.uk) (Last accessed 12 July 2012).

<sup>99</sup> A report for the Department of Business, Innovation and Skills in 2011, found that trade union density had declined in the period of 1995 to 2011, from 32.4 percent in 1995 to 29.8 percent in 2000 and 26.0 percent in 2011. BIS, *Trade Union Membership 2011*, 2011, 7 [www.bis.gov.uk](http://www.bis.gov.uk) (Last accessed 10 July 2012).

existing worker rights<sup>100</sup>. The legislation on agency workers introduced in 2010 (Agency Worker Regulations)<sup>101</sup> does provide for equal treatment between agency workers and comparative full time workers, and so does provide a new level of legal protection for one group of “vulnerable workers”. However, as one of the only lasting policies emerging from the vulnerable worker agenda, it has significant limitations. The first limitation of this legislation is of course that it applies only to agency workers. Although agency workers may be vulnerable, there are many other vulnerable groups or individuals who have not received any legislative attention. Indeed, it could be argued that if the focus of the vulnerable worker policy is extreme worker abuse, there are other individuals or groups more deserving of protection (for example domestic workers). The second limitation of this legislation is its focus on discrimination and the equal treatment principle. The legislation does not deal with the issue of employment status which severely restricts the ability of agency workers to access legal rights, and does not address the problems of low union density amongst agency workers<sup>102</sup>. Finally, there are many limitations within the legislation which will restrict its effectiveness as a means to boost the rights of agency workers. A clear example is the limitation of the principle of equal treatment to “basic working conditions”, which in any event is subject to a qualification period which will exclude many agency workers from its scope<sup>103</sup>.

Interestingly, the Conservative/Liberal government, elected to power in the UK in 2010, has argued that the existence of anti-discrimination legislation based on protected characteristics (such as age, race, sex) means that all vulnerable workers are adequately protected in UK law (irrespective of the AWR). Indeed, the existence of “human” rights to non-discrimination on the grounds of certain protected characteristics has been used to support deregulatory measures in other areas of labour law, on the basis that the former legislation adequately prevents personal abuse. Such an approach of course avoids discussion about the difficulties involved with the enforcement of discrimination law for vulnerable

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<sup>100</sup> A Pollert, 217.

<sup>101</sup> SI 2010/93.

<sup>102</sup> See BIS, *op. cit.*, p. 15. This states that the trade union density for permanent employees is almost twice that of agency workers (26.7 percent and 14.2 percent, respectively).

<sup>103</sup> For a full commentary see A. Davies, *The Implementation of the Directive on Temporary Agency Work in the UK: a Missed Opportunity?*, *European Labour Law Journal* 1, No. 3, 2010, 307-331.

workers, and about whether human rights (and economic efficiency) should be the dominant mechanism for delivering social justice (rather than for example collective bargaining mechanisms). It also unravels some of the work of the previous government in attempting to provide targeted support to those particularly at risk in the labour market.

As part of its Parliament long Employment Law review, the Conservative/Liberal government committed to deregulation in the area of unfair dismissal, by increasing the qualification period from one to two years. In relation to these changes, the government carried out an Equality Impact Assessment in order to ascertain whether these changes would have a disproportionate effect on certain vulnerable groups of workers. The results suggested a “degree of disparity of impact” between workers<sup>104</sup>. In particular, the government found that a higher proportion of black and ethnic minority workers had continuous service of between one and two years than workers in general, and so would be disproportionately affected by the extension of the qualification period from one to two years<sup>105</sup>. This was also true for younger workers, who would also be disproportionately affected by this change.<sup>106</sup> However, the government was keen to stress that the disparate impact was not “considerable”, in the sense of being statistically significant, and that in any event, claims on the grounds of discrimination would be “completely unaffected by this measure”<sup>107</sup>. Therefore any “vulnerable” workers affected by this extension could rely on their human rights if they were aggrieved at work.

Paradoxically, the government also stated that although they believed that the disparate impact between different groups would not be “considerable”, extending the qualification period for unfair dismissal was a “proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff”<sup>108</sup>. This is a reference to the possibility of derogation from anti-discrimination provision (at EU level) on the basis of legitimate employment policy measures. Indeed, when a similar measure introduced by the previous Conservative government was challenged on the ground of (sex) discrimination, the

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<sup>104</sup> BIS, *Resolving Workplace Disputes: Government Response to Consultation*, November 2011, [www.bis.gov.uk](http://www.bis.gov.uk), 34 (Last accessed 10 July 2012).

<sup>105</sup> BIS, *Resolving Workplace Disputes: Final Impact Assessment*, November 2011, [www.bis.gov.uk](http://www.bis.gov.uk), 125 (Last accessed 10 July 2012).

<sup>106</sup> BIS, *Resolving Workplace Disputes: Final Impact Assessment*, *op. cit.*, 124.

<sup>107</sup> *Ibid.*, 122.

<sup>108</sup> BIS, *Resolving Workplace Disputes: Government Response*, *op. cit.*, 34.

government was able to objectively justify any discriminatory effect<sup>109</sup>. Thus, at the same time as removing unfair dismissal protection on the basis that the (human) rights of vulnerable workers remain adequately protected, the government exposed the weaknesses of this approach in providing protection to these workers.

### *3.3. Universal Human Rights and the Capabilities Approach*

It is evident from the above discussion that there are potential weaknesses in the “human rights” approach to the protection of vulnerable workers. One suggestion to boost the potential of human rights approaches for the protection of those at the “bottom of the labour market” is the integration of social rights into the human rights regime, through a “holistic” view of human rights<sup>110</sup>. This view rejects the traditional hierarchical separation between civil and political rights on the one hand and social rights on the other. It suggests that both civil and political and social rights have the same claims to “universality” and have the same moral status (both are “paramount”)<sup>111</sup>. Authors proclaiming this “holistic” view have pointed to the Universal Declaration of Human Rights which presents both civil and political rights alongside social rights, and which, in its opening line refers to the “equal and inalienable rights of all members of the human family”<sup>112</sup>. The holistic view also asserts that all human rights are interrelated, which gives further weight to the suggestion that civil and political and social rights should be considered together. The “holistic” approach to human rights has been used to suggest a way forward for the decent work agenda. The argument is that this approach

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<sup>109</sup> See *R v Secretary of State for Employment ex p Seymour-Smith* C-167/97 [1999] ECR I-623 ECJ. In this case the ECJ held that the statistics did not appear to show that a “considerably smaller proportion of women than men” could comply with the rule and so the rule on unfair dismissal qualification and so it did not amount to indirect discrimination. The ECJ also agreed with the government’s position that the aim of the long qualification period in encouraging recruitment was “legitimate” (unfair dismissal proceedings commenced by employees early in employment would discourage hiring) and could objectively justify and discriminatory effect. The question of whether the “legitimate” aim was proportionate was remitted to the national court for consideration.

<sup>110</sup> S. Marks, *The Past and Future of the Separation of Human Rights into Categories*, *Maryland Journal of International Law* 24, 2009, 209-243, 238.

<sup>111</sup> J. Donnelly, *Universal Human Rights in Theory and Practice*, 2<sup>nd</sup> edition, Cornell University Press, Ithaca, 2003, 28.

<sup>112</sup> G. MacNaughton, D. F. Frey, *Decent Work for All: a Holistic Human Rights Approach*, *American University International Law Review* 26, 2010-11, 441-483, 468.



has the potential to move the Decent Work agenda beyond Core Labour Standards to consider “whole jobs, whole people, and whole families”<sup>113</sup>. It is argued that the expansion of the concept of rights in this way uses the social justice elements of the ILO’s foundations and principles, in that the concern is for “poverty, inequality and human dignity”<sup>114</sup>, but it moves beyond that approach to encompass all individuals and groups (rather than certain oppressed groups). It is also argued that this approach allows consideration of a greater number of “life concerns” which may usually be thought of as outside the direct scope of the regulation of work. For example, the right to work can be viewed as intimately connected to the right to health, because it bolsters the realisation of such rights as the right to food and to housing<sup>115</sup>. Finally, the “holistic” approach, may also allow the consideration of a greater number of interests, beyond those of workers. The example given by Scott is that a court deciding whether to grant injunctive relief to prevent the dismissal of a group of workers for seeking to organise might consider the rights of the children and dependents<sup>116</sup>. This is a further development of the interdependency arguments used by those arguing for a holistic approach to human rights: interdependence can be understood not only in terms of the relationship between rights, but also as the relationship between people.

Of course, there is room for scepticism about the “holistic” approach to the human rights in the context of work. Criticisms of this approach can be formulated in a number of ways. First of all, there is the argument that work rights *should* be privileged over other forms of rights. Not only are work rights at the core of both decent work and personhood, they are a prerequisite to the achievement of other rights (economic and social rights to fair wages can only be achieved if there is the right to freedom of association and union membership). Secondly, there is the argument that the holistic approach to human rights takes away the power of human rights as legal instruments. Strategies for promoting a holistic approach to human rights are necessarily “soft”, and involve “rights-based instruments, budget analysis and risk assessment”<sup>117</sup>. Whilst these

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<sup>113</sup> G. MacNaughton, D. F. Frey, *op. cit.*, 450-451.

<sup>114</sup> *Ibid.*, 458.

<sup>115</sup> WHO Committee on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants on Health*, 2008, [http://whqlibdoc.who.int/publications/2008/9789241563703\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf), 5 (Last accessed 10 July 2012).

<sup>116</sup> C. Scott, *Reaching Beyond (Without Abandoning) the Category of Economic Social and Cultural Rights*, in *Human Rights Quarterly* 21, 1999, 633-660, 645.

<sup>117</sup> G. MacNaughton, D. F. Frey, *op. cit.*, 471.

methods may raise the awareness of rights, and provide a framework for data collection and the generation of “legal” policy, they depend on political commitment and transparency. Where that political will exists, policies can be successful, and social groups have been able to mobilise these methods to further work rights<sup>118</sup>. But without that political will, policies can have little impact or fail to reach the heart of the problems facing vulnerable workers. Finally, the holistic approach is not explicit about the relationship between rights and economics. This means that the uptake of this approach may be severely restricted.

By contrast, the “capabilities approach” first suggested by Deakin and Wilkinson<sup>119</sup> attempts to reconcile social rights with civil and political rights, whilst still taking into account market-oriented goals. The idea is that vulnerable workers are those who do not achieve their (economic) potential either because of a lack of endowments (genetic capacity), resources, or functionings (the “various things that a person may value doing or being”). This lack of endowments, resources or functionings results in a lack of “capability”: the freedom to make effective choices<sup>120</sup>. This is a personal problem for these workers, but it is also an economic problem, because it implies a lack of those institutions which can further economic development. The argument runs therefore, that certain social rights, rather than being a drain on economic functioning, are necessary for both economic and social progress. Furthermore, this link between economic functioning and social progress is only heightened with globalisation and the development of the knowledge economy. The knowledge economy relies on mobilising the economic potential of individuals, and so it is even more important that institutional structures have to be examined in order to assess how far they facilitate or constrain individuals to meet their “desired economic functionings”<sup>121</sup>.

The capabilities approach is used to explain that employment law can be viewed as part of the institutional structure which maintains the knowledge economy (as well as protecting vulnerable workers). Thus, law preventing pregnancy discrimination, rather than being viewed as an economic cost on enterprises, can be viewed as having a number of

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<sup>118</sup> G. MacNaughton, D. F. Frey, 480.

<sup>119</sup> S. Deakin, F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005.

<sup>120</sup> C. Barnard, S. Deakin, R. Hobbs, *Capabilities and Rights: an Emerging Agenda for Social Policy?*, *Industrial Relations Journal* 32, No. 5, 464-479, 465.

<sup>121</sup> *Ibid.*, 466.

positive personal and economic effects<sup>122</sup>. From a personal point of view, protection against dismissal for pregnant employees remedies an injustice (and a breach of human rights). From an economic perspective, law of this kind alters incentive structures so that employers are encouraged to invest in training and skills development of their employees. There is also a “demonstration effect” by which employers are discouraged from dismissal by the threat of damages for unfair dismissal. Furthermore, there may also be wider social changes which stem from the introduction of law prohibiting dismissal for pregnancy “a ‘destabilising effect’ on the set of conventions which together make up the traditional household division of labour”<sup>123</sup>. The capabilities approach is also demonstrated well by disability discrimination law which requires (in the provision for reasonable adjustments) that “employment practices be adapted to the circumstances of the individual”<sup>124</sup> and thus move beyond the guarantee of “formal” freedom, to some level of “substantive” freedom for workers. However, the assertion made by the capabilities approach, that legal structures are fundamental to the furtherance of both social and economic goals, has in fact never been controversial. This assertion fits with both the neo-liberal structure of the economy and the focus of human rights on the law. Furthermore, using discrimination protection as the main example of the achievement of the capabilities approach means avoiding the conflicts which might arise through the introduction of wider social rights into the human rights scheme (discrimination can be considered a human right), or the introduction of labour rights which do not sit well with the “human rights” approach. The capabilities approach is also fundamentally individualistic, like Sen’s capability theory that preceded it. This means that it has its limitations, particularly in the context of labour rights, which can rely on opportunities for collective action. These limitations are recognised by Sen himself: “although the idea of capability has considerable merit in the assessment of the opportunity aspect of freedom, it cannot deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us about fairness or equity in the processes involved, or

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<sup>122</sup> C. Barnard, S. Deakin, R. Hobbs, *op. cit.*, 466.

<sup>123</sup> *Ibid.*, 466.

<sup>124</sup> S. Deakin, *Contracts and Capabilities: an Evolutionary Perspective on the Autonomy-Paternalism Debate*, in *Erasmus Law Review* 3, No. 2, 2010, 141-153, 152.

about the freedom of citizens to invoke and utilize procedures that are equitable”<sup>125</sup>.

#### 4. Conclusion

At the beginning of this article, a distinction was made between attempts to regulate for precarious work and attempts to regulate for vulnerable workers. The argument was that regulation for precarious work focuses on how to achieve economic growth whilst achieving some level of human rights protection and social justice for workers. By contrast, attempts to regulate for vulnerable workers start from the protection of the human rights of workers against employer abuse, on the understanding that this provides a baseline through which social justice (and perhaps economic efficiency) can be achieved.

However, it has become clear that neither of these positions is presented consistently, and that both are severely hampered by the conflicts between the justificatory arguments that support them. In relation to the regulation of precarious work, the interpretation of human rights and social justice arguments in line with economic efficiency has severely limited their scope. At EU level, the right to equal treatment for atypical workers tends to be “balanced” with economic efficiency arguments, which has reduced its effectiveness. At ILO level, there has been a tendency to take a narrow approach to those labour rights deserving of protection in order that the economic processes of globalisation are not unduly restricted. In relation to vulnerable workers, a focus on human rights in the UK has supported economic efficiency, but, particularly latterly, has neglected social justice for workers. Both the “holistic” approach to human rights and the “capabilities approach” attempt to improve social justice for workers, but the practicality of the holistic approach can be questioned, and the capabilities approach is very much wedded to an individualistic and economic approach to social rights, which, in the context of labour law, may not provide any radical solution to the problems faced by vulnerable workers.

It may perhaps be suggested that a way forward exists in the *combination* of law and policies on precarious work with those concerning vulnerable workers. In some sense, this is the approach taken by the recent ILO

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<sup>125</sup> A. Sen, *Elements of a Theory of Human Rights* in *Philosophy and Public Affairs* 32, No. 4, 2004, 315–356, 336.

Convention on Domestic Work (and associated Recommendation)<sup>126</sup>. On the one hand, these instruments recognise that domestic work is “work like no other”; there are particular features of this work which make it precarious and in need of specific regulation<sup>127</sup>. On the other hand, it is recognised that domestic work is “work like any other”. This work involves (vulnerable) workers who are deserving of “human dignity” and respect<sup>128</sup>. The benefit of this approach is that it reaffirms the basic labour rights to which domestic workers should be entitled not only from a “rights” perspective, but also from a social justice perspective. Thus the Convention presents rights to non-discrimination alongside rights to freedom of association and rights to “fair terms of employment as well as decent working conditions”<sup>129</sup>. At the same time, the Recommendation sets out provision to target the specific problems faced by domestic workers at the “bottom of the labour market”, and the need to mobilise representative groups to enable workers to achieve not only individual but also social justice<sup>130</sup>.

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<sup>126</sup> Convention 189 and Recommendation 201, 16 June 2011 (not yet in force).

<sup>127</sup> ILO, *Decent Work for Domestic Workers*, Report IV (I) at the International Labour Conference, 99<sup>th</sup> session, 2010, Fourth Item on the Agenda, International Labour Office, 2010, 12.

<sup>128</sup> ILO, *op. cit.* 13.

<sup>129</sup> Art. 3(a), 3(d) and 5 Convention 189.

<sup>130</sup> For example, it identifies the particular problems of “live-in” domestic workers and provides that they should be given a private room with suitable sanitary provisions and lighting (Art. 16). It also identifies a number of additional measures to ensure the effective protection of migrant domestic workers (Art. 19-22).



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