

# Vulnerable Workers and Precarious Working

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**CAMBRIDGE  
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P U B L I S H I N G

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# INTRODUCTION

MARTINA ORI AND MALCOLM SARGEANT

The papers presented here originated at a wonderful conference held at Middlesex University in London attended by experts on the subject of vulnerable workers and precarious work from all over the world. As an introduction to those papers we wish to expand on what is meant by the terms vulnerable and precarious.

## **Precarious Work and Vulnerable Workers**

The terms “vulnerable workers” or “vulnerable work” and “precarious workers” or “precarious work” are often used interchangeably. There is nothing intrinsically wrong with this except that when talking of occupational, health and safety (OHS) issues the distinction between vulnerability and precariousness can be important. A distinction should be made between the precariousness of work attributable to particular types of contractual relationships, and the vulnerability of the people carrying out the work. Although precarious work often leads to increased vulnerability for workers and the two terms are inextricably linked, it is important to distinguish between the two from an OHS perspective. There are clearly OHS concerns attached to all work with particular reference to some types of work which are less safe. The workers who occupy these jobs can add to or, indeed, lessen OHS concerns as a result of being vulnerable workers.

## **Precarious Work**

Precarious work is often classified as contingent working or non-standard working.<sup>1</sup> The term has been around a long time and has been used quite regularly for hundreds of years. For example, in the nineteenth century, in the UK, references are made to the precarious nature of the

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<sup>1</sup> Standard working here means being employed on a full time open ended contract of employment.

employment of dockworkers who were employed on a casual daily basis and to the seasonal nature of work endured by workers in the Australian agricultural sector.<sup>2</sup> Precarious or contingent work is generally performed for more than one employer, it is not “full-time” and is limited in duration,<sup>3</sup> with employment relationships that may be part time, fixed-term or temporary in nature. It does not necessarily follow that this type of precarious work leads to negative OHS outcomes. Part-time work and work of limited duration may be selected by the worker as meeting their needs at a particular time, although there is evidence that the current recession has forced many people into this type of work because of the lack of full-time alternatives. Figures in the UK show that some 37 per cent of those doing temporary work and some 15 per cent of those doing part-time work were doing so because they could not find a full time job.<sup>4</sup> This amounts to about one million people working part time who would like to work full time and some 426,000 people in temporary work because they could not find permanent jobs.<sup>5</sup>

There are a number of employment relationships which have been described as coming within the term “precarious work”. Quinlan et al.<sup>6</sup> categorised them into five groups. These were:

1. Temporary workers; including short fixed-term contracts and casual workers;
2. Workers subject to organisational change; including re-structuring, downsizing and privatisation;

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<sup>2</sup> Quinlan, M. “The Pre-Invention of Precarious Employment: The Changing World of Work in Context,” *The Economic and Labour Relations Review* 23, No. 4:1-22

<sup>3</sup> See Feldman, D. C. “Toward a New Taxonomy for Understanding the Nature and Consequences of Contingent Employment,” *Career Dev. Int.* 11 No. 1:28-47, 2006; cited in Bohle, P., C. Pitts, and M. Quinlan. 2010. “Time to Call it Quits? The Safety and Health of Older Workers,” *International Journal of Health Services* 40, No. 1:23-41.

<sup>4</sup> Office for National Statistics “Labour Market Statistics: December 2012,”; the figures are for October 2012; <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/december-2012/statistical-bulletin.html>.

<sup>5</sup> See *Flexible Working: Working for Families, Working for Business* A report by the Family Friendly Working Hours Taskforce; [www.dwp.gov.uk/docs/family-friendly-task-force-report.pdf](http://www.dwp.gov.uk/docs/family-friendly-task-force-report.pdf)

<sup>6</sup> Quinlan, M. C. Mayhew, and P. Bohle. 2001. “The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health: A Review of Recent Research,” *International Journal of Health Services* 31, No. 2:335-414

3. Outsourcing; including home working;
4. Part-time working;
5. Workers in small businesses; including self-employment.

In a similar vein, a further study in the UK identified twelve different forms. These were self-employment, part-time work, temporary work, fixed-term contract work, zero hours contracts of employment, seasonal work, home working, teleworking, term time only working, Sunday working and job sharing.<sup>7</sup>

However, it is important of course not to necessarily regard the increase of non-standard working entirely negatively, as governments now actively encourage policies on flexible working. One report for the UK government<sup>8</sup> stated

Flexibility in the workplace is about developing modern working practices to fit the needs of the 21st century. Both employers and employees can gain from flexible working opportunities as both parties have the flexibility to organise their working arrangements in a way that suits them. This can enable organisations to adapt to changing business conditions and individual employees to better balance their work and family life.<sup>9</sup>

There is, as one might expect, a strong gender bias in this “flexible working” pattern with women less likely than men to be in employment and, when employed, working shorter hours than men,<sup>10</sup> but

Domestic responsibilities are not the only reason for women’s lower employment rates. Women have higher unemployment rates than men in many countries, and segregated employment patterns and lack of equal treatment means that once employed they have lower earnings, inferior employment conditions and poorer promotion prospects.<sup>11</sup>

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<sup>7</sup> Dex, S., and A. McCulloch. 1995. *Flexible Employment in Britain: A Statistical Analysis*, Equal Opportunities Commission Research Discussion Series, Manchester.

<sup>8</sup> Supra No. 4.

<sup>9</sup> See also European Commission policies on encouraging flexicurity; <http://ec.europa.eu/social/main.jsp?catId=102&langId=en>.

<sup>10</sup> Fagan, C., T. Warren, and I. McAllister. 2001. *Gender, Employment and Working Time Preferences in Europe*. European Foundation for the Improvement of Living and Working Conditions; <http://www.eurofound.europa.eu/publications/htmlfiles/ef0145.htm>.

<sup>11</sup> *Ibid.*

In a total of 76 studies, however, Quinlan et al.<sup>12</sup> found an association between precarious employment and a negative indicator on occupational health and safety. They concluded that:

On the basis of this review, we find sufficient grounds to argue that the introduction, presence, or growth of precarious employment commonly leads to more pressured work processes and more disorganised work settings and in so doing creates challenges for which existing regulatory regimes are ill prepared.

## Vulnerable Workers

The UK Government produced a strategy paper called *Success at Work*<sup>13</sup> which defined a vulnerable worker as

[...] someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse.

This is a useful starting point and, of course, one can immediately see the connection with precarious employment, as probably this definition is more likely to apply to those in precarious type contracts of employment such as temporary, casual and seasonal workers.

A Policy Studies Institute report found that one in five of the workforce was vulnerable.<sup>14</sup> It drew on interviews with representatives from a range of affiliated unions and the Trades Union Congress (TUC) and was carried out in conjunction with the work of the TUC Commission. The TUC set up a Commission on Vulnerable Employment (CoVE) to carry out a major investigation of the causes of, and solutions to, “vulnerable employment”.<sup>15</sup> The final report defined vulnerable employment<sup>16</sup> as being at risk of continuous poverty and injustices

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<sup>12</sup> Supra No. 6.

<sup>13</sup> Department for Trade and Industry (now Department for Business and Innovation) 2006; <http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/employment/employment-legislation/success-at-work/index.html>

<sup>14</sup> Published in 2006 and available at:

[http://www.psi.org.uk/news/pressrelease.asp?news\\_item\\_id=188](http://www.psi.org.uk/news/pressrelease.asp?news_item_id=188).

<sup>15</sup> A good example of the confusion between precarious employment and vulnerable work.

<sup>16</sup> Hard Work Hidden Lives, available at:

[http://www.vulnerableworkers.org.uk/files/CoVE\\_full\\_report.pdf](http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf).

resulting in an imbalance of power in the employer-worker relationship. The report found that:

Vulnerable work is insecure and low paid placing workers at high risk of employment rights abuse. It offers very little chance of progression and few opportunities of collective action to improve conditions. Those already facing the greatest disadvantage are more likely to be in such jobs and less likely to be able to move out of them. Vulnerable employment also places workers at greater risk of experiencing problems and mistreatment at work, though fear of dismissal by those in low-paid sectors with high levels of temporary work means they are often unable to challenge it.

The report, drawing extensively on other published research and literature, suggests the following reasons for the increase in workers in vulnerable employment: (a) jobs available are changing. While there is still a demand for low skilled jobs, these are increasingly in service work. It has been suggested that there is a polarisation of jobs;<sup>17</sup> (b) more workers are employed by small businesses. Over 40% of the workforce is now employed in a business that employs less than 100 workers; (c) the increasing proportion of agency work; as a proportion of all temporary work; agency work comprised 17.1 per cent of all temporary work in autumn 2007 as compared to 13 per cent in 1997;<sup>18</sup> (d) the informal cash in hand economy; it is suggested this involves billions of pounds;<sup>19</sup> (e) an increased reliance on migrant workers; (f) the employment of women who, on average, are being paid 17.2 per cent less than men<sup>20</sup> and about 40 per cent of women are in part-time employment.<sup>21</sup> Women working part-time earn about 60 per cent of the average hourly earnings of men working full time;<sup>22</sup> (g) there is a relationship between low income and job insecurity;<sup>23</sup>

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<sup>17</sup> The report notes: Goos M., Manning A. 2007. "Lousy and Lovely Jobs; The Rising Polarization of Work in Britain," *The Review of Economics and Statistics*, MIP Press, 89, No. 1 pp. 118-133 and Kaplanis, I. 2007. *The Geography of Employment Polarisation in Britain*. London: Institute for Public Policy Research.

<sup>18</sup> Labour Force Survey Autumn 2007 and Autumn 1997.

<sup>19</sup> HMT. 2000. *The Informal Economy: A Report by Lord Grabiner QC*. London: HMT

<sup>20</sup> Press release, "TUC Response to the ONS Hours and Earnings Survey," 7<sup>th</sup> November 2007.

<sup>21</sup> Equal Opportunities Commission. 2006. *Facts About Women and Men in Great Britain*. London EOC, 15.

<sup>22</sup> Fredman, S. 2004. "Women at Work: The Broken Promise of Flexicurity," *Industrial Law Journal* 33, No. 4: 302.

<sup>23</sup> Evans A., A. Rossiter, K. Mueller, and V. Menne. 2008. *Anglo-Flexicurity: A Safety Net for UK Workers*. London: Social Market Foundation.

(h) working long hours—whilst women may only be part-time in paid employment they often have additional responsibilities as carers. Men tend to work long hours even when they have family responsibilities.

The report also stated that failure to comply with health and safety legislation is extensive, and cites the UK Health and Safety Executive (HSE) as authority for the statement that “most legally reportable workplace accidents, including major injuries, are not being reported.”<sup>24</sup>

In addition, the TUC Commissioners had also seen evidence of low health and safety compliance amongst private contractors such as employment agencies and gangmasters.<sup>25</sup> They found that although the work might be risky, there was no clear understanding who had responsibility for health and safety issues. They point out that when the HSE gave evidence to the Parliamentary Select Committee on Work and Pensions, they highlighted the difficulties employment agencies create for health and safety enforcement. Its Chief Executive said that, although the HSE was trying to make it clear that health and safety responsibilities could not be delegated out to employment agencies, as the workforce became more fragmented, it could be harder to enforce health and safety policy and to keep control over its implementation.<sup>26</sup> The report also noted evidence that employers in small firms were not fulfilling their obligations to undertake a formal risk assessment for their pregnant staff, either because they were unaware of the duty or because they felt that it was common sense.<sup>27</sup> During the course of their research, the TUC Commission identified a poll of young workers by a trade union (UNITE). This had found that 17 per cent of all young workers had worked in unsafe workplaces whilst 22 per cent of all young workers polled had their wages docked when they were ill.<sup>28</sup>

In the light of the above, the chapters that follow examine different aspects of issues with respect to vulnerable workers and precarious work and show the need for developing research on the subject.

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<sup>24</sup> University of Liverpool. 2007. *An Investigation of Reporting of Workplace Accidents under RIDDOR using the Merseyside Accident Information Model*. London: HSE. The researchers interviewed patients in hospital and found only 30% of the injuries suffered had been reported.

<sup>25</sup> At pp. 127/8.

<sup>26</sup> House of Commons Select Committee on Work and Pensions, Uncorrected Oral Evidence, One-off Evidence Session with Ms Judith Hackitt, the Chair of HSC, and Mr. Geoffrey Podger, the Chief Executive of HSE 28th November 2007.

<sup>27</sup> ACAS. 2004. *Pregnancy at Work: Research to Explore Experience of Employers in Small Firms*. London: ACAS, 6.

<sup>28</sup> <http://www.vulnerableworkersproject.org.uk/>.

# THE REGULATION OF VULNERABLE WORKERS AND PRECARIOUS WORK: A LIBERAL FRAMEWORK?

LISA RODGERS

## 1. Introduction

The aim of this article is to build on a previous article comparing the justifications for the regulation of vulnerable workers and precarious work in theoretical terms.<sup>1</sup> The argument of this article is that this regulation must ultimately maintain compatibility with liberal democratic thinking in order to gain (political) legitimacy as a result of the global hegemony of this type of thinking, albeit directed through a commitment to justificatory arguments which may or may not have liberal foundations.<sup>2</sup> It is argued that the global dominance of liberal thought not only restricts or modifies the meaning of the arguments used in support of labour law regulation in this context, it also affects the presentation of the relationship between these goals. Fundamentally, it means that the goals involved in the regulation of labour law are presented as mutually compatible and reinforcing; there is no contradiction between these different goals. The argument of this article is that the presentation of the arguments in this way is only one possible reading among many of the relationships between and content of these kinds of theoretical position. In fact there are many contradictions and conflicts between these theoretical positions which need to be explored.

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<sup>1</sup> Rodgers, L. 2012. "Vulnerable Workers, Precarious Work and Justifications for Labour Law: a Comparative Study," *E-Journal of International and Comparative Labour Law* 1, No. 3-4: 87-113.

<sup>2</sup> The hegemony of liberal political thought and the issues this raises in relation to regulation is discussed in detail in the Critical Legal Studies literature. Although a detailed discussion of this literature is beyond the scope of this article, more information on this approach can be found in Hunt, A. 1986. "The Theory of Critical Legal Studies," *Oxford Journal of Critical Legal Studies* 6, No. 1:1-45; Singer, J. W. 1984 "The Player and the Cards: Nihilism and Legal Theory," *Yale Law Journal* 94 No. 1:1.

Of course, if this article discusses the influence of liberal political theory on the design and content of labour law, then it is necessary to define the basic tenets of this theory. This is not an easy task, given the different forms that liberalism and liberal thought have taken over time, the diversity of ideas within the liberal school.<sup>3</sup> That said, there appear to be certain core principles which are widely held and which are of relevance to the arguments in this article. The first is the foundational principle that there should be individual liberty or self determination under the rule of law. The second is that state interference needs to be limited in order to protect individual liberty, the rule of law, and the functioning of the market economy.<sup>4</sup> It is argued that as free markets and free trade are the most efficient means of wealth generation (the third principle), it follows that the state's role is reduced to that of a guarantor of 'negative' freedoms, such as freedom of contract. Given that labour law is concerned with the modification of contract rules this immediately raises questions about the compatibility of this theory with labour law principles. Furthermore, labour law is concerned with using regulation to determine market outcomes, a process could be seen to be in conflict with all of the principles outlined above.

The aim of this article therefore is to discuss the extent of the potential (in) compatibility between the foundational theories of labour law and liberal theory. This discussion will then be applied to the context of the regulation of vulnerable workers and precarious work, to show that despite these theoretical inconsistencies, the foundational arguments of labour law are presented as compatible both with each other and with the tenets of liberal political theory. This may reduce the transformative capacity of regulation in this field.

## 2. Justification for Labour Law

Justification for labour law tends to centre on one (or all) of the following goals: economic efficiency, social justice arguments, or human rights. On the face of it neither of the first two arguments is compatible with a liberal reading. Labour law based on economic efficiency involves intervention in the market to address market failures, to tackle the problems of the governance of the contract of employment and to create a

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<sup>3</sup> Landesman, B. 2010. "The Responsibilities of the Liberal State: Comprehensive vs Political Liberalism," *Utah Law Review*, No. 1:171-182.

<sup>4</sup> Doering, D. 2007. "Classical Liberalism," in *Dictionary of Liberal Thought*, ed. Brack, D. and E. Randall (Politico's Publishing), 65.

“well co-ordinated flexible division of labour”.<sup>5</sup> This could be seen as interfering with the liberal promotion of freedom of contract and the liberal commitment to the separation of political and economic spheres. Similarly, labour law based on social justice arguments is not, on the face of it, compatible with liberal aims. This regulation traditionally aims towards a fairer distribution of wealth, power or other goods in society.<sup>6</sup> Such re-distributional aims are viewed with scepticism by proponents of a liberal political philosophy, under which the market is seen as the most efficient mechanism for the distribution and generation of wealth. Furthermore, there has, more recently, been a focus in the promotion of social justice arguments on the notion of work quality: that through work, workers should be able to gain the satisfaction of their wants and needs (so far as these are not outweighed by the wants of others).<sup>7</sup> This is a development of the idea that labour is more than (or is not) a “commodity” that can be bought and sold on the labour market. This idea is incompatible with the theoretical (economic) traditions of liberalism, under which the commodification of labour is assumed, and even embraced.<sup>8</sup>

On the one hand, arguments based on human rights can be seen as compatible with liberal traditions. The argument that these rights are “fundamental” refers to the morality attached to these rights on the liberal scheme (and that that they therefore should have a “trumping” effect over other efficiency or welfare considerations).<sup>9</sup> These kinds of arguments have been made in particular in relation to anti-discrimination rights on the basis that they are analogous to “civil” and “political” rights, which tend to have high standing in the liberal human rights regime.<sup>10</sup> However, there are many more problems with use of human rights arguments to promote labour rights beyond this core of political and civil rights. The promotion of labour rights as “social rights” (the right to work or the right to just and

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<sup>5</sup> Collins, H. 2011. “Theories of Rights as Justifications for Labour Law,” in *The Idea of Labour Law*, eds. Davidov, G. and B. Langille (Oxford: Oxford University Press), 137.

<sup>6</sup> Collins, H. *op. cit.*, 137.

<sup>7</sup> Theories of social justice have an extremely long history and have been used in support of a wide range of different policies. A good discussion of the origins of the idea of social justice is presented in Pound, R. 1912. “Social Justice and Legal Justice,” *Central Law Journal*, No. 75:455-463.

<sup>8</sup> Epstein, R. A. 1984. “In Defense of the Contract at Will,” *University of Chicago Law Review*, No. 51:947-982

<sup>9</sup> Dworkin, R. 2009. *Taking Rights Seriously, New Impression with Reply to Critics*. G. Duckworth and Co. Limited, 191.

<sup>10</sup> Davies, A. C. L. 2009. *Perspectives on Labour Law*. Cambridge: Cambridge University Press, 42.

favourable conditions at work for example) is problematical because these rights have a much lower status in liberal human rights theory, and some authors argue that these rights are not “human” rights at all.<sup>11</sup> Problems arise over how to reconcile the redistributive role of the state required by the demands of social rights with the liberal foundations of human rights theory, and also where social rights stand in terms of the law.<sup>12</sup> However, the case is increasingly being made that the position of labour rights as “social rights” should be improved, on the basis that social rights share the same foundations as human rights and/or that the hierarchy between civil and political and economic and social rights is artificial and cannot be sustained.<sup>13</sup>

All three of these justificatory elements can be discerned in the academic literature and in political discussion concerning the regulation of workers at the “bottom of the labour market”.<sup>14</sup> Often, these arguments are presented as fundamentally compatible and the combination of these positions is presented as helpful or of practical use. However, it is the argument of this article, that these complementarities are “created” in order that they fit with the global hegemony of liberal political thinking. It is not a reflection of the actual scope or potential of these approaches. Indeed, on closer scrutiny, there are contradictions which run through and between the three justificatory positions, meaning that in reality, human rights are poor mechanisms for achieving social justice, economic efficiency creates rather than reduces the inequalities which social justice tries to tackle, and finally, any expansive version of human rights (including social rights) presents a major challenge to efficiency arguments. The result is, that although there is theoretically a split between regulation for, “precarious work” which concerns the demand side of the employment relationship and focuses on human rights and social justice in the context of economic efficiency, and regulation for “vulnerable workers” which focuses on workers’ characteristics and status and tends to start from the human rights position, in actual fact, the potential for

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<sup>11</sup> Letsas, G. 2007. *A Theory of the Interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press, 130.

<sup>12</sup> Fudge, J. 2007-2008. “The New Discourse of Labor Rights: From Social to Fundamental Rights?” *Comparative Labour Law and Policy Journal*, No. 29:35.

<sup>13</sup> Gearty, C. and V. Mantouvalou. 2011. *Debating Social Rights* Oxford: Hart Publishing, 98.

<sup>14</sup> Fudge, J. 2005. “Beyond Vulnerable Workers: Towards a New Standard Employment Relationship,” *Canadian Labour and Employment Law Journal* 12:151-176.

regulation of both of these elements is more restricted than the justificatory arguments suggest.

### 3. Precarious Work

#### 3.1 Economic Foundation

In the context of precarious work, the literature attempts to engage with economic perspectives. Using economic starting points for the consideration of precarious work is a theoretical choice, but it can also be seen as a political choice, because arguably it makes such arguments more compatible with liberal political thought. The starting point in the academic and political literature concerning precarious work appears to be economic change brought about by “globalisation”. The argument is that the process of globalisation has led to the disintegration of the old industrial model of employment based on the “standard employment relationship” (full time year-round employment for a single employer).<sup>15</sup> This standard employment relationship along with a number of other key institutions—the “vertically integrated enterprise, the industrial union, the male breadwinner family and the state and employer as provider of services”<sup>16</sup>—provided a basis for a coherent set of social policies which “incorporated a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability and economic growth” in the West around the middle of the last century.<sup>17</sup> However, these institutions have been undermined by economic processes associated with globalisation. The manufacturing sector in developed industrial economies has declined, and the “vertically integrated enterprise” has given way to the decentralisation of production and vertical disintegration. At the same time, the rise of information technologies has given birth to a new “knowledge” economy which emphasises flexibility in the labour market and new employment norms.<sup>18</sup>

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<sup>15</sup> Fudge, J. 2005. “Beyond Vulnerable Workers: Towards a New Standard Employment Relationship,” *op. cit.*, 169.

<sup>16</sup> Deakin, S. 2004 *Renewing Labour Market Institutions*. Geneva: International Labour Office, 1-2.

<sup>17</sup> Rodgers, G. *op. cit.*, 1.

<sup>18</sup> Fudge, J. “Beyond Vulnerable Workers: Towards a New Standard Employment Relationship,” *op. cit.*, 169.

On the one hand, this flexibility has been presented as a new basis for economic efficiency and social compromise.<sup>19</sup> It is argued that flexibility delivers benefits for employers because they are able to “adapt their workforce to changes in economic conditions, and are able to “recruit staff with a better skills match, who will be more productive and adaptable leading to greater innovation and competitiveness”.<sup>20</sup> At the same time, employees benefit from the ability to better manage their work-life balance and to move easily from one job to another.<sup>21</sup> On the other hand, it has been argued that “flexibility”, in certain forms, can be damaging to employees. A distinction is made here between functional flexibility, which allows employers to require employees to change their skills to match changes in technology or workload and “numerical” flexibility which involves “adjusting labour inputs to meet fluctuations in employers needs”.<sup>22</sup> The latter type of flexibility is associated with the use of part-time, temporary, and agency workers and also altering the working-time patterns of shift or full time workers, or contracting out.<sup>23</sup> It has been suggested that it is this numerical flexibility which leads to precarious work, which is “characterised by low pay, low status, and little by way of job security, training, or promotion prospects”.<sup>24</sup>

The challenge presented by precarious work therefore, is how to provide support to those workers displaced by the economic forces of globalisation, whilst still maintaining economic efficiency and growth. Three main ways of achieving this balance have been suggested in the (academic and political) literature. The first is to bring “precarious work” within the scope of traditional labour law rights. This involves either a reaffirmation of “core” rights which should apply to all labour contracts (which has been evident at ILO level) and/or an expansion of labour law concepts in order to include work traditionally outside its scope. The second is to create new rights covering work which is viewed as precarious. This has been the position adopted in the EU, with the creation

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<sup>19</sup> Collins, H. 2001. “Regulating the Employment Relation for Competitiveness,” *Industrial Law Journal* 30, No. 1:17-32.

<sup>20</sup> European Commission. 2007. *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security*, Office for the Official Publications of the European Communities, Luxembourg, 4.

<sup>21</sup> *Ibid.*, 4.

<sup>22</sup> Fredman, S. 2006. “Precarious Norms for Precarious Workers,” in *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*, eds. Fudge, J. and R. Owens (Oxford: Hart), 177.

<sup>23</sup> *Ibid.*, 177.

<sup>24</sup> *Ibid.*, 177.

of the Directives on part-time,<sup>25</sup> fixed term<sup>26</sup> and temporary work.<sup>27</sup> The third category, which is aspirational rather than factual, suggests tying labour law more closely to economic processes to achieve “regulation for competitiveness”. The idea here is that companies are given incentives to reduce precarious work by investment in training and skills and other “supply-side” features of the employment relationship. This tends to follow the new institutional economic perspective, that “smart” regulation can achieve the most efficient economic outcomes.<sup>28</sup>

In this section, the focus will be on the first two of these positions. The EU’s position will be presented first, as it is the most distinct and contained of the three categories in dealing with “precarious work”. It demonstrates quite clearly a number of issues arising from the attempt to wed economic efficiency and human rights approaches, and also makes reference to social justice by the inclusion of “quality” elements into its legislative provisions. The ILO’s perspective will then be introduced, an approach which suggests that economic, human rights and social justice justifications can be used in concert to produce the best outcome for the elimination of precarious work. The third approach, which suggests that regulation should be tailored more closely to economic processes, will not be considered here. This is because the development of this approach has been in the direction of the designation of worker “capabilities” as the key to a well functioning economy. This fits most closely with the “social rights” positions adopted within the theorisations of vulnerable workers rather than precarious work. These positions are considered later in this article.

### 3.2 Precarious Work in the EU

Arguably, the idea that economic efficiency and “rights” are mutually reinforcing and can be developed together is central to the ethos of the EU. Article 2 of the EU Treaty states that the Union is founded on the “values of respect for human dignity, freedom, democracy, equality, the rule of

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<sup>25</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9.

<sup>26</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L 175/43.

<sup>27</sup> Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9.

<sup>28</sup> Davies, A. C. L. *op. cit.*, 29.

law and respect for human rights”, whilst Article 3 expresses the commitment of the EU to a “highly competitive social market economy” arising from “balanced economic growth and price stability”. In the context of labour law, the combination of economic efficiency and “rights” initially proceeded on the basis that regulation for (sex) equality would promote economic integration by creating a level playing field for actors and prevent unfair business competition.<sup>29</sup> This integrationist logic is clearly stated in the early equality Directives: the primary objectives of both Directives 75/117 on equal pay<sup>30</sup> and Directive 76/207 on equal treatment<sup>31</sup> were stated as the “harmonization of living and working conditions while maintaining their improvement”.<sup>32</sup> Arguably, there has now been a shift away from this integrationalist logic and towards the idea that it is in the “balance” between worker protection and economic freedom that lies the most efficient functioning of the EU (i.e. worker protection is valuable in its own right).<sup>33</sup> But there remains a belief in the mutually reinforcing nature of economic efficiency and rights.

The atypical work Directives<sup>34</sup> are a good example of this attempt to marry economic efficiency and rights. On the one hand, the Directives are designed to further the principles of “flexicurity”, a major element of EU employment policy which attempts to combine “flexibility” for businesses with “security” for workers.<sup>35</sup> The flexibility element of this concept speaks directly to the furtherance of economic efficiency. The idea is that the promotion of the flexible organisation of work in the EU (by the encouragement of atypical work) increases competitiveness by allowing businesses to respond to the pressures brought by the globalisation of production. At the same time, workers benefit from “new” kinds of “security” which are compatible with and enhance this kind of flexibility. The notion of “job” security (ability to stay in one job) is abandoned and

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<sup>29</sup> Bell, M. 2012 “Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work,” *European Law Review* 37, No. 1:31-48.

<sup>30</sup> OJ [1975] L45/19.

<sup>31</sup> OJ [1976] L39/40.

<sup>32</sup> This quotation appears in the Preamble to Directive 76/207 on equal treatment. The wording in the Preamble to Directive 75/117 on equal pay is slightly different but of the same effect: the Directive is “aimed at making it possible to harmonize living and working conditions while the improvement is being made”. For further information see Rodgers, L. 2011 “Labour Law and the Public Interest: Discrimination and Beyond,” *European Labour Law Journal* 2, No. 4:302-322.

<sup>33</sup> Bell, M. *op cit.*, 31.

<sup>34</sup> The Part-time Work Directive, the Fixed-Term Work Directive and the Temporary Agency Work Directive: see footnotes 25-27.

<sup>35</sup> European Commission, *op. cit.*, 5.

replaced with the notion of “employment” security (the “protection” of workers from the difficulties of job transitions that flow from a flexible economy).<sup>36</sup> This “employment security” is achieved through providing workers with the training they need to keep their skills up to date, and providing them with adequate unemployment benefits for periods of unemployment. The result is a win-win situation in which both workers and businesses can take the benefits flowing from a well functioning global and flexible economy.<sup>37</sup>

In fact, the effectiveness of “flexicurity” as a means to enhance worker protection has been brought into question, as it has tended to be used as a tool to further economic efficiency at the expense of worker rights.<sup>38</sup> Of course, the atypical work Directives include specific rights (the right to equal treatment) which should provide a boost to worker protection and neutralise some of the negative effects of the flexicurity agenda. The extent of this “boost” however, depends on the status that these “rights” have in the EU legal order. On the one hand, these rights can be seen as simply improving the weight of the security elements in the balance between flexibility for businesses and security for workers. On the other hand, if the right to equal treatment in the atypical work Directives achieves “human rights” status (as a fundamental social right which is at the same standing as other human rights) then this implies that these rights have a “trumping” effect over other efficiency considerations. On this basis, the question is not one of balance between competing interests, but of the absolute status of equal treatment as a fundamental right.<sup>39</sup>

There is also the question of the aim of the atypical work Directives to increase the “quality” of atypical work. All three of the atypical work Directives cite improving the quality of atypical work as an aim alongside the principle of non-discrimination. The Fixed-Term Work Directive (FTWD) sees the application of the principle of non-discrimination as the major way to achieve this aim, as well as establishing a framework for the prevention of abuse arising from the use of successive fixed-term contracts.<sup>40</sup> The Part-Time Work Directive (PTWD) also cites quality alongside the non-discrimination aim,<sup>41</sup> whilst the Temporary Agency

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<sup>36</sup> European Commission, *op. cit.*, 6.

<sup>37</sup> *Ibid.*, 38.

<sup>38</sup> Huiskamp, R., and K. J. Vos, 2007. “Flexibilization, Modernization and the Lisbon Strategy,” *International Journal of Comparative Labour Law and Industrial Relations* 23, No. 4: 587- 599, 593.

<sup>39</sup> Bell, M *op. cit.*, 32.

<sup>40</sup> Clause 1 FTWD.

<sup>41</sup> Clause 1 PTWD.

Work Directive (TAWD) sees the quality of this kind of precarious work as improved not only through the principle of non discrimination but also “by recognising temporary work agencies as employers”, and hence allowing these workers to fall within domestic definitions of “employees” or “workers” and qualify for wider employment rights.<sup>42</sup> As has been mentioned, the promotion of work quality can be seen as an attempt to further social justice; the introduction of the requirement that work quality should proceed alongside the promotion of atypical work contracts, can be seen as an attempt to ensure a fair social distribution of costs and benefits amongst workers. The question is whether this social justice aim is compatible with the other stated (and arguably dominant) aims of the Directives, namely to ensure the protection of anti-discrimination rights for atypical workers, as well as maintaining economic efficiency and growth for the countries of the European Union.

How far the principle of non discrimination can improve work quality will depend on the strength of the *application* of this principle. The weak application of this principle implies that anti-discrimination provisions are subject to wide derogation, resulting from a wide margin of appreciation granted to member states in the application of flexicurity principles (employment policy being deemed outside EU competence and a matter for member states). This inevitably means that (economic) efficiency arguments tend to defeat the anti-discrimination provisions, putting work quality at risk. By contrast, the “strong” application of these rights will mean that they have a “trumping” effect over other efficiency considerations and will therefore be able to have a greater role in maintaining work quality. Furthermore, it is worth noting that in terms of the relationship between economic efficiency and social justice (work quality), economic and social justice do not necessarily proceed hand in hand.<sup>43</sup> In fact, economic efficiency as represented by the principles of flexicurity is potentially detrimental to work quality. This is because, as an element of EU employment policy, job creation tends to be promoted at the expense of job quality, meaning that recourse to atypical work can equate with more “bad” jobs.<sup>44</sup>

An investigation of the case law at EU level gives some insight into how these conflicts are currently resolved. A number of different positions have been presented. The weak application of the non-discrimination

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<sup>42</sup> Art. 2 TAWD.

<sup>43</sup> Rodgers, G., E. Lee, L. Swepston, and J. van Daele. 2009. *The ILO and the Quest for Social Justice 1919-2009*. Geneva: International Labour Office, 95.

<sup>44</sup> European Parliament, *Report on Common Principles of Flexicurity*, 007/2209(INI), 6.

provisions is evidenced by the case of *Mangold v Helm*.<sup>45</sup> In this case, the Claimant challenged a German law<sup>46</sup> which provided that the rules requiring “objective justification” for the conclusion of fixed-term contracts did not apply if, when starting the fixed-term work the employee had reached a certain age (52 for the purposes of the case), unless there was a close connection between that contract and a previous permanent contract with the same employer.<sup>47</sup> The Claimant argued that the reduction in protection resulting from these provisions breached the non-regression clause (Clause 8 (3) FTWD) which provides that the FTWD “shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement”. The Court of Justice came to the bizarre conclusion that although the German law did constitute a reduction in protection for a group of workers, it was not contrary to the non-regression clause because the law was not connected to the “implementation” of the FTWD. Rather, the German government had decided “autonomously to reduce the protection in this area afforded to older workers” even before the implementation of the Directive.<sup>48</sup> Furthermore, this reduction in protection was on the basis of the need to encourage the employment of older workers, which was a valid aim outside the scope of the FTWD because it was an element of employment policy (and so could override the anti-discrimination provisions).<sup>49</sup>

On the other hand, there is evidence that the Court of Justice has restricted the margin of appreciation granted to member states, on the basis that the EU should promote “strong” anti-discrimination rights. In *Del Cerro Alonso*<sup>50</sup> the Court stated that as the FTWD concerned non-discrimination, then as a “principle of Community social law” the derogations had to be interpreted restrictively (and the discrimination provision given wide scope). Indeed, the test that the court used, first stated in the case of *Adeneler*,<sup>51</sup> was that applied in indirect discrimination

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<sup>45</sup> [2006] 1 CMLR 43.

<sup>46</sup> Par. 14 (3) Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen December 2000 (as amended).

<sup>47</sup> Initially this age was set at 58 but was later amended to 52, thereby bringing the Claimant, who was 56 within its scope.

<sup>48</sup> *Mangold, op. cit.*, [2006] 1 CMLR 43 par. AG76.

<sup>49</sup> *Ibid.*, par. 53.

<sup>50</sup> C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 54.

<sup>51</sup> C-212/04 *Adeneler v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057.

cases: namely that the objective reasons used (by member states) to derogate from anti-discrimination provisions must respond to a genuine need, be appropriate for pursuing the objective pursued and necessary for achieving that purpose.<sup>52</sup> Furthermore, those objective reasons must refer to precise and concrete circumstances, and be capable in a particular context of justifying recourse to successive fixed-term contracts. They must not be general and abstract provisions.<sup>53</sup> In *Del Cerro Alonso*, this was interpreted to mean that the Spanish government could not rely on a statute which restricted a set of “length-of-service allowances” to permanent staff. This was a “general and abstract” provision which could not justify the difference in treatment in this case.

This “strong” approach to the anti-discrimination provision of the atypical work Directives was also adopted in *Bruno and Pettini*<sup>54</sup> where the Court found that this provision was “simply a specific expression of one of the fundamental principles of EU law, namely the general principle of equality”.<sup>55</sup> Moreover, in the case of *Bruno and Pettini*, the Court of Justice found that not only were the anti-discrimination provisions of the atypical work Directives fundamental, the quality objectives of the atypical work Directives were also “fundamental” because they concerned the “improvement in living and working conditions” and “proper social protection” for workers.<sup>56</sup> Indeed, not only were the provisions on anti-discrimination and work quality (social justice) given similar weight, they were also presented as mutually reinforcing and the one necessary for the achievement of the other. Specifically, the Court found that Italian statutory rules that qualification for pension rights depended on length of service constituted both discriminatory practice and also created obstacles to part-time work, because the rules made part-time work less attractive. The arguments of the Italian government, that part-time workers and full-time workers were not in comparative situations in relation to pensions,

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<sup>52</sup> C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 55.

<sup>53</sup> C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 54.

<sup>54</sup> Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Matteucci* [2010] 3 CMLR, 45.

<sup>55</sup> Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Matteucci* [2010] 3 CMLR, 58.

<sup>56</sup> Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Matteucci* [2010] 3 CMLR, 30.

and the difference in treatment could be objectively justified were given short shrift by the Court.<sup>57</sup>

At EU level therefore, the Court of Justice has found ways of presenting human rights and social justice (in terms of work quality) as essentially compatible. However, there are a number of points to make at this juncture. First of all, the decision in *Bruno and Pettini* could be limited quite easily to its facts, given the wide margin of appreciation usually granted to member states. It seems a step too far to suggest that relating human rights and social justice in this way is the “new” position of the Court of Justice. Secondly, the mutually reinforcing nature of human rights and social justice relies on a very narrow reading of the latter’s scope, and there are a number of ways in which these two elements could conflict. The relationship is not too controversial when social justice is related to civil rights (such as anti-discrimination). The difficulty is maintaining this relationship when other areas of work quality are considered which go beyond civil rights and inch into the realm of “social rights” (the right to work, the right to minimum income and so forth). Some commentators argue that to extend human rights theory and practice in this way disrupts the whole human rights regime.<sup>58</sup> Thirdly, the presentation of human rights and social justice as mutually reinforcing can be seen merely as a (liberal) political tool which serves to take power away from the most at risk in society. It operates by creating a narrative which because it is essentially “legal” is beyond reproach, but which misunderstands the need for those most at risk to build social justice themselves (through collective action for example).<sup>59</sup>

Finally, it is worth noting that the compatibility of human rights and social justice relies on a particular reading of economic efficiency and flexicurity which can be seen as incompatible with liberal aims. Essentially encouraging atypical work and quality work can be seen as compatible with flexicurity, in so far as a reduction in the quality of atypical work would hinder employment security and therefore make it less easy for workers to move in and out of those jobs. On the other hand, such an interpretation of the atypical work Directives could be seen as hindering the processes of flexicurity by privileging security over flexibility. A commitment to quality jobs necessarily involves investment

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<sup>57</sup> Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Matteucci* [2010] 3 CMLR, para. 71.

<sup>58</sup> Letsas, G. *op. cit.*, 130.

<sup>59</sup> Hutchinson, A. C., and P. J. Monahan. 1984. “Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought,” *Stanford Law Review*, No. 36: 199-246, 209.

in jobs (at the bottom end of the market) which may not meet the expectations of employers, or allow them to respond adequately to changing business needs or conditions. It therefore remains to be seen how far this kind of argument is sustainable given the underlying tenet of this article: that the legitimacy of regulation depends on its broad compatibility with liberal aims.

### 3.3. The ILO and Precarious Work

The notion of social justice lies at the very heart of the ILO Constitution. The Preamble to the Constitution states that many labour conditions involve “such injustice, hardship and privation” that social justice (and lasting peace) will only be achieved if there is an improvement in global labour conditions.<sup>60</sup> According to the original text of the Constitution, the achievement of this social justice must be based on the “guiding principle” that “labour should not be regarded merely as a commodity or article of commerce”.<sup>61</sup> This is a reference to the Marxian notion that, under capitalism, labour becomes a commodity. However, it is the conviction of the ILO that this connection is not inevitable and that “all forms of work can, if they are adequately regulated and organized, be a source of personal well being and social integration”.<sup>62</sup> Thus there is no inherent contradiction between economic efficiency and work quality; social justice and globalisation processes are essentially compatible. Increasingly, human rights at work are also being promoted as essential to the achievement of social justice (and not incompatible with economic efficiency). This is evident in the Decent Work agenda (the ILO’s major work on how to tackle precarious work) and in the attempts to restate the guiding principles of the ILO in the modern era.<sup>63</sup>

Prior to the Decent Work agenda, the ILO did attempt to address the issue of precarious work in a similar way to the EU: by the introduction of specific standards relating to atypical work. In 1994, the ILO introduced

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<sup>60</sup> The text of the ILO Constitution is available at <http://www.ilo.org/ilolex/english/constq.htm> (accessed 13 July 2012).

<sup>61</sup> Art. 427 Treaty of Versailles. Part XIII of the Treaty of Versailles was the original location of the Constitution and is available at [http://www.ilo.org/public/libdoc/ilo/1920/20B09\\_18\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf) (accessed 13 July 2012).

<sup>62</sup> Rodgers, G., E. Lee, L. Swepston, and J. van Daele. 2009. *op. cit.*, 7.

<sup>63</sup> Maupain, F. 2009. “New Foundation or New Facade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation,” *European Journal of International Law* 20, No. 3:823-852.

the Part Time Work Convention<sup>64</sup> followed by the Convention on Home Work<sup>65</sup> and the Private Employment Agencies Convention in 1997.<sup>66</sup> However, the ILO's Constituents disagreed on the value of these Conventions. Whilst they were largely well received by worker groups and some governments, they were considered a restraint on economic efficiency, growth and employment creation by many other government and employer organisations. By 2008, the Part Time Work Convention had received only 11 ratifications, and the Convention on Home Work just 5. The Private Employment Agencies Convention was also poorly ratified.<sup>67</sup> As a result, these concerns have been incorporated and subsumed within the broader Decent Work agenda, for which there is much wider political consensus and agreement.

The starting point of the Decent Work agenda, introduced at the turn of the century, was the need to respond to the “transformation of the economic and social environment brought about by the global economy”.<sup>68</sup> There was a concern that the social dimension of globalisation should be given particular attention, and that there should be a “human face” to the global economy.<sup>69</sup> In promoting “decent work”, the ILO stated that globalisation should not just mean the creation of jobs, but “the creation of jobs of acceptable quality”.<sup>70</sup> In this context, the form of work was important (work should not be precarious), conditions of work should be improved and workers should be able to gain “feelings of value and satisfaction” from work.<sup>71</sup> This is not to say that security should be promoted above economic efficiency, but rather that the two should proceed in tandem: “The need today is to devise social and economic systems which ensure basic security and employment whilst remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market”.<sup>72</sup>

The human rights element of the Decent work agenda was to be delivered by the ILO *Declaration on Fundamental Principles and Rights*

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<sup>64</sup> Convention 175, June 24, 1994.

<sup>65</sup> Convention 177, June 20, 1996.

<sup>66</sup> Convention 181, June 19, 1997.

<sup>67</sup> ILO. 1999. *Decent Work*. Report of the Director General, International Labour Conference, 87<sup>th</sup> session, Geneva. Available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> (accessed 10 July 2012), 4.

<sup>68</sup> *Ibid.*, 4.

<sup>69</sup> ILO, *Decent Work*, *op. cit.*, 5.

<sup>70</sup> *Ibid.*, 7.

<sup>71</sup> *Ibid.*, 7.

<sup>72</sup> *Ibid.*, 7.

*at Work*<sup>73</sup> (the “Declaration”). This Declaration introduced a set of Core Labour Standards, consisting of freedom of association, freedom from forced labour, freedom from child labour and non-discrimination in employment.<sup>74</sup> The idea was that concentration on a “small and eminently manageable set of standards” would elevate the status of these rights and create a new impetus and focus for the ILO, whilst the procedural nature of these standards would maintain the ILO’s commitment to worker empowerment and social justice (the “*de facto* privileging of the right to freedom of association”).<sup>75</sup> It was hoped that the association of these standards with human rights norms would help to establish them as “fundamental international norms” which would promote both the ILO and worker protection worldwide. At the same time, the Core Labour Standards were not “rights” which meant that they could be introduced outside of the ILO’s traditional supervisory machinery. This meant that they were “much more palatable to many governments and many employers in a world of ever increasing capital mobility”.<sup>76</sup>

In fact, the Core Labour Standards have been criticised on the basis that they weaken the idea of (all) labour rights as human rights. First of all, the Declaration selects only civil and political labour rights, and excludes social and economic rights from consideration. This is compatible with (liberal) human rights discourse, but does not present the fairest outcome for workers.<sup>77</sup> It is also unfaithful to the commitment to social justice in the ILO constitution which contains reference to a whole range of social and economic rights,<sup>78</sup> and it suggests that job quality is fulfilled if human rights abuses are avoided, as “bad jobs” are only those which include some

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<sup>73</sup> ILO. 1998. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*. International Labour Office, Geneva.

<sup>74</sup> Alston, P. 2004 “Core Labour Standards and the Transformation of the International Labour Rights Regime,” *European Journal of International Law* 15, No. 3:457-521, 458.

<sup>75</sup> *Ibid.*, 460.

<sup>76</sup> *Ibid.*, 458.

<sup>77</sup> Alston, P. *op. cit.*, 460.

<sup>78</sup> The Preamble to the Constitution states that social justice requires “the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures”.