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# Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation

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## Abstract

Labour rights have been neglected in human rights law. Classified usually as social rights, they have been excluded from key human rights conventions. Recently, the European Court of Human Rights has developed a technique, known as an 'integrated approach to interpretation', because it integrates social and labour rights in the European Convention on Human Rights. The first part of this article presents case law and debates on the adoption of this technique, and also discusses the example of Canada, where similar developments are

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taking place. It finds controversy in literature, and uncertainty in judicial decision-making. The second part, therefore, develops a normative justification for the integrated approach in interpreting labour rights. This is based on freedom, a key value underlying civil and political rights. Negative accounts of freedom are inadequate, though, for reasons that the article explains. Instead, it analyses positive freedom in light of the theory of capabilities, which leads to the collapse of sharp divisions between groups of rights. A positive account of freedom as capability *requires* the protection of labour rights under the European Convention on Human Rights, and leads to the development of important principles on human rights at work.

**Keywords:** social rights – labour rights – capabilities theory – European Convention on Human Rights

## 1. Introduction

In jurisdictions the world over, courts have engaged in the complex task of exploring the relationship between civil and political rights, on the one hand, and economic and social rights, on the other. This process has been taking place in the context of the interpretation of justiciable civil and political rights documents, as a response to individual petitions that questioned the dichotomy between the two groups of entitlements. Courts and other monitoring bodies have been faced with difficult questions of substance and competence: do social rights impose duties similar to civil and political rights or are they clearly distinguishable? Can judicial interpretation of a human rights document extend to areas that the drafters never envisaged, and if so, in what circumstances and to what extent? Viewed as social and collective rights, but appearing also in traditional civil rights documents, labour rights have often been at the forefront of academic debates.

The aim of this article is to give a principled justification for protecting labour rights as a part of civil and political rights conventions. The main focus of the analysis is on the European Convention on Human Rights (ECHR or ‘the Convention’), which has given rise to controversial decisions in recent years (section 2). The article explores an interpretive method that has come to be known as ‘an integrated approach to interpretation’. It is an integrated approach, because it integrates certain socio-economic rights into civil and political rights documents. Even though the European Court of Human Rights (ECtHR or ‘the Court’) has sometimes been willing to expand the scope of civil and political rights in the area of labour rights, at other times there has been uncertainty, which is evident both in the outcomes reached and the reasoning. This article describes the process and suggests that the uncertainty in these moral, legal and political questions is due to the fact that the integrated approach has mainly rested on reliance on materials of labour rights

bodies, such as the International Labour Organisation (ILO), which provoked much controversy among judges and academic scholars. The problem is also evident in the context of the Canadian Charter of Rights and Freedoms, which has addressed similar issues as discussed in section 3.

What emerges from the developments and debates is that the work of bodies like the ILO can help contextualise human rights questions in the employment sphere. However, what is missing in the process of interpretation is a theoretical justification. Where can we find such a justification for the integrated approach to interpretation in the area of labour rights? In order to address this question, the article turns to human rights theory. Section 4 looks at the idea of the indivisibility of rights, first, and the concept of freedom, second, as a justification. This section argues that liberty, which is a commonly articulated basis of civil and political rights, is equally critical as a basis for social and labour rights too. What is needed is a positive account of freedom, though, which this article advances. This takes account of issues such as material resources and availability of options, and is here analysed in light of the theory of human capabilities. This analysis of freedom underlies all groups of rights, leads to the collapse of sharp divisions between them, and requires the adoption of the integrated approach to interpretation.

## **2. The European Convention on Human Rights**

A definition of labour rights is necessary before moving on. Labour rights are entitlements that relate specifically to the role of being a worker. They can include a right to work in a job freely chosen; a right to fair working conditions, which may encompass issues as diverse as a just wage or protection of privacy; a right to be protected from arbitrary and unjustified dismissal; a right to belong to, and be represented by, a trade union; and a right to strike. Some of these rights can only be exercised individually and others collectively. Each of these rights may give rise to positive or negative duties. Even though differing between themselves, all these entitlements should be examined together for they arise in the employment context.

Labour rights have mostly been incorporated in social rights treaties, but some of their aspects have been included in civil rights documents. The European regional system of the Council of Europe provides an excellent illustration of the question of the legal protection of labour rights. As is well known, the Convention primarily concerns civil and political rights, and the European Social Charter (ESC or 'the Charter') guarantees social and economic rights. Most labour rights are protected in the ESC. The ECHR provides for a right to individual petition to the ECtHR. The ESC is monitored by the European Committee of Social Rights (ECSR or 'the Committee'), which issues periodic reports and hears collective complaints.

### A. The 'Exclusive Approach'

The ECtHR was traditionally reluctant to protect the alleged social components of the Convention. Even though in the early landmark case *Airey v Ireland*,<sup>1</sup> it held that there is no watertight division between the Convention and social rights, its position was far from consistent. *Francine van Volsem v Belgium*<sup>2</sup> involved the question whether cutting off, or the threat to cut off, the electricity from the applicant's council flat, while she was depressive and with chronic respiratory problems that made it difficult for her to find a job, while she was also caring for her ill grandchild, constituted degrading and humiliating treatment. The Commission, examining the admissibility of the application, held that, although in principle facts such as these might give rise to a breach of Article 3 that prohibits inhuman and degrading treatment, the minimum level of severity was not attained. The complaint was, therefore, declared inadmissible. The judicial protection of a social minimum of decency under the Convention was uncertain, and the decision was criticised by leading scholars, like Antonio Cassese.<sup>3</sup>

Labour rights case law illustrates the problem. The Convention explicitly protects two labour rights only: the right to form and join a trade union and the prohibition of slavery, servitude, forced and compulsory labour. Yet in a line of cases that were decided in the 1970s, 1980s and 1990s, looking at trade union rights, the Court repeatedly ruled that when a right can be classified as social and is protected in the ESC or in instruments of the ILO, it ought to be excluded from the ECHR. When applicants alleged that Article 11 (the right to form and join a trade union), encompasses a right to strike, for instance, the claim was rejected.<sup>4</sup> Similarly, the right to consultation and the right of a union to be recognised for the purposes of collective bargaining were not regarded as essential components of Article 11.<sup>5</sup> The Commission and Court created what Craig Scott called a 'ceiling effect';<sup>6</sup> the ceiling being, in this context, the ESC and the ILO.

This approach can also be called the 'exclusive approach', because the Court excluded social and labour rights from the scope of the ECHR, for the reason that they were protected in the ESC. Unsurprisingly, the jurisprudence where the Court adopted this stance gave human rights a bad name in labour law scholarship. Labour lawyers, like Keith Ewing, were sceptical about the effect of the Convention on rights of the socio-economic sphere, and questioned the

1 A 32 (1995); 2 EHRR 305.

2 (1991) 1 *Droit Social* 88. Discussed by Pettiti, 'Pauvreté et Convention Européenne des Droits de l'Homme' (1991) 1 *Droit Social* 84.

3 Cassese, 'Can the Notion of Inhuman or Degrading Treatment Be Applied to Socio-Economic Conditions?' (1991) 2 *European Journal of International Law* 141.

4 *Schmidt and Dahlstrom v Sweden* A 21 (1976); 1 EHRR 632.

5 *National Union of Belgian Police v Belgium* A 19 (1975); 1 EHRR 578.

6 Scott, 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' (1999) 21 *Human Rights Quarterly* 633 at 638–39.

role of human rights for labour law altogether.<sup>7</sup> Tonia Novitz said that the Court shows 'a greater interest on the defence of individual autonomy than collective solidarity',<sup>8</sup> and Lord Wedderburn described the case law as 'individual and formalistic'.<sup>9</sup>

That the decisions of the Court were criticised does not mean that they cannot be explained. Two reasons may explain the exclusive approach: first, the strict separation between civil and political rights and economic and social rights that was prevalent in international human rights law in the second half of the twentieth century; second, the fact that international human rights law traditionally regulated the relationship between the state and the individual, while the employment relationship is usually part of the private sphere. Both these assumptions have been challenged in recent years.

#### (i) Civil/social

Being classified as social rights, labour rights were neglected in international human rights law.<sup>10</sup> In the context of the ILO, their monitoring was weak.<sup>11</sup> Many liberal constitutions and human rights documents either did not protect them at all, or did not protect them on an equal footing with civil and political rights. There are, of course, certain examples of European national legal orders that incorporate social and labour rights.<sup>12</sup> In Italy, for instance, they feature in a section of the Constitution;<sup>13</sup> in Spain certain labour rights are protected together with other civil and political rights, while other social and labour rights are classified as principles of social policy;<sup>14</sup> in Greece, social and labour rights are protected together with civil and political rights.<sup>15</sup> Yet in many other jurisdictions at national level, in common law countries mainly, and at international level, they were neglected. This was due to the

7 See, for instance, Ewing, 'The Human Rights Act and Labour Law' (1998) 27 *Industrial Law Journal* 275.

8 Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003) at 238.

9 Wedderburn, 'Freedom of Association or Right to Organise? The Common Law and International Sources', in Lord Wedderburn (ed.), *Employment Rights in Britain and Europe* (London: Lawrence and Wishart, 1991) 138 at 144.

10 See, for instance, Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?', in Alston (ed.), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005) 61 at 83.

11 See, for instance, the discussion of recent developments in Alston, "'Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 457; see also Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art', in Alston, *ibid.* at 1.

12 See Fabre, 'Social Rights in European Constitutions', in de Burca and de Witte (eds), *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 15.

13 Title III Constitution of the Italian Republic 1947.

14 Spanish Constitution 1978, Chapter 1 on Fundamental Rights and Chapter 3 on Social Policy Principles.

15 Part II Greek Constitution 1975.

supposed sharp differences between the two groups of entitlements. On a view commonly advanced in the second half of the twentieth century, civil and political rights are negative, cost-free and have easily definable content. Social rights are positive, resource demanding and vague. For these reasons, these should not even be seen as rights;<sup>16</sup> or even if they are, a court is an inappropriate forum to decide questions that are abstract and resource demanding. These should better be left to the discretion of people's elected representatives, rather than the hands of unelected and unaccountable judges.<sup>17</sup>

The above assumptions have been put into question in recent years by two lines of developments. First, in theory, the conceptual division between the two groups of entitlements has been challenged. Scholars have shown that civil, political, economic and social rights can give rise to positive and resource demanding state obligations.<sup>18</sup> They face similar interpretive challenges, which can be overcome by theoretical and judicial engagement through interpretation. Second, in practice, social rights (including labour rights) have been recognised as legal entitlements of a higher status than ordinary legislation in several jurisdictions. Various countries, international and regional organisations have incorporated them in human rights treaties and constitutions, and made them enforceable through individual or collective petitions. The South African Constitution of 1996 and the case law of the Constitutional Court have come to be exemplary in these debates. At international level social rights became enforceable through individual petition in the United Nations (UN) and through collective complaints in the ESC. The EU Charter of Fundamental Rights 2000, which became legally binding through the Treaty of Lisbon, similarly incorporated both civil and political, and socio-economic rights.<sup>19</sup> The sharp line between civil and social rights started to fade away in recent years, and the real question emerged: what is the best way to give legal force to social rights?<sup>20</sup>

## (ii) Public/private

There is a second reason why the applicability of human rights law traditionally appeared very limited when it came to workplace relations. At its inception, international human rights law regulated the public sphere, namely the way in which the state treats its people, and not the private sphere, namely

16 See, among others, Cranston, *Human Rights Today* (London: Ampersand Press, 1962) at 38–9.

17 Gearty, 'Against Judicial Enforcement', in Gearty and Mantouvalou (eds), *Debating Social Rights* (Oxford: Hart Publishing, 2011) 54ff.

18 See Holmes and Sunstein, *The Cost of Rights – Why Liberty Depends on Taxes* (New York: Norton, 2000); and Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008).

19 For an overview of the issue in various national and supranational jurisdictions, see Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008); and Barak-Erez and Gross (eds), *Exploring Social Rights* (Oxford: Hart Publishing, 2007).

20 Mantouvalou, 'In Support of Legalisation', *supra* n 17 at 107ff.

how people treat each other. Private relations were (and still are) generally regulated by private law. Labour law primarily involves the relationship between the employer and the worker who are most of the time private actors, and hence beyond the reach of human rights.

Yet human rights law has over recent years been found to give rise to positive state obligations to regulate private conduct in several jurisdictions, both at international and at national level.<sup>21</sup> Convention case law provides ample evidence of positive state obligations. The Court has found in a number of cases that the ECHR imposes duties to act on the state, when conduct of private individuals is at stake. In *Opuz v Turkey*,<sup>22</sup> for instance, it examined the severe abuse to which a man subjected his wife. It ruled that Turkey violated its positive obligations under Articles 2 (the right to life), 3 (prohibition of torture and inhuman treatment) and 14 (prohibition of discrimination) of the Convention by failing to protect the applicant. Positive obligations can be imposed when there is imbalance of power between private parties, and state authorities know or ought to have known that one of the private actors abused the position of power.

The imbalance of power between parties that requires positive intervention is very familiar in labour law, where it is used to justify unionisation or legislative intervention.<sup>23</sup> The existence of positive obligations, it ought to be explained, does not mean that an individual who has a claim under the Convention can turn against another individual directly. The horizontal effect of the ECHR is indirect: it is the state that may be liable for failing to protect individuals from abuse by other individuals.

- 21 See generally Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006); Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341; Collins, 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization' (2007) 30 *Dalhousie Law Journal* 1; and Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 225.
- 22 Application No 33401/02, Merits, 9 June 2009. For analysis of positive obligations under the ECHR, see Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).
- 23 There is much literature on the justification for labour law. For an introduction, see Collins, Ewing and McColgan, *Labour Law* (Cambridge: Cambridge University Press, 2012) at Chapter 1. For discussion of other justifications, see Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Review* 468; Collins, 'Theories of Rights as Justifications for Labour Law', in Davidov and Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 137; Davies, *Perspectives on Labour Law*, 2nd edn (Cambridge: Cambridge University Press, 2009); Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 1; Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151; and Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2008) 8 *Theoretical Enquiries in Law* 531.

Civil and political rights cannot be sharply separated from economic and social rights. At the same time human rights law may be applicable to private conduct. Did these two developments affect the exclusive stance of the Court, described earlier on?

### B. The 'Integrated Approach'

Perhaps due to the developments sketched above, among other reasons, the case law of the Court took a turn in recent years when it employed an interpretive method, which came to be known as an 'integrated approach' to interpretation.<sup>24</sup> It is an *integrated* approach, because it integrates certain socio-economic rights into a civil and political rights document. This integrated approach characterises the work of the ILO more generally and has also been described as a 'holistic approach'.<sup>25</sup> Applied to the ECHR, it means that certain social and labour components are essential elements of the Convention, and should therefore be protected as such.

In the area of labour rights under the Convention, the adoption of the integrated approach is found in two key fields: on the one hand, we have a line of cases that look at collective labour rights under Article 11; on the other, there is case law that involves access to work and decent working conditions under Articles 8 (the right to private life) and 4 (prohibition of slavery, servitude, forced and compulsory labour).

In a series of cases, the Court took cognisance of social and labour rights materials of other international bodies that illuminated the scope of the Convention. The first labour rights case where the Court adopted the integrated approach was *Wilson, National Union of Journalists and Others v United Kingdom*,<sup>26</sup> a collective labour law case that ruled that the UK was in breach of Article 11. In *Sidabras and Dziautas v Lithuania*,<sup>27</sup> the Court read a social right, the right to work, into Article 8 of the ECHR that protects the right to private life. In these two cases, the Court took note of ESC and ILO materials. *Siliadin v France*<sup>28</sup> held that lack of criminalisation of extremely harsh working

24 The term was used by Scheinin, 'Economic and Social Rights as Legal Rights', in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff, 2002) 32.

25 Leary, 'The Paradox of Workers' Rights as Human Rights', in Compa and Diamond (eds), *Human Rights, Labor Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) 22 at 40.

26 2002-V; 35 EHRR 523. For analysis, see Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 *Industrial Law Journal* 1.

27 2004-VIII; 42 EHRR 104. For analysis, see Mantouvalou, 'Work and Private Life: *Sidabras and Dziautas v Lithuania*' (2005) 30 *European Law Review* 573.

28 2005-VII; 43 EHRR 287. See Mantouvalou, 'Servitude and Forced Labour in the 21<sup>st</sup> Century: The Human Rights of Domestic Workers' (2006) 35 *Industrial Law Journal* 395; and Cullen, '*Siliadin v France*: Positive Obligations Under Article 4 of the European Convention on Human Rights' (2006) 6 *Human Rights Law Review* 585.

conditions, such as those faced by the applicant migrant domestic worker, amounted to a breach of Article 4. In ruling this, the Court relied on several ILO materials. In *Rantsev v Cyprus and Russia*,<sup>29</sup> where the Court was asked to examine the alleged violation of Article 4 (among other provisions), it was satisfied that the provision covers human trafficking. The Court took note of international conventions on human trafficking in support of its decision. Unsurprisingly, this interpretive technique made the Court much more open to labour rights than it had been in the past, bringing civil and social rights a step closer.

However, reliance on materials of other bodies was strongly questioned in the Grand Chamber case *Demir and Baykara v Turkey*.<sup>30</sup> The facts were as follows: Tum Bel Sen, a civil servants' trade union, had been recognised for the purposes of collective bargaining and had also concluded collective agreements. Following litigation, Turkish courts found that these agreements should be annulled, because civil servants' unions should not have been recognised as having a right to conclude them in the first place. In examining the complaint, the Court made mention of several ILO and other relevant documents, at which point Turkey raised an objection: how can it be legitimate for the Court to use ILO Conventions even though Turkey had not signed and ratified some of them? How could the ECtHR impose on it international obligations that Turkey had never agreed to undertake?

The Grand Chamber of the Court was clear: 'the Court has never considered the provisions of the Convention as the sole framework of reference' for its interpretation.<sup>31</sup> According to the rules of interpretation found in the Vienna Convention on the Law of Treaties 1969, a treaty ought to be interpreted according to its object and purpose. The object and purpose of a document that protects human rights is, according to a well-established principle of the Court, to make these rights 'practical and effective, not theoretical and illusory'.<sup>32</sup> The interpretation of the Convention must also take account of other rules of international law,<sup>33</sup> and read it as a 'living' document according to 'present-day conditions'.<sup>34</sup> Several materials can serve to elucidate the content of the Convention, both from other international organisations and from the Council of Europe itself. In addition, when taking note of the relevant materials, the Court stressed that it never distinguishes between documents that the Respondent State has signed and ratified and those that it has not.<sup>35</sup>

29 *Rantsev v Cyprus and Russia* Application No 25965/04, Merits, 10 January 2010; noted in Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 *Human Rights Law Review* 546.

30 48 EHR 54.

31 *Ibid.* at para 65.

32 *Ibid.* at para 66.

33 *Ibid.* at para 67.

34 *Ibid.* at para 68.

35 *Ibid.* at para 78.

Not only that, but at times it has paid attention to materials that are not, at the time, legally binding, such as the EU Charter of Fundamental Rights.<sup>36</sup>

### (i) Optimism

The integrated approach to interpretation can be better understood if it is set against the background of the idea of cross-fertilization,<sup>37</sup> which is said to take place when a monitoring body is willing to refer to other bodies' jurisprudence. Looking at the Convention system in particular, Judge Rozakis suggested that it is 'in constant dialogue with other legal systems':<sup>38</sup> namely the European legal order, the international legal order and other national legal orders.<sup>39</sup> The ECtHR and its judges 'do not operate in the splendid isolation of an ivory tower built with materials originating solely from the ECHR's interpretative inventions or those of the States party to the Convention'. Materials of other bodies have gained weight in the case law and '[t]his is a good sign for the founders of a court of law protecting values which by their nature are inherently indivisible and global'.<sup>40</sup>

By taking note of social and labour rights materials, the Court benefits from their expertise in the labour law field. The legitimacy of its decisions may also be enhanced when they are based on consensus of more than one supra-national bodies on issues that have proved to be controversial. Labour rights are definitely one such issue, so making mention of other bodies' position has positive effects.

The reliance of the ECtHR on expert bodies in the above line of cases revived the interest of labour law scholars, who had been disappointed by early ECHR case law. Ewing said that *Wilson* is a decision that would 'restore confidence in Article 11 of the Convention'.<sup>41</sup> More recently, Ewing and Hendy characterised *Demir and Baykara* an 'epoch making' judgment,<sup>42</sup> and said that in this decision 'human rights have established their superiority over economic irrationalism and "competitiveness" in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers'.<sup>43</sup> *Siliadin* was also welcomed for opening up the

36 Ibid. at para 80. For analysis against the background of Strasbourg's methods of interpretation more generally, see Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509 at 521–3.

37 Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997–1998) 107 *Yale Law Journal* 273 at 323.

38 Rozakis, 'The European Judge as a Comparatist' (2005) 80 *Tulane Law Review* 257 at 268.

39 Ibid. at 269–70.

40 Ibid. at 278–9.

41 Ewing, supra n 26 at 5.

42 Ewing and Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2 at 47.

43 Ibid. at 47–8.

Convention to claims of grave labour abuse, raising awareness and leading to legislative reform.<sup>44</sup> Countouris and Freedland examined the compatibility of UK law on strikes with ECHR principles.<sup>45</sup> Finally, Collins suggested that 'it is important to appreciate that recent years have revealed a profound reorientation in the ECHR's interpretation of Convention rights in the context of the workplace and employment relations'.<sup>46</sup> Human rights law scholars too explored how far this interpretive method could go in rights at work and other social rights.<sup>47</sup>

These developments were significant, both for providing broader protection to social and labour rights, which are monitored weakly in Europe and internationally, and for questioning the traditional division between civil, and social and labour rights.

#### (ii) Dilemma and disappointment again

But the optimism about the potential of the adoption of the integrated approach was not bound to last long. In another judgment, *Sorensen and Rasmussen v Denmark*,<sup>48</sup> it became clear that mere reliance upon materials of other international organisations was not a panacea. The case involved the right not to associate, which the Court has found to be a component of Article 11 of the Convention. Relying heavily on materials of the ECSR, the Grand Chamber examined the compatibility of 'closed shop' agreements with the ECHR.<sup>49</sup> The majority held that agreements which impose an obligation on employees to be members of a particular trade union with which the employer has agreed to negotiate, violate the Convention. In terms of the reasoning that relies on materials of expert bodies, the *Sorensen and Rasmussen* case raised the following issue: at the same time that the ECSR holds that closed shops breach the ESC, the ILO leaves discretion to member states; it does not find that compulsory union membership is contrary to ILO documents. The integrated approach, which had relied on experts' opinions up to that point, was faced with a dilemma. What should the ECtHR do when expert bodies do not agree?

44 Mantouvalou, 'Modern Slavery: The UK Response' (2010) 39 *Industrial Law Journal* 425.

45 Countouris and Freedland, 'Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK' (2011) 1 *European Labour Law Journal* 489.

46 Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 *Modern Law Review* 619 at 627.

47 O'Connell, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) *European Human Rights Law Review* 583; and O'Connell, 'The Right to Work in the ECHR' (2012) 2 *European Human Rights Law Review* 176.

48 2006-I; 46 EHRR 572.

49 This question had been examined in past case law. For analysis of the issue see Mantouvalou, 'Is There a Human Right not to Be a Trade Union Member?', in Novitz and Fenwick (eds), *Human Rights at Work – Perspectives on Law and Regulation* (Oxford: Hart Publishing, 2010) 439.

The case *Palomo Sanchez v Spain*<sup>50</sup> can further illustrate the point that materials of expert bodies do not play a decisive role in the determination of whether there is a breach of the Convention. The question was whether the dismissal of employees for publishing offensive materials in a trade union newsletter violated freedom of expression (Article 10) read together with Article 11. The Grand Chamber took note of Recommendation 143 of the ILO and other relevant materials examining the special role of freedom of expression in the trade union context. However, the majority rejected the claim of the applicants on the basis of the specific facts of the case, rather than the issue of principle. Domestic courts did not reach an unreasonable decision, as the Court said.<sup>51</sup> A powerful dissent disagreed with the approach of the majority for not being appreciative of the specific context.<sup>52</sup> Even though the majority mentioned international legal materials of the ILO and the judgment of the Inter-American Court of Human Rights, it gave them insufficient attention, in the view of the dissenting judges, who said that the majority was mistaken in balancing the conflicting interests.

Judge Rozakis also stressed that use of materials of other bodies alone does not answer the most difficult moral, legal and political questions that the Court must address. He admitted that 'to be fair in regard to the way in which the ECtHR assesses the value of these documents, reference to one of them does not automatically lead it to rely solely or exclusively on it in reaching its decisions; the ECtHR is free to consider all the material before it, in full knowledge of its legal value and validity, and to decide accordingly.'<sup>53</sup>

The Court's uncertainty on the relationship between the Convention and social rights became even more striking in another (non-labour rights) Grand Chamber case, *N v United Kingdom*.<sup>54</sup> This judgment dealt with the issue of medical asylum. In developing its reasoning in a striking passage of the majority opinion, the Court said: '[a]lthough many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.'<sup>55</sup> This statement marks a retrograde step in the protection of socio-economic aspects of the rights protected under the ECHR, and was strongly criticised by Judges Tulkens, Bonello and Spielmann.<sup>56</sup>

50 Application Nos 28955/06, 28957/06, 28959/06 and 28964/06, Merits, 12 September 2011.

51 Ibid. at 74.

52 See dissenting Opinion of Judges Tulkens, Thór Björgvinsson, Jočienė, Popović and Vučinić.

53 Rozakis, *supra* n 38 at 275.

54 47 EHRR 885.

55 Ibid. at para 44.

56 Ibid. at Dissenting Opinion, para 6. For analysis of the judgment, see Mantouvalou, 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72 *Modern Law Review* 815.

*Sorensen and Rasmussen, Palomo Sanchez and N v United Kingdom* revealed weaknesses: first, reliance on the views of expert bodies cannot do all the work, not least because experts may disagree; second, and more generally, there is uncertainty as to the social aspects of the Convention, as well as to how much attention has to be paid to ILO and ESC materials. The ILO, the ECSR or other international bodies cannot replace the Court's duty to reason morally and legally, in the same way that *our* moral thinking and reasoning cannot be done by others.

### 3. Canada

The raising of questions concerning the protection of social rights in the context of civil and political rights documents is not a development unique to Strasbourg jurisprudence. The example of Canada has raised dramatic controversy in academic literature, with important implications for workers' rights. The Canadian Charter of Rights and Freedoms follows the model of the ECHR: it does not explicitly protect social rights. Section 2(d) of the Charter protects workers' freedom of association. For many years, the Supreme Court of Canada excluded collective bargaining and the right to strike from the scope of freedom of association. In jurisprudence known as the *Labour Trilogy*, the Court examined three separate claims: one regarding Alberta statutes that did not permit many categories of public servants to go on strike and required compulsory arbitration instead;<sup>57</sup> the second involving federal legislation on public sector wage control that impaired the power to bargain collectively for two years;<sup>58</sup> and the third one involving a provincial statute that banned temporarily a lawful strike in the dairy industry.<sup>59</sup> The Court refused to recognise that the Charter protects the right to collective bargaining and the right to strike. In the *Alberta Reference* case, Justice Le Dain stated that 'modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer, are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise.'<sup>60</sup> For this reason, it was ruled to be compatible with the role of the Court to interpret the Charter in light of 'modern rights' that were not explicitly mentioned in the provision in question.

Labour law scholars criticised the *Labour Trilogy*. Arthurs said that in this line of cases the 'score was management *three*, labour *nil*,'<sup>61</sup> expressing

57 *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313.

58 *Public Service Alliance of Canada v Canada* [1987] 1 SCR 424.

59 *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v Government of Saskatchewan* [1987] 1 SCR 460.

60 See *supra* n 57 at para 144.

61 Arthurs, 'Labour and the "Real" Constitution' (2007) 48 *Cahiers de Droit* 43 at 47–8.

pessimism about the role of constitutional rights and constitutional courts for the protection of workers. Christian and Ewing examined the developments in relation to the ECHR and the UK experience, and said that ‘incorporation of the European Convention as an equivalent document into domestic [UK] law will offer little protection from government attacks and may indeed create another platform for further restrictions on the unions.’<sup>62</sup> As the Canadian developments occurred before the incorporation of the ECHR into UK law, they suggested that if incorporation took place, an effort should be made to protect trade unions from the human rights document itself, as it could have a harmful effect on the interests of workers.

However, in 2007, in the case *B.C. Health Services*<sup>63</sup> the Supreme Court of Canada ruled that Section 2(d) of the Canadian Charter includes a right of unions to engage in collective bargaining, and imposes on employers a duty to consult and negotiate in good faith. In doing so, it relied on Canada’s undertakings in international law, paying special attention to materials of the ILO, such as Convention No 87 on Freedom of Association and Protection of the Right to Organise 1948, the ILO Declaration of Fundamental Principles and Rights at Work, as well as reports and observations of the Committee of Experts and the Committee on Freedom of Association. It also discussed other international human rights documents, as well as the surrounding academic literature. The Court said that international materials can assist it in the interpretation of the Charter,<sup>64</sup> that the Charter should be interpreted as providing protection at least equal to that in international treaties that Canada has ratified,<sup>65</sup> and that ‘these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.’<sup>66</sup> Several Canadian scholars generally embraced this development for recognising fundamental labour rights in the Charter.<sup>67</sup>

However, the reasoning of the Canadian Supreme Court, which took note of ILO materials, was also seriously questioned. In a series of articles, Brian

62 Christian and Ewing, ‘Labouring Under the Canadian Constitution’ (1988) 17 *Industrial Law Journal* 73 at 90.

63 *B.C. Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27, [2007] 2 SCR 391.

64 *Ibid.* at para 69.

65 *Ibid.* at para 70.

66 *Ibid.* at para 71.

67 See, for instance, Blackett, ‘Mutual Promise: International Labour Law and *B.C. Health Services*’ (2009) 48 *Supreme Court Law Review* 365; see also Brunelle, ‘La Liberté d’Association Se Porte Mieux: Un Commentaire de l’Arrêt *Health Services*’ (2009) *Conférence des juristes de l’État 2009: XVIII<sup>e</sup> Conférence* 237. For further (not un-critical) discussion, see Fudge, ‘The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond’ (2008) 37 *Industrial Law Journal* 25; and Etherington, ‘The *B.C. Health Services and Support* Decision: The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did It Come from and Where Will It Lead?’ (2009) 30 *Comparative Labor Law and Policy Journal* 715.

Langille challenged the Court's reasoning for several reasons.<sup>68</sup> Langille was particularly critical of the Court's reliance upon ILO jurisprudence, namely the adoption of an integrated approach to the interpretation of the Canadian Charter. His criticism was based on questions such as these: why did the Court take note of opinions of ILO bodies, which are not judicial bodies and do not have the power to issue authoritative interpretations of ILO Conventions? Why did it rely on the ILO Declaration of Fundamental Principles and Rights at Work, without explaining that it is merely a Declaration, and not a binding Convention? How did the Court take note of Convention 98 that has not been signed by Canada—an objection that echoes the position of Turkey in the *Demir and Baykara* case?

The criticism of the use of international labour law materials in the interpretation of the Charter did not remain unanswered.<sup>69</sup> However, the stance of the Canadian Supreme Court led to even greater controversy in 2011, in the *Fraser* judgment.<sup>70</sup> The case examined Ontario legislation, which involved agricultural workers. The legislation did not recognise a mechanism through which trade unions or other representatives could obtain collective bargaining rights. The effect was that agricultural workers were treated differently to other groups of workers in Canada. *Fraser* weakened the duty recognised in *B.C. Health Services* from an obligation of the employer to bargain in good faith, to an obligation to good faith consideration of workers' representations. Leaving the substantive outcome of the case on the side (the weak protection of a traditionally vulnerable group of workers, which Abella J emphasised),<sup>71</sup> the relationship between the Canadian Charter and international labour law came again to the forefront of the debate. The majority of the Court ruled that ILO treaties which Canada has ratified are relevant to the interpretation of constitutional guarantees: '*Charter* rights *must* be interpreted in light of Canadian values and Canada's international and human rights commitments.'<sup>72</sup> Justice Rothstein, however, citing Langille's arguments, stressed that Canada has not ratified Convention 98 of the ILO, which cannot therefore be used as authority.<sup>73</sup>

68 Langille, 'Can we Rely on the ILO?' (2008) 13 *Canadian Labour & Employment Law Journal* 363; and Langille, 'The Freedom of Association Mess: How we Got Into it and How we Can Get Out of it' (2009) 54 *McGill Law Journal* 177. For further critical discussion, but from a different perspective to Langille, see Tucker, 'The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada' (2008) 61 *Labour/Le Travail* 151.

69 See Adams, 'The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille's "Can we Rely on the ILO?"' (2008) 14 *Canadian Labour and Employment Law Journal* 317.

70 *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3.

71 *Ibid.* at Dissenting Opinion of Abella J, paras 348–50.

72 *Ibid.* at para 92; see also para 93.

73 *Ibid.* at para 248 (*per* Rothstein J).

Academic scholarship from both ends of the debate's spectrum has been critical of *Fraser*, both for its outcome and the reasoning.<sup>74</sup> Scholars that were in favour of the integrated approach in the interpretation of the Canadian Charter expressed scepticism particularly because of the lack of consistency in engaging with ILO jurisprudence. Fudge said that it 'serves as a reminder that judicial decisions are pulled by gravitational forces, but unlike tides, these forces are not natural, but political',<sup>75</sup> and criticised the Court for being 'selective in how it uses the ILO's commentary on freedom of association and how it refers to ILO supervisory body decisions without clearly identifying the basis for the selection'.<sup>76</sup> Big questions remained open, such as whether the right to strike is protected under Section 2(d) of the Canadian Charter, which is the clear position of the ILO jurisprudence on Convention 87.<sup>77</sup> The stance of the Canadian Supreme Court in its reliance on ILO materials was characterised as 'unpredictable'.<sup>78</sup> On the other hand, Langille who had been critical of the interpretation of the Charter in light of ILO materials remained highly sceptical. In a co-authored piece on the *Fraser* judgment, he criticised afresh the Court for using human rights documents rather than developing legal arguments, treating the relevant texts as 'Holy Scripture'.<sup>79</sup> On his view, what the Court ought to do is to develop reasoning on the basis of legal arguments and not on the basis of ILO documents.

Bogg and Ewing, in turn, used a metaphor to illustrate the role and importance of ILO materials in the interpretation of labour rights, and the danger of ignoring the ILO's approach. They said:

Let us imagine a legal universe where Freedom of Association, as protected by the Canadian Charter, floats perilously free in its application to labour relations from its corresponding elaborative standards as specified in ILO Convention 87 and the associated Committee jurisprudence. The risk involved in such a delinking is that there would be everything to play for in filling up content-less principles with whichever interpretive theory seems to suit a particular interlocutor. Perhaps we are seeing the effect of this asserted evacuation of normative content at the

74 For analysis of the background and implications of the judgment, as well as forceful criticisms, see Bogg and Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2011–2012) 33 *Comparative Labor Law and Policy Journal* 379; and Fudge, 'Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* case' (2012) 41 *Industrial Law Journal* 1.

75 Fudge, *supra* n 67 at 29.

76 *Ibid.* at 26.

77 Gernigon, Otero and Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *International Labour Review* 33.

78 Fudge, *supra* n 67 at 26.

79 Langille and Oliphant, 'From the Frying Pan Into the Fire: Fraser and the Shift from International Law to International "Thought" in Charter Cases', Labour Law Research Network, April 2012, available at: <http://www.labourlawresearch.net/Portals/0/Langille.pdf> at 2 [last accessed 24 January 2013].

international level in recent work in labour law theory. If adopted in other jurisdictions, this approach risks dragging down standards at national level (as is obvious in *Fraser*), with the possible risk that standards will be dragged down at international level as well, as international agencies contemplate what is possible rather than desirable.<sup>80</sup>

As in the European example, the legal protection of labour rights as human rights, and the role of materials of expert bodies in the interpretation of human rights charters and constitutions, remained highly contested and, for the time being, unresolved in Canada too.

#### 4. Justification

The developments in the context of the ECHR and in Canada and the surrounding literature show that use of experts' materials is important. It provides a deeper understanding of the labour law context and a certain degree of inspiration for the interpretation of human rights at work. Yet, the inconsistency in the way that courts use them and the controversy in academic literature, which has been illustrated above, shows that the integrated approach is in need of a deeper justification.<sup>81</sup> Where could we find such a justification? This section turns to human rights theory to look for a justification by, first, presenting the idea of indivisibility of rights. It then explores the value of freedom as a justification. It argues that a positive account of freedom as capability breaks down traditional dichotomies between civil and social rights, and requires the adoption of an integrated approach to interpretation.

##### A. Indivisibility

The integrated approach to interpretation has also been described in literature as the 'permeability thesis'. In a series of articles on the relation between civil, political and socio-economic rights, Craig Scott was the first scholar to coin the term and explore the idea. Referring to the International Covenant of Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, Scott urged the UN Human Rights Committee to 'break down the artificial separation of the two leading universal human rights instruments by means of a permeability presumption'.<sup>82</sup>

80 Bogg and Ewing, *supra* n 74 at 416.

81 For an argument that the ECHR must be interpreted in light of its underlying values more generally, see Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

82 Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769 at 778.

Permeability was more specifically described as ‘the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights.’<sup>83</sup> The permeability of human rights norms was said to be ‘one means of giving legal effect to the abstract doctrine of interdependence.’<sup>84</sup>

The slogan of indivisibility, interdependence and interrelatedness to which Scott and others refer,<sup>85</sup> is usually taken from a variety of international human rights instruments of a non-binding nature, such as the 1993 Vienna Declaration and Programme for Action. This stated that ‘all human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’ and went on to stress that ‘it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’<sup>86</sup> The Vienna Declaration and other documents incorporating similar statements suggest that the international community cannot and should not only strive for the realization of some human rights; it should attempt to protect all human rights. On the integrated approach to interpretation, the idea of indivisibility suggests that the protection of certain rights might simply not be possible, if we draw a sharp dividing line between civil and social rights, because all rights are closely linked.

The links between rights have been examined in theoretical scholarship from a variety of different perspectives. Henry Shue suggested that rights are very closely linked. He said that ‘[a]ny form of malnutrition, or fever due to exposure, that causes severe and irreversible brain damage, for example, can effectively prevent the exercise of any right requiring clear thought.’<sup>87</sup> Amartya Sen argued that there are strong connections between economic need and political freedom. ‘[F]amines have never afflicted any country that is independent, that goes to elections regularly, that has opposition parties to voice criticisms, that permits newspapers to report freely and to question the wisdom of government policies without extensive censorship.’ Sen also said that ‘[p]olitical rights, including freedom of expression and discussion, are not only pivotal in inducing political responses to economic needs, they are also central to the conceptualisation of economic needs themselves.’<sup>88</sup>

83 Ibid. at 771.

84 Ibid.

85 See, for instance, Koch, ‘The Justiciability of Indivisibility Rights’ (2003) 72 *Nordic Journal of International Law* 3.

86 Vienna Declaration and Programme for Action, 12 July 1993, A/CONF.157/23, at para 5.

87 Shue, *Basic Rights* (Princeton: Princeton University Press, 1996) at 24–5.

88 Sen, ‘Freedoms and Needs’, *The New Republic*, 10 and 17 January 1994, 31 at 32; see also Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) Chapter 6.

Indivisibility statements have been scrutinised by James Nickel, who pressed for conceptual clarity. Nickel warned that we should guard against the view that links between all rights are very strong.<sup>89</sup> Exploring linkage arguments, he said: ‘Supporting relations have different strengths. Strong supporting relations can be defined in terms of logical or practical inconsistency. An assisting right strongly supports the assisted right when and only when it is inconsistent—logically or as a practical matter—for a person to endorse the implementation of the assisted right without endorsing the simultaneous implementation of the assisting right.’<sup>90</sup> Weak supporting relations, though, do not mean that the supporting right is not to be protected as an aspect of the right that is explicitly protected in a document. A weak supporting relation, in Nickel’s words, ‘provides a reason for having [the supporting right] but not a full justification.’<sup>91</sup> Nickel’s suggestion about the idea of indivisibility urges us to consider the integrated approach and examine carefully if the right that is derived from the Convention has sufficiently strong links with the ‘anchor right’,<sup>92</sup> which is explicitly mentioned.

The statement that human rights are indivisible tells us that all human rights must be protected, but it does not necessarily require that a particular body, such as the ECtHR or the Canadian Supreme Court, which interprets a particular document, such as the ECHR or the Canadian Charter, protect all rights. The answer to this question cannot be a conceptual exercise; it has to involve the values underlying the Convention<sup>93</sup> and the interests supporting the right to work and rights at work. This justification can be found in the idea of freedom.

## B. Positive Freedom<sup>94</sup>

Few would contest that liberty is a foundational value of at least civil and political rights that are also called ‘liberty rights.’<sup>95</sup> For some libertarian thinkers, liberty requires state abstention from interference, and not positive action. The fewer restraints the state imposes on individual action, the freer people are. On this view, rights based on freedom are negative in the sense that they impose on state authorities a duty not to act. For a *laissez-faire* liberal, state

89 Nickel, ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights’ (2008) 30 *Human Rights Quarterly* 984.

90 Ibid. at 988.

91 Ibid. at 999.

92 I am grateful to James Nickel for suggesting the term ‘anchor right’.

93 See generally, Letsas, *supra* n 81 at 99.

94 The words ‘freedom’ and ‘liberty’ are used interchangeably here.

95 Moller Okin, ‘Liberty and Welfare: Some Issues in Human Rights Theory’, in Pennock and Chapman (eds), *Human Rights, NOMOS XXIII* (New York: Atherton Press, 1981) 232.

intervention cripples freedom, rather than promoting it.<sup>96</sup> For some, this distinguishes the basis of human rights from the basis of labour rights, which may be grounded on equality,<sup>97</sup> social inclusion,<sup>98</sup> democratic theory<sup>99</sup> or citizenship.<sup>100</sup> If negative freedom formed the basis of human rights law, it would not ground positive state obligations. Bogg and Ewing explained, for instance, that a libertarian account of negative freedom underlies the opinion of Rothstein J in *Fraser* that argued for very minimal protection of trade union rights.<sup>101</sup>

However, there is a better account of freedom than that espoused by Justice Rothstein in *Fraser*: positive freedom, which recognises that people are not free, if the options open to them are very limited and unappealing. That there is more to the value of liberty than the imposition of normative constraints on state action has been analysed in theoretical scholarship that shows that people are not free if their basic needs are not satisfied. Waldron has argued, for instance, that '[t]here is no prospect of an individual living the sort of autonomous life we have in mind when we talk about liberty if he is in a state of abject and desperate need. His autonomy would be one of lethargy rather than agency, or, at best, action under the impulse of necessity rather than action governed by autonomous deliberation.'<sup>102</sup> Cohen also famously examined the relationship between freedom and material resources in his essay 'Freedom and Money'.<sup>103</sup> He argued that lack of money leads to lack of freedom (and not just lack of ability to act). This is because our property rules set normative constraints on the freedom of those who are not property-owners. Someone who has no money, but wants to travel by train to visit her family, will not be allowed to get on that train with no ticket, to use one of Cohen's examples. With no money, we are unfree. This point is also brilliantly illustrated in Waldron's piece 'Homelessness and the Issue of Freedom',<sup>104</sup> which analyses the grave restrictions that property rules set on those who are homeless. To the argument that a homeless person is as free as the rest of us to do

96 Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990) at 4.

97 On equality as a justification of trade union protection, see White, 'Trade Unionism in a Liberal State', in Gutmann (ed.), *Freedom of Association* (Princeton: Princeton University Press, 1998) 330 at 337.

98 On social inclusion as a justification of anti-discrimination legislation, see Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16.

99 Bogg, *Democratic Aspects of Trade Union Recognition* (Oxford: Hart Publishing, 2009).

100 Schultz, 'Life's Work' (2000) 100 *Columbia Law Review* 1881; Forbath, 'Caste, Class and Equal Citizenship' (1999) 98 *Michigan Law Review* 1; and Mundlak, supra n 23.

101 Bogg and Ewing, supra n 74 at 394.

102 Waldron, 'Liberal Rights: Two Sides of the Coin', in Waldron, *Liberal Rights: Collected Papers* (Cambridge: Cambridge University Press, 1993) 7 at 7–8.

103 Cohen, 'Freedom and Money', available at: <http://www.howardism.org/appendix/Cohen.pdf> [last accessed 24 January 2013]; see also Cohen, 'Capitalism, Freedom and the Proletariat', in Ryan (ed.), *The Idea of Freedom* (Oxford: Oxford University Press, 1979) 9. For a classical account of positive freedom, see Berlin, *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958).

104 Waldron, supra n 102 at 309.

whatever she wishes, Waldron responds that this is incorrect, because someone who is homeless cannot do anything in any place that is not public. The homeless person cannot act in private (as she does not have a home), and there are certain activities that are prohibited in public space. In this way, freedom to act is gravely restricted. The satisfaction of a basic need, like access to housing, is essential for someone's freedom.

A positive account of freedom can serve as a justification of all groups of rights. What is the relationship between positive freedom and the integrated approach?

### C. Capabilities, Labour Rights and the Integrated Approach

This section will argue that a positive account of freedom both permits and demands the adoption of an integrated approach to interpretation. It will do so by examining the relationship between capabilities, as an account of positive freedom, and labour rights.

One of the key reasons why most people work is because of the income they gain through work. Having a job brings tangible benefits. Money is normally not valued as such, but because it gives access to goods that are essential for the satisfaction of basic needs, which are in turn essential for freedom. Without the money that individuals earn through paid work, they would be less free or completely unfree (unless they have some other source of income). Work and freedom are connected in this way: without work, most people cannot earn money, which is essential for freedom.

Work, though, does not only bring tangible benefits. It also brings intangible benefits.<sup>105</sup> Someone's job is an important element of who someone is. This is why one of the questions that we ask people that we meet is what job they do. Work is a central element of a person's identity, not only because of the value of work for people's self-perception, but for the social status that it confers, and for socialisation. The workplace is where many people develop friendships and other social relations. In addition, having a job is psychologically beneficial because it makes people feel valued in society. 'Work is a site of deep self-formation that offers rich opportunities for human flourishing (or devastation),' in the words of Schultz.<sup>106</sup> Work is crucial for self-fulfilment and as a source of income, for socialisation of the person and for societal well-being.<sup>107</sup>

These intangible benefits of work can be captured particularly well by elements of an account of positive freedom put forward by Amartya Sen, and

105 Collins, *Employment Law* (Oxford: Oxford University Press, 2010) at 21–2; see also the excellent analysis by Schultz, *supra* n 100 at 1928ff.

106 Schultz, *supra* n 100 at 1883.

107 For analysis, see Stiglitz, 'Employment, Social Justice and Societal Well-being' (2002) 141 *International Labour Review* 9; and Mundlak, 'The Right to Work – The Value of Work', in Barak-Erez and Gross (eds), *Exploring Social Rights* (Oxford: Hart Publishing, 2007) 341.

further developed by Martha Nussbaum and others. This account of freedom underlies all human rights and justifies an integrated interpretation of labour rights under the ECHR. The theory of capabilities is concerned with *actual* freedom that cannot only be measured in terms of income that people have. It moves from the importance of resources to the actual opportunities that a person has to function in ways that she deems valuable. In this way, it pays special attention to choice.<sup>108</sup> According to the capabilities theory, a state does not treat its people as truly human if it does not attend to their basic capabilities. More precisely, state authorities have an absolute obligation to make people capable to pursue a series of valuable functions. A 'functioning is an achievement, whereas a capability is the ability to achieve'.<sup>109</sup>

Capabilities theory has been used to support an account of labour rights as negative rights by Brian Langille, who suggested that on this view '[r]emoving barriers to help is a core concern'.<sup>110</sup> However, freedom as capability is not only about removing barriers: quite to the contrary. This is because, in Sen's words, '[c]apabilities . . . are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead'.<sup>111</sup> The fact that we refer to *real* opportunities should not be underestimated, and is developed further by Nussbaum.

The theory of capabilities, as elaborated by Nussbaum, has as its aim 'to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires'.<sup>112</sup> This theory provides, in fact, criticism to accounts of rights that are about the removal of barriers against state action: 'The Capabilities Approach . . .', Nussbaum says, 'insists that all entitlements involve an affirmative task for government: it must actively support people's capabilities, not just fail to set up obstacles. In the absence of action, rights are mere words on paper'.<sup>113</sup> This feature of the theory also explains why it has been used as a justification for the legalisation of social rights.<sup>114</sup> The theory of capability rejects libertarian accounts of negative freedom.

108 See Sen, *The Idea of Justice* (Oxford: Oxford University Press, 2009) at 253ff.

109 Sen, 'The Standard of Living: Lives and Capabilities', in Hawthorn (ed.), *The Standard of Living* (Cambridge: Cambridge University Press, 1987) 20 at 36.

110 Langille, 'Core Labour Rights – The True Story' (2005) 16 *European Journal of International Law* 409 at 434. For criticism of this view, see Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights' (2007) 29 *Comparative Labor Law and Policy Journal* 29 at 58.

111 Sen, *supra* n 109 at 36.

112 Nussbaum, *Women and Human Development* (Oxford: Oxford University Press, 2000) at 5.

113 Nussbaum, *Creating Capabilities – The Human Development Approach* (Oxford: Oxford University Press, 2011) 65. For a forceful argument that capabilities theory involves positive state duties, see West, 'Rights, Capabilities and the Good Society' (2001) 69 *Fordham Law Review* 1901 at 1906–12.

114 Deakin, 'Social Rights in a Globalized Economy', in Alston (ed.), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005) 25, at 57–60; and Deakin and Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005) at 342ff.

At the same time, Nussbaum's catalogue with the key capabilities, which a state that treats its citizens with dignity ought to promote, shows how the division of rights in categories, which we find in international law, collapses. This point is crucial for the adoption of an integrated approach. Nussbaum's list includes a capability to life of normal length; to bodily health and bodily integrity; senses, imagination and thought; emotions; practical reason; concern for other species; play; control over one's political and material environment.<sup>115</sup> On her theory, human dignity demands 'that citizens be placed above an ample (specified) threshold of capability, in all . . . of those areas.'<sup>116</sup> No division between civil and social rights exists here. Nussbaum, in fact, explicitly rejects this division, because '[a]ll entitlements require affirmative government action, including expenditure, and thus all, to some degree, are economic and social rights.'<sup>117</sup> This theory reminds that links between all rights are complex, which is a point that traditional divisions in categories fail to capture. On the other hand, the integrated approach to interpretation provides an opportunity to address the problem. Capabilities theory, as an underlying justification of human rights, requires an integrated approach to the interpretation of documents, which are based on a false dichotomy and a poor understanding of freedom.

Which capabilities are important for the present analysis? And what concrete principles can we derive? The section that follows makes mention of some of these, referring back to case law discussed earlier on.

#### (i) Coercion

Accounts of positive freedom pay attention to choice. Can we talk about a meaningful choice to act in a certain way, if we have no more than one option available? Resources, earned through work, are crucial for someone's ability to have options. On a negative understanding of freedom, it might be hard to see how people in the position of Siliadin (the domestic worker) or Rantseva (the victim of human trafficking) were unfree. A libertarian analysis would suggest that they both worked in extremely poor conditions, but they were not coerced to do that. They were not held in chains. Insofar as the employer imposed no physical constraints on them, they had a choice—or so the libertarian argument would go. This position is reflected in jurisprudence from the US, in the interpretation of the notion of 'involuntary servitude' of the 13th Amendment, where it was said that 'the most ardent believer in civil rights might not think that cause would be advanced by permitting the awful machinery of the criminal law to be brought into play [against employers] whenever an employee

115 Nussbaum, *supra* n 112 at 78–80; see also Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273 at 287.

116 Nussbaum, *supra* n 113 at 36.

117 *Ibid.* at 67.

asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful.<sup>118</sup>

On positive accounts of freedom, this interpretation of choice is inadequate, for choice is so limited, the alternatives that individuals in the position of the applicants have are so poor, that the claim that they are free is very questionable. As the concern is about how to make people free, great socio-economic deprivation coupled by immigration rules, as in the case of Siliadin and Rantseva, limits choice to such a degree that their situation has rightly been presented as ‘modern slavery’.

## (ii) Relational element

A positive analysis of freedom as capability is not individualistic. It views the ability to relate to others as central. Robin West has emphasised the importance of this aspect of capabilities theory, which takes rights’ theory beyond traditional individualistic interpretations, which are sometimes overemphasised in other accounts of human rights.<sup>119</sup>

The relational aspect of capabilities theory for the interpretation of labour rights sheds light on several issues that have already been explored in the case law. First, Nussbaum’s ‘capability to affiliation’ is useful here. It was earlier said that one of the reasons why work is valuable is because people develop important relations at work. In Nussbaum’s analysis, ‘being able to work as a human being, exercising practical reason and entering into meaningful relationships of human recognition with other workers’ is a central capability,<sup>120</sup> while ‘[m]aking employment options available without considering workplace relations would not be adequate.’<sup>121</sup> The ECtHR has upheld this principle. In cases such as *Niemietz v Germany*, where the question was whether the right to private life extends to the workplace, the Court said insightfully: ‘it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.’<sup>122</sup> The *Sidabras and Dziautas* judgment also highlighted how the implications of unemployment and the resulting social isolation can affect a person’s private life as such.

The ability to develop interpersonal relations outside work has not always been given sufficient attention in Strasbourg case law, on the other hand. Dismissal for reasons involving the person’s private life has sometimes been upheld as compatible with the Convention, without adequate analysis of the

118 *United States v Shackney* 333 F.2d (1964) 475 at 486.

119 West, *supra* n 113 at 1912–13.

120 Nussbaum, *supra* n 112 at 79–80.

121 Nussbaum, *supra* n 113 at 39.

122 A 251-B (1992); 16 EHRR 97, at para 29.

social isolation to which it leads. In the case *Pay v United Kingdom*,<sup>123</sup> for instance, the applicant was dismissed from his job because he engaged in sado-masochistic activities outside the workplace and working time, in his private life. The Court held that his dismissal was not in breach of the Convention. In doing so, it paid little attention to the importance of having attachments and developing relationships that a person values, but that the employer might find inappropriate or immoral. The ECtHR did not give weight to the fact that someone's dismissal does not only signify loss of income (because work is important not only for the income it brings), but also loss of the ability to develop relationships with others in the workplace. The relational aspect of freedom was neglected in this case that failed to capture the links between dismissal and freedom.<sup>124</sup>

The relational element also supports the right to form and join a trade union, which has been explored in cases, such as *Wilson and Palmer*. People form groups with others so as to pursue common aims that they deem valuable. If there are impediments to this right (in this case, financial incentives for non-union members), the right to associate is clearly jeopardised. The ability to relate to others is an important function of freedom of association, including unionisation, which the case law of courts should reflect.

### (iii) Voice

In the labour law context a further question naturally arises: does the account of freedom presented here support any other aspect of trade union rights or does it merely require the protection of a right to form and join an association?

Positive freedom justifies not just forming associations, but also the protection of a voice at work, which has to be effective. One of Nussbaum's central capabilities is the capability to control one's environment.<sup>125</sup> In labour law, for a voice at work to be meaningful, it has to encompass collective bargaining. Bogg and Ewing explained how trade union activity may be protected, in a scale ranging from weak to strong protection, as follows: first, a right to make representations to the employer, second, the right to consultation, and third, the right to negotiate.<sup>126</sup> For workers to have a voice at work, strong protection of collective bargaining is essential, and a 'thick' conception of freedom of association is required, which 'encompasses special constitutional "activity-rights"

123 *Pay v United Kingdom* Application No 32792/05, Admissibility, 16 September 2008. For analysis, see Mantouvalou and Collins, 'Private Life and Dismissal: *Pay v UK*' (2009) 38 *Industrial Law Journal* 133.

124 More recent case law has been more elaborate: see *Obst v Germany* Application No 425/03; *Schuth v Germany* Application No 1620/03, Merits, 23 September 2010.

125 See also Kolben, 'A Development Approach to Trade and Labour Regimes' (2010) 45 *Wake Forest Law Review* 355 at 369.

126 Bogg and Ewing, *supra* n 74 at 385.

for trade unions'.<sup>127</sup> Otherwise, the voice at work will be muted, as they convincingly argued discussing the *Fraser* case of the Canadian Supreme Court.<sup>128</sup>

The right to strike must also be given special status, for without the ability to resort to strike collective bargaining becomes 'collective begging'.<sup>129</sup> The right to strike is an essential means that workers have to control the environment, and to resist the power of the employer to abuse the inequality inherent in the employment relation. Recent Strasbourg case law that views the right to strike as an essential component of the right to associate also reflects this view.<sup>130</sup> Looking at the right to strike as a human right has important implications.<sup>131</sup> First of all, it becomes an individual right instead of a right that belongs to trade unions. Moreover, its nature changes, for it no longer depends on collective bargaining. 'The human rights lawyer will see the right to strike as having a wider purpose than the labour lawyer, as relating not only to the exercise of power in the workplace but also the exercise of power in the wider political community.'<sup>132</sup> Third, a right to strike as a human right imposes a duty upon the state to protect individuals from dismissal for its exercise.

A positive account of freedom as capability, to conclude this section, requires the protection of civil and political, and economic and social rights, and can shed light on important principles that are relevant to the protection of labour rights through civil rights documents. Even though it is not the only possible justification for an integrated approach to interpretation,<sup>133</sup> it is fundamental to realise that it is a significant one. Capabilities theory leads to a better understanding of the notion of freedom and emphasises the collapse of artificial divisions of rights that traditionally placed emphasis on some elements of individual well-being (free expression, for instance), neglecting some others (like the right to work). It also captures the importance of non-material benefits of work, and therefore requires a more complete protection of work-related rights. In addition, the understanding of freedom as capability enriches the content of human rights by moving their content beyond individualism. Finally, the interpretation of rights in light of this theory is based on values that underlie the Convention, and recognises aspects of them that have been neglected this far. In this way, it creates what Nussbaum calls 'capability security',<sup>134</sup> ensuring that key human capabilities are recognised as

127 Ibid. at 390.

128 Ibid.

129 Ewing and Hendy, *supra* n 42 at 13.

130 See the analysis in Countouris and Freedland, *supra* n 45.

131 Ewing, 'Laws Against Strikes Revisited', in Barnard, Deakin and Morris (eds), *The Future of Labour Law* (Oxford: Hart Publishing, 2004) 41 at 48–50.

132 Ibid. at 49.

133 Other possible justifications can include values such as citizenship or equality: see *supra* nn 97 to 101.

134 Nussbaum, *supra* n 113 at 43.

having an important role, and are not left to the whim of those that have the political, legal or economic power to neglect them.

## 5. Conclusion

This article discussed the controversial issue of the legal protection of labour rights under the ECHR. It focused on a particular interpretive technique that has emerged in jurisprudence, the integrated approach to interpretation, which reads certain social and labour rights into a traditional civil and political rights document. It accepted that by using materials of expert labour bodies, the European Court of Human Rights can contextualise human rights in the employment relation. However, resting on the belief that legal rights should be read in their best light and in accordance with present day conditions, this article argued that a deeper justification for the integrated approach is both possible and necessary. In order to find such a justification, it explored positive accounts of freedom. It argued that accounts of freedom that pay attention to choice and resources, but also more social and relational elements, can serve as a foundation of these documents and a justification for the adoption of an integrated approach to interpretation. What emerged is that a positive account of freedom, analysed in terms of human capabilities, demands the adoption of an integrated approach to the interpretation of the ECHR.

As a matter of human rights theory, to conclude, a principled justification for the integrated approach to interpretation is essential for a process that at this point is faced with uncertainty. In the current climate of academic controversy, this analysis serves as a starting point to move beyond questions of expertise in the labour and social rights context, and helps break down artificial dichotomies between rights that today seem obsolete. It helps link the various different debates on the character of labour rights as human rights, which we find in labour law scholarship. It connects human rights law to the underlying normative principles.<sup>135</sup> Crucially, what this analysis shows is that workers have human rights, which the law, read in its best light, recognises and protects.

135 For a discussion on labour rights as human rights, see Mantouvalou, *supra* n 23.