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Safe and Healthy Work: a Human Right

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Abstract

Workplace incidents and work-related diseases are major causes of death and disability worldwide, but especially in the developing nations. Although rights to health and safety on the job appear in all major human rights instruments, such issues have not consistently been framed as human rights issues and have not attracted the same level of attention as other human rights issues. This paper explores the reasons for this, including the theoretical issues that arise in relation to the question whether workers' rights are human rights. It critiques the ILO's decision to identify a narrow core of workplace rights (excluding workplace health and safety) in the 1998 Declaration on Fundamental Principles and Rights at Work, and makes a case for the inclusion of rights to health and safety in this core.

The final section of the paper considers the difficult questions of how such a right might be defined and what the role of the State, as duty holder, might be. It concludes with a brief attempt to evaluate New Zealand's health and safety regime in human rights terms with particular reference to the State obligations set out in the Maastricht Guidelines on economic, social and cultural rights.

It concludes that the recommendations of the recent Report of the Independent Taskforce on Workplace Health and Safety would need to be implemented in full for the standard set by the Maastricht guidelines to be achieved.

Key words

Human Rights, Labour Law, ILO, Declaration on Fundamental Principles and Rights at Work, Workplace Health and Safety, Health and Safety in Employment Act 1992

Introduction

Fatal workplace incidents or work-related diseases claim over two million victims a year worldwide.[1] The numbers who lose their lives at work far exceed the numbers who die as a result of the death penalty[2] or from armed conflict.[3] The situation in the developing economies has been described as a crisis, with American commentator Jeff Hilgert asking:[4] "Is the search for cheap labor by the world's multinationals

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[1] International Labour Organisation "Work-Related Fatalities Reach 2 Million Annually" <www.ilo.org/global>.
[2] The Guardian "Death Penalty Statistics Country by Country Visualisation and Data" <www.guardian.co.uk>.
[3] World Health Organisation "World Report on Violence and Health" (2002) Ch 8 <www.who.int>.
[4] Jeff Hilgert "A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right" in James A Gross and Lance Compa (eds) *Human Rights in Labor and Employment Relations* (Labor and Employment Relations Association) 43 at 50.

better characterized as a search for disposable labor and an unspoken license to kill workers when production demands"?

Given that workers' rights (including rights to health and safety on the job) appear in all major human rights instruments, it might seem settled that these statistics give rise to human rights issues. Yet, failures to protect worker health and safety, along with other issues relating to workers' rights, have not consistently been framed as human rights issues and have not attracted the same level of attention as other human rights issues.[5] While the notion that workers have rights is neither new nor radical, the basis and scope of such rights have been matters of ongoing debate. So have questions about whether a rights-based analysis can usefully be applied to help protect workers from abuse, exploitation and danger on the job. This paper sets out to show that workers' rights, generally, and health and safety rights in particular, can and should be addressed within a human rights framework.

It will begin by offering some indications as to why human rights discourse has not always had a clear place in discussion about workers' rights. From there, it will go on to look at some of the theoretical issues that arise in relation to the question whether workers' rights are human rights.

The next section will outline the broad range of workplace rights (including rights to a safe and healthy workplace) which are contained in key human rights instruments and which have historically been advanced by the International Labour Organisation (ILO). The paper will then critique the ILO's decision to identify a narrow core of workplace rights (excluding workplace health and safety) in the 1998 Declaration on Fundamental Principles and Rights at Work,[6] and make a case for the inclusion of a wider range of workplace rights, including rights to health and safety, to be included in this core.

In doing so, however, it acknowledges that certain difficult questions must be tackled in asserting the right to a safe and healthy workplace. These are questions about the extent of any such right and about who the duty holders might be. In the final section, this paper will return to the question of how such a right might be defined, with reference to the New Zealand health and safety regime, which has been under scrutiny since 2010 when 29 men died in the Pike River mine explosion.

What Ross Wilson of the Council of Trade Unions (CTU) has described as: "a tragedy which should never have occurred"[7] had the effect of drawing public and government attention to our ongoing poor workplace health and safety statistics. Workplace accidents kill at least 80 New Zealanders, on average, each year[8] while over three hundred more live with permanent impairment.[9] Up to a thousand die or suffer chronic ill health from work-related diseases such as asbestosis.[10] These figures are much higher than in other developed countries: double that of Australia and four to six times that of the United

[5] Virginia A Leary "The Paradox of Worker's Rights" in Lance A Compa and Stephen F Diamond (eds) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press, Philadelphia, 1996) 22 at 22.

[6] International Labour Organisation Declaration of Fundamental Principles and Rights at Work, adopted at its 86th Session Geneva June 18 1998.

[7] New Zealand Council of Trade Unions "Submission to The Royal Commission on the Pike River Coal Mine Tragedy" Transcript of Phase Four Hearing at [5487].

[8] Statistics New Zealand "Serious injury outcome indicators: 1994–2010" (2011) <www.stats.govt.nz> at 59.

[9] Above at 59.

[10] Independent Taskforce on Workplace Health and Safety "Safer Workplaces Consultation Document" <www.hstaskforce.govt.nz/documents/Consultation_doc.pdf> at 2.

Kingdom.[11] Against this background, this paper concludes with an assessment of whether New Zealand's statutory health and safety regime meets State obligations as enunciated in the Maastricht Guidelines on economic, social and cultural rights.[12]

Are Workers' Rights Human Rights?

The Contested Place of Rights Discourse

The idea that human rights apply in the workplace is not new, even if, as some argue, it has recently gained more traction.[13] Parallels have long been drawn between "violations caused by a tyrannical government and violations caused by tyrannical force in an economic system."[14] Tonia Novitz and Colin Fenwick, for example, point to the influence of Catholic teaching that workers have rights in natural law, independent of any deal they might negotiate individually or collectively.[15] The existence of such rights is premised on the view that, before they are servants, employees, or human resources, workers are, first and foremost, human beings. This view was restated in a 1981 papal encyclical in the following terms:[16]

> …work is…a source of rights on the part of the worker. These rights must be examined in the broad context of human rights as a whole, which are connatural with man, and many of which are proclaimed by various international organisations and increasingly guaranteed by the individual States …

American Linda Lotz has traced such ideas back even further to the Hebrew story of Moses freeing the Jewish people from Pharoah. Framing this as an organised walkout by exploited workers (rather than a rebellion against a tyrannous state), she noted the ongoing resonance of this narrative in Judaism, Christianity and Islam.[17]

Sarah Joseph describes labour rights as having been: "at the vanguard of the modern human rights movement" citing efforts to fight slavery and child labour as good examples of a common history between human rights and labour issues.[18] Despite these shared beginnings, however, workplace rights and general human rights have not developed in an integrated discourse. Workplace rights have been

[11] Above at 1.
[12] Philip Alston et al "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20.3 HRQ at 691.
[13] Tonia Novitz and Colin Fenwick "The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010) 1 at 6.
[14] James A Gross "A Long Overdue Beginning" James A. Gross (ed) *Workers Rights as Human Rights* (Cornell University Press, Ithaca, 2003) 1 at 4.
[15] Novitz and Fenwick, above n 13, at 6.
[16] Pope John Paul II "Laborum Exercens On Human Work" (1981) at para 16 <www.osjspm.org>.
[17] Linda A Lotz "All Religions Believe in Justice" in James A Gross (ed) *Workers Rights as Human Rights* (Cornell University Press, Ithaca, 2003) at 183.
[18] Sarah Joseph "UN Covenants and Labour Rights" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010) at 331.

dominated by the paradigms of social justice and economics[19] while the idea that workers' rights are human rights has waxed and waned in influence.[20]

This has resulted in part from the priorities of activists. Virginia Leary noted in 1996 that Amnesty International was, at that time, the only leading non-government human rights organisation working closely with the ILO.[21] Perhaps some activists have regarded issues about 'first tier' civil and political rights as more pressing, and as necessary antecedents to other rights. Others, according to James Gross, have joined forces with big business and the proponents of the free market, asserting the supremacy of "negative rights" whilst opposing economic and social rights.[22] The result, he says, is a "lack of attention" that:[23]

> …has contributed to workers being seen as expendable in worldwide economic development, and their needs and concerns not being represented at conferences on the world economy dominated by bankers, finance ministers and multinational corporations.

It might be reasonable to suppose that trade unions would have made a high priority of promoting workers' rights, but unions do not always apply a human rights framework to workplace issues. The first reason for this is that unions, as well as employers, often situate employment in an economic context. Although in Europe, historically, workers have at times pursued their demands within a human rights framework, using the language and legal tools of international human rights,[24] in the United States the market analysis has left little space for human rights-based strategy. Economic demands dominate routine collective bargaining and pressure to compromise means sectional interests are prioritised (sometimes at the expense of other workers) even if the wider union movement supports human rights goals. As a result, a market analysis prevails, with the workplace characterised as an arena where competing interests are to be balanced. Jeff Hilgert goes so far as to say "from the earliest foundations, human rights were marginalised ideas and took a backseat to what became the constructed vision of the labour market and its acceptable regulation".[25]

Trade unions have also been suspicious of what they see as the individualistic nature of rights discourse.[26] Hilgert suggests that this is based on the fear that it will "impede the idea of community, solidarity, civic virtue and, in our context, the goals of collective bargaining".[27]

This mistrust of a rights-based approach is not limited to organised labour, or to the United States. Simon Deakin has argued that this approach may also be perceived as a potential threat to the social contract that underpins the modern welfare state:[28]

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[19] See for example Hugh Collins "Theories of Rights as Justifications for Labour Law" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) 137 at 137.

[20] See for example, Harry Arthur "Labour Law after Labour" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) 13 at 23.

[21] Leary, above n 5, at 24.

[22] Gross, above n 14, at 4.

[23] Gross, above n 14, at 3.

[24] Tonia Novitz and Colin Fenwick "Conclusion: Regulating to Protect Workers' Human Rights" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing Oxford and Portland, Oregon, 2010) 585 at 587.

[25] Hilgert, above n 4, at 62.

[26] Hugh Collins "The Productive Disintegration of Labour Law" (1997) 26 Indus LJ 295 at 306.

[27] Hilgert, above n 4, at 62.

> Depending on one's point of view, social rights could be a bulwark against neo-liberalism and a mechanism for equipping the welfare state to survive in a globalised world; or, alternatively, a corrosive force, which by individualizing legal claims to access to resources undermines those solidaristic forms of social cohesion around which the twentieth century welfare state was constructed.

In recent decades, however, it has become clear that collective bargaining, the primary mechanism by which unions promote the interests (and rights) of their members, cannot realise a good "market value" for the labour of all workers. Hugh Collins attributes this failure to a "type of deafness in relation to issues of distributive justice" saying:[29]

> The system of industrial relations presented collective agreements as a fair mechanism for setting the distribution of wealth and power in society…This analysis failed to acknowledge the possibility of segmented labour markets, where outside the realm of collectively agreed terms and conditions, there was a substantial sector of low paid employment, populated often by women and minorities, where the industrial structure and the transitory nature of the businesses precluded the development of bargaining structures.

To make matters worse for workers, even in developed economies, the sector "outside the realm" of collective bargaining has been growing. Manufacturing has been in decline and with it the reach of organised labour. Increasing emphasis has been placed on the individual employment contract as a means of regulating working relationships, and labour or industrial law courses have been re-labelled as courses in employment law.

As James Gross has noted, the multi-national corporations of today exceed many nation states in money, power and influence. Individuals may be as much, or more, at risk from abuse by such entities as they are from governments, yet often, as Gross suggests, they lack mechanisms to address this situation: "…while assertions of individual rights and freedom are commonly made against the exercise of power by the state, rights and freedom are routinely left outside the factory gates and office buildings with barely a murmur of protest".[30]

New ways were, therefore, needed for workers to deal with the challenges of a global economy and an increasingly segmented labour market. Women and other disadvantaged groups were looking for solutions to workplace inequalities.[31] It is in this context that the human rights approach has gained (or re-gained) ground. As Novitz and Fenwick argue:[32]

> there appears at least to be consensus amongst workers and their organisations, at the national, regional and international levels, that they must present their claims in terms of human rights, even if not exclusively so. The imperative to present their claims as human rights comes from the desire to utilize the potentially powerful legal methods of securing advantage to pursue their claims, and also from the perceived need to respond to employers' willingness to use these arguments and tools themselves.

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[28] Simon Deakin "Social Rights in a Globalized Economy" in *Labour Rights as Human Rights*, Philip Alston (ed) Oxford University Press (2005) 25.
[29] Collins, above n 26, at 306.
[30] Gross, above n 14, at 4.
[31] A C L Davies "*Perspectives on Labour Law"* (Cambridge University Press, Cambridge, 2004) at 5.
[32] Novitz and Fenwick, above n 24, at 587.

The latter part of the 20th century saw the United Kingdom, Canada, Australia and New Zealand pass a raft of legislation concerned with employment rights. In this country, this included the Equal Pay Act 1972, the Parental Leave and Employment Protection Act 1987, and the Human Rights Act 1993. Anne Davies argues that this programme of statutory protections marked the point at which a human rights perspective really began to achieve traction in the employment context.[33]

Theories of Rights in the Workplace

It is probably uncontentious to say that some labour issues clearly are *not* human rights issues. For every right there is a duty, and a duty holder. It follows that not all claims (indeed not all needs) amount to rights, as this will depend on whether there is a basis for imposing a duty on another party. Claims for paid professional development leave, for example, would probably be regarded by most as matters for negotiation between employer and employee.

We do, however, freely apply the language of rights to the workplace. We speak of "rights" to a minimum wage, to protection from unfair dismissal, and to a safe workplace. All of these examples are enshrined in New Zealand's domestic law, and all can be described as "labour rights" or "employment rights." Does this mean that they (or any other labour rights) are human rights?

The term "human right" is used in this paper to mean "universal human right" in the sense, as Hugh Collins puts it, of a right which "stresses how human rights are universal, natural, and inalienable" and justifies interference in the affairs of a sovereign state.[34]

Such a right is not something that is earned, or even legislated into existence. It attaches to the very fact of being human and cannot be bargained away. In becoming the holder of entitlements, a worker is "cast as a self-sufficient and independent rights-bearer whose assertion of rights amounts to a vindication of …autonomy, personhood and dignity".[35]

If (as set out in the previous section) activists have taken awhile to decide that labour rights *should* be pursued within a human rights framework, scholars have been cautious about confirming that they *can* be. As Virginia Mantouvalou has noted: "some endorse the character of labour rights as human rights without hesitation, while others view it with scepticism and suspicion".[36]

Mantouvalou identifies three ways in which the literature tends to approach the question. The first is a positivist approach, by which the existence of labour rights, in various international human rights instruments, is taken as indicating that they are indeed human rights. The second is an instrumental approach, by which the success of strategies promoting labour rights as human rights confirms that that is what they are. The third is a normative one.[37]

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[33] Davies, above n 31, at 36.

[34] Hugh Collins "Theories of Rights as Justifications for Labour Law" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) 137 at 144.

[35] Claudia Geiringer and Matthew Palmer "Human Rights and Social Policy in New Zealand" [2007] Social Policy Journal of New Zealand 12 at 15.

[36] Virginia Mantouvalou "Are Labour Rights Human Rights?" (18 February 2012) European Labour Law Journal < http://ssrn.com/abstract=2007535>.

[37] At 1.

The positivist approach, as she points out, has limitations. The biggest is that conceptions of rights vary greatly between different instruments. What has been included and what has not has usually come down, in practice, to negotiation and compromise, rather than any reasoned basis.[38] So while looking at human rights documents can give us some idea of the variety of labour rights which have been labelled as human rights, it does not provide a definitive answer to the question whether, or which, labour rights are human rights.

The instrumentalist approach, typified by Philip Alston asking whether it is: "helpful or appropriate to approach labour rights as human rights"[39] is, in Virginia Mantouvalou's view, the prevailing one.[40] We have already seen in the previous section that labour unions and other activists have identified the potential for a human rights approach to provide a powerful way of dealing with the challenges of a global economy and an increasingly segmented labour market. It is not difficult to see why some scholars might also turn, or return, to human rights discourse for the tools and language they need to grapple with workplace issues. The human rights approach means that, instead of being framed exclusively in economic terms, certain issues will be looked at in light of values that emphasise the duties owed to a person by virtue of their humanity. The existence of rights also provides a way to resolve competing interests, at least some of the time, since rights will take priority over other claims.

Mantouvalou notes that the instrumentalist approach has received a boost in recent years in that the European Court of Human Rights (EctHR) "has been receptive to workers' claims in a development that led labour law scholars to change their position towards labour rights as human rights".[41] She observes that this has been a factor in the increased willingness on the part of unions to adopt human rights strategies.[42]

However, Mantouvalou also notes that the instrumental approach to whether labour rights are human rights often amounts to an empirical treatment of the question, which exposes what is probably the greatest weakness of the approach:[43]

> the success of a strategy leads to endorsement, the failure leads to rejection of labour rights as human rights…The costs of abandoning rights as a discourse, however, are not always carefully considered. These include a loss in aspirational standards and impoverishment in normative legal scholarship.

In practice, this impoverishment will mean, as noted in the previous section, that efficiency arguments and considerations of social justice will dominate thinking about labour and employment law. Hugh Collins has suggested that neither provide a reliable justification for constraints on the freedom of individuals and markets.[44] Arguments based on the need to ensure the efficient functioning of markets readily tend towards a call to do away with labour laws altogether, while a variety of redistributive mechanisms (many unrelated to labour law) can provide alternative ways of achieving social justice

[38] At 3.
[39] Philip Alston "Labour Rights as Human Rights: The Not So Happy State of the Art" in Philip Alston (ed) *Labour Rights as Human Rights* Oxford University Press 2005 1 at 4.
[40] Mantouvalou, above n 36 at 1.
[41] At 10.
[42] At 11.
[43] At 11.
[44] Collins, above n 34, at 137.

objectives. The New Zealand labour and employment relations system is a case in point. Since the first inroads into compulsory arbitration in 1973, the labour market has been increasingly deregulated,[45] while the low paid are assisted through measures such as Working for Families.[46]

This leads to consideration of Mantouvalou's third category for determining the question whether labour rights are human rights: the normative approach.

Collins has observed that there is an attraction in basing a theory of labour law on a "strong theory of rights" that "forecloses the discussions of efficiency and welfare by an appeal to an overriding value that justifies labour law".[47] The operative word here is "strong" since as he points out: [48]

> Not all theories of rights deliver the required degree of foreclosure… only rights regarded as having pre-emptive force provide a theoretical basis for labour law that can securely withstand attacks that promote other values and goals which may argue against regulation of the labour market and the workplace.

Collins doubts whether labour rights are really human rights although he is prepared to say that they may be "some other kind of 'fundamental rights' with exclusionary force".[49] I will come back to what other kind of rights he thinks they may be. First, however, I will discuss his reasons for disputing that labour rights are human rights, and the counter arguments developed by Virginia Mantouvalou.

Collins identifies four crucial features of human rights: that they are claims with moral weight, universal application, stringency and consistency over time.[50] He says that labour rights differ from human rights in respect of all four features. Mantouvalou has challenged Collins' assertions about all of these supposed points of difference.

With regard to the first (that labour claims lack the requisite moral weight of human rights), she argues that while not all labour issues necessarily have the moral weight of human rights issues, some certainly do. She equates the physical assault, sexual abuse and inadequate meals suffered by many migrant domestic workers in the United Kingdom with such "compelling and absolute" human rights issues as the prohibition of torture.[51] (A similar comparison may indeed be made with loss of life or serious impairment arising from dangerous working conditions.)

Her response to his assertion that labour rights are not universal claims (because they apply only to workers and not to everyone) is that: "because a right is conditional upon a particular status does not mean that it is not a human right".[52] She cites for comparison the fact that refugees and migrants enjoy protection from extradition to places where they may face torture. A similar example might be found in an alleged criminal's rights to due process and a fair trial. And a majority of individuals are likely to be workers at some time in their lives when (at least one hopes) rather fewer will be charged with a crime or

[45] See Industrial Relations Act 1973, Labour Relations Act 1987, Employment Contracts Act 1991.
[46] New Zealand Government "Working for Families" <www.workingforfamilies.govt.nz>.
[47] Collins, above n 34, at 139.
[48] As above.
[49] At 140.
[50] At 143.
[51] Mantouvalou, above n 36 at 12.
[52] As above.

be at risk of torture.

The third criterion on which Collins bases his conclusion that labour rights are not human rights is whether they are stringent claims. He suggests that:[53]

> it seems likely that what will be regarded as fair pay and a reasonable holiday must depend to a considerable extent on what the relevant society can afford, whereas respect for dignity and liberty seems to require observance of minimum standards below which no government should be permitted to operate.

Mantouvalou points out that this argument could be applied equally to any economic, social or cultural rights that are affected by resource constraints. She argues that there is no basis on which requirements to provide a minimum core, and to achieve progressive realisation, should not be applied to labour rights in the same way as to other such rights.

Finally, on the question whether labour rights are timeless entitlements, Collins suggests that such rights will change over time with changes to production systems, work methods and the labour market. Once again, Mantouvalou rejects his argument, suggesting that a claim may remain timeless even though the way it is expressed develops and evolves. Her example is the timelessness of privacy rights in the face of changing technology. Another which springs to mind is the right to free speech in the age of the internet.

Mantouvalou's overall conclusion: that at least some labour rights "are not necessarily and by definition different in nature to other human rights. It can therefore be said that some labour rights are human rights on that normative analysis." Others, she acknowledges, may be categorised differently (perhaps as labour standards).[54]

Mantouvalou has, thus, successfully rebutted Hugh Collins' appraisal that all labour rights fail to meet the four criteria for inclusion as human rights. Her analysis leaves the way open for a normative assessment as to which labour rights can be considered to be universal human rights. This question will be considered with respect to health and safety rights later in this paper.

First, however, it is worth returning briefly to Hugh Collins' discussion of other conceptions of rights which may help us understand workers' rights. Collins focusses on two alternatives to labour rights being human rights (as defined at the start of this section). Both, he suggests, offer theoretical justifications for the idea of a labour right being a "forceful constitutional type of right."

The first draws on liberal theories of justice and Rawls' 'veil of ignorance'. Collins puts the question:[55]

> Assuming (behind the veil of ignorance) that the rational person does not know whether he will be an employer, a worker or unemployed, but he or she knows that in a market economy most people earn the necessary income to support themselves and their families by taking a job… what protective guarantees would the rational person insist upon?

Although Rawls himself did not include workers' rights within the canon of protections that might be

[53] Collins, above n 34, at 142.
[54] Mantouvalou, above n 36 at 23.
[55] Collins, above n 34, at 142.

sought from behind the veil, Collins sees value in the methodology since it gets around issues of universality: the model enables us to consider what rights might properly apply to a particular subgroup or community.

Collins concludes that: "…we can feel reasonably confident that, given the centrality of work in the achievement of primary goods, some special protections for workers might be found to be necessary." He mentions, for example, the right to work.

Collins also sees approaches based on the dignity or autonomy of the individual as being relevant to justification for labour rights,[56] especially given that they are consistent with the ILO's historic assertion that "labour is not a commodity".[57] Using Jeremy Waldron's work as an example, he notes that: "respect for human agency as an end in itself" leads to the conclusion that "…at least some social and economic rights should be guaranteed, in order to prevent the level of destitution that would deny individuals any dignity at all (that is, undermine their civil liberties)".[58]

An approach based on equality leads to a similar conclusion. As Emily Spieler has noted: "Rights-based theory confronts the problems of inequality in a segmented market by asserting an entitlement to a common floor, based on ideas of justice and humanity".[59]

For labour issues outside the strictly defined category of universal human rights, therefore, approaches based on justice, dignity and equality provide ways of establishing that some of these should have the status of rights at the domestic level. Later in this paper, these approaches will be helpful in helping define the right to a safe and healthy workplace.

Applying a Rights Approach in the Workplace

The Role of the International Labour Organisation

The International Labour Organisation (ILO) is a specialised agency of the United Nations (UN) with 185 member states. Its purpose is to promote "social justice and internationally recognised human rights" which it claims to achieve by "drawing up and overseeing international labour standards".[60]

The ILO, in fact, predates the UN itself. Set up in the aftermath of World War I, it owed its existence to a mixture of humanitarian, political and economic considerations. At the end of the war, trade union groups had pushed for any peace treaty to include provision for international minimum labour standards and an international labour office. Fear of further political and social unrest, and a wish to head off the potential spread of communism, made the original nine member states receptive to this proposal.[61]

[56] At 151.
[57] International Labour Organisation "ILO Declaration of Philadelphia" 1944 <www.ilo.org>.
[58] Collins, above n 34, at 152.
[59] Emily Spieler "Risks and Rights: the case for Occupational Safety and Health as a Core Worker Right" in James A. Gross (ed) *Workers Rights as Human Rights* (Cornell University Press, Ithaca, 2003) 78 at 93.
[60] International Labour Organisation "About the ILO" <www.ilo.org>.
[61] International Labour Organisation "Origins and History" <www.ilo.org>.

As a result the 1919 Constitution of the ILO, Part XIII of the Treaty of Versailles provided for the establishment of a tripartite body made up of representatives of trade unions and employer groups as well as member states. It also acknowledged the critical place of workers' rights, including the right to a safe and healthy workplace, in the following terms:[62]

> Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, ... the protection of the worker against sickness, disease and injury arising out of his employment.

Health and safety issues were also one of the eight "areas for improvement" listed in the preamble to the Constitution.

Unlike the other creation of the Treaty of Versailles, the League of Nations, the ILO was to survive. Between the two world wars, it demonstrated its relevance and effectiveness with a raft of labour standards. Most of these focussed on working conditions, including health and safety. Today, nearly half of all ILO instruments deal with some aspect of workplace health and safety,[63] with over 40 standards and a similar number of Codes of Practice addressing issues relating to national policy as well as specific sectors, industries, and risks.

In 1944, the ILO restated its aims and purposes in the Declaration of Philadelphia. This document (which is essentially a high-level statement of fundamental principles) does not contain a specific reference to health and safety but its first principle has become a famous phrase: "labour is not a commodity".[64]

In 1949, the ILO became the first specialised agency of the new United Nations, retaining its tripartite structure. It was the engine of the international labour rights system, which Alston has described as having been "long held up as one of the most successful of international regimes".[65]

Throughout the cold war period, the ILO was seen as having a key role in helping maintain the social contract between labour and capital that underpinned the mixed economies of Europe. (Although it was viewed with suspicion by the United States which, to this day, has ratified a very paltry list of conventions.)

Eventually, with the demise of the communist threat, this aspect of its influence was perceived as less critical. By the mid-90s, the ILO was facing pressure to prove its ongoing relevance in a new era of globalisation. Sarah Joseph suggests that rights discourse had its part to play in the ILO's search for a new direction and quotes Philip Alston as saying, in 1994, that "a clear ideological position in favour of basic human rights can be the Organisation's only viable raison d'etre."[66]

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[62] International Labour Organisation "ILO Constitution" <www.ilo.org>

[63] International Labour Organisation "Occupational Health and Safety" <www.ilo.org>.

[64] International Labour Organisation "ILO Declaration of Philadelphia Declaration Concerning the aims and purposes of the International Labour Organisation" <www.ilo.org>.

[65] Philip Alston "Core Labour Standards and the Transformation of the International Labour Rights Regime" (2004) 15 EJIL 457 at 458.

[66] Joseph, above n 18, at 363.

Workplace Rights in key Human Rights Instruments

Although, as Sarah Joseph points out, the core United Nations treaties have not given rise to a significant body of jurisprudence,[67] workers' rights have been acknowledged as human rights since they were first included in the 1948 Universal Declaration on Human Rights, Article 23 of which provides: "Everyone has the right to live, to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment…".[68]

A limited group of labour rights (those which are accepted as essentially negative or first tier rights) are included in the International Covenant on Civil and Political Rights (ICCPR).[69] Articles 8(1), 8(2) and 8(3) prohibit slavery and forced labour, and Article 22 provides for freedom of association. ICCPR rights are expressed with relative strength in that state parties are required to guarantee these rights. They are also justiciable pursuant to the optional protocol to the convention. This means that individuals are able to complain about State failures to protect these rights to a monitoring body: the Human Rights Committee.

The United Nations International Covenant on Economic, Social and Cultural Rights (ICESR)[70] addresses a wider group of labour rights. There is some overlap with the ICCPR: Article 8 of the ICESR provides the right to join a union, reinforcing Article 22 of the ICCPR. Anti-discrimination provisions are also common to both the ICCPR (Articles (2) (3) and (26)) and the ICESR (Article 2).

The ICESR also provides for further "second tier" or positive rights. Most importantly for the purposes of this paper, Article 6 provides the right to work and Article 7 the right to safe and healthy working conditions. Also relevant to workplace health and safety is Article 9 which sets out rights to social security (which includes workers' compensation). Under these provisions, workers who are unable to earn a living due to injury on the job are to be supported and compensated. Of further potential application to health and safety on the job are Article 10(2) which provides for paid parental leave and Article 10(3) which provides for protection of young workers. Finally Article 12 (which deals with health rights generally) requires states to take measures to improve industrial hygiene and combat occupational diseases.

The rights in the ICESR are weaker than those contained in the ICCPR. States are not required to guarantee these rights; all that is required is for them to take steps to achieve their progressive realisation. The rights in the ICESR have also been much harder to enforce, since they were justiciable only by means of group action. However, due to the adoption of a further optional protocol for the instrument (in December 2008), individuals now have the same rights of enforcement under the ICESR as they have always enjoyed under the ICCPR.

Article 2 of the ICESR is also of significance in relation to questions about the impact of globalisation on labour rights and health and safety. It deals with international assistance and cooperation. Compliance with this obligation means that states will not undermine the rights of others, and "may be required to

[67] As above.
[68] Universal Declaration of Human Rights art 23.
[69] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
[70] International Covenant on Economic, Social and Cultural Rights 990 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

take positive actions to improve enjoyment of those rights, particularly when a latter state is unable to provide for minimum core rights".[71]

The Declaration on Fundamental Principles and Rights at Work

In 1995, in Copenhagen, the United Nations World Summit on Social Development reached agreement that certain fundamental workers' rights should be safeguarded as a priority. The Fundamental Declaration on Principles and Rights at Work (The Declaration) was adopted three years later in 1998. It sets out as follows: [72]

> The International Labour Conference …
>
> Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely:
>
> 1. freedom of association and the effective recognition of the right to collective bargaining;
> 2. the elimination of all forms of forced or compulsory labour;
> 3. the effective abolition of child labour; and
> 4. the elimination of discrimination in respect of employment and occupation.

The Declaration pulls together the content of a group of existing Conventions[73] which are a small but critical subset of the workplace rights contained in other ILO standards and conventions. Prohibitions on forced labour were first set out in Convention 29 in 1930 and expanded upon in Convention 105 in 1957. The right to freedom of association and related recognition of collective bargaining were enshrined in complementary Conventions (87 and 98) in 1948 and 1949 respectively. Discrimination came a little later with Convention 100 (Equal Remuneration) in 1951 and Convention 111 (Discrimination, Employment and Occupation) in 1958. Finally, the abolition of child labour was addressed in Convention 138 (Minimum Age Convention) in 1973 and Convention 182 (Worst forms of Child Labour) in 1999.

The Declaration is explained by the ILO itself as a response to the impacts of globalisation and a universal market economy,[74] although Philip Alston suggests that the idea of identifying a core of "basic human rights" in the workplace had been around for as long as 40 years.[75] He traces its eventual acceptance by the members of the ILO to the fall of communism when he says it became part of a move to "refine and sharpen the original system of classifying international labour standards according to their subject matter as well as to their centrality to the work of the Organisation and to human rights."[76]

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[71] Joseph above n 18, at 336.
[72] International Labour Organisation Declaration of Fundamental Principles and Rights at Work, adopted at its 86th Session Geneva June 18 1998.
[73] International Labour Organisation "The International Labour Organisation's Fundamental Conventions" <www.ilo.org>.
[74] International Labour Organisation "History" <www.ilo.org>.
[75] Alston "Core Labour Standards," above n 65, at 484.
[76] As above.

Certainly by the late 1990s, rising inequality indicated a need to strengthen international labour standards, and it was perceived that this would be assisted by prioritisation and clarification of the "unwieldy and unenforceable list of ILO conventions" currently in existence.[77]

The Declaration, as its name suggests, is a soft law instrument. Writing in 1998, a former deputy legal adviser of the ILO, Hillary Kellerson, extolled its "intrinsic" value, in that it reaffirmed "the universality of fundamental principles and rights at a time of widespread uncertainty and questioning of those rights".[78] Acknowledging that it is a soft law instrument, he nonetheless argued the advantages of this by asserting that:[79]

> A remarkable aspect of this approach is that it represents a collective decision to pursue social justice by the high road – drawing on people's aspiration for equity, social progress and the eradication of poverty – rather than by sanctions which can be abused for protectionist purposes in international trade.

It was adopted on the basis that it restates fundamental obligations of the ILO Constitution and Declaration of Philadelphia. For this reason, it applies to all member states whether or not they have ratified the key conventions which underpin it. Its expressed intention is to complement the existing system rather than replace it.[80] As Alston describes it, the dominant narrative around the adoption of the Declaration was that it "…provided the necessary flexibility in the face of forces of globalisation and universalized the reach of the core labour standards. While it left intact the pre-existing labour law regime, it made it potentially more effective".[81]

The Declaration has achieved support outside the ILO with the Organisation for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF), and the World Bank all having agreed, in principle at least, that the four rights identified here are core workplace rights.[82]

Meanwhile workplace matters outside this set of four rights – including all issues pertaining to working conditions – have been relegated to a lower tier. Health and safety, regarded as an aspect of working conditions, is in this category.

Sarah Joseph has argued that: "claims for the primacy of a small core of labour rights could only be made if a workable boundary were drawn between the core and other labour standards".[83] So what distinguishes the core from all the rest?

What the four have in common is that they can be seen as so-called "first tier" human rights: negative rights or freedoms from interference. Essentially, they all correspond to fundamental civil and political rights. This makes them relatively uncontroversial. Importantly for the defenders of the free market, all four rights "are about the formation of the labor market and not the establishment of any minimum

[77] Spieler, above n 59, at 82.
[78] Hilary Kellerson "The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future" (1998) 137.2 Int'l Lab Rev 223 at 227.
[79] As above.
[80] At 223.
[81] Alston "Core Labour Standards," above n 65, at 458.
[82] Spieler, above n 59, at 83.
[83] Joseph, above n 18, at 363.

standards within the employment contract".[84] On this assessment, freedom of association is effectively a procedural right that impacts on the workplace in much the same way as the way the right to vote impacts civil society. The associated ability to bargain collectively may influence the labour market but will not fundamentally impede its functioning. Working conditions, because they were seen as lying within the scope of the employment contract, would be determined through negotiation.

Several factors influenced the decision to restrict the range of the core rights to the "first tier." One was the prevailing economic orthodoxy that (given the range of variables impacting on the wage bargain), the free market was best left to itself to achieve optimal outcomes in relation to working conditions. Another was the acceptance that developing economies could not afford first world conditions of employment and would lose any competitive advantage they had if pushed to meet external standards before they were ready. Political differences, and suspicions that the developed world had a protectionist agenda, also presented obstacles to consensus on a wider core of rights.

Associated with the decision to identify a core of rights was a commitment by the ILO to channel its resources into those priorities. Kellerson has described this as adding further "potential value" to the Declaration: [85]

> The promotional effort called for in this Declaration implies a reorientation of the ILO's constitutional, operational and budgetary resources in support of the priorities determined in the global reports, themselves based on annual reports and other official information available to the ILO. The full value of the Declaration, which depends on the active implementation of the follow-up by many in and outside the ILO, will only emerge in the course of time. The challenge facing the ILO in the next millennium will be to ensure that the Declaration achieves the significance and the impact it offers.

Essentially, Kellerson saw the Declaration as giving the ILO a mandate to work with its members on a set of key concerns on the basis that securing these rights will be a necessary first step towards improving the position of workers in developing nations. [86] Joseph suggests that the ILO has indeed been restructured around the core which gets "special priority and processes", including provision of technical and advisory services and support for economic and social development.[87]

Not all the ILO's energies have gone into the core, however. Before evaluating the core rights approach is necessary to acknowledge the Decent Work Agenda and the Seoul Declaration.

The Decent Work Agenda and the Seoul Declaration

In September 2000, the United Nations adopted its Millennium Declaration which set eight goals to be achieved by 2015.[88] The first of these, which addresses poverty, was amended in 2005 to include the objective of "achieving full and productive employment and decent work for all, including women and young people".[89] Within the United Nations, the ILO has responsibility for monitoring progress towards

[84] Spieler, above n 59, at 83.
[85] Kellerson, above n 78, at 227.
[86] At 225.
[87] Joseph, above n 18, at 363.
[88] United Nations Millennium Declaration GA Res 55/2, A/55/L.2 (2000).
[89] International Labour Organisation "Millennium Development Goals" <www.ilo.org>.

this goal and has structured its Decent Work Agenda to support it.[90] The four strands of the Decent Work Agenda are employment creation, social dialogue, social protection, and rights.

While safe work is part of the decent work programme but it also has been the subject of its own specific document. The Seoul Declaration on Safety and Health at Work was adopted on 29 June 2008 by the Safety and Health summit of the XVIII World Congress on Safety and Health at Work.

The Congress was organised by the International Labour Office, the International Social Security Association, and the Korea Occupational Safety and Health Agency. The preamble to this Declaration recognises that safety and health at work is a fundamental human right in the following terms:[91]

> Recognizing the serious consequences of work-related accidents and diseases, which the International Labour Office estimates lead to 2.3 million fatalities per year world-wide and an economic loss of 4 per cent of global Gross Domestic Product (GDP),
>
> Recognizing that improving safety and health at work has a positive impact on working conditions, productivity and economic and social development,
>
> Recalling that the right to a safe and healthy working environment should be recognized as a fundamental human right and that globalization must go hand in hand with preventative measures to ensure the safety and health of all at work.

The Seoul Declaration does not change the fact that workplace health and safety is not the fifth core right. It can, however, be construed as some acknowledgement of the seriousness of health and safety as a human rights issue, and an attempt to address the issues raised by those who have criticised the failure to include it in the core four. It has now been signed by some 50 different union, employer, and government agencies from around the world.

The Case for a Fifth Core Right

Criticisms of the Core Rights Approach

The decision to isolate four rights as core rights has been subject to criticism. One of its most prominent detractors has been Philip Alston.[92] His first concern relates to the inclusion of the word "principle" in the title of the Declaration. If the contents of the core are essentially in the nature of first tier rights, then why (he asks) use the weaker term "principle" at all? He also fears that the move towards "soft promotional techniques" could result in the downgrading of the role of the ILO's "traditional enforcement mechanisms".[93]

[90] International Labour Organisation "Decent Work Agenda" <www.ilo.org>
[91] Seoul Declaration Secretariat "Seoul Declaration of Safety and Health at Work" <www.seouldeclaration.org.
[92] Alston "Core Labour Standards," above n 65, at 457.
[93] At 458.

Most relevantly for the purposes of this paper, he is also concerned that the Declaration creates a "normative hierarchy" which could privilege the four core rights at the expense of others.[94] He seems to see this as a futile attempt, noting that there has never been agreement on a preeminent human right or value (be it dignity, equality or anything else). Emily Spieler makes a similar point by rejecting the suggestion that the core four might be "self-defining and universal" and so distinguishable from matters to do with working conditions. She says the core four will, like any other rights, require analysis depending on the context.[95] This argument seems strong: it cannot be self-evident, for example, at what age a child labourer becomes a young working person, or whether a workshop in a poor town is exploiting children or teaching them vital skills.

Alston argues that the decision as to which rights would be in the new core was "neither scientific nor deliberate"[96] and notes that while commentators may seek to extract a rational basis for such decisions after the event, at the time they are usually the outcome of negotiation and accommodation between the holders of conflicting positions. In this case, he suggests that:[97]

> The choice of standards to be included …was not based on the consistent application of any coherent or compelling economic, philosophical, or legal criteria, but rather reflects a pragmatic political selection of what would be acceptable at the time to the United States and those seeking to salvage something from what was seen as an unsustainably broad array of labour rights.

Although he does acknowledge that there is some coherence in the core rights grouping in that they are process rather than result-orientated in a way that is consistent with a free trade agenda, Alston concludes that a "handful of exclusively civil and political rights have been selected" to the exclusion of rights contained in other human rights instruments[98] and says that it is inevitable that rights outside the core four will be neglected:[99]

> To the extent that the Declaration has succeeded in one of its principal objectives, which is to make it easy for other actors ranging from corporations, through international financial institutions, to international labour rights monitors, to narrow their gaze and focus on the four core rights, it has by implication taken the pressure off them in relation to the non-core rights, whatever rhetorical assurances to the contrary might issues forth from the ILO or those other actors.

He suggests that one of the criteria by which the success of the new regime should be assessed is that: "the promotion of this limited range of core standards does not serve to undermine the status of other labour rights which have long been recognised as human rights".[100]

Francis Maupain, former legal adviser to the ILO, has responded to what he calls Alston's "polemic" on the core rights approach.[101] He agrees that core rights came out of a process of debate and compromise

[94] As above.
[95] Spieler, above n 59, at 92.
[96] Alston "Core Labour Standards," above n 65, at 485.
[97] As above.
[98] At 486.
[99] At 488.
[100] Alston "Core Labour Standards," above n 65, at 461.
[101] Francis Maupain "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16.3 EJIL at 439.

and reflect only a very small part of the body of ILO standards, but rejects the assertion that the category is "neither scientific nor deliberate." [102] Instead he argues:[103]

> …there is a sort of 'Kantian' thread running through their diversity…freedom from forced labour and child labour as well as non-discrimination relate to the autonomy of the will and freedom of association and collective bargaining are the extrapolation of this autonomy from the individual to the collective level. It points to the fact that the concept of 'social justice' …cannot be defined so much in terms of a pre-defined product as in terms of fair processes which are themselves inseparable from its proclaimed values of human dignity, freedom and dialogue…
>
> …the fundamental workers' rights category enjoys a 'functional coherence' which relates to their impact on the achievement of other rights…as enabling rights or process rights, they empower workers with the tools that are necessary for the conquest of other rights.

Maupain denies that identifying a core of rights has the effect of relegating the rest "into a second class".[104] He says that the Declaration should not be looked at in isolation as it is complemented by the Decent Work strategy. Together, he says, they are part of "an effort to underline the necessary complementarily and interdependence between the various aspects of workers' protection and rights".[105]

He disagrees that the strengthening of the core rights will affect progress in respect of other rights and suggests that empirical evidence is what counts. That is to say, wait and see whether "the emphasis on fundamental rights [is] a boost for, or a break in, the protection of other labour rights".[106]

Although there is more than a touch of asperity in the tone of Maupain's response to Alston, he does not appear, essentially, to disagree with the substance of what Alston says about the core rights approach. He does not deny that process rights have been prioritised in the hope that they will enable workers with the capacity to work for the other rights on their own behalf. Where he differs is rather that he thinks the core rights strategy has a chance of working, and believes only time will tell if he is right and Alston is wrong.

It remains now to assess whether a case can be made for the inclusion of health and safety as a fifth core right.

Health and Safety on the Job – A Human Right?

As discussed in the early part of this paper, there is a case to be made (on a positivist, instrumentalist and normative basis) that at least some workplace rights amount to fundamental human rights. This conclusion is consistent with the fact that all 185 members of the ILO have been able to agree on four core rights that are considered universal and capable of binding them all.

What is less clear is whether other labour rights, beyond the scope of the four included in the core, can also be said to be human rights and, in particular, whether the right to a safe and healthy workplace is one such right. I now attempt to answer that question using Virginia Mantouvalou's approach of reviewing

[102] At 446.
[103] At 448.
[104] At 447.
[105] At 462.
[106] At 443.

the positivist, instrumentalist and normative arguments to support the notion that health and safety is a human right.

The inclusion of health and safety in key human rights instruments (as set out above) indicates that the positivist argument, for what it is worth, is strong. It may not be worth very much; however, if counter arguments (such as those of the neo-liberal economic agenda) continue to dominate popular discourse and policy making as they have done in recent decades. The circularity of the positivist approach (it is a human right because it is in the instrument and it is in the instrument because it's a human right) renders it ineffective unless it is supported by other arguments with more substance.

The instrumentalist approach is, as Mantouvalou noted, the approach many commentators take to the question. Even leading scholars like Alston are prey to this charge: as noted already, Maupain has described his writing on the issue of the core rights as "polemical" in tone and criticised its lack of analysis.[107]

Alston observes that amongst those who argue for additional rights to be included in the core, there is consensus that "the list should include the right to a safe and healthy workplace".[108] Emily Spieler articulates that consensus view when she argues that concern about the exclusion of working conditions from the core rights is "especially justified when one considers the particular problems posed by health and safety hazards".[109] She suggests that even if there were a case for preferencing certain rights, the exclusion of working conditions from the core could be said to overlook the fact that many workers endure punishing hours in hazardous conditions for wages that are insufficient to feed them and their families.[110] And Hilgert (also in a defiantly polemic tone) proclaims that "the human rights analysis argues all workers have a right to return home from work as alive as when they punched in, regardless of the business cost estimate".[111]

Maupain defends the exclusion of health and safety from the core on the basis that the core rights are procedural rights and that "workers' health and safety… even though it may in the strict sense be regarded as of 'vital' importance, cannot be regarded as fundamental in the sense of being an enabling right".[112]

Procedural rights, as noted already, safeguard access to the labour market. Women and others who might be excluded have their place secured, as do organised workers, while protections are erected against the potential distortions that might arise from the use of unpaid or child labour.

Spieler points out that health and safety issues also impact on access. Workers face a "circular problem":[113]

> The ability of workers to seek improved conditions is contingent on their ability to quit, to withhold their labour, to bargain (individually or collectively) and to seek alternative employment; the ability to seek alternative employment is contingent on the continued health of the worker. In order for workers

[107] At 441.
[108] Alston "Core Labour Standards," above n 65, at 457.
[109] Spieler, above n 59, at 86.
[110] At 85.
[111] Hilgert, above n 4, at 66.
[112] Maupain, above n 101, at 449.
[113] Spieler, above n 59, at 92.

> to have sufficient means to withhold their labor or quit jobs in order to bargain for improved wages and benefits, their health must be protected.

Since workers who lose life and limb are unable to participate in the labour market, perhaps health and safety rights can be described as enabling rights with a legitimate place in the core, even on the proceduralists' terms.

The procedural position is that once their place in the market is secured, it is up to workers to take action on their own behalf to secure safe working conditions. The instrumentalists are not prepared to wait. They point out that in a global economy where there is a market for everything, even regulatory frameworks,[114] industry will move to whichever location offers the most favourable conditions for business: "What is new about the more recent appearance of regulatory competition is the exploitation of new possibilities for entry to and exit from jurisdictions, in particular by corporate entities".[115]

The market may eventually respond to industry relocation. Worker power will grow as demand for labour increases and, eventually, conditions will equalise. The timeframes for these market corrections may, however, be unacceptable in terms of human lives. Emily Spieler says there is only one way to address these issues, and it is not through the core rights approach: [116]

> …the extension of human rights to the private sector is critical, as the increasingly complex web of governmental and private arrangements means that private entities function internationally in ways that mirror governmental functioning. Pure reliance on an unregulated market permits the persistence on human rights abuses in workplaces that are the equivalent of direct political oppression by governments.

While Deakin argues that the outcome of this process is not "pre-ordained" and that low regulation regimes will not necessarily trump others in the quest for investments,[117] it remains nonetheless that "…emerging hazards and the absence of the regulatory state that protects human rights over employer property rights means workers in the global south bear a disproportionate burden of the world's dangerous work".[118]

(If need be, of course, local legislation may even be amended on demand to meet the bottom line, as we saw in New Zealand with the 2010 amendment to s.6 of the Employment Relations Act.)

The instrumentalists assert that relying on the market to deliver safe working conditions is, at best, a long-range strategy, and, at worst, will fail to deliver at all. They make a good case for saying that it is in workers' interests to use whatever strategies they can to pursue the objective of safe and healthy work. It remains to be established, however, whether that objective amounts to a human right.

It is time to turn to a normative assessment. For consistency, the same four features of human rights by which labour rights generally were evaluated are now applied to health and safety rights. These are moral weight, universal application, stringency, and timelessness.

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[114] Deakin, above n 28, at 38.
[115] At 39.
[116] Spieler, above n 59, at 79.
[117] Deakin, above n 28, at 39.
[118] At 52.

The moral weight issue appears relatively straightforward. A right that goes to issues of survival, especially in circumstances where affected individuals are not certain to have knowledge of or control over the risks they face, would seem to be of fundamental importance. Indeed, one commentator, Tonia Novitz, has gone so far as to say that workplace health and safety amounts to "one of the many facets of the inalienable right to life".[119]

Universal application has been discussed already. Most people are workers at some time in their lives, but even for those few who are not, the possibility of having to earn a living exists for everyone in the same way that the possibility of being falsely accused exists for everyone. Whether we choose it or not, we are all members of the category "potential worker" so, to that extent, the right to health and safety of the job has universal application.

The final two categories are more problematic. No activity (work or any other) can be made entirely risk free. Any right to health and safety must be bounded by some limitations as to reasonableness. It is suggested that whether health and safety meets the tests of stringency and timelessness will depend on how the right is defined. This crucial point will be explored more fully in the next section but it is suggested that, with care, it may be possible to define a stringent right to health and safety.

The final point to be made in relation to a normative assessment of health and safety as a human right is the close connection between health and safety and the key values which underpin human rights: liberty, equality and dignity. To lose one's health, possibly one's life, is a frontal assault on all three, and compounded for many workers by the absence of choice.

Defining and Protecting the Right

It must be acknowledged that risks are associated with work as they are, inevitably, with any human activity. If there can be said to be a right to health and safety, then further questions immediately follow, concerning the extent of the right and the corresponding duty and as to who bears that duty. As Spieler has put it:[120]

> One might boldly (and simplistically) assert the proposition that health and safety should be viewed as a human right, and leave it at that… [but] an undefined labor right has a tendency to migrate to an unsatisfactory least common denominator. The alternative approach is to begin the challenging process of further definition of the right to health and safety.

This section will consider how that right might be defined and then go on to consider how the protections available in New Zealand domestic law stand up in comparison.

The Extent of the Right and the Threshold for Protection

Spieler acknowledges that there is a "spectrum of health and safety risks" in the workplace.[121] At the most serious end, hazards may arise out of a deliberate act by an employer, such as violence towards

[119] Novitz and Fenwick, above n 13, at 13.
[120] Spieler, above n 59, at 97.
[121] At 100.

domestic workers and deaths in factory fires where exits had been locked to prevent theft. Infamous cases include those in 1993 in Bangkok, where two hundred workers died,[122] and in 1911 in New York, where 147 lost their lives.[123]

Spieler says that acts at this end of the spectrum (which might fall to be addressed by the law of negligence or by the criminal law) should always be regarded as breaches of human rights.[124] If the right were to be defined at this minimum level (as some might say) it might be seen, as she notes, as "a non-waivable right to be free from excessively dangerous working conditions or from grave danger".[125]

However, she asserts that the human right to health and safety goes further than this, and should extend to situations where harm can be avoided by safety measures which (in the local context) are straightforward and affordable.

But what of cases where hazards are not readily identifiable, or where there are known risks, but the cost of prevention would threaten the viability of the business, and the livelihoods of the very workers whose protection is desired? Work is, of course, as inherently risky as any other human activity. At the other end of the scale from the Thai factory with the bolted fire exits, workers may be exposed to risks which are unforeseeable to them and their employers, or in respect of which there is no mechanism for prevention.

Spieler does not see such cases as human rights violations, accepting that the scope of the employer's duty can be modified to accommodate the location and circumstances of the workplace. However, she rejects any suggestion that it follows from this that health and safety is not a human right, or should not be part of the four core rights. Health and safety, as she sees it, is not fundamentally different in this way from the core four:[126]

> The fact that implementation of a right may in part be locally contingent undeniably creates uncomfortable ambiguity in the definition of rights. It encourages the search for a least common denominator that is a universal *standard* for violation of the right: no child under six should be working; no worker should be locked in to a workplace without regard to fire hazards. But there is a difference between the development of local standards for the implementation of a right and the fundamental nature of the right itself.

Spieler is also careful to note, however, that multinational corporations that shop around for the least restrictive regulatory framework, as described above, should not be able to rely on being held to the same standard as local employers.

She also acknowledges that, in some cases, a worker might expressly accept a known risk (perhaps in consideration for additional remuneration) thus justifying: "A two-tier approach with a non-waivable right to "levels of safety that reasonable workers would not wish to relinquish" and waivable but presumptive rights to further protections".[127]

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[122] New York Times "May 9-15; More Than 200 Die in Thailand Toy Factory Fire" <www.nytimes.com>.
[123] Cornell University "Remembering The 1911 Triangle Factory Fire" <www.ilr.cornell.edu>.
[124] Spieler, above n 59, at 103.
[125] At 99.
[126] Spieler, above n 59, at 104.
[127] At 100.
[127] At 99.

This leads her to frame the right itself in the following terms: …the right to work in an environment reasonably free from predictable, preventable, serious risk".[128]

How, then, does New Zealand domestic legislation measure up against this proposed standard? Consideration of this issue requires some background as to the philosophy which underpins our health and safety regime.

Throughout most of the 20th century, workplaces in New Zealand, the United Kingdom, Australia and Canada were governed by a regulatory framework which imposed detailed, industry specific requirements on employers. This was monitored and enforced by state agencies which were perennially overstretched and under-resourced. In 1972, the United Kingdom's Robens report concluded that the existing system was inadequate to the task of reducing workplace accidents.[129] It proposed to curtail the body of specific regulations and to impose a general duty on employers, backed up by provision for worker participation in the monitoring of health and safety on the job. In this way, it was felt that the primary responsibility for maintaining workplace safety would sit with those who had the most control over the workplace, and those who were most affected by hazards.[130]

The report can be seen very much as a product of its time and place. In an economy dominated by manufacturing industries with high union density, British workers willingly exchanged the machinery of a highly regulated system for one in which they, through their unions, took on shared responsibility for maintaining workplace safety. The views espoused in the Robens report also met with wide support outside the United Kingdom and shaped the redevelopment of health and safety laws in Canada and Australia. Then in New Zealand, a 1988 tripartite advisory group also endorsed the approach, advocating a major overhaul and simplification of workplace health and safety laws. The end result, enacted after an intervening change of government, was the Health and Safety in Employment (HSE) Act 1992.

Consistent with the underpinning philosophy of the Robens report, New Zealand, Australia, Canada and the United Kingdom all found the employer duty in respect of health and safety on the notion of what is "reasonably practicable". Section 6 of the New Zealand HSE Act requires employers to take "all practicable steps to ensure the safety of employees while at work".

Section 2 of the HSE Act defines "all practicable steps in relation to achieving any result in any circumstances" as "all steps to achieve the result that it is reasonably practicable to take in the circumstances" provided these are circumstances the employers knows about or ought reasonably to know about, and having regard to a list of factors. These factors include the nature and severity of the potential harm, and the current state of knowledge about the harm, its nature and severity, and its likelihood. Other factors to be taken into consideration include the means available to achieve the result, their efficacy, cost and effectiveness.

So what does "reasonably practicable" mean? What has been called a "classic definition"[131] was set out in the 1949 judgment of Asquith LJ in *Edwards v National Coal Board* [132]

[128] At 99.
[129] R W L Howells "The Robens Report" (1972) 1 Indus L J 185.
[130] Anthony D Woolf "Roben's Report – The Wrong Approach?" (1973) 2 Indus L J 88.
[131] *Buchanans Foundry Ltd v Department of Labour* [1996] 1 ERNZ 333.

> "Reasonably practicable" is a narrower term than physically possible and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale, and the sacrifice involved and the measures necessary for reverting the risk, whether in money, time or trouble, is placed in the other; and that if it can be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident.

This definition has been expanded upon, here, in *Buchanan's Foundry Ltd v Department of Labour*, in these terms: "It is clear what the Act requires is that an employer takes all reasonably practicable steps to guard against potential hazards, rather than a certain, complete protection against all potential hazards".[133]

The current British legislation is the Health and Safety at Work Act 1974, section 2(1) of which sets out the general duties of employers in the following terms: "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees".

In 2007, the Commission of the European Communities asked the European Court of Justice (ECJ) to determine whether the "reasonably practicable" standard was sufficient to meet the United Kingdom's obligations under Article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989, broad duties which provide that "the employer shall have the duty to ensure the safety and health of workers in every aspect related to the work…" And:

> This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employer's responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

The Commission argued that the words "so far as is reasonably practicable" in the legislation of the United Kingdom, limited the scope of the employer's duty in a way which was inconsistent or incompatible with Article 5. While acknowledging that no employer can provide a zero risk workplace, it submitted that the duty on the employer is absolute. Effectively, it sought to have the directive construed as requiring member states to impose strict liability on employers. Argued in this way, the case failed.[134]

However, in an opinion to the ECJ, Advocate General Mengozzi attempted to "define specifically the substance and extent" of the general duty in Article 5(1) which he considered was expressed in "absolute terms". [135] He concluded that it was "to prevent or reduce, so far as possible and taking into account technical progress, all of the risks to the safety and health of workers that are actually foreseeable".[136]

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[132] *Edwards v National Coal Board* [1949] 1KB 704 at 712.
[133] *Buchanans Foundry Ltd v Department of Labour*, above n 131, at 333.

[134] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* European Court Reports Case C-127/05.
[135] Advocate General Mengozzi "Opinion" 18 January 2007 European Court Reports 1-04619 at [100].
[136] At [111].

He then went on to express these reservations as to whether the "reasonably practicable" standard was compatible with this duty:[137]

> In my view, since it introduces a criterion for assessing the appropriateness of the preventive measures taken which is less rigorous than sheer technical feasibility, the reference in section 2 (1) of the HSW Act to the concept of what is reasonably practicable is incompatible with the cope that should attach to the general duty to ensure safety laid down in Article 5(1).

Perhaps, the question whether the "reasonably practicable" test adequately safeguards worker rights to health and safety might yet be revisited.

In the meantime, the new Australian Model Work Health and Safety Act 2011 appears to raise the standard slightly with the introduction of the following "…regard must be had to the principle that workers and other persons should be given the highest level of protection against harm…as is reasonably practicable". An "although the cost of eliminating or minimising the risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of safety ahead of cost".

It will be interesting to see what effect these new provisions have on Australian jurisprudence in the area.

Rights to Information

To expose someone to risk without their knowledge seems intuitively wrong, and as Spieler points out, it is also inconsistent with an economic perspective on work, since markets cannot function properly (thereby, producing market solutions) unless the participants in the market exercise informed choices. In the context of employment negotiations, as Spieler explains, imperfect information transfer results in market failure, whereas:[138]

> if a worker knows of the risks, she or he can make effective choices: the worker can consent to exposure to the risk, or bargain for a compensating wage differential or refuse the employment. The labor market will thereby create optimal incentives for safety and compensation for injury.

At the very least, therefore, workers must have access to information about the dangers they face on the job. The New Zealand HSE Act recognises this, providing at s.7 that employers must identify and assess workplace hazards, including new hazards as they arise, and at sections 11 and 12 that the results of monitoring of the workplace are to be given to employees.

However, Spieler argues that even good faith attempts to communicate may not be effective, with workers making poorly informed choices because they have not understood the implications of the information provided, or out of desperation because there is no alternative work available. From a human rights perspective, therefore, rights to information are "necessary but not sufficient to the right to healthy and safe working conditions".[139]

Freedom to Raise Concerns or Decline Unsafe Work

[137] At [113].
[138] Spieler, above n 59, at 98.
[139] As above.

The level of risk associated with a job may not be constant over time as the circumstances in place at the start of employment may change. Unforeseen hazards may emerge when equipment fails, new technology or work methods are introduced or when the broader environment changes. A worker who, in a perfect (hypothetical) labour market, has evaluated and accepted a particular level of risk in return for an agreed rate of pay may subsequently re-evaluate the risk in light of such developments.

Spieler argues that many such changes, and the risks associated with them, will be outside the control of the workers who are affected by them. If they are, simply knowing about the risks will not do the workers much good: they will need to be able to raise their concerns and (if those concerns are not addressed, or cannot be addressed in a timely fashion) to decline to perform the unsafe work.[140]

By this, of course, she means free to do so without retaliation or punishment from the employer. She acknowledges that (given the core right of freedom from forced labour) any employee is free, in theory at least, to quit a dangerous job. If the labour market were working perfectly, it would follow that it would become hard to find staff to work somewhere that was known to be dangerous, forcing the employer to remedy the situation. However, Spieler points out that those workers who are subject to the worst and most dangerous working conditions are often also the ones who often lack any ability to move to another job.[141]

The right to refuse unsafe work (a subset of rights to refuse an unlawful or unreasonable instruction from an employer) exists at common law.[142] Section 28A (1) of the HSE Act 1992 enshrines that right by providing that "an employee may refuse to do work if the employee believes that the work that the employee is required to perform is likely to cause serious harm to him or her".

Section 28A (2) places the employee under an obligation to attempt to resolve the matter with the employer "as soon as practicable" but if the matter is not resolved and "the employee believes on reasonable grounds that the work is likely to cause serious harm to him or her" the employee may continue to refuse work.

The right is qualified by s.28A (5) which provides that an employee may not decline work that: "because of its nature, inherently or usually carries an understood risk of serious harm unless the risk has materially increased beyond the understood risk." This provision ensures that those engaged in particularly hazardous work (such as firefighters) are not at liberty to decline what are (for them) normal duties.

Rights of Participation

Spieler also draws a connection between the right to protest or refuse dangerous work and the core right to freedom of association which she says gives rise to the right to organise and "the choice to "stay and fight" rather than to quit." It could be inferred that this gives rise to a right on the part of employees to participate in decisions that affect their health and safety. As noted already, the Robens report was, to some extent, predicated on the continued predominance of the male-dominated, unionised blue-collar

[140] At 99.
[141] As above 99.
[142] *BB Ltd v Dohrman* (2006) 7 NZELC 98, 436 (ERA).

workplace of post war Britain. In that environment, trade unions provided a ready-made mechanism for participation in identification, monitoring and enforcement of health and safety rights.

By the time New Zealand came to adopt a similar model, union density here was already trending downwards, especially in the private sector. Since then, our statutory participation provisions have been through a couple of iterations. The purpose of participation in the current scheme, as set out in s.19A of the HSE Act is for "all persons with relevant knowledge and expertise" to "help make the place of work healthy and safe" and for employers engaged in making health and safety decisions to have the benefit of "information from employees who face the health and safety issues in practice".

Section 19B requires every employer to provide "reasonable opportunities" for employees "to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work", but what is reasonable depends on a range of factors, including the number of employees, the number and geographic spread of work sites, the type of work and work systems, "the likely potential sources or causes of harm in the place of work" and the willingness of employees and unions to develop employee participation systems." In the event that a functioning health and safety committee or health and safety representative makes a recommendation regarding health and safety in a place of work, the employer must either adopt the proposal or provide a written statement to the health and safety committee or health and safety representative setting out the reasons for not adopting the proposal.

It is suggested that these protections, which have been in place since 2003, are considerably weaker than the right to active participation that Spieler seemed to be supporting. They are, indeed, weaker than the provisions they replaced, which required employers to involve employees in the development of health and safety procedures.

Monitoring and Enforcement: the Role of the State

The role of state parties in relation to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was the subject of high level consideration in 1986 when the International Commission of Jurists, the Maastricht Centre for Human Rights of the University of Limburg and the Urban Morgan Institute for Human Rights at the University of Cincinnati brought together a panel of academics and United Nations personnel to discuss the implementation of the ICESCR. This exercise produced the "Limburg Principles" which Jochnick and Petit have described as "an authoritative summary of the state of international human rights law" at that time.[143]

However, Dankwa et al. consider the Limburg Principles to be only a "first effort to substantiate the meaning of violations of economic, social and cultural rights".[144] Ten years later, the subject was revisited when a similar group produced the "Maastricht Guidelines" (the Guidelines).[145] As with the Limburg Principles, the Guidelines were intended primarily for use by the Covenant Committee (to aid the interpretation and application of the ICESCR) but also provide a tool for use in the interpretation and application of other domestic and international human rights instruments.[146]

[143] Chris Jochnick and Javier Mujica Petit (1999) 2 Yale Hum Rts & Dev L J 209 at 212.
[144] Victor Dankwa, Cees Flinterman and Scott Leckie "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20.3 HRQ at 710
[145] Alston et al "Maastricht Guidelines," above n 12, at 691.
[146] Dankwa, Flinterman and Leckie, above n 144, at 705.

The overarching theme of the Guidelines is the continuing need for states to acknowledge the legitimacy of economic, social and cultural rights. Guideline 2 reiterates that "as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights".[147] A similar point is made in Guidelines 4 and 5, respectively, which provide that "states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights" and that failure to comply with economic, social and cultural obligations under the ICESCR (and other instruments) is a violation of those treaties.[148]

Guideline 6 breaks down state responsibility into component "obligations to respect, protect and fulfill" (a characterisation of what states are required to do which is attributed to Special Rapporteur Asbjorn Eide).[149] The separate obligations are explained in the following way:[150]

> Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

The first component, the obligation to respect, correlates to what is often regarded as the predominant feature of "negative" rights. In the context of workplace health and safety, it would restrict any activity on the part of the state which might undermine or reduce workplace health and safety, arguably including action by the state in its capacity as a major employer.

The second, the obligation to protect, comes in to play in relation to the actions of third parties. As Sarah Joseph says:[151]

> The 'protection' obligation corresponds with the state's obligations to prevent or punish human rights violations by non-state actors. Such obligations are discharged by the enactment and enforcement of legislation, and the taking of reasonable steps to appropriately control the actions of private entities. The latter obligations are important in the arena of labour rights, given the increasing dominance in most countries of the private sector over the availability of work.

The employment related example set out in the Guidelines is, of course, specifically relevant for our purposes. It illustrates the application of the guideline by asserting that the state is required to act to

[147] Alston et al "Maastricht Guidelines," above n 12, at 691.
[148] As above.
[149] Dankwa, Flinterman and Leckie, above n 144, at 705.
[150] Alston et al "Maastricht Guidelines," above n 12, at 691.
[151] Joseph, above n 18, at 335.

ensure that employers do not breach workers' rights, such as rights to work and to reasonable conditions, which include safe conditions.

As discussed already, the New Zealand HSE Act imposes on employers a general duty to take all practicable steps to ensure the safety of employees at work[152] as well as duties to identify and manage hazards.[153] A breach may be prosecuted by the Department of Labour and will be classified as an infringement or offence depending on how serious it is, and on the level of knowledge the employer had of the risk involved.[154] Sanctions extend to imprisonment of up to two years.

In practice, however, the Department of Labour prosecutes only a small proportion of accident cases, and while few prosecutions fail, it is rare for sentences imposed by the courts to utilise the full range of penalties available. Although a maximum fine of $500,000 is possible, the highest fine awarded to date (in *Department of Labour v Fletcher Concrete and Infrastructure Ltd t/a Stresscrete*) was less than half that. That fine was imposed after a crane rope broke, causing the lifting beam to fall and kill a worker below.[155] It was found that the company knew that the crane required a replacement part and also knew that without it the rope was at serious risk of breaking. (A quote for the necessary part had been sought and arrived the day of the fatality.) Nonetheless, workers were instructed to continue to operate the crane in order to avoid production losses.

The third element, the obligation to fulfill, is linked to the duty to work for the progressive realisation of economic, social and cultural rights.[156] Dankwa et al. consider that this duty requires states to be pro-active in respect of "legislation, administration, budget and the judiciary".[157]

In the context of workplace health and safety, this may mean that the state has an obligation to provide (along with effective enforcement mechanisms) specialist technical advice and services relating to inspection, monitoring, and reporting. The legislation required to deliver all this would seem to be in place in New Zealand. The HSE Act provides for the imposition of codes of practice and regulations,[158] the warranting of inspectors with rights to enter and inspect workplaces,[159] the issuing of improvement, hazard and prohibition notices,[160] and powers for coroners to call for reports into fatal accidents.[161] However, whether the system is adequately administered and resourced may be another matter, as will be discussed below.

Guideline 7 deals with obligations of conduct and result that run through all three of the elements just discussed. The guideline provides that:[162]

[152] Health and Safety in Employment Act 1992, s. 6.
[153] Health and Safety in Employment Act 1992, ss 7, 8, 9 and10.
[154] Health and Safety in Employment Act 1992, ss 49 and 50.
[155] *Department of Labour v Fletcher Concrete and Infrastructure Ltd t/a Stresscrete* DC Papakura CRN 05000000763, 26 March 2007.
[156] International Convention on Cultural, Economic, and Social Rights, art. 2(1).
[157] Dankwa, Flinterman and Leckie, above n 144, at 705.
[158] Health and Safety in Employment Act 1992, s 20.
[159] Sections 29, 30, 31, 32 and 33.
[160] Sections 39, 40, 41, 42, 43, 44, and 45.
[161] Section 28.
[162] Alston et al "Maastricht Guidelines," above n 12, at 693.

> The obligations to respect, protect and fulfill each contain elements of obligations of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right…The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.

Dankwa et al. note that the conduct obligation is consistent with the idea of progressive realisation, and signals a departure from earlier notions that placed most emphasis on outcomes.[163] They also suggest that it emphasises the "permeable, intertwined and equal nature" of rights.

In respect of workplace health and safety, the obligation of conduct will include effective monitoring and assessment, capture and benchmarking of data on accident and mortality rates, and the adoption of plans to maintain or reduce accident rates. Obligations of result will require states to meet appropriate targets that have been set in this way.

Also of particular relevance to this discussion are Guidelines 9 and 10 that relate to minimum core obligations and availability of resources. Guideline 9 provides that:[164]

> Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the rights…

Guideline 9 also provides that these obligations apply whatever level of resources is available to the state concerned. Guideline 10 reinforces this principle with the comment "resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights". As Dankwa et al. put it, states which have taken on the legal obligations set out in the ICSCR must ensure provision of the minimum core: "under all circumstances, including periods characterized by resource scarcity".[165]

So how is our own track record in meeting these obligations?

In April 2012, in the wake of the Pike River disaster, the government established an Independent Taskforce on Workplace Health and Safety (the Taskforce). It was charged with conducting a full strategic review of the workplace health and safety system.[166]

In September 2012, the Taskforce issued its consultation document: "Safer Workplaces".[167] Presented largely in the language of management and economics, with rights and duties rarely mentioned, it showed no sign of having been informed by a rights-based perspective. Instead, it suggested that employers are to be incentivised and influenced to provide safe working conditions, and drew attention to the cost of lost productivity compared to the cost of health and safety protections.[168] The Terms of Reference for the

[163] Dankwa, Flinterman and Leckie, above n 144, at 711.
[164] Alston et al "Maastricht Guidelines," above n 12, at 694.
[165] Dankwa, Flinterman and Leckie, above n 144, at 705.
[166] Independent Taskforce on Workplace Health and Safety "Strategic Review of the Workplace Health and Safety System" <www.hstaskforce.govt>.
[167] Independent Taskforce on Workplace Health and Safety, above n 10.
[168] At 79-81.

Taskforce also required it to "identify the net and gross fiscal and economic costs and benefits of our recommendations and, if applicable, how they should be financed".[169]

More promisingly, however, this is how it describes the role of government: "…government sets the rules of the workplace health and safety system and determines the approach that is taken to enforcing these rules and the level of resourcing provided for support, guidance and enforcement activities".[170]

It also makes three points about effective regulation which are consistent with the approach set out in Guidelines 8 to 10. The first is that a regulator must have a clearly defined role and functions. Mention is made of the new Australian Model Health and Safety Act 2011 which sets out, in greater detail, than our own (or any previous Australian legislation) what a regulator must do in respect of monitoring and reporting, and in respect of provision of advice and information.[171] The second is that the regulator must operate within a legislative framework that will enable performance of the role and functions.[172] Finally, the point is made that the system must have the capacity and capability to deliver.[173]

The Report of the Independent Taskforce on Workplace Health and Safety (the report) was issued in April 2013.[174] A full discussion of the work of the Taskforce is outside the scope of this paper, but a brief overview of the report indicates that the existing health and safety regime in New Zealand is unlikely to comply with the Maastricht Guidelines.

The report notes our poor health and safety performance compared to other countries, which adopted the Robens model, and describes the existing New Zealand model as "Robens Light" in part because of resource constraints that dated from its implementation.[175] While the report continues to see that model as sound, it identifies a number of key weaknesses of the New Zealand system.[176] These include confusing regulation,[177] a weak regulator,[178] poor worker engagement and representation,[179] poor data and measurement,[180] insufficient oversight of major hazard facilities,[181] and a lack of support for small and medium enterprises.[182]

To address these issues, the report recommends the enactment of new workplace health and safety legislation based on the Australian Model Law.[183] This would include strengthened provision for, and powers of, worker representatives.[184] It proposes making the "reasonably practicable" test more explicit

[169] As above.
[170] At [14].
[171] At [74].
[172] At [75].
[173] At [73].
[174] Independent Taskforce on Workplace Health and Safety "Report" (April 2013) <hstaskforce.govt.nz/documents/report-of-the-independent-taskforce-on-workplace-health-and-safety-pdf>.
[175] Independent Taskforce on Workplace Health and Safety, above n 174, at 20.
[176] At 21.
[177] As above.
[178] At 22.
[179] At 24.
[180] At 30.
[181] At 33.
[182] At 34.
[183] At 47.
[184] At 57.

and strengthening the legal framework for worker participation. The report also recommends that the object of the new legislation should include:[185]

> …a principle to inform duty holders and regulators on the level of health and safety being sought. We need to adopt the principle in the Model Law that "workers should be given the *highest level of protection* against harm to their health, safety and welfare from hazards and risks arising from work…as is reasonably practicable.

The report also recommends the establishment of a new regulator: a health and safety agency with statutory independence, legislative and monitoring functions and tripartite governance.[186] It does not shy away from acknowledging that more resources are needed in this area. It specifically recommends that, over a two to three year period, the ratio of frontline inspectors to workers be lifted from the current 0.84 per 10,000 workers to the mean level in Australia (1.07 per 10,000 workers).[187]

This paper has sought to make the case that (subject to appropriate definition) safe and healthy work is a human right. It appears that this right has not been adequately respected, protected, and fulfilled in New Zealand. While the recent Taskforce has not adopted a rights-based approach to its review of workplace health and safety, it has identified a pressing need for the state to establish and resource an effective framework to support, monitor and enforce the safety of New Zealand workplaces.

If the Taskforce recommendations are adopted, it will be a significant step toward securing the right to safe and healthy work for all New Zealand workers.

Conclusion

Hazards and diseases at work are major causes of death and impairment. The development of a global economy is compounding these problems in the medium term, as the size, influence and mobility of multinational corporations make workers just as vulnerable to abuses of power by these entities as citizens are to abuses of state power. Legal remedies based on the contractual nature of the employment relationship obscure the fact that many workers have no choice about taking unsafe, unhealthy jobs.

This makes a rights-based approach an increasingly attractive strategy to combat abuse, exploitation and danger on the job. The suggestion that workers' rights are human rights is supported by positivist, instrumental and normative analysis. At least some labour rights will meet the tests of moral weight, stringency, universal applicability and timelessness. A human rights approach is also grounded in the basic premise that labour is not a commodity and frames workplace issues in terms of human dignity and equality.

However, difficulties in establishing consensus around which labour rights amount to human rights has led the ILO to prioritise a narrow group of four core rights. These four rights mirror relatively uncontroversial civil and political rights and impact on the formation and composition of the labour

[185] At 52.
[186] At 47.
[187] At 120.

market rather than its operation. Matters relating to working conditions are excluded. They are regarded as social rights, at most, or as claims that should be left to bargaining.

Health and safety issues relate to working conditions and do not, therefore, fall within the core group. This paper, however, argues that a case can be made for the inclusion of health and safety in the core four. This argument is based on an assertion that the right to safe and healthy work meets the four tests set out above and is a matter of the right to life, dignity and equality. Finally, it can be argued that, like the other core rights, it is essentially a process right, in that it is about retaining the capacity to have a place in the workforce.

However, it is acknowledged that the right needs to be carefully defined if it is to be elevated to core rights status. It is crucial to identify its boundaries and component elements. The current review of New Zealand's statutory health and safety framework provides an opportunity for us to establish that a safe and healthy workplace is indeed a human right.