Global Workplace Law & Policy

On the Nature of Work and the Purpose of Labour Law: Part II

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Introduction

Earlier this month, I presented a paper at the Socio-Legal Studies Association Annual Conference at the University of Leeds, 'On the Nature of Work and the Purpose of Labour Law'. A version of the paper as presented at the conference is available online here. In Part I of this two-part blog post, I concluded that all human activity is skilled and work involves using one's skills in a particular way, namely, through productivity. In my view, productivity is the hallmark of work. Fundamental to the regulation of work, therefore, must be the right to work. For the purposes of this blog, a number of sources of the right to work are relevant.

The Right to Work

The Right to Work in International Human Rights Law

Article 23(1) UDHR recognises the right to work as a fundamental right of everyone: '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. The right to work is also guaranteed in several other international human rights treaties, namely, in and through art 8(3)(a) ICCPR, art 6 ICESCR, art 11(1)(a) CEDAW, art 5(e)(i) CERD, art 27(1) CPRD, art 32 CRC and in arts 11, 25, 26, 40, 52 and 54 ICRMW. All member states of the European Union are parties to these respective human rights treaties (except the ICRMW, to which only a minority of member states are party) and, according to art 3 TEU, the EU is committed to the respect, protection and promotion of human and fundamental rights. It is thus essential that the EU, in its laws and policies, respect, protect and promote the right to work to ensure its compliance with international human rights law. Of the guarantees of the right to work here mentioned, only the ICESCR shall be considered in full below because the ICESCR 'deals more comprehensively than any other instrument with this right'.[1]

Article 6 ICESCR is perhaps the most interesting instantiation of the right to work in international human rights law, which recognises in art 6(1) 'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. This text may suggest, at least, a degree of consistency with the concept of work we adopted in section II which incorporates not only paid work but also unpaid forms of work. Article 6(2) ICESCR also indicates an important degree of consistency with the Skills Approach generally in holding that, to give effect to the right to work, states should adopt measures including 'vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment'. Further evidence of the link between the right

to work and the concept of work and the Skills Approach is to be found in General Comment No 18 on the right to work by the Committee on Economic, Social and Cultural Rights ('CESCR'). According to that Comment, '[t]he right to work contributes (…) to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community'.[2] This underlines the fact that 'respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice of work, while emphasising the importance of work for personal development as well as social and economic inclusion'.[3]

The Right to Work in International Economic Law

Article I GATS provides that the agreement applies to measures by member states affecting trade in services, defined as the supply of a service

- From the territory of one member into the territory of another;
- In the territory of one member into the territory of any other another;
- By a service supplier of one member, through commercial presence in the territory of any other member; or
- By a service supplier of one member, through presence of natural persons of a member in the territory of any other member.

The last of these—so-called 'Mode 4' GATS provides for the temporary presence of a service supplier from one member state in the territory of another member state. Access by service providers of one member state to the market of another member state is a fundamental part of the GATS but is not granted automatically. To put it another way, as a matter of international economic law, service providers—on our analysis above, those who undertake paid self-employed work or their employees—are only permitted access to the market of a given state if a specific commitment in a relevant sector of the economy has been made by the host state.

The Right to Work in the European Social Charter

Article 1 of the European Social Charter guarantees the right to work and provides as follows:

"With a view to ensuring the effective exercise of the right to work, the Parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation."

As Simon Deakin has observed, '[l]ooking at these provisions as a whole (…) it can be argued that the unifying idea in Article 1 is that of a *right to access the labour market*'.[4] According to Deakin, there are three senses in which it guarantees a right to access the labour market. A first sense is the way it protects the property right—the right to sell one's labour—in the market. It accurately acknowledges that labour is indeed a commodity in a market economy. Second, the conception of the labour market developed therein is a social one: art 1 ESC protects a social market economy. And third, art 1 ESC 'assumes that the state and the legal system constitute the

labour market not in an abstract sense, but with a particular instrumental goal in mind: this is the goal of protecting and enhancing the capabilities of market actors'[5] or, according to the analysis developed in this blog, people's skills.

The Right to Work in EU Law

The most obvious manifestation of the basic liberty to work in EU law first emerged in the case of Case 4/73 *Nold* [1974] ECR 491. In that case, the applicant, a wholesaler in the coal industry, challenged a decision of the Commission concerning the establishment of conditions required for the acquisition of the status of 'direct wholesaler' in the industry. Those rules required, amongst other things, the acceptance of minimum purchase arrangements from a consolidated coal consortium in the Ruhr area of Germany. The applicant, however, was unable to meet these minimum requirements. In essence, the applicant's business was too small to survive in heightened conditions of competition. As argued by the applicant, 'the effect of the new terms of business [was] to favour the concentration of this distribution into the hands of a small number of major dealers'.[6] The Court of Justice rejected the applicant's challenge to the decision of the Commission on the grounds of discrimination and breach of fundamental rights. For our purposes, the most interesting aspect of the Court's judgment is that part concerning fundamental rights. According to the Court, the right to free pursuit of a business activity, as protected by the German Basic Law and in constitutions of the other member states, must be considered as a fundamental right which forms an integral part of the general principles of EU law.[7] The Court then went on to note the social nature of the right to choose and practice a trade or profession, in holding that such a right and analogue rights must be considered in the light of their social function: such rights 'are protected by law subject always to limitations laid down in accordance with the public interest'.[8] In the instant case, while the applicant's right to practice its profession was engaged, it was not infringed: 'the disadvantages claimed by the applicant are in fact the result of economic change'.[9]

The Charter of Fundamental Rights of the EU also plays a foundational role in establishing the right to work in the EU. Article 15, the explanatory notes to which refer to art 1 ESC already discussed, extends to 'everyone' the right to work and pursue a freely chosen occupation. This general expression of the right to work is then applied, more particularly, to certain categories of person in the following sub-clauses of art 15. Thus, art 15(2) provides that Union citizens have the freedom to seek employment, to work and to exercise the right of establishment and to provide services in the territory of the member states. While the republican overtones are difficult to find here, links can be drawn with other rights in the CFREU—particularly art 5 on the prohibition on slavery and forced labour—to see the republican undertones in operation in the Charter's schema of protection. By contrast, according to art 15(3) CFREU, third-country nationals who are duly authorised to work are merely afforded working conditions 'equivalent' to those of member state nationals.

Article 16 CFREU provides for the freedom to conduct a business 'in accordance with Union law and national laws and practices'. While arts 15 & 16 thus express different rights, they must emanate from the same central basic liberty, namely, the liberty to work, be it as an employed person, or a self-employed person or service provider. In his Opinion in *Alemo-Herron*, AG Cruz Villalón made a number of helpful comments in relation to art 16 CFREU.[10] The AG first noted that art 16 is based not only on case law concerning the freedom to pursue an economic activity but also contractual freedom and the principle of free competition.[11] Second and relatedly, the AG made several comments on the nature of art 16 CFREU as a market norm. The AG first observed

that the freedom to conduct a business 'acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law'.[12] Second and relatedly, the AG emphasised that the freedom to conduct a business 'protects economic initiative and the ability to participate in a market'.[13] Once again, we see the significance of the right to work in facilitating access to the labour market. Finally, AG Cruz Villalón emphasised the possibility of using art 16 CFREU as a 'counterweight' to other fundamental rights.[14]

Conclusion

To sum up, in this blog post, I have argued

- The right to work is foundational in allowing people to use and deploy their skills, subject to market demand;
- The right to work is viewed as foundation in international human rights law, international economic law and under the European Social Charter and EU law.

As mentioned at the outset, this is the first in a series of posts. The next post shall consider the role of skills in the EU's external relations.

[1] Committee on Economic, Social and Cultural Rights, 'The Right to Work: General Comment No 18' (24 November 2005) 2; Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2016) ch 8.

[2] 'The Right to Work: General Comment No 18' (n 1).

[3] ibid 3.

[4] Simon Deakin, 'Article 1: The Right to Work' in Nikklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart 2017).

[5] ibid.

[6] [1974] ECR 491, 499.

[7] [1974] ECR 491 [12]-[13].

[8] [1974] ECR 491 [14].

[9] [1974] ECR 491 [15].

[10] Case C-426/11 *Alemo-Herron* ECLI:EU:C:2013:82.

[11] ECLI:EU:C:2013:82 [48].

[12] ECLI:EU:C:2013:82 [50].

[13] ECLI:EU:C:2013:82 [51].

[14] ECLI:EU:C:2013:82 [52].

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