

RIGHT TO WORK

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I. Introduction and Historic Background

[1] The first expression of the 'right to work' is usually attributed to the nineteenth century French socialists Charles Fourier and Louis Blanc. Fourier ([1822] at 93) deplored its absence in the French Declaration of the Rights of Man and of the Citizen of 1789. In *Le Socialisme: Droit au Travail*, Blanc then promoted its inclusion in the constitution and suggested that the state should implement it by establishing national workshops to employ those out of work (Blanc [1848] at 8). In the aftermath of the French Revolution of 1848 triggered by workers out of work in Paris, the right to work was laid down in Article 13 of the French Constitution of 1848, which was abolished only a few years later. Under that provision, society must favour and encourage the establishment by the state of public works proper for the employment of unoccupied laborers.

[2] Seventy years later, the right to work became a central right of the Bolshevik program. Article II of the Code of Labour Laws of Soviet Russia of 1919 expressly contained the right to work, which read: 'all citizens able to work have the right to employment at their vocations and for remuneration fixed for such class of work.' The enforcement of the right to work was to be secured through the distribution of work to wage earners by the state. The right to work was reaffirmed in Article 118 of the Soviet Constitution of 1936, which was the first fundamental right mentioned in the constitution. It was defined as 'the right to guaranteed employment and payment for work in accordance with its quantity and quality' and was to be 'ensured by the socialist organization of national economy, the steady growth of productive forces, the preclusion of the possibility of economic crises and the abolition of unemployment.'

[3] Historically, the "socialist" right to work has always been strongly opposed. In France, for example, Alexis de Tocqueville rejected its inclusion in the Constitution of 1848 by fear of seeing the state control the entire economy and become the unique propriety owner of all things (de Tocqueville [1848] at 101). The same fear was also raised in the United Kingdom during the debate over the Unemployed Workmen Bill of 1908, according to which every workman not in employment would be given work by the state. After the First World War, capitalist societies that were confronted with the problem of unemployment nevertheless needed to counter the rise of the Soviet Union. In the United States, Ross suggested in *The Right to Work* that there was a need to provide the opportunity of working for such a wage ([1917] at 28). He recommended the provision of better information about available jobs, employment bureaus and a system of compulsory social insurance (*ibid*, at 46). By the time, countries were also debating solutions against unemployment at the recently established International Labour Organization (ILO), but could only agree on establishing employment agencies and unemployment statistics in the Unemployment Convention of 1919.

[4] Finally, two events influenced the current content of the right to work before its adoption in the Universal Declaration of Human Rights (UDHR). First, the Great Depression led the Roosevelt Administration in the United States to undertake a decade of efforts under the New

Deal to secure work. At the time, Keynes' *General Theory of Employment* also gave an impulse for state intervention in employment policies. By the end of the Second World War, Roosevelt proposed an Economic Bill of Rights containing an explicit right to work (Harvey [2013] at 143). The ILO Conferences met a few weeks later and adopted the Philadelphia Declaration. Although the declaration does not explicitly contain a right to work, it sets the obligation of the ILO to further programmes which will achieve full employment and the employment of workers 'in the occupations in which they can have the satisfaction of giving the fullest measure of their skill.'

[5] Second, both the Nazi German regime and the Soviet Union claimed they had abolished unemployment (Ascoli [1939] at 256). In fact, the war exacerbated the use of compulsory labour, which was a manner to officially eradicate unemployment by allocating work. The extensive use of compulsory labour explains why most governments drafting the UDHR emphasized the right to free choice of employment within the right to work, which as presented below, prohibits forced labour (Bueno [2017] at 474).

II. Sources

1. International Instruments

[6] At the universal level, the right to work was first laid down in Article 23(1) UDHR, which stipulates that '[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 was then detached from the right to just and favourable conditions of work and included in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6(1) ICESCR reads:

'The States Parties to the present Covenant recognize 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, and will take appropriate steps to safeguard this right.'

The Committee on Economic, Social, and Cultural Rights (CESCR) adopted General Comment No 18 on the right to work (2006), providing further details on the content of Article 6 ICESCR.

[7] As presented below, the right to work contains several sub-rights. These rights are also reflected in subject-specific ILO Conventions, that can enable and inform the scope of the right to work (Saul, Kinley and Mowbray [2014] at 275; ILO Standards). This is in particular the case of three fundamental ILO conventions: the Forced Labour Convention of 1930; the Abolition of Forced Labour Convention of 1957 and the Discrimination in Employment and Occupation Convention of 1958. In addition, relevant ILO technical conventions for the right to work include the Unemployment Convention of 1919; the Unemployment Provision Convention of 1934; the Termination of Employment Convention of 1982; the Employment Promotion and Protection against Unemployment Convention of 1988.

[8] The right to work contains some more specific guarantees regarding individuals who may encounter certain barriers in accessing work in the labour market. This includes Article 5(e)(i) of the International Convention on the Elimination of the All Forms of Racial Discrimination,

Article 11(1)(a) of the Convention on the Elimination of All Forms of Discrimination against Women and Article 27(1) of the Convention on the Rights of Persons with Disabilities. The right to work of workers belonging to an indigenous people is protected under ILO Convention No 169 on Indigenous and Tribal Peoples (1989). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) does not recognize a right to work as such, but prohibits compulsory labour and unequal treatments regarding, for example, termination of the employment relationship. Only workers in a regular situation shall additionally enjoy equality of treatment with nationals in respect of unemployment benefits and access to public work intended to combat unemployment (discrimination, prohibition of).

2. Regional Instruments and Domestic Constitutions

[9] The right to work is also guaranteed in all regional human rights systems. Chronologically, it was first included in Article XIV of the legally non-binding American Declaration on the Rights and Duties of Man of 1948, before the adoption of the UDHR. It was then laid down in Article 1 of the European Social Charter, Article 15 of the African Charter on Human and Peoples' Rights (AfCHPR), Article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 1 of the Revised European Social Charter, Article 15 of the Charter of Fundamental Rights of the European Union (see Ashiagbor [2014]), Article 30 of the Arab Charter on Human Rights, and, though not a legally binding international treaty, Article 27 of the Association of Southeast Asian Nations Human Rights Declaration (soft law).

[10] Finally, the right to work is included in numerous national constitutions from different political or economic systems. The right to work exists, for example, in the Afghan, Algerian, Chinese (see Lu [2011]), Danish, Dutch, French, Indian, Italian, Japanese, Polish, Romanian, Russian, Slovakian, South Korean, and Spanish constitutions (Nussberger [2007] para 7).

III. Material Scope

[11] Article 23(1) UDHR contains in one single sentence four different elements including the rights to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment. Article 6(1) ICESCR is more precise. It defines two core elements of the right to work: the right of everyone to the opportunity to gain a living by work and the right to freely choose or accept work (see Saul, Kinley and Mowbray [2014]; O'Cinneide [2015]).

1. The Right to the Opportunity to Gain a Living by Work

[12] The right to the opportunity to gain a living by work means in the first place that states must take measures to guarantee that work is available. In this regard, states parties to the ICESCR 'must adopt, as quickly as possible, measures aiming at achieving full employment' (CESCR, *GC No 18: Work* [2006] para 18; see also Sarkin-Hughes and Koenig [2011] at 16). More specifically, states parties are required to formulate and implement 'an employment policy with a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment' (CESCR, *GC No 18: Work* [2006] para 26). Although there is no absolute and unconditional right to obtain employment, states must progressively realize the right by implementing employment policies with the maximum of their available resources as indicated in Article 6(2)

ICESCR (core obligations and progressive realization). They must also have specialized services to assist and support individuals in order to enable them to identify and find employment although these services must not necessarily be free of charge (CESCR, *GC No 18: Work* [2006] para 12).

[13] The right to the opportunity to gain a living by work contains two non-discrimination obligations to ensure that work is accessible (discrimination, prohibition of). First, states must guarantee equal opportunity to access employment. In this regard, states must actively promote equality of opportunity to disadvantaged groups, in particular women, older persons, young persons, persons with disabilities and indigenous peoples. For example, the CESCR endorses the adoption of employment quotas particularly for persons with disabilities (CESCR, *Concluding Observations China* [2014] para 18; CESCR, *Concluding Observations Sri Lanka* [2017] para 27). In general, insufficient expenditure or misallocation of public funds to promote participation of marginalized or disadvantaged groups may amount to a violation of the right to equal access to work (CESCR, *GC No 18: Work* [2006] para 36; Saul, Kinley and Mowbray [2014] paras 289-314). By contrast, states may expressly restrict access to limited categories of employment for migrant workers, at least where this is necessary in the interests of the state and provided for by national legislation (Art 52(a) ICMW).

[14] Second, states must protect from discrimination in employment, which covers all aspects of employment from recruitment to termination (respect – protect – fulfil). The ILO Convention on Discrimination in Respect of Employment and Occupation of 1958, which is one of the eighth fundamental conventions of the ILO, provides further guidance for international human rights bodies in this respect. It specifies when inherent requirements to the performance of a specific job, such as age or health or security considerations, may be lawfully invoked to deny an individual her or his right to work. The right to work, finally protects from discriminatory dismissals by requiring valid grounds for dismissal as well as the right to legal and other redress in cases of unfair dismissal (CESCR, *GC No 18: Work* [2006] para 11).

2. The Right to Freely Accept or Choose Work

[15] Under the right to work, work must not only be available and accessible without discrimination. It also includes the right to freely accept or choose work. To be acceptable work must be at least decent and therefore respect the right to just and favourable conditions of work as guaranteed by Article 7 ICESCR. Even when work is acceptable, it cannot be imposed on individuals. The right to freely accept work implies ‘not being forced in any way whatsoever to exercise or engage in employment’ (CESCR, *GC No 18: Work* [2006] para 6). However, this does not mean that there exists a right not to be forced to accept working conditions dictated by the labour market. The right to freely accept work only reflects the definition of forced labour outlined in the ILO Convention on Forced or Compulsory Labour of 1930 according to which someone is forced to work when work is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily (slavery, servitude and forced labour, prohibition of). The CESCR also refers to the Abolition of Forced Labour Convention of 1957, which emphasizes the aspect of forced labour imposed by governments reaffirming the prohibition of forced labour as enunciated in the UDHR, in the International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments (CESCR, *GC No 18: Work* [2006] para 9; see Swepston [2014] at 46).

[16] International human rights instruments traditionally do not include a duty to work as an obligation of the individual towards society (De Schutter [2015] at 143; Paz-Fuchs [2015] at

182-189; but see Art 29 AfCHPR). However, the prohibition of forced labour is subject to public purpose exceptions. In this regard, Article 2(2) ILO Convention on Forced or Compulsory Labour of 1930 excludes from the scope of forced labour, work such as compulsory military service, normal civic obligations, work exacted in cases of emergency, but also prison labour (prisoners).

[17] Another question under the right to freely accept work is to what extent a government can make dependant the provision of unemployment benefits on the acceptance of work assigned by the state. In *Faure v Australia* (2005), the Human Rights Committee assessed whether the cancelling of unemployment benefits after a person repeatedly refused to participate in a work program organized by the state could amount to prohibited forced labour in the meaning of Article 8 ICCPR. The Committee found that due to the absence of a degrading or dehumanizing aspect of the specific labour assigned, it did not enter into the scope of forced labour and therefore did not violate Article 8 ICCPR (para 7.5).

[18] Finally, the right to freely choose work does not mean that the state must provide the job that any individual desires. It is sometimes presented as a mere synonym of the right to freely accept work, which prohibits forced labour (Sarkin-Hughes and Koenig [2011]; Dermine ([2017] at 152; Bueno [2017]). For example, in *QCEA v Greece* (2001), the European Committee on Social Rights admitted that an alternative civilian service to the military service could not be considered as forced labour. However, the fact of preventing the claimant from accessing the labour market and a work of his choice during several months due to his civilian service was found in breach of his right to earn a living in an occupation freely entered upon, as protected by Article 1(2) European Social Charter (paras 22-23; Dermine [2017] at 152).

IV. Critical Assessment and Trends

1. From Non-Binding Responsibilities to Obligations of Non-State Actors

[19] The CESCR highlighted the responsibilities of non-state actors regarding the realization of the right to work. Accordingly, private enterprises, while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. (CESCR, *GC No 18: Work* [2006] para 52). In practice, however, the CESCR has not addressed its observations specifically to business but has urged states to better regulate business activities, for example concerning the employment opportunities of women or of ethnic minorities in the private sector (Saul, Kinley and Mowbray [2014] at 379).

[20] Since then, the United Nations Guiding Principles on Business and Human Rights have clarified the content of the corporate responsibility to respect human rights. In the field of work more specifically, they are completed by the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and Chapter V of the OECD Guidelines for Multinational Enterprises on employment and industrial relations that apply to multinational enterprises (Bueno [2019]).

[21] Regarding the elements of the right to work in particular, multinational enterprises are required to take adequate steps to ensure that forced or compulsory labour does not exist in their global operations (ILO [2017] para 25; OECD [2011] ch 5 para 1). Multinational enterprises should also be guided by the principle of equality of opportunity and treatment in employment (*ibid*, ch 5 para 1(e)) and promote employment opportunities when they operate in developing countries. In this regard, they should give priority to the employment of nationals of the host country; have regard to the importance of using technologies which generate employment, and give consideration to the conclusion of contracts with national enterprises

(ILO [2017] paras 16-20). Finally, the ILO Tripartite Declaration recommends that they endeavour to provide stable employment, which requires in particular providing notice to the government and representatives of the workers of changes resulting from mergers, take-overs or closure of an entity involving collective lay-offs in order to mitigate adverse effects to the greatest possible extent (*ibid*, para 34). However, these standards do not create obligations for non-state actors under international law (soft law). At present, domestic legislation has mainly focused only on issues of forced labour, as it is the case of the UK Modern Slavery Act of 2015 and the Australian Modern Slavery Act of 2018.

2. Right to Work or Freedom from Work?

[22] Finally, there has always been a paradox regarding the right to work, considering that for many individuals work is associated with a constraint. In *The Right to be Lazy* (1880), for example, Lafargue presented the right to work as a ‘mental aberration’. He concluded that people must rather proclaim a right to be lazy and accustom to working but three hours a day, reserving the rest of the day and night for leisure. In *In Praise of Idleness* (1936), Bertrand Russell also shared the idea that ‘far too much work was done in the world’. According to him, ‘modern technique made it possible for leisure’ by diminishing enormously the amount of labour required to secure the necessities of life for everyone.

[23] Today, the right to work remains sometimes under critique. It is not the goal – which is to increase income security – that is under critique, but the means to achieve it. In this respect, some suggest that income security could be already guaranteed through a basic income, as an alternative or a complement to the right to work (Standing [2012]). Others suggest rethinking the logic behind the right to work. Instead of looking at how to create jobs to receive an income that will then be used to fulfil needs, they suggest looking at how work and technology could fulfil these needs more efficiently and thereby expand freedom from work instead of a right to work (Bueno [2017]; Bueno [2021]).

V. Conclusion

[24] The right to work is a universally recognized human right that aims at providing economic security through work. At the universal level, the right to work contains a right to the opportunity to gain a living by work, which obliges state to adopt economic policies towards full employment, to ensure equal opportunity to access employment and to protect from discrimination in work. The right to work also contains a right to freely accept work, which prohibits forced labour. Although the purpose of the right to work is not contested, it is questionable whether it can be implemented in a global economy in which states must compete against each other for work. For this reason, some authors are investigating the role of multinational enterprises towards the right to work. Others suggest looking at how to expand freedom from the need to work as a way to increase economic security.

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