CAN A LEGAL THEORY OF ‘VULNERABILITY IN EMPLOYMENT’ BE CONSTRUCTED AND DOES IT REPRESENT A VALID ORGANISING PRINCIPLE FOR THE REGULATION OF PRECARIOUS WORK?

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CAN A LEGAL THEORY OF ‘VULNERABILITY IN EMPLOYMENT’ BE CONSTRUCTED AND DOES IT REPRESENT A VALID ORGANISING PRINCIPLE FOR THE REGULATION OF PRECARIOUS WORK?

Abstract

The context of this thesis lies both in labour law theory and labour law literature on ‘precarious’ work. In this thesis, the concern is to show that although precarious work is presented as a modern problem with distinctive modern solutions in the literature, the problems of precarious work can usefully be aligned with more general attempts to determine the problems and solutions to vulnerability at work.

In the first part of the thesis, the analysis proceeds by the construction of a ‘theory’ of vulnerability based around a ‘wide’, ‘middle’ and ‘narrow’ view. It is argued that these different ‘views’ have a certain internal coherence and represent a particular way of seeing both the challenges faced by labour and the best way to tackle those challenges. The second part of this thesis looks at the application of this theoretical framework. It is argued that these different ‘views’ represent a good way of analysing approaches at different geographical levels of regulation (UK, EU and international) to the problems of precarious work. Finally, the thesis investigates two case studies and suggests that these different ‘views’ can be used to analyse the approach taken to different ‘vulnerable’ or ‘precarious’ groups of workers in the labour market.
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<td>BIS</td>
<td>Department for Business, Innovation and Skills</td>
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Chapter 1: Labour Law and the Concept of Vulnerability in Employment

1. Context

The broad context of this thesis is the (increasing) complexity of the labour market, and the challenge of regulating for that complexity. More specifically, the thesis investigates labour law theory and labour law literature on the subject of ‘precarious’ work. It draws on both labour law theory and labour law literature to explore the concept of ‘vulnerability’, which although implicit in the literature, is neither defined nor explored in its own right. The argument of the thesis is that from an analysis of labour law theory and labour law literature, there emerges a legal theory of vulnerability in employment which provides a coherent framework for the organisation of labour law. This framework has normative potential: the reorganisation of labour law according to the principle of vulnerability in employment implies a certain set of solutions and a new way of analysing the current successes and failures of the labour law system. This is not to suggest that this concept will solve all the current problems associated with the regulation of the labour market. Rather, it is to suggest that analysis of labour law according to the principle of vulnerability in employment provides new insight into the system, and constitutes a valid starting point from which to explore the direction of labour law development (which in this thesis is limited to the exploration of ‘precarious work’).
This thesis has two main elements. The first is the identification of the principle of vulnerability in employment as a valid organising principle for labour law. This draws directly from labour law literature and labour law theory. The second element is the development of a theoretical framework which represents that identified principle, but also develops it so that it has potential normative strength (in relation to the regulation of precarious work). The theoretical framework identified presents three categories through which labour law can be organised, according to different ‘views’ of vulnerability: the ‘wide view’, the ‘middle view’ and the ‘narrow view’. It is argued that these different ‘views’ have a certain internal coherence and represent a particular way of seeing both the challenges faced by labour and the best way to tackle those challenges. It is further argued that these different ‘views’ are represented at different levels of regulation, at UK, EU and international level, and represent a good way of analysing approaches at different levels to the problems of ‘precarious work’. Finally, it is suggested that these different ‘views’ can be used to analyse the approach taken to different ‘vulnerable’ or ‘precarious’ groups of workers in the labour law market.

2. Research Question

The thesis asks: Can a legal theory of ‘vulnerability in employment’ be constructed and does it represent a valid organising principle for the regulation of precarious work? This question is divided into two main parts in the thesis. The first part concerns the construction of a legal theory of vulnerability based around a ‘wide’,
‘middle’ and ‘narrow’ view, and the second part concerns the application of this theory to both law and policy on precarious work and precarious workers. The two parts of the question are represented in three detailed research questions, with question 1 relating to the matters of theory and questions 2 and 3 concerning the application of that theory:

1. Can a legal theory of ‘vulnerability in employment’ be constructed consisting of a wide view, middle view and narrow view of vulnerability?
2. Is this framework useful for analysing the approach at UK, EU and ILO levels to the problems of precarious work?
3. Is this framework useful for analysing the problems and solutions to groups of ‘vulnerable’ or ‘precarious’ workers in law?

3. Methodology

Research methods

This thesis is fundamentally a theoretical project. It is concerned with the identification and exposition of theoretical standpoints which influence regulation under labour law. It is hoped that through this systematic identification and exposition a more complete understanding of the conceptual basis of legal
principles in the field of precarious work will be achieved.¹ That said, although the project is very largely theoretical, there will be an attempt to apply the theoretical findings to specific laws and policies, and in the latter stages of the project, to specific case studies (temporary agency work and domestic work). This research (in the latter half of the project) will not be entirely doctrinal. Largely, the analysis will be ‘in law’ and will investigate what the law ‘is’ rather than what it ‘ought’ to be.

² There will be an attempt at the exposition of current legal categorisations and rules governing vulnerability in employment. However, there will also be research conducted into policy which might have influences external to law, and there will also be reference to labour law statistics where this helps to illuminate the extent of a problem (for instance the proportion of temporary compared to permanent workers in the UK).

The theoretical orientation of the project is fundamental to the aims of the project and also to its originality. This originality lies in the consideration of a number of different legal theory texts which have not previously been considered together. Although these theories may have been implicit in the design and implementation of law relating to vulnerability in employment, they have not previously been systematically analysed to provide a greater understanding of the law. The theoretical analysis was also adopted for practical reasons. Adopting this methodology meant that the material to be analysed was readily available and

¹ T Hutchinson and D Campbell, ‘Defining and Describing What We Do, Doctrinal Legal Research’ (2012) 17 (1) Deakin Law Review 83, 101

accessible (subject to obtaining material from other libraries and obtaining translations where documents existed in languages other than English).

Of course, there are potential weaknesses in a theoretical project of this kind. First of all, these kinds of projects have been criticised for being insufficiently ‘thorough, systematic, justifiable and reproducible’. The candidate aims to address this criticism through a very structured theoretical exposition and systematic analysis of labour law (and labour law theory) texts. Second, this theoretical orientation necessarily limits the scope of the project. For example, in this project there is no empirical analysis of the nature of vulnerability in employment or how vulnerability is assessed by workers themselves. There is also no assessment of the relative vulnerability of one particular group over another. Indeed, it is worth noting at this point, that the selection of the case studies in chapters 6 and 7 of this thesis has not been carried out on any empirical basis. The selection has been based on the reference in the policy and legal texts to these particular groups as ‘vulnerable’ and the candidate’s own subjective experience. However, the aim of the use of these case studies is not to show that they are (or not) the most vulnerable groups of workers compared with other groups. Rather, the aim of the use of these case studies is to illustrate how legal theory has been applied in regulation for these groups and whether this corresponds, at different levels, to the categorisation of the theory of vulnerability in employment exposed in this thesis. Further empirical research, in this area as in the other areas suggested above, would likely be

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outside the scope of the project. Finally, the theoretical nature of this project also restricts the scope for suggesting law reform. It is hoped however, that the detail exposition of the theoretical standpoints at work in the area of precarious work, and the effect that these standpoints have on this area of regulation will provide a point for further reflection and research.

4. Theoretical background

Literature review

The concept of ‘vulnerability’ is very wide. It is used in a great many contexts, both within and outside the law, most of which are beyond the scope of this thesis. In terms of law, it is interesting that the concept of ‘vulnerability’ has previously been used as a foundational legal principle in areas other than labour law. ‘Human vulnerability’ is mentioned as one of Hart’s ‘truisms’. According to his argument, these ‘truisms’ provide the law with a certain minimum content; they explain the voluntary submission of subjects to law (and morals). Hart’s argument is that the vulnerability of humans to each other, in the sense of physical susceptibility to

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There are many examples which could be cited here. One example is the discussion in political, social and healthcare literature about the challenges faced by ‘vulnerable adults’. These are defined as ‘people who are at greater than normal risk of abuse. Older people, especially those who are unwell, frail, confused and unable either to stand up for themselves or keep track of their affairs, are vulnerable.’ See NHS, ‘Vulnerable Adults’ (11 May 2011) <http://www.nhs.uk/CarersDirect/guide/vulnerable-people/Pages/vulnerable-adults.aspx> accessed 15 August 2012
bodily attack, gives reason for submission to (criminal) legal rules.\(^5\) He explains that ‘If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: Thou shall not kill’.\(^6\) Moreover, the idea that ‘human vulnerability’ is at the foundation of legal rules is seen in an area of law more closely associated to issues of employment or labour law, that of human rights. For example, Turner argues that the ontological vulnerability of human subjects is the ‘common basis’ of human rights.\(^7\) The definition of ‘human vulnerability’ here is wider than that used by Hart: vulnerability can stem from physical threats (both natural and social), but can also refer to human susceptibility to psychological, moral or spiritual suffering.\(^8\) In any event, human vulnerability is the universally shared experience which forces human beings to institute legal rules, and specifically universal human rights.\(^9\)

The wide scope of ‘human ‘vulnerability’, in terms of its physical, moral and psychological elements, has had some influence on the functioning of labour law. Arguably the understanding of the scope of this vulnerability has extended the duties imposed on employers, particularly in the field of health and safety at work. An example is the reasoning in relation to stress at work cases; here is it understood that employers should take some responsibility not only for the physical but also the psychological well-being of their employees.\(^10\) However, in

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\(^5\) HLA Hart, *The Concept of Law* (Oxford University Press 1961) 190
\(^6\) Ibid 190
\(^7\) B Turner, *Vulnerability and Human Rights* (Pennsylvania University Press 2006) 1
\(^8\) Ibid 28
\(^9\) Ibid 6
\(^10\) In the case of *Walker v Northumberland County Council* [1995] IRLR 35 the Court formulated a test to determine the liability of employers in stress cases. This included the ‘threshold question’
relation to this thesis, it is the link between (human) vulnerability and labour law theory which is of particular interest. Arguably this link can be discerned in the foundational argument that labour law is ‘not a commodity’.\textsuperscript{11} The attempt here is to recognise that workers are first and foremost people rather than simply commodities to be bought and sold on the labour market. This recognition determines that regulation should aim to imbue the human subject of labour law with ‘dignity’ so that ‘all forms of work... can be a ‘source of personal well-being and social integration’.\textsuperscript{12} Of course, this reference to the decommodification of the subject of labour law represents only half of labour law’s traditional theory of justice.\textsuperscript{13} The second half is not about labour per se, but about the relationship between that labour and the employers of labour. The argument is that employees are in need of protection because they suffer from an ‘inequality of bargaining power’ vis-a-vis their employers. This means that the ‘normal’ set of rules of market ordering needs to be limited to ensure that the worst excesses of labour market exploitation are avoided (either through law or collective bargaining processes).

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\textsuperscript{11} This formulation is cited specifically as the ‘fundamental principle’ of the International Labour Organisation in paragraph I (a) of the Declaration of Philadelphia which is annexed to the ILO Constitution. The Constitution is available at <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> accessed 1 August 2012

\textsuperscript{12} G Rodgers, E Lee, L Siewpston, J van Daele, \textit{The ILO and the Quest for Social Justice 1919-2009} (International Labour Office 2009) 7

\textsuperscript{13} B Langille, ‘Labour Law’s Theory of Justice’ in G Davidov and B Langille (eds), \textit{The Idea of Labour Law} (Oxford University Press 2011) 105
Recently, these foundational aspects of labour law have been challenged. The notion that the ‘inequality of bargaining power’ between employers and employees should be the foundation for labour law regulation has been criticised. It is argued that this notion is outdated for two reasons. Firstly, it is based on certain assumptions about the position of work in society, namely, that work or employment is simultaneously the site of: (1) the greatest social oppression, (2) the greatest inequality of bargaining power, (3) the most revolting excesses of power, and (4) the greatest social conflict. This is simply no longer the case. Secondly, it is based on the stereotype of the ‘standard employment relationship’ (full time, year round work for a single employer) under which inequality of bargaining power may be taken for granted. The reality is that this ‘standard employment relationship’ no longer exists (if it ever did), so that regulation based on this principle fails to capture those most in need of labour market protection.

There are also problems with embedding the foundation of labour law in the link between ‘inequality of bargaining power’ and the recognition that ‘labour is not a commodity’. It has been argued that this link constrains the possibilities of labour law, because worker protection is limited to addressing lack of bargaining power experienced by workers in the negotiation of their terms and conditions of

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14 A Hyde, ‘What is Labour Law’ in G Davidov and B Langille (eds), Boundaries and Frontiers of Labour Law (Hart Publishing 2006) 46
15 For example, persistently high levels of unemployment can be seen to pose the greatest social threat. This is well represented by the comments of Eyraud and Vaughan-Whitehead that: ‘From our analysis of the labour market we can distinguish between different types of risk with regard to employment and working conditions that may threaten workers....We would consider the greatest risk as remaining excluded from the labour market because this often leads more quickly to social exclusion.’ F Eyraud and D Vaughan-Whitehead, ‘Employment and working conditions in the enlarged EU: Innovations and new risks’ in F Eyraud and D Vaughan-Whitehead (eds), The Evolving World of Work in the Enlarged EU: Progress and Vulnerability (ILO 2007) 31
16 M Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 ILJ 1, 28
employment. This means that labour law tends towards paternalism and does not properly consider the assets, capabilities and potential of workers as human beings. Essentially, the foundation of labour law in an understanding of the unequal relationship between employee and employers means that the range of human vulnerabilities inherent in the assertion that 'labour is not a commodity' is not explored: ‘[D]ignity will not provide the required moral ammunition if it is understood as merely providing a set of reasons as to why humans must be protected when they meet the wheels of commerce’.  

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The literature on precarious work develops some of these criticisms of the traditional theory of labour law, and provides further context for the arguments made in this thesis. The starting point for this literature is the deterioration of the 'standard employment relationship', and the set of institutions and work practices which served to underpin this relationship. It is argued that for a time, between the end of the Second World War and the mid-1970s, the development of institutions (including labour law) around this 'standard employment relationship' made some sense. The 'Fordist' model of industrial production (large industrial enterprises engaged in mass production based on a narrow specialisation of skills and a clear management hierarchy) and the male-dominated nature of the workforce, supported the 'standard employment relationship', which, because of its dominance, became the foundation of an 'occupational status' around which labour law and other social institutions (social security law) were established. Under these (industrial and social) conditions, a particular social compromise was

17 Langille (n 13) 111
reached whereby the (male) worker ‘conceded dependency’ in return for a secure livelihood for himself and his family.\textsuperscript{18} The upshot was a ‘core of social stability’ which both protected workers and also provided a basis for economic growth and stability.\textsuperscript{19} However, there are a number of economic and (related) social processes which have undermined this standard employment relationship and its institutions. The economic processes are cited in the literature as: technological innovation (in the fields of information technology), increased competition stemming from ‘globalisation’, and the considerable increase in the dominance of the service sector over that of manufacturing.\textsuperscript{20} Social changes have included ageing societies and changing consumer demand, as well as the ‘crumbling’ of the gender contract\textsuperscript{21} (male head of the household working for his family’s living). The buzz-word of both industrial and social organisation has therefore become not ‘stability’ but ‘flexibility’. Companies have come to organise themselves on a more flexible basis to meet the demands of increased competition, employing ‘dislocating strategies’ such as outsourcing, networking and subcontracting.\textsuperscript{22} At the same time, the organisation of work has changed significantly. There has been a dramatic increase in more flexible forms of work, which both meet the needs of capital to enhance ‘competitive advantage’, and also the need of workers to combine work and family responsibilities in the light of the increased labour market.

\textsuperscript{19} G Rodgers, ‘Precarious work: The state of the debate’ in G Rodgers and J Rodgers (eds), \textit{Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe} (ILO 1989) 1
\textsuperscript{20} Supiot (n 18) 34
\textsuperscript{21} L Vosko, \textit{Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment} (Oxford University Press 2009) 81
\textsuperscript{22} M Weiss, ‘Re-inventing Labour Law?’ in G Davidov and B Langille (eds) \textit{The Idea of Labour Law} (Oxford University Press 2011) 45
participation of women. These more flexible forms of work are often referred to as ‘non-standard’ or ‘atypical’ and include: part-time work, fixed-term work, temporary agency work, homework and self-employed or economically dependent work.

The literature on precarious work highlights the disadvantages for workers employed on these non-standard contracts. Firstly, it is argued that jobs created on the basis of ‘flexibility’ are simply a vehicle through which labour market risk is shifted from employer to worker: the ‘gains to employers in matching supply and demand have been translated directly into costs for workers.’ Secondly, there is no incentive for companies to invest in workers in these kinds of jobs, given that these jobs have only peripheral or marginal importance to the company. The result is jobs which are not only insecure, but are also characterised by low pay, low status and little in the way of promotion or training prospects. Thirdly, there is also a question mark about the level of ‘choice’ that labour market participants have in selecting flexible employment. It is argued, for example, that women’s continued primary responsibility for child care leaves them with comparatively few options for paid work, and forces them to accept terms and conditions which are to their detriment and disadvantage. Thus part-time work or other non-standard work is not a ‘choice’ at all. Finally, there is the problem that labour market institutions

23 Ibid 46
24 Vosko (n 21) 1
26 Ibid 177
27 Ibid 180
are still tied to the model of the ‘standard employment relationship’. This means that non standard workers have great difficulties in obtaining the protections and benefits associated with employment law.\textsuperscript{28} This position continues despite specific protection for atypical workers through statute.\textsuperscript{29} Although these statutes create equal treatment rights for non-standard workers, they do not determine their employment ‘status’ (in terms of being an employee or worker for example). Consequently, these workers still encounter problems in qualifying for many labour law rights.

In terms of this thesis, it is worth noting that in certain contexts, the terms ‘precarious’ and ‘vulnerable’ have been used more or less interchangeably. This is particularly the case in the literature concerned with the determination of the factors which constitute ‘precarious’ work, and the social effect of this phenomenon. In a sense, vulnerability is a more useful term than precariousness here, because of the width of its possible usage, and its versatility in describing problems within and beyond work. For example, Eyraud and Vaughan-Whitehead identify a number of risks in the ‘new economy’ which ‘put workers in more uncertain or vulnerable situations’.\textsuperscript{30} When these risks combine, workers enter into

\textsuperscript{30} Eyraud and Vaughan-Whitehead (n 15) 31
‘vulnerability vectors’ which mean that workers are trapped in work of poor quality, and are at increased risk of experiencing other social problems. Interestingly, non standard work is cited as a point of entry into such a ‘vulnerability vector’, particularly for women and for younger workers. The width of the term vulnerability also means that it is used to develop the ‘dimensions of precariousness’ identified by Rodgers as constituting precarious work. Rodgers’ model identified that precarious work should not just be defined in terms of whether it was ‘standard’ or non standard but according to four elements: temporal (degree of certainty over the continuity of employment), organisational (working conditions, pay, individual and collective control over work), economic (sufficient pay and salary progression), and social (legal and social protection). This model has been developed by Grimshaw and Marchington to suggest seven features of jobs that carry a risk of vulnerability, and ‘four dimensions of vulnerability’ created by the UK employment model (flexibility, insecurity, under-valuation, poor working conditions).

In fact, this association of the notion of vulnerability with precariousness actually serves to highlight the difficulties with the literature on precarious work. There is the empirical problem of classifying ‘precarious’ work which is not only a problem of labour, but is also a wider social problem. Attempts to classify precarious work tend to end up with a range of factors which expand ad infinium, and end up losing

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31 Ibid 39
32 Rodgers (n 19) 3
33 D Grimshaw and L Marchington, ‘United Kingdom: Persistent inequality and vulnerability traps’ in F Eyraud and D Vaughan-Whitehead (eds), The Evolving World of Work in the Enlarged EU: Progress and Vulnerability (ILO 2007) 550
consistency. Empirical analysis of precarious work is also hampered by the association of precarious work with non-standard work. In fact, the empirical reality is that non-standard work is extremely heterogeneous and not all non-standard work can be designated precarious.\textsuperscript{34} A good example is the phenomenon of temporary agency work. Although some of this work is characterised by low pay and poor working conditions, it is also adopted as a strategy by ‘gold-collar’ workers to maximise their market power.\textsuperscript{35} These gold-collar workers often have a greater bargaining power than ‘standard’ workers, and so it is difficult to consider this group ‘precarious’. The association of precarious work and non-standard work is not only an empirical problem, but is also normative. It means that the frame of reference for analysing and for regulating for precarious work remains the ‘standard’ employment relationship in contrast to ‘non-standard’ forms. This means that regulation covering non-standard work can be limited to situations where that work deviates only slightly from the standard employment relationship. Vosko refers to the ILO Convention on Part-time work, which demands that the situation of part-time workers only differs from the full-time equivalent according to the number of ‘normal hours’ carried out. This in fact allows the exclusion of a range of part-time workers who have contracts which differ significantly from the norm: those workers engaged on a casual, seasonal or temporary basis.\textsuperscript{36}

\textsuperscript{34} R Gomez and M Gunderson, ‘Non-standard and vulnerable workers: A Case of Mistaken Identity’ (2005) 12 Canadian Labour and Employment Law Journal 177, 178
\textsuperscript{35} P Leighton, M Syrett, R Hecker and P Holland, Managing self-employed, agency and outsourced workers (Butterworth-Heinemann 2007) 57
\textsuperscript{36} ILO Convention 175 ‘Convention Concerning Part-time Work’ (International Labour Office 1994); Vosko (n 21) 101
The transformative power of labour law based on the theory of precarious work is limited for another reason. This theory is underpinned by economic understandings about the transformation of work, and ultimately the desirability of non standard work as emerging from sound and inevitable economic processes. Precarious work is treated as the problem encountered by individuals, which needs to be managed (for example by equal treatment mechanisms) to ensure that the traditionally poor working conditions associated with this kind of work are eliminated. It does not say anything about the elimination of precarious work, understood as non-standard work forms.\(^{37}\) This is perfectly compliant with a liberal or neo-liberal understanding of the function of labour law, and therefore cannot engage with debates about whether it is this neo-liberal dominance which is one of the problems when it comes to understanding labour law regulation. It cannot consider whether the problem is systemic: part of a greater shift in the division of national income between workers and owners of capital.\(^{38}\) This also begs the question whether it can really shake off the shackles of labour law’s traditional theory of justice identified above. Certainly, the theorisation of precarious work is compliant with an understanding of the ‘inequality of bargaining power’. Indeed this theory is based on the idea that this inequality of bargaining power particularly affects precarious workers. It is also evidently accepting of the link between ‘inequality of bargaining power’ and ‘labour law is not a commodity’. Under this

\(^{37}\) Vosko (n 21) 2

\(^{38}\) This is the argument made by Fudge in J Fudge, ‘Beyond Vulnerable Workers: Towards a New Standard Employment Relationship’ (2005) 12 Canadian Labour and Employment Law Journal 151, 172
theory, it is the extreme inequalities between employers and precarious workers which determine that these workers are in particular need of protection.

Originality of the thesis

From the previous section, it emerges that there are flaws in both current labour law theory and (in a related way) the theorisation and description of precarious work. Further, the current association of the notion of ‘vulnerability’ with these theorisations adds little. 39 All it does is to suggest that that precarious work may be part of a wider social phenomenon, or that the notion of precariousness should be given wider definition, to include all the possible risks associated with ‘bad jobs’ (physical, psychological etc). 40 These flaws, and the rather restrictive way in which the notion of vulnerability is used, form the central problems that this thesis attempts to address. The thesis attempts to show that the concept of vulnerability in employment is useful in more than an empirical sense (i.e. to stretch the empirical understanding of the scope of precarious work). This concept of vulnerability can also be used to explore and develop labour law theory; indeed the concept can be seen as central to the theorisation of both the subject of labour law (workers) and the relationships formed between labour, employers and society.

Essentially, this project puts the flaws and challenges faced by labour law theory and the theorisation of precarious work in context: the context of the legal theory of vulnerability. This thesis therefore turns the current position on its head. Rather than vulnerability being discussed in the context of labour law theory and the theorisation of precarious work, it is argued that the theorisation of vulnerability needs to occur *a priori*, in order to put the current problems and challenges faced by labour and theorisations of labour law in context and understand the assumptions which in some way contribute to the problems and challenges they face.

This methodology is central to the originality of this thesis: it is original precisely because it brings the concept of vulnerability centre stage, and uses the theme of ‘vulnerability in employment’ as a basis for the analysis of the legal theory of employment law (rather than vulnerability being used in a descriptive sense and as an adjunct to the literature on precarious work). The thesis constructs a systematic exposition of labour law theory according to the conceptualisation of ‘vulnerability at work’. The theory is separated into 3 broad schools of thought into which (labour) law theorists are categorised. The first school of thought centres on the wide view of vulnerability evident in the classical labour law theory of Kahn-Freund and Sinzheimer. The argument within this school is that vulnerability is inherent in any employment relationship, and is caused by the nature of the capitalist

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system and the lack of social power on the part of workers. In order to counteract this vulnerability, the social power of workers needs to be boosted through collective bargaining. This view of vulnerability is distinguished from a ‘middle’ view of vulnerability espoused by the advocates of ‘social law’, such as Ewald and Rosenvallon. On this view, systemic vulnerability is rejected, and vulnerability is deemed to attach to certain groups within the labour market of the welfare state. This vulnerability can be successfully counteracted not through a unilateral improvement in the social power of all workers, but through successful negotiation between the different groups in the labour market. On this view, labour law is a law of non-discrimination and mediation between different ‘vulnerable’ groups. Finally, vulnerability can be conceptualised as attaching to the individual ‘vulnerable’ worker, as a result of exclusion from certain labour law rights. This exclusion can take a number of forms, for example exclusion on the basis of the categorisation of the level of dependency of the worker (as conceptualised by Freedland and Davidov), or the lack of ability on the part of the worker to enforce employment rights.

Not only is this thesis original in this organisation, it is also original in the broad scope of legal theory which is used to inform these different ‘views’, both in a diachronous and synchronous sense. For example the wide view of vulnerability


discusses the ‘traditional’ or historical influences of classical labour law theory, which may be rejected as irrelevant or outdated in the current social context. The middle view considers the influence and relevance of the theories of social law to the theorisation of labour regulation. These social law theories, although associated with labour law in continental theory, have traditionally been considered outside the scope of labour law in the UK. By contrast, the narrow view focuses on the more recent literature on the (liberal) direction and scope of labour law. Finally, this thesis is original in the application of this theoretical framework. This application allows new insights into the regulation of precarious work at different geographical levels by exploring how UK, EU and ILO law and policy fits with the theoretical framework identified. It also allows new insight into the potential for the regulation of two groups of workers considered particularly ‘vulnerable’ or precarious: domestic and temporary agency workers. These two case studies outline the current problems and challenges faced by these workers, and how these problems have (or have not) been addressed, and consider how far this approach is influenced by the particular adherence to different views in the theoretical framework.

5. Structure of the thesis

Following the introduction and research methodology in chapter 1, chapters 2 to 4 discuss the theoretical framework of the thesis. Chapter 2 outlines the foundations of the ‘wide view’ of vulnerability in employment, and discusses the classical labour law position. It outlines the traditional solutions to the problems of labour law in the
wide view. Chapter 3 follows the same pattern as chapter 2, and outlines the theorisation of vulnerability in employment according to the ‘middle view’, and the solutions suggested to the problems of labour law on this view. The final theoretical chapter is chapter 4, which discusses the problems of labour law according to the ‘narrow view’, and the preferred solutions to these problems according to this view. Chapters 5 to 7 apply the theoretical framework. Chapter 5 explores the policy on vulnerability in employment at UK, EU and international (ILO) levels. The aim of this exploration is to determine whether distinct schools of thought correspond to different geographical levels of analysis, and the reasons why this might be so. In particular, at the UK level, the law and policy of the ‘vulnerable worker’ is explored. At the EU level, there is a discussion of ‘atypical work’ and at the ILO level, the notion of ‘decent work’ is assessed in terms of its implications for the legal theory of vulnerability in employment. Finally, there are two case studies on agency work and domestic work in chapters 6 and 7 respectively. These chapters combine the discussions of the legal theory of vulnerability espoused in chapters 2-4 with the policy on vulnerability in chapter 5. For agency work, the implications of the narrow view of the ‘vulnerable worker’ on regulation at the UK level will be considered. At the EU level, the impact of a focus on anti-discrimination according to the middle view of vulnerability will be discussed. Finally at the ILO level, the wide view of the vulnerable worker as part of the discourse on decent work will be analysed. For domestic work, a similar analysis of the law will be undertaken, with the aim of discovering the different schools of thought on vulnerability in action in its regulation.
Chapter 2: The Wide View of Vulnerability

1. Introduction

The aim of this chapter is to investigate the theorisation of the link between (human) vulnerability and labour law in the work of the classical labour law scholars Otto Kahn-Freund and Hugo Sinzheimer, and in the work of the more modern authors who share their views. To a large extent, these classical labour law theorists are associated with the foundational view of vulnerability identified in the introduction to this thesis, which has come to underlie our dominant understanding of the need for labour law. This view of vulnerability is labelled the ‘wide view’ in this chapter, as it covers all workers in every employment relationship. It stems from the insertion of workers into a capitalist mode of production which has two effects. Firstly, there is the ‘commodification’ of labour under a capitalist mode of production, which determines that human beings are reduced to goods which can be exploited for profit. This process involves the alienation of human beings from both the means of production and also themselves, resulting in a stifling of human potential and creativity. Secondly, there is the inequality of bargaining power between employers and employees. This inequality of bargaining power is created by employers’ ownership of the means of production and maintained by the reliance of employees on their engagement in the capitalist process to meet their subsistence needs. Labour law is therefore
required to counteract both of these processes and is the best means of worker protection.

In fact, the association of the classical labour law scholars with these ideas holds true only to a certain extent. Both Kahn-Freund and Sinzheimer were certainly influenced by Marx and believed that all workers suffered from a lack of social power in the productive relationships of the capitalist system. However, both authors were sceptical of the ability of the law (on its own at least) to counteract this kind of vulnerability. Kahn Freund suggested that the law could do little to modify the power relations between employers and workers. Rather, he argued that this modification could only be achieved through collective bargaining: the ‘spontaneous creation of a social power on the workers’ side to balance that of management’.\(^1\) Likewise, Sinzheimer advocated that the ‘release’ (\textit{Erlösung}) of workers could only occur through the involvement of all social partners in the direction of the economy.\(^2\) Ultimately, laws which were imposed independently of this process would be unsuccessful at achieving either social or economic goals. What was required was an economic constitution through which the social partners were involved in both the determination and implementation of labour law (which was cemented by the state acting in the public interest).\(^3\)

\(^{1}\) P Davies and M Freedland, \textit{Kahn-Freund’s Labour and the Law} (Stevens 1983) 19  
\(^{2}\) Rätebewegung und Gesellschaftsverfassung (1920) in H Sinzheimer, \textit{Arbeitsrecht und Rechtssozioologie: Gesammelte Aufsätze und Reden (Band 1)} (Otto Brenner Stiftung 1976) 356  
\(^{3}\) Zur Frage der Reform des Schlichtungswesens (1929) in H Sinzheimer, \textit{Arbeitsrecht und Rechtssozioologie: Gesammelte Aufsätze und Reden (Band 1)} (Otto Brenner Stiftung 1976) 226
The chapter proceeds in a number of sections. The following section investigates the theoretical foundations of the ‘wide view’ of vulnerability. It investigates the extent of the adoption by both Kahn-Freund and Sinzheimer of Marxist ideas, in relation to the commodification of labour and the inequality of bargaining power between employers and workers. The third section investigates the solutions to the vulnerability of workers envisaged in the wide view. Here, there is a discussion of the departure of the authors in the wide view from Marxist ideas, as well as an investigation of some of the differences between the positions adopted within the wide view. The final section presents the main critique of the wide view in the current industrial climate: that trade union organisation cannot represent all workers, either in numerical or substantive terms.

2. The construction of vulnerability in the wide view

Labour is not a commodity

It was Sinzheimer, rather than Kahn-Freund, who made explicit the vulnerability of workers subject to the commodification processes of capitalism. The explanation of this commodification processes and the dangers it entails for workers, derived from Marxist ideas about the alienation of workers involved in the capitalist system of production. This system of alienation takes a number of forms. The first is that the worker lacks control over what he produces, and anything that he does produce is appropriated by others, so that he does not benefit from it. This includes his own
labour: ‘Labour produces not only commodities; it produces itself and the workers as a commodity – and does so in the proportion in which it produces commodities generally’.\textsuperscript{4} Furthermore, the more that the commodified worker produces, the cheaper he becomes, and ultimately the less value he has (and the less he has to consume). Secondly, labour is alienated from the work task, which is structured so as to stifle creativity and mental and physical energy.\textsuperscript{5} This is a particular problem because, under the Marxist scheme, productive activity is at the heart of social (and human) development. The result is that the humanity of workers is compromised, because it is the process of labour as well as the function of that labour in society which confers his humanity upon him.

The writing of Sinzheimer reflects these concerns about the vulnerability of workers exposed to the alienating processes of capitalism. His starting position, like that of Marx, is that labour is the creator of humanity: ‘\textit{Arbeit ist der Mensch selbst}’. This means that workers are particularly vulnerable in a process which controls that labour, because this control is not only physical but also spiritual/intellectual. The capitalist system treats workers as a means to the ends of others, rather than an end in themselves. This negates the function of work as the ‘\textit{personaliche Grundlage des menschlichen Lebens}’ (the personal basis of human life) and undermines both the spirit and dignity of those workers.\textsuperscript{6} On this particular

\textsuperscript{5}A Giddens, \textit{Capitalism and Modern Social Theory: an Analysis of the Writings of Marx, Durkheim and Weber} (Cambridge University Press 1971) 12
\textsuperscript{6}H Sinzheimer, \textit{Grundzüge des Arbeitsrechts} (1927) in H Sinzheimer in H Sinzheimer, \textit{Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden (Band 1)} (Otto Brenner Stiftung 1976) 8
point, he refers to the Kantian distinction between things that have a price (commodities) and those that have dignity. Under the capitalist system, humans are reduced to things which have a price, they serve the ends of others, and can be replaced at any time by anything with equivalent value. By contrast, Sinzheimer argues that humans should be treated as elements of dignity. This dignity determines the transcendence of price considerations, and recognises the independent value of each human being as irreplaceable.\(^7\)

**Inequality of bargaining power**

The influence of the idea of commodification is not so obvious in the work of Kahn-Freund, although he does recognise that a worker’s own interests are subsumed by those of his employer.\(^8\) Rather, his main concern is the function of the capitalist system in creating an inequality in power relations between the employer on the one hand, and the employee on the other. He argues that economic purposes cannot be achieved without a ‘hierarchical order’ which translates into a ‘power to command and a duty to obey’ in every employment relationship.\(^9\) This analysis reflects the Marxist idea that there are essentially two classes in the capitalist system of production: the bourgeoisie and the proletariat. The bourgeoisie own the means of production and control the surplus value created by the labour of the proletariat class. The accumulation of this surplus value (profit) by the bourgeoisie

\(^7\) Ibid 8
\(^8\) Kahn-Freund in Davies and Freedland (n 1) 24. He states here that: ‘Protective legislation thus enlarges the worker’s freedom, his freedom from the employer’s power of command, or if you like, his freedom to give priority to his own and his family interests over those of his employer.’
\(^9\) Kahn-Freund in Davies and Freedland (n 1) 18
allows the proper functioning of the capitalist system, but means that the proletariat class are maintained in permanent position of subordination, as they have no realistic alternative to working in the capitalist system and no means of increasing their control over either the means of production or their own labour.\(^{10}\) For Kahn-Freund this class relationship of control and subordination reflects the reality of all employment relationships. For Sinzheimer, too, this idea of subordination is central. He explains that the subordination of the worker by the employer is symptomatic of the subordination of labour to property in liberal capitalist societies.\(^{11}\) In these societies, property rights are absolute and are the source of managerial power. The employer as proprietor becomes the only economic agent and therefore has unlimited power to manage labour, which serves to increase the powerlessness and vulnerability of the worker.\(^{12}\)

Both Kahn-Freund and Sinzheimer point out that the inequalities inherent in the employment relationship are maintained by the different interests and aims of both workers and managers in the employment system. Whereas management’s priority is to maximise investment (and represent the welfare of future generations), labour’s is to maximise consumption (and the maintenance or improvement in the immediate standard of living).\(^{13}\) The labour/capital relationship is therefore not only unequal but inherently conflictual: ‘[I]n labour-management


\(^{12}\) There is a very good commentary on this in R Dukes ‘Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law’ (2008) 35(3) *Journal of Law and Society* 347

\(^{13}\) Kahn-Freund in Davies and Freedland (n 1) 66
relations conflict is very much the “father of all things”.\textsuperscript{14} However, it is in the interests of the dominant class, and the law it produces, that this conflict and subordination inherent in all employment relationships is obscured. One method of obscuring this subordination is by ‘that indispensible figment of the legal mind known as the contract of employment.’\textsuperscript{15} This institution rests on the idea that the parties to the employment contract freely negotiate its terms; that there is equality of bargaining power between the parties. Kahn Freund argues that this idea of freedom of contract is a ‘verbal symbol’ rather than a ‘social fact’. It is a ‘conceptual apparatus’, which has been created to see ‘relations of subordination in terms of coordination’\textsuperscript{16}. He argues that the ‘social fact’ of ‘freedom of contract’ usually represents only the freedom to restrict or give up one’s freedom.\textsuperscript{17} The lack of social power of all workers means that the ability of workers to actually negotiate in the conclusion or performance of the terms of the contract of employment is severely limited.\textsuperscript{18}

In fact, this analysis can also be said to have Marxist roots. Marx argued that class domination is not just present in the industrial sphere. Rather, the class which owns the means of production also has the means to disseminate and enforce \textit{ideologies} (expressed in law, politics and religion), which function to legitimate its dominance.\textsuperscript{19} The corollary is that legal concepts, such as freedom and equality,

\textsuperscript{14} O Kahn-Freund, ‘Intergroup conflict and their settlement’ (1954) \textit{British Journal of Sociology} 193, 195
\textsuperscript{15} Kahn-Freund in Davies and Freedland (n 1) 18
\textsuperscript{16} Ibid 25
\textsuperscript{17} Ibid 25
\textsuperscript{18} Ibid 17
\textsuperscript{19} Giddens (n 5) 41
cannot be taken at their face value. These concepts do not in any way represent social reality; they are merely constructs which serve particular political and economic ends. The import of this discussion is the conviction that the inequality of bargaining power which exists between employers and employees does not stay confined to the industrial sphere. It is reinforced by law and by the ideology of the ruling class, and means that dominance is not only material but also intellectual: ‘the ideas of those who lack the means of intellectual production are subject to it’.  

The ‘wide view’ of vulnerability thus captures the idea that it is not only all workers which are subject to domination, but **all of workers**, because of the complicity of employers with the political and legal ideology of dominance.

3. Solutions to vulnerability in the wide view

**Inequality of bargaining power**

*The development of social power*

Both Kahn-Freund and Sinzheimer suggested that the correction of the inequality of bargaining power inherent in all employment relationships was key to solving the problem of the vulnerability of workers. For both authors, this could not be achieved simply through individual negotiation; nor can it be achieved through the

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20 Marx, *The German Ideology* 61 quoted in Giddens (n 5) 41
instigation of individual rights. Rather, as inequality of bargaining power in employment relationships is *socially* constituted (part of the wider commodification processes of capitalism),\(^{21}\) it follows that the solution must also be social, and involve an increase in the social power of workers which cannot be achieved through individual means alone. For both authors, then, the involvement of trade unions in industrial relations is of central importance. If workers have the opportunity to join together in trade unions then this means that they gain a ‘collective power’. Thus, they have the opportunity to negotiate much more effectively with employers, who themselves represent ‘collective power’ in the form of the enterprise (an accumulation of material and human resources).\(^{22}\)

The theories of both Kahn-Freund and Sinzheimer were rooted in a deep commitment to pluralism, essentially that progress followed from the proper recognition and articulation of the different interests in industrial society.\(^{23}\) This essentially meant that although both Kahn-Freund and Sinzheimer were committed to Marxist ideas about the sources of industrial conflict, they disagreed with Marx about the solutions to that conflict. For Marx, progress could only be achieved through the abolition of conflict between workers and management, and the dissolution of the capitalist system itself. By contrast, for both Kahn Freund and Sinzheimer, this conflict was a necessary part of any properly functioning system of industrial relations, and to try to prevent this conflict could only be damaging.\(^{24}\)

\(^{21}\) Kahn-Freund in Davies and Freedland (n 1) 17
\(^{22}\) Ibid 17
\(^{23}\) Ibid 27
\(^{24}\) Sinzheimer (n 3) 228
However Kahn-Freund and Sinzheimer disagreed on how the balance between management and labour should be struck. For Kahn-Freund, the solution lay in exploiting, the ‘one interest which management and labour have in common’: a set of ‘reasonably predictable procedures’. This procedural base would allow all negotiation options to be exhausted before one party resorted to radical action to change the status quo (for example workers would go on strike).\textsuperscript{25} For Sinzheimer, the particular compromise to be struck was viewed a function of the relationship of that compromise to the public interest. It was only where the public interest in the mediation of industrial conflict was recognised, that there could be any lasting industrial peace.\textsuperscript{26}

For Sinzheimer, the inequalities between management and labour created by the legal abstractions of ‘property’ and ‘contract’ could only be counteracted by giving labour a status equal to that of property. This could be achieved through allowing collectivities of workers decision making powers equal to that of employers in an ‘economic constitution’ consisting of employers’ associations, trade unions, works councils and self-regulatory industrial councils.\textsuperscript{27} This ‘constitutionalisation’ of the economic sphere would put an end to the control of markets by capital and to the control of the state by the propertied classes.\textsuperscript{28} Central to Sinzheimer’s theory was the idea that the creation of an economic constitution would create democracy in the economic sphere and would mirror the equalisation effects of democratisation.
of the political sphere. The economic constitution would ensure that each and every worker was involved (indirectly) in the direction of the economy (and society).

This empowerment would both counteract the inherent tendency of capitalist relations toward inequality, and would also meant that the economy was run much more effectively both in terms of meeting economic but also social needs. Equality would therefore be achieved by two methods: first in the procedures for negotiation between the social partners and secondly in the outcomes achieved through that negotiation.

The function of law

In the work of Kahn-Freund and Sinzheimer there is the sense that law, in terms of state law, is a much less effective way of achieving worker goals than a properly functioning system of industrial relations involving equal and autonomous social partners. Indeed, for Sinzheimer, ‘law’ can only function properly if created and legitimised by autonomous means: die Entwicklung des Arbeitsrechts auf einer bestimmten Stufe die Notwendigkeit tarifträglicher Regelungen in sich schliesst.

The autonomous production and legitimisation of law is also in the state interest for a number of reasons. Firstly, state law can only be implemented effectively with the help of trade unions in consultation with management. These organisations are in the best place to be able to understand the implications of regulatory law in the

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29 Ibid 327
30 Sinzheimer (n 3) 227
31 ‘The development of labour law relies on the foundation of rules created by the social partners’ (my translation) Sinzheimer (n 3) 226
whole range of different and changing industrial contexts, and therefore ensure the implementation of this law in a workable manner. Secondly, the autonomous production of law ensures the achievement of certain social aims for the state and for its workers. Finally, Sinzheimer viewed the relationship between the trade unions and management as forming the basis of an ‘economic constitution’ which would be the best means of achieving *economic* ends and meeting the aims of (economic) national policy. This economic constitution, and the economic democracy it involved, paralleled the political democracy already achieved in western society.

However, Sinzheimer did not advocate that the autonomous organizations of the economy should be totally free from state control. Rather, the economic constitution remained subordinate to the state and the political constitution. For Sinzheimer, the economy was a public, not a private matter and should operate for the achievement of public and not private aims. The economy should be run in the public interest, and that public interest would be defined by the organs of the economic constitution with reference to the needs of the population as a whole. Indeed, the state remained free to intervene where that was deemed to be necessary for the achievement of fair terms and conditions of employment. For Sinzheimer this involvement was not problematic because the state, as well as the autonomous organs of the economic constitution, also had an interest in the

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32 Sinzheimer, ‘Die Reform des Schlichtungswesens’ (1930) in *Arbeitsrecht und Rechtsoziologie: gesammelte Aufsätze und Reden (Band 1)* (Otto Brenner Stiftung 1976) 236
33 Sinzheimer (n 3) 228
34 Sinzheimer (n 32) 239
development of employment and social norms as part of the successful development of labour law. However, Sinzheimer argued that in the economic sphere, the function of state law should be limited. State law should be subsidiary to ‘autonomous legislation’, as it was only the latter which would have sufficient flexibility and immediacy to be effective.

In a similar way to Sinzheimer, Kahn-Freund viewed legal functions as secondary to the impact of the labour market (supply and demand), and “the spontaneous creation of a social power on the workers’ side to balance that of management”. For Kahn-Freund legal norms could only be enforced when backed by social sanctions: “that is by the countervailing power of trade unions and other organised workers asserted through consultation and negotiation with the employer, and ultimately, if this fails, through withholding their labour”. Furthermore, for Kahn-Freund, the regulation of terms and conditions through negotiation was a much more effective way of creating equilibrium between the parties of an employment relationship. He argued that this system of negotiation is much more flexible than legislation and represents a ‘spirit of cooperation which cannot be engendered by the application of legal standards.’ The terms agreed through negotiation will also be more far reaching than legal standards: ‘they are as manifold as they are subtle and do not lend themselves to enforcement by state-created machinery’.

35 Sinzheimer (n 3) 226
36 Dukes (n 12) 347
37 Kahn-Freund in Davies and Freedland (n 1) 19
38 Ibid 20
39 Kahn-Freund (n 14) 204
40 Ibid 204
Kahn-Freund was particularly scathing about the possibilities for the common law of the protection of workers in labour relations. He argued that the courts ‘deal with the marginal, the exceptional, the abnormal, the pathological situations’ and so cannot deal with the general protection of the worker. More than that, the court is not interested in a balance of collective forces: ‘[i]t is (and this is its strength and weakness) inspired by the belief in the equality (real or fictitious) of individuals; it operates between individuals and not otherwise.’ According to Kahn-Freud, there is no public interest represented in the civil courts. It is this and the personal background of the judiciary, ‘which explains the inescapable fact that the contribution which the courts have made to the orderly development of labour relations has been slight indeed.’ Indeed, as has been mentioned, both Kahn-Freund and Sinzheimer were concerned about the power relations inherent in the law itself, and the possibility for ‘bourgeois society’ to maintain power through legal abstraction. For both of these authors, the law could actually be a source of inequality in which the courts are complicit:

The technique of bourgeois society and its law is to cover social acts and factors of social existence with abstractions: property, contract, legal person. All these abstractions contain within them socially opposed and contradictory phenomenon: property used for production and property between equal parties, capitalist and worker. Through abstraction it is

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41 Kahn-Freund (n 11) 53
42 Kahn-Freund (n 14) 12
43 Ibid 12
possible to extend legal rules, which are appropriate to the social phenomenon for which they were originally developed, to other social phenomena, thereby concealing the exercise of social power behind a veil of law.\textsuperscript{44}

Collective laissez-faire

Kahn-Freund labelled the British system of industrial relations in existence after the second world war as ‘collective laissez faire’.\textsuperscript{45} He characterised this system by the almost complete absence of the law: ‘there is, perhaps no major country in the world in which the law has played a less significant role in the shaping of [labour-management] relations than in Great Britain’. According to Kahn-Freund this could be explained by the growth of the trade unions outside the parliamentary franchise after the First World War. This development meant that trade unions had had not relied on the law to achieve their aims.\textsuperscript{46} Instead, as trade unions grew in strength they had developed a preference for collective bargaining and autonomous norm creation over and above state guarantees in the form of legislation.\textsuperscript{47} Both unions and employers alike had come to see legislation merely as ‘state interference’ in their freedom of negotiation and ‘from a worker’s point of view, industrial action

\textsuperscript{44} Kahn-Freund (n 11) 102
\textsuperscript{45} O Kahn-Freund, ‘Legal Framework’ in A Flanders and H A Clegg (eds), \textit{The System of Industrial Relations in Great Britain} (Blackwell, Oxford 1954) 44
\textsuperscript{46} O Kahn-Freund \textit{Labour Law: Old Traditions and New Developments} (Clarke, Irwin and Company Limited, Toronto/Vancouver 1968) 7-8
\textsuperscript{47} R Dukes,‘Otto Kahn Freund and Collective Laissez-Faire: An Edifice without a Keystone?’ (2009) 72(2) MLR 245, 246
was far more promising an instrument of regulation than political action through legislation.\textsuperscript{48}

The system of collective laissez-faire was remarkable for the fact that it not only evidenced a low level of ‘regulatory law’, the auxiliary legislation in place was both ‘marginal’ and ‘sporadic’.\textsuperscript{49} This legislation for example did not seek to give rights or impose duties on the parties to negotiate with any particular opponent, neither did this specify the bounds within which those agreements needed to be reached.\textsuperscript{50}

Where the state did intervene, this was simply to give support to the autonomy of the collective parties, for example by the ‘general absence of direct legal sanctions in the State’s efforts to encourage industrial peace by conciliation and arbitration and to extend collectively agreed terms, and by the principle that the success of a statutory wages council was to be judged by its abolition in favour of collective bargaining.’\textsuperscript{51} Perhaps the most supreme example of abstentionism was the absence in Britain of a positive legal right to strike and establishment of the legal freedom to strike in the form of negatively expressed statutory immunities from judge-made liabilities,\textsuperscript{52} which remains a feature of British labour law today.

Furthermore, under the system of collective laissez-faire, collective agreements did not constitute legally binding contracts.\textsuperscript{53} Routinely, terms of the collective agreements would be regarded as being impliedly incorporated into contracts of

\textsuperscript{48} Kahn-Freund (n 11) 9
\textsuperscript{49} Kahn-Freund (n 46) 7
\textsuperscript{50} Dukes (n 12) 355
\textsuperscript{51} R Lewis, ‘Kahn Freund and Labour Law: an Outline Critique’ (1979) 8 ILJ 202, 209
\textsuperscript{52} Ibid 209
\textsuperscript{53} Kahn-Freund (n 14) 203
employment, but even where this was the case, these terms could be continually negotiated, even to the detriment of the employee.\textsuperscript{54} To Kahn-Freund, this prevalence of norms over sanctions was not problematic, and even desirable: ‘Legal norms and sanctions are blunt instruments for the shaping of intergroup relations which have developed into a higher community’.\textsuperscript{55}

\textit{Criticisms and breakdown of collective laissez-faire as ideology}

Many criticisms have been levelled at the concept of collective laissez-faire, both as a description of the industrial relations system (in Britain) and as a prescriptive ideology in a normative sense. Kahn-Freund himself recognised that towards the 1960s at least, the policy of abstention or non-intervention had become increasingly controversial, and greater recourse was being made to regulatory legislation.\textsuperscript{56} He explained this development in terms of a number of factors. Firstly he made reference to the growth in the labour force of the ‘white collar element’ which tended to ‘falsify the assumption of a strong collective bargaining machinery’.\textsuperscript{57} Second he identified the growth of industry-wide collective bargaining far from the plant, which reduced the effectiveness of collective bargaining at plant level and introduced a greater need for regulatory legislation, particularly in the field of job security: ‘it appears that….. for the moment at least,

\textsuperscript{54} Dukes (n 12) 356
\textsuperscript{55} Kahn-Freund (n 14) 204
\textsuperscript{56} Kahn Freund (n 46) 10
\textsuperscript{57} Ibid 34
our collective bargaining has stalled and legislation has to take its place.\textsuperscript{58} He did not, however, abandon his conviction that collective bargaining was the best and most effective way to address vulnerability in the workplace. For Kahn-Freund, recourse to legislation was a temporary phenomenon to be replaced by collective bargaining once a suitable bargain was struck: ‘[Regulatory] legislation of employment in Britain is, like so much of our legislation, a response to needs as they arise and not informed by any desire for systematic order.’\textsuperscript{59} Furthermore, he consistently argued that the common law was totally inadequate as a regulator of industrial relations, ‘with its impracticable and unpredictable standards of ‘reasonableness’ and its artificial concept of ‘intention of the parties’, ‘blanks which judges are able to fill as they choose’.\textsuperscript{60}

It has also been argued that the representation of collective laissez-faire as a policy of state abstentionism serves to mask the ideology which existed behind clear state policy. In other words, collective laissez-faire was a particular kind of state intervention, both legislative and non-legislative, based on ‘encouraging the establishment and maintenance of autonomous regulatory and dispute mechanisms.’\textsuperscript{61} The evolution of voluntary institutions and rules under the guise of collective laissez-faire represented a distinctive ideology which was adopted by all sections of the industrial system, ‘first by the trade unions and then by employers,

\begin{flushright}
\textsuperscript{58} Ibid 34-35
\textsuperscript{59} Ibid 30
\textsuperscript{60} Ibid 34
\textsuperscript{61} Dukes (n 12) 358
\end{flushright}
the civil service and eventually even by the judges'. According to Ramm, the notion of collective laissez faire was useful to the government at the time, as the freedom of the individual to bargain was simply replaced by the notion of the collective to bargain: ‘it replaced individual laissez-faire with collective laissez faire.

It follows from the above discussion that the perfect separation of the ‘political’ from the ‘industrial’ envisaged by Kahn-Freund in his articulation of collective laissez-faire was not borne out in reality, and it is to be doubted whether this was (and is) ever an achievable aim. Indeed, Kahn-Freud’s delimitation of what constituted the political and industrial spheres, came itself to influence policy and to further the political ends of the state. According to Kahn-Freund’s writing, the appropriate subject of collective bargaining was limited to the ‘rules of the workplace’ and ‘to the question of the division of profits between re-investment and wages’. This implied a rather restrictive idea of trade union function and legitimate areas of conflict. In particular, Kahn-Freund disapproved of ‘political’ and ‘national emergency strikes’ which touched ‘the borderline of what can

62 Lewis (n 51) 210
63 Dukes (n 47) 236
65 Dukes (n 12) 354
66 Lewis (n 51) 210
legitimately be called industrial relations."\(^{67}\) He also disapproved of syndicalism and labour representation on company boards, which he saw as blurring the distinction between managerial functions and trade union functions (to act as a collective force in opposition to management).\(^{68}\) Against this background, Kahn-Freund became involved in the drawing up of the Donovan report which sought to set up new public agencies and laws designed to reform collective bargaining and protect management and trade unions from unofficial strikes, thereby allowing these bodies to regain control over workplace industrial relations.\(^{69}\)

Ironically, the collective laissez-faire or voluntarist ideology has also been linked to the decline in trade unionism as a force in the UK, and paradoxically, as a force to protect workers against the excesses of management power. According to Rogowski, British trade union strength declined after the 1970s, precisely because it 'developed on the basis of procedural as opposed to substantive rules, which took the form of 'gentleman’s agreements’ rather than legally enforceable contracts.'\(^{70}\) As a result, the collective bargaining system had to develop its own institutional structures to protect itself, consisting of a wide variety of disparate organisations such as conciliation boards, arbitration panels and voluntary labour courts’.\(^{71}\) This informal system proved unsustainable and resulted in ‘largely informal, fragmented and autonomous shop-floor bargaining at the workplace

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\(^{67}\) Kahn Freund (n 46) 124  
\(^{68}\) Dukes (n 12) 354  
\(^{69}\) Lewis (n 51) 213  
\(^{71}\) Ibid 64
[taking] control over many substantive issues. These arrangements lacked robustness and proved susceptible to the legal interventions and hostile campaigns of the Thatcher government in the 1980s. Furthermore, the British reliance on ‘single channel’ (worker representation by unions only) rather than ‘dual-channel’ (worker representation by unions and some other form i.e. works council), can also be traced to the voluntarist roots of the development of the industrial relations, and this too has undermined the effectiveness of collective bargaining in the UK.

**Labour is not a commodity**

As was stated in section 2, Kahn-Freund’s focus in terms of the conceptualisation of worker vulnerability was the inequality of bargaining power between employer and worker (rather than the commodification of labour). This focus was also reflected in his discussion of the solutions to vulnerability. Kahn-Freund concentrated on how best to equalise the bargaining power between labour and management. However, for Kahn-Freund, the equalisation of bargaining power through collective bargaining was not only an end in itself, but also the means to an end: the starting point from which other benefits would flow both to management and labour. For management, the collective bargaining process would allow the proper planning of the industrial process, as well as the

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72 ibid 64
maintenance of industrial peace. For workers, collective bargaining would allow them to meet their ‘legitimate expectations’, both in the short and longer term. It would not only ensure a certain level of job security in the shorter term, it would also guarantee ‘a stable and adequate form of existence [and] as to be compatible with the physical integrity and moral dignity of the individual’. Collective bargaining would allow workers to escape the worst excesses of the capitalist system of production, and guarantee a certain level of integrity and dignity in the pursuance of their work. In other words, the outcome of the processes of ‘decommodification’ (the creation of worker dignity and integrity) could be achieved within the confines of the capitalist system.

Indeed, this argument has been adopted by a number of more modern labour lawyers, who are sympathetic to Kahn-Freund’s claims. Like Kahn-Freund, these authors are convinced by the importance of collective bargaining for the achievement of worker emancipation. They also tend to promote the necessity of an effective system to back up the operation of collective bargaining. The question is how to ensure the effectiveness of this system, given the changes in the normative operation of the industrial system since the time of Kahn-Freund’s writing (these changes are discussed in chapter 4). The question is also how to make the link between the equalisation of bargaining power and the decommodification of labour more explicit, and so increase the legitimacy of these kinds of argument. One recent solution has been to suggest the promotion of

74 Kahn Freund (n 1) 69
75 Lord Wedderburn, ‘Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition’ (2000) 29 (1) ILJ 1, 25
labour rights (to collective bargaining) as human rights.\textsuperscript{76} On the face of it, this is a surprising development amongst those broadly supportive of the wide view of vulnerability. As will be discussed later, human rights are founded upon an individualism which has, in the past, conflicted with collective interest goals (and has been rejected by authors sympathetic with the wide view).\textsuperscript{77} However, it appears that, increasingly, authors have recognised the strategic importance of reference to human rights in the furtherance of collective goals. In human rights theory, pure (civil and political) human rights are so important to the functioning of (liberal) society that they can ‘trump’ other considerations, including economic action and policy.\textsuperscript{78} It follows that if rights to collective bargaining are human rights, these rights gain a status which is difficult to challenge. Furthermore, reference to human rights automatically implies a reference to human dignity; human rights are founded on the recognition of the importance of maintaining equal concern and respect for all citizens. This is useful to authors sympathetic with the desired outcome of collective bargaining in the wide view: the decommodification of labour. Recourse to human rights can thus provide a mechanism to ensure that collective bargaining rights are constitutionalised in a way which means that labour is not treated as a pure commodity, subject to the whims of ‘economic irrationalism’.\textsuperscript{79}

Indeed, it has been suggested that decisions in the European Court of Human Rights on the right to association under article 11 European Convention on Human

\textsuperscript{78} R Dworkin, \textit{Taking Rights Seriously} (Duckworth 1997) 200
\textsuperscript{79} K Ewing and J Hendy, ‘The Dramatic Implications of Demir and Baykara’ (2010) 39 (1) ILJ 2, 47
Rights, provide a good example of the power of these rights to protect human dignity (and to ensure that labour is not treated as a commodity). In particular, the case of *Demir* has been used to illustrate this point. This case concerned the status of a trade union in Turkey. The trade union, formed by civil servants, entered into a collective agreement with a municipal council. The council breached the agreement and the union brought civil proceedings against it. The council claimed that the union did not have the legal capacity to enter into and enforce the agreement under Turkish law, and this was upheld in the domestic courts. The case was subsequently referred to the ECtHR. The ECtHR held that the ‘right to form and join trade unions’ under Article 11(1) of the ECHR had been breached. This decision was quite straightforward. However, the ECtHR was then tasked with how to show that this breach was relevant to the legitimacy of the collective agreement between the municipality and the trade union. In previous decisions of the ECtHR, the link between the right to form and join trade unions and the right to collective bargaining had not been expressly made, and the court had refused to guarantee any means by which the ‘right to form and join trade unions’ should be exercised (i.e. by entering into collective agreements).

The way that the court moved to guarantee the union right to collective bargaining was to refer to international labour standards, namely ILO conventions 98 and 151,

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80 *Demir and Baykara v Turkey* (34503/97) [2008] ECHR 1345
81 Ibid para 8
82 See for example *Swedish Engine Driver’s Union v Sweden* (1976) 1 EHRR 617, para 40: ‘in the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11(1) certainly leaves each State a free choice of the means to be used towards this end. Whilst the concluding of collective agreements is one of these means, there are others.’
the Council of Europe’s Social Charter of 1961, the EU Charter of Fundamental Rights (article 28) and the practice of other countries in the European Union. On assessing these instruments the court held that collective bargaining had become ‘one of the essential elements’ of the trade unions’ right to protect their own interests under article 11 ECHR. It also used the argument as to the ‘essential’ nature of collective bargaining under these international and European instruments to deny the Turkish government’s arguments under Article 11(2), namely that the interference with the trade union’s rights could be justified on the basis that the interference was prescribed by law, that it had a legitimate aim and that it was necessary in a democratic society. The ECtHR decided that given the content of the international and European standards, the restrictions imposed by the Turkish government were not justified, thereby further elevating the status of these standards: these standards were to be used not only for determining the content of the Article 11 right, but also the possible derogations from it.

Ewing and Hendy suggest that this decision not only ensures theoretical protection for workers, it will also have a number of practical effects; Demir will require a ‘judicial change in approach to questions of industrial action’ in the UK. Instead of relying on the common law assumption that the illegality of industrial action is the starting point from which (trade union) immunities must be justified, the right to collective action should now be the starting point from which any restrictions will

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83 Demir (n 80) para 98-101, 147-151
84 Ibid para 154
85 Ibid para 162-169
86 Ewing and Hendy (n 79) 7
have to be justified. Secondly, the UK courts will have to treat ILO and ESC standards as yardsticks for industrial action, which they have so far refused to do. Thirdly, the Demir decision may precipitate a change in UK legislation, which has been consistently challenged on the basis that it is not compatible with ILO Convention 98. These amendments may fall within 3 broad areas: the British recognition procedure, restrictions on the legitimacy of secondary action and the protections of workers from dismissal for taking part in a lawful strike. This decision is thus a victory for human rights, and the ability of human rights to guarantee the dignity of workers.

There are a number of points to make here. The first is that different judicial interpretations of the ‘human’ right to collective bargaining can have completely different implications for worker protection and dignity. This is well illustrated by the marked contrast between the approach adopted in the ECtHR in the case of Demir, and the decisions of the CJEU in Viking and Laval In the Laval and Viking judgements, the court stated that the fundamental right to strike must be reconciled with rights protected under the Treaty and in accordance with the

87 Ewing and Hendy (n 79) 34
88 See for example Metrobus v Unite the Union [2009] EWCA Civ 829
90 Ewing and Hendy (n 79) 34-37
91 Case C-438/05 Viking Line ABP v The International Transport Workers’ Federation, the Finnish Seaman’s Union [2007] ECR I-10779
92 Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767
principle of proportionality. If the ‘fundamental’ rights to strike were permitted, it would be in the context of a derogation from the main economic freedoms of the Treaty. In these cases, it was decided that derogation would be permitted, but only under four conditions: (1) it pursues a legitimate aim compatible with the treaty; (2) it is justified by overriding reasons of public interest; (3) the action is suitable for securing the attainment of the objective pursued; and (4) it does not go beyond what is necessary in order to obtain it. The CJEU found that the right to take collective action ‘for the protection of workers’ does constitute an overriding reason of public interest. However, that overriding reason was interpreted narrowly, and in Laval, it was found that the actions of the trade unions could not be justified on this basis because of the breach of the Posted Workers Directive and the uncertainty for service providers in having to comply with foreign collective agreements. In Viking, the court was more willing to accept the justification of the trade unions actions on the basis of the protection of workers, but implied that the means used by the Finnish Seaman’s Union were not proportionate to the achievement of its aims.

In these cases therefore, the assertion of workers’ ‘fundamental rights’ arguably had little impact on either their protection or their dignity. First of all, although the

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93 Viking (n 91) para 75
94 Laval (n 92) para 103
95 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ [1996] L18/1
96 Ibid paras 107,108
97 The CJEU stated that the national court should examine whether ‘the FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking and, on the other, that the trade union had exhausted those means before initialising such action.’ Viking (n 93), para 97
CJEU recognised the right to collective action as a method for protecting workers, the 'limitations imposed on the right’s exercise almost completely nullified it'.

Secondly, although social considerations were recognised as legitimate, they were subordinate to other political aims, regarded as ‘truly foundational’, such as the economic freedoms under articles 43 and 49 EC (now 49 and 56 TFEU).

Thirdly, the *Laval* and *Viking* cases show evidence of deep suspicion within the judiciary of collective bargaining as means of regulation. Collective autonomy was referred to as ‘[in]sufficiently precise and accessible’ as compared to the certainty of judicially enforced legislation.

This failure to recognise the ‘distinctive context of industrial relations’ and the potential for collective bargaining means that this conceptualisation and usage of the notion of ‘fundamental rights’ will not achieve the aims of the protection of workers and would not find approval with the classical labour law scholars, particularly Kahn-Freund. Finally, the suggestion which derives from these cases that ‘not only trade unions, but also national courts, engage in a complex discretionary exercise every time industrial action is threatened’ may reduce the willingness of trade unions to engage in industrial action, thereby undermining their power.

The second point about the ability of human rights to present a solution to the problem of commodification in the wide view follows from the first. That is, human

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99 Ibid 26
100 *Laval* (n 94) para 110 and Fudge (n 98) 26-27
rights rely on judicial enforcement. Under the human rights scheme, this process is underlined by an understanding of the neutrality of the law, and the independence of the judiciary in applying these neutral and abstract principles. As we have seen, both Kahn-Freund and Sinzheimer are sceptical about both of these premises. They are sceptical about the idea that the law is neutral and free from political interference. Both these authors argue that legal terms (and ‘rights’ could be included in this) are merely ‘abstractions’ which serve certain political ends, and therefore are not ‘neutral’ in content. They also argue that the determination of worker rights through the courts is a particularly ineffective way of achieving (social) justice. For a start, the courts mostly deal with individual complaints. This means that even if a human right is structured as a collective right, it has effect only at individual level. Secondly, the courts deal only with ‘marginal’ or ‘pathological’ situations which do not necessarily present well the position of all workers. Finally, the courts deal with conflicts ex post: the common law ‘does establish rules, but not before something has gone wrong’. This means that it is

102 An exception to this is the collective complaints procedure which can be used to enforce (collective) rights under the European Social Charter (1961). Under this procedure, three categories of complainant can make a complaint to the European Committee of Social Rights that a social right has been violated: international organisations of employers and trade unions, approved international NGOs and national organisations of employers and trade unions (Article 2 of the Collective Complaints Protocol available at <http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm> last accessed 25 June 2013). Many authors consider this an important development, and trade unions have been successful at challenging government actions through this method (see European Committee of Social Rights, Decision on the merits (13 September 2011) in the case of European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB) v Belgium, Complaint No. 59/2009). There are however weaknesses with this procedure, including: the low number of EU member states accepting the procedure, the complexity of the enforcement mechanisms and the lack of endorsement of the ECSR’s findings by those governments found guilty of violation. P Alston, ‘Assessing the strengths and weaknesses of the European Social Charter’s supervisory system’ in G de Búrca and B de Witte (eds), Social Rights in Europe (Oxford University Press 2005) 45.

103 Kahn-Freund in Davies and Freedland (n 1) 29
much more ineffective than either statute law or collective bargaining for achieving justice for workers.

The final point to make about the human rights scheme and its potential for the wide view, is that this scheme is not necessarily radical either in political or economic terms. The system of human rights was specifically constituted so as to be compatible with the political and economic liberalism of the capitalist state. These political and economic foundations are similarly implicated in the creation of the problems of the commodification of labour, and the problems of loss of worker dignity which result. It is therefore possible to argue that if there is to truly be a solution to worker vulnerability in the wide view, then this must involve either the bringing down of the capitalist structures which create the commodification of labour, or else a change from the political and economic liberalism of states which support these processes. This kind of radical argument is associated more with Sinzheimer (and his followers) rather than Kahn-Freund. For Sinzheimer, the decommodification of labour could only be achieved with a radical political reorganisation which would not only change the way in which industrial relations were organised, but also, fundamentally the function of the state. The state, under his scheme would not be liberal in the sense of guaranteeing only the negative freedoms of the human rights regime. Through the steering of the collective bargaining process, it would also ensure that social goals were also furthered. This would be achieved through respecting the rules created by the action of the autonomous parties, but it would also be achieved through intervening in the
‘public interest’ where necessary to do so: only this would guarantee the freedom of workers.  

4. Modern problems with the wide view

The main premise of the wide view is that collective bargaining is the best way to counteract worker vulnerability. Underlying this view is the assumption that there is both homogeneity of status and interest amongst workers. This assumption of homogeneity can be linked to the Marxist idea that there are only two classes involved in industrial conflict: the bourgeoisie and the proletariat. It can also be linked to the particular period of history in which the classical labour law scholars were writing. Indeed, it has been suggested that at the time Kahn-Freund was writing about the system of collective laissez faire, a certain homogeneity of occupational status had developed amongst workers. This occupational status centred on three elements. The first was the prevalence, in the industrial sphere, of the manufacturing sector dominated by the Fordist production model (large companies engaged in mass production based on a narrow range of tasks). The second was the existence of the ‘standard employment relationship’, which consisted of permanent full time employment performed by the male breadwinner. The third was the linkage of social security benefits to work, which protected workers in times of difficulty. All of these factors combined to produce a ‘degree of

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104 Sinzheimer (n 32) 238: ‘Die Friedensfunktion im Schlichtungswesen besagt nicht, dass der Staat unter allen Umständen in de Kämpf ringreifen muss. Sie besagt nur, dass der Staat im Schlichtungswse aus Gründen des öffentliche Interesses in Arbeitskämpfe eingreifen muss.’ (My translation: Achieving freedom through the negotiation process does not mean that in all circumstances the state must get involved. It means only that when the state does get involved in the negotiation process, this involvement is in the public interest.)
regularity and durability in employment relationships' and was maintained by both the relative economic and social stability of the time.  

It could also be argued that at this time, this homogeneity of status produced a certain homogeneity of interest amongst workers. Indeed, Kahn-Freud presented the interests of all workers as similar. He included within these interests the enjoyment of a reasonable level of job security, and ‘the worker’s interest in planning his and his family’s life and in being protected against the interruption in his mode of existence, either through a fall of his real income or through the loss of his job.’ These interests were of course, tied to the understanding that most jobs were for life (the Fordist mode of production) and that employees were men who brought home the family wage (under the ‘standard employment relationship’). Most importantly, they were central to Kahn-Freud’s understanding that collective bargaining in general and trade unionism specifically was the best means of achieving worker goals. Homogeneity of status and interest meant that, not only could trade unions develop a large membership base in the context of the grounding of work organisation in large enterprises with vertical hierarchies, they could also successfully represent the interests of their members in achieving, for example, a decent family wage.

Arguably it is not possible to characterise the modern labour market in terms of either homogeneity of interest or status. Both economic and social factors

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106 Kahn-Freund in Davies and Freedland (n 1) 66
(discussed in detail in chapter 4) have determined the breakdown of the ‘standard employment relationship’ and its institutions. This creates two main problems for unions. The first is that work is no longer organised in a way which is conducive to the development of union membership. Indeed, in the UK, trade union density has almost halved since its peak in 1979.\footnote{BIS, ‘Trade Union Membership 2011’ 9 <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/t/12-p77-trade-union-membership-2011.pdf> accessed 2 November 2012} The increase in service jobs means that workers interact more directly with clients, patients or customers, rather than reporting directly to a single ‘employer’. This complicates the ‘us and them’ basis of union organisation.\footnote{P Smith, ‘Organizing the Unorganizable: Private paid household workers and approaches to employee representation.’ (2000) 79 North Carolina Law Review 45, 69} Furthermore, the vertical integration of the firm in the Fordist mode of industrial organisation has broken down and been replaced by smaller and more decentralised work units. This has undermined the clear identification of the ‘bargaining unit’ upon which traditional trade unionism relies.\footnote{Ibid 70} The second problem faced by trade unions is that both economic and social change has meant an increase in the diversity of interests represented by workers. The question is whether unions are equipped to deal with this diversification, or can maintain their attractiveness to all workers, given their traditional association with only a narrow set of interests.\footnote{A good example here is the relationship between trade unionism and domestic workers. Traditionally, unions ignored such workers because of the dominant vision of the status of domestic work and the work of women, and the fact that domestic work posed no competitive threat to male workers. Ibid 67}

Therefore, it is to be questioned whether trade unions can deliver the equalisation of bargaining power for all workers envisaged by the wide view. Certainly, the
decline in trade union membership in many countries (in 2011, less than a third of workers in the UK (26.0%) were actually a member of a trade union organisation\textsuperscript{111}) means that it is difficult for trade unions to represent the interests of the entire workforce. There is also the problem of the increasing heterogeneity of worker interests which make it difficult for trade unions to capture all workers through their activities. Indeed, there are signs that unions are increasingly recognising the importance of representing the diversity of interests involved in the workforce. Trade unions have been strongly involved in equal pay cases in recent years,\textsuperscript{112} and have been very important in the promotion of (new) rights for particularly vulnerable groups. On the one hand, these activities represent a way forward for the wide view, and can be viewed as the modern solution to the problems experienced on the wide view. On the other hand, advocating particular interests is a difficult strategy for trade unions, given that these interests may conflict with the interests of the core workforce (may still constitute a large part of its membership). These issues will be discussed in more detail in the case study chapters in the latter part of this thesis (chapters 6 and 7).

5. Conclusions

It is dangerous in a way to see the ‘wide view’ as a coherent set of principles and goals. Certainly, authors in this view are concerned with the vulnerability of all

\textsuperscript{111} BIS (n 107) 7
workers as a result of their insertion into a capitalist system. They are influenced by the Marxist ideas that workers are at a disadvantage in the capitalist system because they have to sell their labour to capitalists who constantly exploit them for profit. They are also at a disadvantage because they are alienated from their own labour. Authors in the wide view realise that this is a particular problem because the alienation and exploitation of workers affects not only the sphere of work, but affects their status as human beings (vulnerability is not just of all workers but all of workers). Authors in this view also share some ideas about how best to counteract the vulnerability of all workers inserted into the capitalist system of production. They argue that as this is a social problem, then there must be some kind of collective (social) organisation which allows workers to gain social power against their exploitative employers. These authors tend to promote collective organisation in trade unions, because this was either the most established structure at their time of writing (Kahn-Freund, Sinzheimer), or because they see the revival of trade unions as the best and most efficient way of achieving worker goals (Ewing and Wedderburn).

There are however, a number of points of departure of authors in the wide view. They disagree on the degree that the state should be involved in the direction of industrial relations. They also disagree on the function that the state should have; the extent of and the grounds for state action. Finally there is rather profound disagreement about how radical change needs to be (in economic and social terms) in order for the equalisation of social power envisaged by the wide view to
be achieved. On the one hand, Kahn-Freund suggests that the equalisation of bargaining power can be achieved by the proper working of two autonomous parties, with very little (state) intervention in either the process or the market mechanisms. This would also comply with the liberal view that if the 'right' to collective bargaining is maintained in law, then this will also ensure fairness and dignity for workers (although Kahn-Freund himself did not make this specific argument). On the other hand, there are other authors who doubt whether equalisation of bargaining power and the decommodification of labour can be achieved within the confines of a capitalist system maintained only by a liberal state. For Sinzheimer, the (social democratic) state must interfere in this capitalist system and the negotiation of the autonomous social partners where this is in the public interest. This interference could (and should) be not only on economic but also on social grounds.

Indeed, these more radical arguments are one way of addressing the problems of the traditional association of the wide view with trade union membership.¹¹³ In the social democratic state envisaged by Sinzheimer, the state would not only ensure that procedures are in place to encourage collective bargaining, the state would also direct its outcomes. This would determine that a greater number of interests are recognised, and possibly increase the legitimacy of the trade union movement. On another view, it may be that these criticisms can only be countered by adopting the spirit rather than the letter of the work of the authors in the wide view. This involves the acceptance of the importance of collective bargaining, but also a

recognition of the problems of collective bargaining based on trade union organisation. These issues will be explored in the next chapter, which discusses the ‘middle view’ of vulnerability and solutions based on the recognition of different interests under the premises of social law.
Chapter 3: The Middle View of Vulnerability

1. Introduction

This chapter aims to encapsulate a 'middle view' of vulnerability in employment. It is argued in this chapter that this 'view' of vulnerability is associated with a particular academic tradition known as the sociology of law. Of course, this is a rich and varied tradition, whose reach stretches far beyond the scope of this work, and far beyond just the concerns of labour law. The aim of this chapter is certainly not to analyse the usefulness of the sociology of law to labour law in general (although this would be an interesting exercise in itself). Rather the aim is to investigate this tradition in terms of its characterisation of society as constituted through groups or associations which ultimately determine the state of the law. In particular the interest is with 'social law'; the adaptation of ideas in the field of the sociology of law to deal with the regulation of groups in the labour law field. For this reason, the chapter will focus on the work of Emile Durkheim and François Ewald, both of whom (writing in different historical time frames) talked of the potential application of the sociology of law to the labour law field. It is argued that the analysis of social law is a worthwhile exercise for the purposes of this thesis both in a negative and positive sense. In a negative sense, there are elements of social law in terms of both its characterisation of vulnerability and the solutions
proposed to that vulnerability which provide an interesting and insightful contrast to
the position on the wide or narrow view of vulnerability. In a positive sense, it can
be argued that modern labour law (as far as it concerns vulnerability) is derived in
part from the social law analysis. This is evident, for example, in the way in which
labour law recognises different group interests, and/or in the way that labour law
attempts to achieve social justice for (passed over) social groups.

It may be argued that the adoption of social law principles (in the middle view)
leads to a rejection of both the narrow and the wide views of vulnerability
represented in this thesis. As will be explained in chapter 4 of this thesis, the
narrow view is fundamentally grounded in liberal theory. That theory is based on
the separation of a public realm of law represented by universal values from a
private realm of arbitrary desires which is excluded from the law. The middle view
of vulnerability (based on the sociology of law) sees the operation of law very
differently. Social lawyers reject both the naturalism and universalism upon which
law in liberal theory is based. They reject the idea that law represents a set of
universal standards which are determined outside of society. Rather, for these
authors, reality and law are socially constructed; it is not possible to separate
society from the law.¹ Social lawyers would also tend to reject the foundational
premises of the wide view. This view is grounded in the (Marxist) idea that society
is divided into classes which are economically determined. An inequality of
bargaining power exists between those groups which must be addressed. On the
middle view, grounded in the work of the social jurists, this is a reductionist view of

¹ MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (Sweet and Maxwell 2008) 836
society, and does not correspond with social reality. Groups are formed on all sorts of different lines, and associations may have more or less economic value. Furthermore, the status of these groups is not-predetermined and is subject to change depending on the importance of the group to society or social order at any particular time.

The middle view of vulnerability in employment starts from the premise that society is constituted through the relationships between different groups: ‘Society is the sum total of the human associations that have mutual relations with one another’. These groups possess their own ways of working and are regulated by their own sets of norms. However, these groups are not equal and are not equally recognised. The extent of the recognition of groups depends on the importance attached to that group by the state, which is ultimately determined by how far the furtherance of that particular group interest is in the state (or general) interest. The incorporation of these ideas into labour law has important implications. First of all, according to the middle view, labour law cannot just regulate the inequality of bargaining power between capital and labour (as might be the case on the wide view). Labour law must also recognise that inequalities of power exist between a whole range of different groups on the labour side which are fundamental to labour’s experience of vulnerability. Therefore, labour law on the middle view must be concerned with narrowing the gap between groups in the labour market, as well as between employers and workers. Secondly, labour law must give central thought to the production of law as socially derived. If group negotiation is the the

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main way through which legal change happens, then the structures of associations, and the creation of an environment through which those interests can be represented is important to law. Finally, the scope of the law needs to be considered. The middle view advocates the extension and expansion of law, to give proper support to all relevant groups in society. In contrast to the position on the wide and narrow views, this expansion is viewed as a sign of a social solidarity and social maturity.  

It is worth noting at this point, that the academic and policy literature identifies a number ‘vulnerable groups’ in the labour market. At the international level, the Decent Work agenda of the ILO, which will be discussed in more detail in chapter 5, identifies that ‘women are more vulnerable’ in the labour market due to the often precarious nature of flexible work in which they tend to be involved. The Decent Work agenda also suggests that older workers are more vulnerable, as they can be ‘prematurely excluded from work’, or end up in ‘precarious jobs’. Disabled workers can also ‘face equally serious problems’. At the EU level, recent studies have identified vulnerable groups according to ‘traditional categories’ and ‘new types’ of vulnerable workers.  

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3 Ibid 155-6. Ehrlich states as follows: ‘In reality, therefore, the historical fact that state law is manifestly gaining ground is merely the expression of the intensified solidarity of society. As the conviction grows stronger that everything that is in society concerns society, the idea appears that it would be a great advantage if the state should prescribe a unitary legal basis for each and every independent association in society.’


5 Ibid 33

6 Ibid 33

young people, older people, minority groups, immigrants and lower-educated workers, whereas 'new types of vulnerable workers' include teachers and employees in the health sectors, and workers in particular regions newly acceded to the EU.\(^8\) The aim of this chapter however, is not to provide insight into the particular vulnerability of one group in comparison to another (whether in sociological/legal or other terms). To some extent, this analysis will be conducted in the case study chapters 6 and 7 of this thesis. Rather, it aims to take one step further back in theoretical terms, and probe more deeply into how the idea of vulnerable groups has become enshrined in labour law theory (or might become so enshrined) and what impact this has on legal methodology in the labour law field.

This chapter will begin with an analysis of the construction of vulnerability in the middle view. This process will follow the structure of chapter 2, in dealing first with the compatibility of the ideas in the middle view with the notion of inequality of bargaining power. There will then be a discussion of the compatibility of the middle view with the second element of classical labour law theory: that 'labour is not a commodity'. The third section will deal with the (theoretical) solutions to vulnerability in the middle view. Again the solutions will be discussed according to the classical propositions of classical theory (inequality of bargaining power and labour is not a commodity). The fourth section will provide an introduction to the application of the middle view in terms of its relevance to unionism (further application will follow in chapter 5-7), and the final section will consider the

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\(^8\) Ibid 32-37
criticisms that can be made against using the middle view as a basis for regulation under labour law.

2. The construction of vulnerability in the middle view

Inequality of bargaining power

On the wide view, vulnerability is a function of the inequality of bargaining power between employers and (all) workers. This inequality is theorised according to Marxist notions about the operation of the capitalist system and the class system through which the capitalist system is maintained. For theorists in the social law tradition however, Marxist premises are modified or disregarded, and vulnerability is characterised differently. For a start, the economic determinism which is a feature of Marxist thought is rejected by social law theorists. Under the social law scheme, it is society, rather than the economy, which is the starting point for the analysis of (worker) vulnerability. In all societies, it is society which directs economic relationships, because economic processes themselves have no moral function and, without regulation, inevitably lead to chaos.  

Furthermore, social lawyers reject the idea of the existence of just two classes in society: the proletariat and the bourgeoisie. Although it may be possible to identify these two groups in broad terms, these theorists argue that empirical analysis reveals that

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society is much more complex than the Marxist scheme implies. On the social law scheme, Marx misunderstood the way in which society was constituted. Under Marx, all identity was economically constituted; Marx addressed neither gender nor race discrimination in his theory of capitalism and was not concerned with the subordination of women per se (although he did recognise that this might result from capitalist exploitation). For social lawyers, this view is damaging to workers and actually creates vulnerability. It is damaging because it denies voice to groups constituted on other grounds. It serves to exclude groups from participation in the both the social and legal system, and to mask the different inequalities which in fact exist in society, through which different social groups can gain recognition, and through which a properly functioning social order can be established.

This is not to suggest that vertical inequality of bargaining power between employers and workers can never exist on the social law scheme. Indeed, in Durkheim’s work, he did recognise that the locus of wealth in the hands of capitalists could cause a problem for social development and for the life chances of workers. But he also recognised that the conflict between capital and labour was not the only source of vulnerability. Rather, there was a great diversity of tastes, aptitudes and skills within the ‘working class’, and not all workers were

11 Ibid 136. Some authors do however suggest that group vulnerability cannot be considered without reference to economic subordination. See for example the comments of M Crain ‘Between Feminism and Unionism: Working Class Women, Sex Equality and Labor Speech’ (1993-1994) 82 The Georgetown Law Journal 1903, 1906-1907: ‘I argue that attacking class oppression is integrally connected to achieving sex equality. Economic subordination lies at the core of women’s political and social disempowerment, and mobilizing women therefore requires intermingling economic and political concerns. Consciousness-raising and organising of working class women in the workplace is essential to the feminist project of elevating women as a group from our subordinated position in society.’
12 Durkheim (n 9) 302.
equally, or indeed inevitably vulnerable.\(^\text{13}\) As a result, vulnerability could be just as easily created by the inequality of bargaining power *between* groups of workers, as between capital and labour itself. For example, Durkheim’s scheme of ‘organic solidarity’ relied on an understanding of inequality of bargaining power between worker groups. Durkheim identified that as societies develop, labour functions become increasingly specialised. This process of specialisation leads to the creation of a division of labour in which specific tastes, aptitudes and capacities held by workers develop. These talents and aptitudes are not distributed equally in society and are only possessed by certain groups. With the increase in specialisation of functions brought about by the division of labour, these groups must increasingly interact with each other. This interaction is necessary because of the narrow remit of their functions which dictates an increasing need for exchange. However, despite the need for this increased interaction between groups, it is also a source of conflict as a result of the different interests of those at different levels of the occupational strata.\(^\text{14}\) For Durkheim, these inequalities can only be managed through a system of ‘organic solidarity’. This organic solidarity is the ultimate aim of all industrial societies, because it represents that all groups in the division of labour recognise their own function and their place in society. It represents a social morality which recognises how inequality of bargaining power between groups can be managed to the benefit of all.

\(^\text{13}\) Durkheim (n 9) 311
\(^\text{14}\) A Giddens, *Capitalism and Modern Social Theory: an Analysis of the Writings of Marx, Durkheim and Weber* (Cambridge University Press 1971) 103
Other theorists in the social law tradition have reinforced Durkheim’s vision that society is constituted by groups, and that inequality of bargaining power exists horizontally between these groups (as well as vertically when power relations dictate). For example, Ewald argues that under the modern welfare state, society is constituted through relationships of interdependence and solidarity between groups. Rather than one ‘social contract’ based on invariable terms, there is a series of ‘solidarity contracts’ which contain the compromises reached between the parties. In terms of the labour market, the employment contract itself is conceived of in solidaristic terms. The contributions of workers and employers are seen as not only equally necessary, but also interdependent, such that one could not exist without the other.\(^\text{15}\) But the relationship between ‘employer’ and ‘worker’ is not the only way in which these individuals can interact. They have a number of identities and interests and they are free to make compromises and coalitions with others on whatever basis is politically feasible. This freedom is essential to a well functioning society, and is the only possible basis for a sustainable social order. It allows the vulnerable a voice because it allows them to form groups which represent more than just their economic interest. Ultimately this means all persons feel that they are included in and represented by society. This freedom allows ‘society to coincide with itself’; the ultimate aim of social law.\(^\text{16}\)

This analysis of the nature of vulnerability is important in terms of labour law. It provides a starting point for thinking about the importance of identity and the


\(^{16}\) Ibid 50
nature of the group to labour law regulation. In particular, this analysis lends itself to a broader and more sophisticated consideration of ‘equality’ as a foundational aspiration of labour law than can be gleaned from the wide view of vulnerability. If the middle view is about the nature of the group, and groups have different experiences in the labour market, then the experience and the achievement of equality cannot be the same for everyone. The achievement of equality will be a complex process and may involve the differential treatment of groups within the labour market. This will be discussed in more detail in section 3. The middle view also differs from the wide view in its assessment of the vulnerability of workers vis-a-vis the economic functioning of capitalism, and this difference is also important. On the middle view, although such ‘commodification’ may be a problem for workers, this is not necessarily the case, and is dependent on a number of factors (including identity itself). This reflects the empirical experience of vulnerability: not all workers are equally vulnerable or suffer from the effects of vulnerability in equal ways. The theorisation of the nature of ‘commodification’ under the middle view of vulnerability and its importance for the operation of labour law is discussed in detail in the following section.

**Labour is not a commodity**

The second idea of vulnerability which underscores labour law thinking in the wide view is that labour is not a commodity. Behind this idea is the assumption that capitalist processes are both exploitative (capitalists siphon off the surplus value
created by workers) and alienating (workers are isolated from the fruits of their work and also from each other as they cannot participate in capitalist decision making processes). However, the middle view of vulnerability sees this process quite differently. For a start, there is no assumption on the middle view that the process of ‘commodification’ is detrimental for workers. Indeed, work is given positive value under the middle view of vulnerability. Under the middle view, work gives workers the opportunity to gain personal self-fulfilment, and most importantly, gives workers a sense of membership to the social system. In Durkheim’s work, the best functioning social system (towards which we should constantly strive) exists in conditions of ‘organic solidarity’. This ‘organic solidarity’ develops where the specialisation of work activities develops into a particular ‘division of labour’. This ‘division of labour’ allows each person to find their ‘fit’ in the (capitalist) system according to his/her particular strengths and weaknesses.\(^{17}\) This is fundamental to the sustainability of the system of organic solidarity: the personal fulfilment that each person gains through work gives them an incentive to constantly reinforce the social order.

However, although this division of labour is fundamental to the development of a sustainable social order, it is not sufficient of itself. Work does not always provide the value to workers that it should (for example there may be work stoppages or a mismatch between a worker’s skills and the job in which s/he finds her/himself). Something more is needed. In particular there is a need to mediate between workers and between workers and the state where the work relation fails. This

\(^{17}\) Durkheim (n 9) 311.
mediation is provided by groups or ‘associations’ which are essential to the experience of labour in two ways. First, they have their own norms attached to them which allow their members a sense of belonging (which is important for example where that work relation is unsatisfactory). More importantly, these associations are the main way in which individuals attain visibility vis-a-vis the state. This visibility is fundamental to worker groups, because it is only through this visibility that workers can have their interest recognised as part of the general (state) interest. Once this particular (group) interest becomes part of the general interest then it is necessarily protected through state legislation and reinforced by the courts (whose role is to ‘create the means and methods to effectuate the ends of society’).

That group then takes all the benefit which society can afford.

Therefore under the middle view of vulnerability, it is not the capitalist system itself which is the creator of vulnerability. It can create vulnerability (particularly where workers find themselves out of work) but this vulnerability is not an inevitable consequence for all workers. Rather, the real problem for workers on the middle view is a lack of effective group membership. Group membership on the middle view helps to ensure worker protection where the economic system fails. It does this through the creation of a support network for members of the group, and also through bargaining for rights which can be legally enforced. This system of the creation of law, and the importance of law as a solution to vulnerability on the middle view will be discussed in more detail in the next section.

3. Solutions to vulnerability in the middle view

Inequality of bargaining power

Solutions to vulnerability in the middle view rely explicitly and unashamedly on extensive state regulation and the enforcement of particular legal interests. This is fundamentally different to the position in relation to solutions of worker vulnerability on both the wide and the narrow views. The narrow view is essentially a liberal view, which is suspicious of extensive state regulation. The kind of extensive state regulation and enforcement proposed by the middle view would appear to interfere with the promises of liberalism: to allow individual freedom against excessive powers of the state. The wide view is also suspicious of state regulation, because the idea is that in the capitalist system the state becomes co-opted by the dominant bourgeois interest. This determines that law is framed in terms of furthering the interests of employers at the expense of workers. On the middle view, the attitude towards legislation is different. Legislation is legitimate and desirable because it emerges from the particular social form in existence at the time. For example under Durkheim’s scheme of organic solidarity, law emerges ‘automatically’ from the division of labour.19 As workers increasingly interact with each other through exchange, the modes of interaction become cemented into rules of conduct. These rules of conduct allocate rights and duties and are systematically transformed into legal rules upon which society relies (through

19 Durkheim (n 9) 302
Ultimately, law becomes the external index of social solidarity, and serves to reinforce the preferred social arrangement to the benefit of all.  

On the middle view, if solidarity is to be maintained, then the role of the state must increase beyond that envisaged by classical legal methodologies. On Durkheim’s scheme of organic solidarity, not only is the state charged with maintaining the more considerable legal code which accompanies the division of labour, it is also increasingly charged with the reinforcement of solidarity itself. This expansion of the role of the state and law under the social law scheme has been termed the socialisation of the law. This means that the functions of the law expand, as the ‘true and only voice’ of democracy; and the state becomes involved in a myriad of previously excluded activities. Law can thus interfere in areas which were previously excluded by the traditions of classical private law, in particular labour law, which has been deemed one of the ‘privileged legal fields’ of this type of law. It can also directly intervene in the market, which is strictly limited under a liberal conceptualisation of the role of law. Under liberal ideals, it is stipulated that the market is the best mechanism for the creation of wealth, and that regulation is essentially second best to market allocation. Under the social law scheme, regulatory legitimacy stems not from the market, but through the interactions of

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21. Durkheim (n 9) 24
22. Durkheim states that ‘Life in general cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion.’ Durkheim (n 9) 25
society, and equilibrium is not based on economic but on societal factors. Indeed the aim of social law is not the establishment of economic equilibrium, but a stable social order. This allows intervention in the market on a number of bases (equality and equity) other than the maximisation of wealth, and means that the state can take charge of decisions about which areas of human interaction will be subject to the market and which de-marketised.\textsuperscript{26}

This vision of the functioning of society and law implies a number of things about the functioning of solutions to vulnerability on the middle view. The first is that group membership becomes the category upon which juridical treatment depends.\textsuperscript{27} Indeed, as the task of the law under the social law scheme is to recognise socially legitimate interests and give them the means to fulfil their social function, group membership becomes necessary for all.\textsuperscript{28} Secondly, the scheme of social law implies that the functions of social groups become very important; they are not only the main locus of law but also power in society. Indeed, on the production of the second edition of the \textit{Division of Labour}, Durkheim devoted a whole new preface to the function of ‘secondary groupings’ in the proper functioning of society (and law) under the division of labour. Durkheim argued that if the system of organic solidarity were to function correctly, then it could not be maintained by an all-controlling state. The state is too far remote from individuals and its powers are far too superficial to be able to create the necessary moral

\textsuperscript{26} C Courtis, ‘Social Rights as Rights’ (date unknown), 37< http://islandia.law.yale.edu.sela.ecourtis.pdf> accessed 7 December 2012
\textsuperscript{27} Ibid 38
\textsuperscript{28} Ewald (n 15) 58
consensus. Rather, society could only be sustained by the establishment of secondary groups which mediate between the individual and the state. Durkheim suggested that ‘professional’ groupings are most fitting to serve this function. These professional groupings are an inevitable outcome of the increased contact between (working) individuals under the division of labour. They are also desirable in that they counteract many different kinds of vulnerability. For the individuals in the division of labour, they represent a ‘source of satisfaction’ and have a function in the prevention of both individual and group conflict. These professional groupings also further social inclusion because they bring individuals closer to society, and are directly involved in a number of educational and recreational activities. Finally, they play a direct role in the political system and maintain the stability and accountability of state function.

There is a further implication of the social law scheme for the consideration of solutions to vulnerability under this section. This is the place and function of regulation based on equality. Under the social law scheme, the state has a much greater role in the consideration of the function and effect of inequalities in society; with the rejection of liberal conceptualisations of universality both material inequalities and legal inequalities can be considered. Anti-discrimination law becomes central to the function of the state on the social law scheme. This kind of law is seen as particularly useful because it allows a consideration of group relationships; it is more concerned with rights between groups than (absolute)

29 Durkheim (n 9) liv
30 Durkheim (n 9) xlii
31 Durkheim (n 9) 24-27
32 Giddens (n 14) 104
rights for individuals. Furthermore, anti-discrimination law has the potential to correct settlements and balances between groups which are artificially created (for example through inherited wealth). On the social law scheme, the state is given the space to intervene to equalise or compensate for social inequalities which are considered undesirable, which might have been historically generated and to intervene in diverse areas of social life, not limited by the liberal public/private distinction.\textsuperscript{33} Judicial regulation on the basis of social law uses of state power to equalise disparate situations, through better opportunities for passed over social groups, or to make up for the differences in power between groups.\textsuperscript{34} This correction is important to the social law scheme, because it implies that all persons have the opportunity to participate properly in social life, and contributes to the overall aim of the elimination of social exclusion.

It emerges from the analysis under this section that under the social law scheme of the middle view, there is not just one ‘equality of bargaining power’ around which legal regulation should turn (as would be argued on the wide view). There are instead many inequalities of power drawn along many different lines. It is the responsibility of the law to recognise these inequalities and, where it is deemed socially expedient, to address these equalities through their eradication. In terms of the content of that law, it appears that addressing inequalities under the social law scheme implies a wider response than the response under the liberal regime. This ‘wider’ response is a result of the fact that ‘rights’ are not predetermined and so social groups can fight for those rights which appear to be the most useful to them.

\textsuperscript{33} Courtis (n 26) 38
\textsuperscript{34} Ibid 40-41
It is also a result of the willingness of the social law scheme to enter more fields of action and to interfere more strongly in different areas of social life than would be permitted under the liberal regime. The distinction between liberal and social law formulations of equality and the implications of these distinctions for regulation are discussed in more detail in the next section.

**Labour is not a commodity**

Under Durkheim’s social law scheme, commodification is not an inevitable feature of the capitalist system. Commodification only occurs in the capitalist system when a worker does not work according to his capability, but purely according to the demands of ‘external forces’. Under these conditions a worker becomes merely a ‘lifeless cog’ who will achieve no personal satisfaction from work.\(^\text{35}\) Therefore, it is essential that each worker is given the freedom to work according to his/her capability, because this in itself allows the worst excesses of commodification to be avoided. Furthermore, the freedom to work according to capability is important because it allows the worker to find his position in society. This position is as much a group position as it is an individual position, and relies on the worker’s attachment to associations (with other workers). As we have seen, group position is absolutely vital on the social law scheme. Group membership and the interaction of one particular group with other (as well as the state) is the foundation of normative rules which are cemented into law. This group position therefore

\(^{35}\) Durkheim (n 9) 306
becomes the means through which rights and social functions are determined for the individual. This freedom is also important because it is the only way in which any social order can be maintained under capitalism. If workers do not have the freedom to work according to their own capabilities, and do not get any satisfaction from work, then there is no incentive for them to work with others to keep the social order alive. The social order can only then be maintained by constraint, meaning that it no longer has any legitimacy and will ultimately break down.

The question is therefore, how far (labour) law is implicated in this freedom to work according to capability. Unfortunately, legal outcomes are not defined specifically by Durkheim, and social law in general tends to favour the specification of procedure rather than substantive result. However, there are a number of insights which can be drawn from Durkheim’s scheme. The first is that ‘equality’ must include some form of equality of opportunity. This equality of opportunity is to a certain extent procedural: there must be structures in place to allow workers the freedom to work according to their tastes and aptitudes. But this equality of opportunity also suggests a certain outcome. Durkheim’s scheme is aspirational and seeks to establish what a perfect social system would look like under advanced capitalism. That perfect scheme requires that ‘social inequalities express precisely natural inequalities’. It implies certain ends as well as procedure: that all workers can achieve the most fitting place in the social order of organic solidarity. This also perhaps suggests that the nature of work must be directed. If all workers are to have work which meets their needs for self-fulfilment, there must be work of

\[\textit{Durkheim (n 9) 313}\]
sufficient quality to allow this to happen. The problem is of course, that these aims cannot be met by the anti-discrimination law suggested by the social law scheme. This idea of work quality suggests absolute standards, which do not fit with the idea of ever shifting compromise and balance under social law.

There is a further problem. Modern anti-discrimination law represents and reflects a whole range of different aims and aspirations, which may or may not achieve the aims of equality of opportunity (itself not well defined) or of social law in general.\(^{37}\) Anti-discrimination law is not social law. For example, the principle of formal equality which underpins much modern anti-discrimination law represents liberal ideals and only weakly responds to any aspirations under social law. At the level of employer and employee, the notion that likes should be treated alike is no more than a relative principle and does not distinguish between treating people equally badly and treating them equally well.\(^{38}\) It does not guarantee any substantive outcome for different labour market groups. Formal equality is also based on individual notions of justice. The individualised nature of this kind of justice means that such laws have little moral force on the social law scheme, and introduce a number of practical problems due to the abstract nature of their operation and the cost (social and economic) of their enforcement.\(^{39}\) In broader terms, the focus on the individual obstructs the project of revealing structures and institutions which disadvantage certain groups in society and gives no means by which these

\(^{37}\) A very interesting discussion of the failings of modern anti-discrimination law is provided in A Somek, \textit{Engineering Equality} (Oxford University Press 2011)


\(^{39}\) M Bell and L Waddington, ‘Reflecting on inequalities in European equality law’ (2003) 28 (3) \textit{European Law Review} 349, 351
structures can be challenged. This means that the views and assumptions built into all legal forms and the values and goods recognised by legal arrangements express the views of the dominant group, represented as an abstract entity. Formal equality can therefore be a means through which groups can be excluded from being given or enforcing rights. On the other hand, there are some ways in which a system of formal equality could meet social law aspirations. If the principle of formal equality is applied at the point of recruitment for example, this would mean that no considerations based on prejudice would be allowed to interfere in the assessment of a person’s ability to do a particular job. All persons would therefore have the opportunity to work according to their capabilities. This would contribute to the establishment of a procedure for achieving equality of opportunity for all.

However, equality of opportunity in the social law scheme accords much better with group-based models of justice. These group-based models have been incorporated into modern discrimination law to a greater or lesser extent to counteract the harshness of the formal equality rule and the problems associated with its enforcement. They aim towards social inclusion rather than equal treatment, suggesting that ‘equality’ requires not just a fair process (through formal equality), but must also have a substantive or redistributive goal in order to achieve an improvement in the relative position of vulnerable groups. This aim of social inclusion appears to be in line with the aim of social law towards a particular social

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40 N Lacey, ‘From Individual to Group’ in B Hepple and E Szyszczak (eds), Discrimination: The Limits of the Law (Mansell 1992) 107
41 Ibid 107
42 C McCrudden, Buying Social Justice: Equality, Government Procurement and Legal Change (Oxford University Press 2007) 70
(rather than just individual) outcome. In terms of the equality of opportunity required on the social law scheme, there is the recognition that a certain level of redistribution is required for its achievement, as ‘equality’ can be influenced by different starting points between different groups. This can be illustrated by Durkheim’s criticism of the institution of inherited wealth. For Durkheim, this institution presents a real barrier to equality of opportunity and the achievement of social order. Such an institution obscures the social value of exchange because those with fewer resources have a lower bargaining power and are therefore obliged to accept conditions which are unfavourable. That in turn means that the individual is not working at his level of capability and feels constrained. That constraint is terminal to solidarity: ‘In the final analysis what constitutes liberty is the subordination of external to social forces, for it is only in this condition that the latter can develop freely’.\textsuperscript{43}

The problem is that when equality of opportunity is used alongside liberal notions of equality it has not always been able to achieve any of its redistributive goals. Firstly, there is a continual tension between goals of formal equality and more substantive notions of equality. Courts are therefore involved in a balancing act between the two ideals, and are most likely to try to avoid the ‘dangerous sacrifice’ of the principle of equal treatment.\textsuperscript{44} Secondly, liberal notions persist in the requirement that an action is pursued by an individual complainant regardless of whether the aim of the legislation is equal treatment or equality of opportunity etc. For example, the notion of ‘indirect discrimination’ in UK discrimination law seeks

\textsuperscript{43} Durkheim (n 9) 321
\textsuperscript{44} H Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 MLR 16, 18
to reduce institutional barriers to discrimination and thereby achieve greater equality opportunity for disadvantaged groups. However, the legislation requires an individual to show that the rule or practice disproportionately affects one of the protected groups, and does not permit class action. This presents a limitation for the transformative power of such a rule for challenging institutional discrimination, particularly given the difficulties for individuals of access to the justice system.\textsuperscript{45}

Thirdly, liberal or neo-liberal governments have used the rhetoric of substantive equality whilst continuing with an individualist agenda, which has further reduced the impact of these notions for improving the position of vulnerable groups. This equality of opportunity approach is based on an individualistic notion of equality. It seeks to ensure individual autonomy; that all individuals (regardless of gender, ethnicity, sexual orientation and age) should be free to determine their labour market outcomes.\textsuperscript{46} It is also based on the ideal that markets produce a fair distribution of wealth for most people, provided that everyone has a fair opportunity to participate.\textsuperscript{47} Although the equal opportunity approach seeks to remove formal barriers to progress, this is largely pursued as a procedural notion and does not guarantee any substantive fairness of outcome.\textsuperscript{48} Where a substantive outcome is pursued, this is justified on the basis of ‘merit’. However, this criterion of ‘merit’ is very problematic. For vulnerable groups who have suffered disadvantage in the past, they may not have had the opportunity to acquire ‘merit’ and therefore remain

\textsuperscript{45} Bell and Waddington (n 39) 254
\textsuperscript{46} A Coffey, Reconceptualising Social Policy: Sociological Perspectives on Contemporary Social Policy (Open University Press 2004) 63
\textsuperscript{48} S Fredman, Discrimination Law (OUP 2002) 15
in a prejudiced position. As a result, the substantive potential of equality of opportunities i.e. to ensure that all persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good, cannot be attained.\(^49\)

It could be argued, that if there is to be true equality of opportunity then this implies that there must be a further departure from the model of formal equality. One such model is that of ‘positive discrimination’, which permits unequal treatment between groups where additional measures are necessary to ensure that equality is actually realisable.\(^50\) Such a measure suggests a radical departure from formal equality, and as such has rarely featured in anti-discrimination law in practice. Another model, which has appeared in equality statutes in practice, involves combating societal rather than individual discrimination through imposing duties on public sector authorities to promote equality. These duties are triggered not on the identification of individual prejudice, but where there is a pattern of group underrepresentation or evidence of structural discrimination.\(^51\) The burden is on public sector bodies to alter structures of prejudice to accommodate disadvantaged groups.\(^52\) As a concept, this duty moves away from a fault based model of discrimination law, based on individual liability.\(^53\) Societal discrimination is seen as extending far beyond individual acts of prejudice, so that equality can only be meaningfully advanced by those in the best position to address institutional and


\(^{50}\) Coffey (n 46) 65

\(^{51}\) Fredman (n 38) 164


\(^{53}\) Fredman (n 38) 163
structural barriers to equality, regardless of fault or individual responsibility.\textsuperscript{54} To that extent, it has some potential to meet the needs of an expansive view of real equality of opportunity as envisaged on the social law scheme. This is particularly the case where this duty encourages the greater participation of groups affected by discrimination in decision-making processes. In this case, the duties of employers or public bodies are not fixed in advance, but rather respond to the particular problems identified by the (vulnerable) group. What emerges then is a system of negotiation between interest groups, which requires a ‘continuing process of diagnosing the problem working out possible responses, monitoring the effectiveness of strategies, and modifying those strategies as required.’\textsuperscript{55} However, even where this duty has been incorporated into domestic law, this very important feature has not always been included in the legal provisions. This is illustrated by the provisions in relation to the public sector equality duty under the UK Equality Act 2010. Although the inclusion of interested persons was included in the original negotiations for the Equality Bill, that inclusion was not a feature of the final statutory law.\textsuperscript{56} This exclusion, and the very vague nature of the duty, call into question the effectiveness of this measure of achieving the equality of opportunity envisaged on the social law scheme.

Alternatively, it could be argued that a (complete) reliance on anti-discrimination law for the achievement of the goals of the social law scheme is unworkable and misunderstands the creation and operation of law under social law. It is to be

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\begin{itemize}
  \item \textsuperscript{54} Ibid 164
  \item \textsuperscript{55} Ibid 164
  \item \textsuperscript{56} Section 149 Equality Act 2010
\end{itemize}
questioned whether modern equality law can ever meet the needs of social law. Social law requires law to emerge from social actions and processes of negotiation between social groups. Modern anti-discrimination law is arguably too formal, too rigid and too distant from social actors to fulfil any of the functions assigned to it on this scheme. Furthermore, modern anti-discrimination law tends to privilege equal treatment over social inclusion aims; on the social law scheme, this hierarchy would be reversed. There is also the argument that anti-discrimination law does not sufficiently influence work quality. Arguably for Durkheim’s scheme to work there must be acceptable jobs available which allow workers to achieve self-fulfilment. This implies a particular work standard rather than simply equality between (equally bad) jobs. Perhaps then the emphasis of statute should be the implementation of jobs of sufficient quality to allow workers to achieve their goals. Interestingly, the notion of job quality has been used alongside the principle of equal treatment in certain equality laws. In particular, the EU atypical work directives concerning part-time, fixed-term work and agency work\textsuperscript{57} (discussed in detail in chapter 5) state both the achievement of equal treatment and the improvement of quality as contingent aims. Where these aims have been considered complementary rather than conflictual, there have been favourable outcomes for (vulnerable) groups.\textsuperscript{58} However, it is worth stating at this point that this scheme is not without its problems in terms of its representation of Durkheim’s


\textsuperscript{58} M Bell, ‘Between flexicurity and fundamental social rights: the EU Directives on atypical work’, (2012) 37 (1) European Law Review 31, 45
scheme. In particular, there is a reluctance to associate job security with any notion of quality. This is perhaps problematic given the importance of a consistent work experience for worker and social development under conditions of ‘organic solidarity’.

4. Unionism

The theory of social law is generally sympathetic to trade unionism and collective bargaining practices. Indeed, collective bargaining and agreements in the field of labour law have been seen as ‘a major practice of social law’ and the collective contract and its enforcement a good example of the ‘subject of the new Social Law.’ However, in practice trade unions have largely failed to fulfil the functions envisaged on the social law scheme. Although trade union strategies are now changing, trade unions have, in the past, failed to incorporate adequately different labour market interests. This has meant a steady decline in trade union membership and recurrent questions over the legitimacy of the trade union movement. Two reasons for this emerge. The first is the inequality of access to collective bargaining, and the exclusion of workers from groups traditionally disadvantaged in the labour market. The second is the traditional concerns and preoccupations of collective bargaining which have shied away from matters of equality and the protection of vulnerable groups, and have even sometimes

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59 Ewald (n 15) 55
60 O Boulanger, ‘Notes on Social Law’ (1920) 40 Canadian Law Times 399, 400
endorsed racist and exclusionary anti-immigration policies where these were seen as a threat to the dominant workers in a particular industry.\textsuperscript{62}

The inequality of access to collective bargaining stemmed from the original design and application of collective bargaining machinery, which overlooked or excluded certain categories of workers because they were not part of the dominant paradigm.\textsuperscript{63} This dominant paradigm followed the postwar social consensus which viewed the labour force as unfragmented and composed of full-time male workers in regular employment.\textsuperscript{64} It was therefore not seen as problematic to exclude women, for example, from involvement in collective bargaining, because either they were involved in non-productive work in the home or their involvement in the labour market was temporary and contingent, and simply a supplement to the work of the male breadwinner.\textsuperscript{65} Traditional liberal/Fordist accounts also presumed homogeneity in society, and failed to acknowledge labour market segmentation on racial, ethnic or other grounds.\textsuperscript{66} Furthermore, trade unions have, in the past, argued that ‘identity politics’ undermine class-based interests and worker solidarity.\textsuperscript{67} The interest of vulnerable groups in ‘equality’ has been problematic. This interest has resulted in the association of these claims with the pursuit of individualistic human rights goals rather than the collective or social goals of collective bargaining. \textsuperscript{68} Finally, trade unions have traditionally operated at

\textsuperscript{62} Ibid 433
\textsuperscript{63} Ibid 422
\textsuperscript{65} Ibid 77
\textsuperscript{66} Blackett (n 61) 425
\textsuperscript{67} Ibid 435
\textsuperscript{68} Ibid 434
workplace level and reflected the needs of the workers of a particular industry. It has been argued that this is difficult to reconcile with wider issues of inequality (of under-represented groups), which are often systemic in nature.\textsuperscript{69} The result is that trade unions have not traditionally been effective at promoting the interests of vulnerable groups.\textsuperscript{70}

Of course, a trade union strategy which shies away from the representation of particular group interests can never be successful on the social law scheme. On the social law scheme, failure to represent particular interests suggests that the particular group (the trade union) has insufficient flexibility to change in line with labour market conditions. It also suggests that the group does not understand the way in which arguments on the basis of equality (not solely represented by individualistic notions of formal equality) are essential to all kinds of status in society. More recently, trade unions have started to recognise these arguments, and the importance of the representation of group interest for its own legitimacy. Trade unions have now been involved in advocating for minority rights; for instance they were central in lobbying for legislation determining equal rights for agency workers in the UK. They have also increasingly attempted to encourage membership amongst previously excluded groups.\textsuperscript{71} This is true in terms of agency workers in the UK, but it is also true on a much wider, global scale. A good

\textsuperscript{69} Ibid 433
\textsuperscript{71} Indeed, it is worth noting that female membership has overtaken male trade union membership in the UK. In 2012, 29 per cent of female employees were trade union members, as opposed to 23 per cent of male employees. BIS, Trade Union Membership 2012 (May 2013) 10 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204169/bis-13-p77-trade-union-membership-2012.pdf> accessed 2 July 2013
example is provided by the increasing willingness of trade unions to countenance membership by domestic workers, a group previously unrecognised. More information will be provided on these new trade unions in chapter 7, but suffice to say that domestic worker unions now exist in South Africa (the South African Domestic, Service and Allied Workers’ Union) and in Hong Kong (the Hong Kong Domestic and General Workers Union). Domestic workers have also been able to join unions with a wider focus in Kenya (the Kenya Union of Domestic, Hotel, Education Institutions, Hospitals and Allied Workers’ Union) and India (the Self Employed Women’s Association).

However, one of the benefits of the social law scheme in the middle view over the ‘group’ schemes in the wide view, is precisely that it does not dictate the form of group interests or the form of representation of those interests. This leaves room for workers to organise outside of the trade union movement, and to improve or expand the functions of such groups. There have been a number of instances where that organisation has been successful. For example, in chapter 7, the strategies of organisation amongst domestic workers will be discussed. These strategies reveal that domestic workers have been successful at organising in member based organisations outside of the confines of the trade union movement. They have also set up worker co-operatives which extend the functions normally associated with trade unions. These worker co-operatives not only act to market domestic workers’ services and provide training sessions for

72 Bonner (n 70) 9
73 Ibid 6
workers, they also have a social and political agenda that seeks to improve working conditions for all domestic workers. Arguably, these worker cooperatives operate in just the way groups should work on the social law scheme. They represent a set of professionals who have a particular set of interests which include improving working conditions, but which extend beyond the workplace. This kind of organisation therefore represents a real opportunity for these workers to improve not only employment status but also social status, and achieve full integration into social life.

5. Criticisms of social law

There are many criticisms that can be raised against the principles of social law. The first and very important criticism is that it does not fulfil its claims to be the protector of the worst off in society effectively. The process of social law involves the continued negotiation between social groups. There is 'no longer anything but group interests jockeying to assert themselves as being in the general interest'. This implies that the content of the law will depend on the particular strength of those groups negotiating for it and will ultimately reflect the aims of the most powerful groups. Those groups may not necessarily be the same groups as those with power under liberal law, although this is a distinct possibility. For example, in the settlement between workers and employers, the terms of the negotiation are

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74 An example here is the Choices Cooperative in Californias San Fransisco Bay Area. See P Smith, 'Organizing the Unorganizable: private paid household workers and approaches to employee representation' (2000) 79 North Carolina Law Review 45, 87
75 Ewald (n 15) 59
not necessarily systematically modified. This means that there is the possibility for just the same imbalance under the social law scheme as under that of liberal law. Without any reference to universal principles or universal standards under the social law scheme, there is no way of determining what a bad or undesirable settlement is, apart from according to the standards of social normality (which are determined by the strongest groups). This implies that there can be just as many problems for labour on the social law scheme as on the scheme of liberal law. There is also the possibility defining individuals according to group membership may actually obscure power relations and their particular exposure to processes of social exclusion (for example multiple discrimination).\textsuperscript{76}

Where the social law scheme does depart from the liberal scheme is the involvement of law in all the diverse areas of social life, and its willingness to set social as well as public/civil rights. This is certainly an advantage for social groups whose social exclusion is constituted by a large range of factors (both employment and non-employment related). It allows the state to be involved directly in welfare, setting standards according to the social norm. However, it could be argued that in practice, the increased socialisation of the law has contributed to the real difficulties and crises of modern welfare states. The need for the state to become involved in all the minutiae of life means that the state expands from a single legislator into by a multiplicity of ‘regulators’ (public bodies etc) who incessantly generate technical and strategic modifications. The state gets too involved in the

\textsuperscript{76} Bell and Waddington (n 39) 358
direction of society, which ultimately stifles group dynamics and independence. 77
The role of the state also becomes unmanageable. The lack of universal principles
means is a process of constant readjustment; former regulations have to be
adjusted and new ones elaborated.78 This can lead to the state setting limits that
leave too much to discretion because it is simply unable to fulfil the aims given to
it. Alternatively it means a crisis of resources, particularly if secondary groupings
are not in place to modify the demands of citizens on the state. The state collapses
under financial and administrative burdens and legitimacy is transferred to more
liberal and less interventionist approaches to law and society.

6. Conclusions

The social law scheme is very useful in terms of the theorisation of vulnerability in
employment relationships, and what this theorisation means for the structure and
content of labour law. Social law represents a view of society which emphasises
the importance of group membership for both individual experience and social
cohesion. This implies a revision of the traditional function of inequality of
bargaining power and the commodification of labour in the formation of labour law
(which in itself is problematic). Under the social law scheme, it is the inequality of
bargaining power between groups which is important, because it is this inequality
which directs the form and function of the law. This group based theorisation is

77 Courtis (n 26) 45
78 P Thion, Questioning Alternatives to Regulation’ in L Wintgens (ed) Legislation in Context:
Essays in Jurisprudence (Ashgate 2007) 102
useful because it allows a move away from purely liberal theorisations, and perhaps helps us to understand the departures from liberal mechanisms within labour law, in which the classical theorisation of vulnerability is implicated. For example, the social law scheme gives a theoretical basis for the incorporation of substantive and redistributioanal elements into modern anti-discrimination law, and for the inclusion of quality elements alongside the equal treatment scheme. In terms of the theorisation of the commodification of labour, it could be argued that the social law scheme is also very useful. Under the social law scheme, the commodification of labour is not seen as an inevitable result of (the capitalist) system of production. This means that, given the capitalist system is here to stay, the social law scheme is arguably stronger than theories which rely on the transformation of the capitalist system for their legitimacy (Marxist theories), or deny that commodification is a problem (liberal theories). The social law scheme suggests real ways in which vulnerability can be counteracted within the capitalist system, and is therefore arguably of practical modern relevance.

This is not to say that the social law scheme is without its problems. In some sense, it could be argued that it is not a coherent theory, because it has simultaneously been used to justify and explain the institutions of the welfare state (Ewald) as well as the practices of modern liberalism (Thion). Furthermore, more modern applications of social law depart in various ways from Durkheim’s original formulations at the end of the twentieth century. There is also the problem that to a large extent, the social law scheme is aspirational rather than practical, and is rather vague in its prescriptions of the nature of law. Ironically, the fluidity of the
concepts under social law can actually undermine the aspirations of this theory. This is because under this scheme, the weaker groups in society have no independent 'higher' principle of law on which to base their negotiations, and as law is dependent on those negotiations, it is the stronger groups which tend to be more successful in securing the law for themselves. On the other hand, the fluidity of the social law scheme can actually increase its legitimacy. Arguably this scheme is more sustainable than theories which are very prescriptive about the form of group membership (for example trade union membership on the wide view), because those groups have shown a tendency to change and decline in practice. It also arguably has an advantage over those schemes which ignore the importance of worker participation in law and society or provide few mechanisms through which workers can become involved in the content or the direction of law (this will be discussed in greater detail in the next chapter). Modern experience shows that there are many groups and individuals who find that group participation increases both their strength in terms of resolving workplace issues and also their inclusion into society as a whole.
Chapter 4: The narrow view of vulnerability

1. Introduction

This chapter aims to explore labour law theorisations which see vulnerability as attaching to certain individuals in the labour market, rather than to all workers by virtue of their subordination (the wide view) or to specific groups (the middle view). This ‘narrow view’ of vulnerability represents, to a large extent, the preoccupations of modern labour law theorists with challenging the assumptions of traditional labour law positions (these are explored in detail in the ‘wide view’ in Chapter 2). Theorists in the narrow view challenge both of the ‘foundational’ assumptions of classical labour law (in the wide view) that: (1) there is an inbuilt and inevitable inequality of bargaining power between employers and employees which is in need of correction and (2) labour law should aim to counteract the commodification processes of capitalism which tend to dehumanise workers. The argument in the narrow view is that the operation of labour law which rests on these ideals is both under- and over-inclusive. It is over inclusive because it fails to recognise the increasing and desirable autonomy of labour law subjects, and it is under-inclusive because it creates a legal system which focuses on ‘core’ workers at the expense of more peripheral, marginal or ‘precarious’ elements of the workforce. It is argued
in this view that the traditional approach to labour law simply does not understand the practical and empirical reality of the modern operation of labour law contracts.

The question is, of course, the kind of construction which should follow from such deconstructive processes. In the narrow view there is a preoccupation with providing practical ‘modern’ solutions to labour law problems, and as such there is a tendency of authors within this view to align themselves with what is arguably the dominant political and legal paradigm of our time: liberalism. The corollary is that the theoretical foundations of the narrow view are divorced from those of the middle view of vulnerability, as well as those of the wide view. The middle view specifically rejects liberal political notions. For example, it rejects liberal arguments about the desirability of economic freedom (individually and systemically), advocating that the state should be centrally involved in the direction of the economy and the (re)distribution of its effects. The middle view also rejects liberal notions about the function and operation of the legal system. Whereas the liberal legal position rests on the notion that legal and political systems can function separately, advocates of the middle view would argue that the law is inherently political and that it can, and should be, manipulated by different groups and different times. It is only when the law is utilised in this way that it can function to promote any of the goals of society (for example social inclusion and social cohesion).

Although the reliance of the narrow view on liberal notions may make the theorisations under this view more readily acceptable politically, this reliance is not without its problems. One of the central problems is that liberal arguments can just
as easily be used to argue for deregulation in the sphere of labour law, as opposed to (re)regulation. This argument for deregulation can be presented in the following way: normal contract rules produce the most efficient outcomes for employees, workers and the economy as a whole, and as the employment contract functions just as any other contract, there is no need for specific regulation which would disrupt these outcomes.¹ Labour lawyers who adopt the liberal perspective therefore need to find a way in which to deal with this challenge. On the one hand, labour lawyers have been successful at disrupting the automatic association of deregulation with efficiency, and have made innovative suggestions as to ways in which to amend liberal models so that they can more readily incorporate labour law. On the other hand, there is the ever-present danger that raising the challenge to (current) liberal laws through the use of liberal ideals and techniques will only ever represent a partial solution. It will simply reproduce existing problems, because it is the outcome rather than the system of regulation which is under review.

The chapter will proceed by an investigation of the construction of vulnerability in the narrow view, followed by an examination of the preferred solutions to vulnerability under this view. The same categorisations will be used to examine the construction and solutions to vulnerability as were used in the previous two chapters. The first categorisation will be that of ‘inequality of bargaining power’ between labour market subjects, and the second will be the commodification of labour under the capitalist mode of production. Although these categorisations are

largely rejected under the narrow view, these categorisations are still useful in bringing out the contrasts between the wide and middle views of vulnerability on the one hand, with the view of vulnerability under the narrow view on the other.

2. The construction of vulnerability in the narrow view

Inequality of bargaining power

Both the wide view and the narrow view of vulnerability start from the assumption that there are social inequalities in the labour market which the law needs to correct in the interests of justice. Under the wide view, inequalities between employers and employees are inevitable and stem from the insertion of these elements into the economic and political system of capitalism. These inequalities are then reinforced by legal constructions, particularly the ‘figment of the legal mind’ known as the contract of employment. On the middle view, it is inequalities between labour market groups which are the foundation of social functioning, and therefore the foundations of legal regulation. Those labour market groups may be employers and employees, but they can equally be groups of employees. In any event, these inequalities need to be addressed by the operation of law (which functions best if the groups themselves have an input into its creation). The starting point on the narrow view is different. On the narrow view, there are fundamental problems with the idea that there are inbuilt inequalities of bargaining
power either between employers and workers, or amongst workers themselves. There are also deep problems with the idea that the law should function to correct those equalities which exist between the different elements of the labour market.

The starting point for the narrow view of vulnerability is that each labour market participant is an individual and should be treated as such. Underlying this position, it is often possible to discern the liberal conviction that individual freedom is the highest social aim, and that this individual freedom has moral value (perhaps limited to the extent that that freedom does not harm others). In a connected way, it is also possible to discern the (also liberal) assumption that individual freedom includes ‘freedom of contract’; that each individual should have the freedom to enter into those contracts that he/she wishes, and that that freedom should suffer from very little interference by the state or by the law. Finally, the narrow view of vulnerability is not only an argument about freedom, but also about (economic) efficiency. This follows the liberal argument that allowing individual freedom is the best way in which to aid the functioning of the economic market, because individuals are in thus in the best position to constantly make adaptations to this ever changing entity. Furthermore, as the market is the most efficient means of wealth generation, then maximising its functioning will have positive results not only for the individuals directly involved in its operation, but also for society as a whole (the ‘trickle-down effect).

Of course, the individualist/ contractualist approach in the narrow view does not support the idea that there is an inevitable and undesirable inequality of bargaining power between employers and workers (which needs to be corrected by law). As
each member of the labour market is an individual, there are going to be a whole myriad of different power relations between employers and employees/workers, which are most efficiently directed, determined and regulated by the parties themselves. Where those power relations impinge severely on the ‘human’ elements of the employment relation (for example an employee’s dignity) then there may be an argument for regulation of the employment relation (and here there may be reference to the human rights regime). However, in the normal course of events, the parties are in the best position to determine their own relations to meet their own needs, so those parties should be left as far as possible to their own devices (except where the parties’ actions breach contract law). Furthermore, on this view, inequality of bargaining power between employers and workers may be desirable as it may produce the most effective or efficient economic results. According to some (neo-classical) economic theory, inequality of bargaining power can be an indication of the effective operation of a competitive labour market, which tends, for example, to push down prices for labour. ² If this is the case, then it brings into the question the need for labour law, particularly where it acts to correct inequalities of bargaining power to protect workers. This intervention can be seen as imposing costs on the labour market which will have to be absorbed in order that labour market efficiency is maintained. This increase in costs will ultimately be absorbed by workers to their detriment (for example if wage costs are increased, then workers will receive less paid holiday) which will compromise the efficiency of the economy as a whole.

² H Collins, ‘Justifications and Techniques of Legal Regulation of the Employment Relation’ in H Collins, P Davies and R Rideout (eds), Legal Regulation of the Employment Relation (Hart 2000) 10
In practice, there are very few labour lawyers who would support this (neo-classical) economic perspective in its entirety. A more popular perspective is that derived from new institutional economics, which suggests that the economic market does not always produce the most efficient results, and that it is dogged by certain ‘market failures’. These market failures include inequality of bargaining power. The argument is that inequality of bargaining power can exist in the labour market, and where it does exist it creates inefficiencies because it tends to promote opportunistic behaviour on the part of employers to exploit this power. This is a problem for individual (vulnerable) workers because they do not have the opportunity to challenge this behaviour, and it is also a problem for the economy as a whole. It is a problem for the economy as a whole because it means that employers tend to focus on short-term goals, rather than long term investment in employees. For developed economies, which rely on the knowledge and skills base of their workers, this means that the economy as a whole would be less efficient. In this situation, there may be an argument for intervention in the market, for example through labour laws which encourage training programmes and employment security.³

Modern preoccupations on the narrow view

In any event, labour lawyers in the narrow view tend to agree that (combating) inequality of bargaining power is not an effective foundation for labour law. Although inequality of bargaining power may represent market failure, this is not

³ H Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 ILJ 17, 29
necessarily the case. Moreover, inequality of bargaining power simply does not represent the reality of the majority of modern employment relationships which have been transformed by the processes of ‘globalisation’. The argument proceeds as follows. Prior to the ‘globalisation’ phenomenon, and after the two world wars, it was possible to identify a distinct and stable employment relationship between employers and workers. This ‘standard employment relationship’ (full time, year round employment for a single employer) was a function of the ‘Fordist’ model of production in existence at the time and also the social compromise which had grown up around it. This ‘Fordist’ model consisted of manufacturing production in large factory units run by one company. The employment structure was male dominated, with the male employee functioning as the ‘breadwinner’ for his family. Tasks were closely defined, and the structure of the enterprise was characterised by a clear structure of hierarchies. Whilst it was possible to identify ‘subordination’ within these enterprises, and a distinct power on the part of the employer to command and control the workforce, the trade off was a certain amount of stability and security within the employment relationship. This stability and security was reinforced both by the operation of the social security system, which guaranteed an income for the incapacitated worker and his family outside employment and by the operation of (labour) law based on the notion of the contract of employment.

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4 G Rodgers, ‘Precarious Work in Western Europe: The state of the debate’ in G Rodgers and J Rodgers (eds), Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe (ILO 1989) 1
6 S Deakin, ‘Does the ‘Personal Employment Contract’ Provide a Basis for the Reunification of Employment Law?’ (2007) 36 (1) ILJ 68, 68
However, this system of industrial organisation (and social compromise) started to break down with the processes of ‘globalisation’. The increased speed of transport and communication meant a growth in international trade and investment. Transnational companies proliferated, aided by a political commitment to the deregulation of economies and the opening up of international borders. At the same time, the nature of production changed. There was a shift away from the manufacturing sector towards the service sector. Information and knowledge became commodities in their own right, and these commodities were not tied to geographical location like the traditional ‘raw materials’ of production. Furthermore, the increase in global competition meant that companies had to become more ‘flexible’ in the way they organised production. This was true for the global transnational corporations just as much as the new ‘micro-enterprises’, both aiming to meet the spiralling upward demand for new products in innovative ways. The result was a series of industrial arrangements which no longer complied with the ‘Fordist’ model of production. Industrial organisation became characterised by a whole range of disaggregative practices such as subcontracting, franchising, networking and outsourcing. Vertical integration was replaced by flat hierarchies. Links between companies became more important than links within them, as firms seeking specialisation came to rely increasingly on other firms in the production chain.

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8 M Weiss, ‘Re-Inventing Labour Law?’ in G Davidov and B Langille (eds), The Idea of Labour Law (OUP 2011) 45
9 Fudge and Owens (n 7) 7
The argument continues that these globalisation processes have resulted in a profound change in employment patterns and the way in which the workforce operates. On the one hand, there has been the emergence of ‘knowledge workers’, high functioning entrepreneurs who can build their own networks and profit from the reliance of enterprises on managerial, professional and technological expertise.\(^\text{10}\) On the other hand, there are the ‘precarious’ or ‘vulnerable’ workers who are forced into ‘flexible’ work, but do not have the skill set to guarantee employment security. The prospects for these workers are generally assessed negatively; these jobs are described as typically poorly paid, unstable and outside the scope of collective representation.\(^\text{11}\) In neither case do these workers fit the traditional employment pattern under the ‘standard employment relationship’. Knowledge workers have significant labour market power because their skills constitute highly desirable ‘human capital’. In Marxist terms, these workers own the means of production (knowledge), so that the dividing line between these workers and the businesses for which they work is increasingly blurred. It is no longer the case of a worker in a subordinate position working for an employer who has complete control over the person and the work. Furthermore, these knowledge workers are not reliant on job security or permanent positions. They are independent risk takers who are highly mobile and are not tied down by geographical location. These high status workers have sufficient employment security to enable them to take the risk of periods of unemployment so they desire neither the old occupational status nor the institutions which surrounded it. In the

\(^{10}\) J Fudge, ‘The Legal Boundaries of Employer, Precarious Workers, and Labour Protection’ in G Davidov and B Langille (eds), *The Boundaries and Frontiers of Labour Law* (Hart 2006) 296

\(^{11}\) Ibid 296
same way, ‘precarious’ workers do not fit the traditional or standard employment models. These precarious workers are required to meet the demands for firms for ‘flexible forms’ of labour, and so positions are ‘atypical’ in the sense of being part-time, temporary or for a fixed term only. There may be very little commitment on either side to receive or accept work (casual or ‘zero-hours’ contracts being good examples), or workers may be operating outside the formal labour market completely. In any case, none of these forms of work fit with the ‘standard employment relationship’: full-time, year round employment for a single employer.

This analysis raises a number of serious questions for labour law and for the foundation of labour law on the notion of inequality of bargaining power under a standard employment relationship. It appears that if this model does not reflect economic reality, then laws based on this model will produce unfair results for certain of those workers falling outside it. By way of example, labour law relies on the finding of a level of subordination (flowing from the inequality of bargaining power between employers and workers) inherent in every contract of employment which remains stable over time.\(^\text{12}\) Indeed, this legal categorisation (of subordination) has been used to justify the distinction between those who are in need of protection (i.e. dependent employees) and those who are outside the need for legal protection (independent contractors).\(^\text{13}\) The argument is that for those in subordinate relationships, market failures will mean that they will have to live with terms and conditions of work that society finds unacceptable. As a result they are

\(^{12}\) Deakin (n 6) 69

vulnerable and deserving of legal protection. By contrast, ‘independent contractors’ are capable of achieving contracts with employers which are socially acceptable as a result of their increased market power. They therefore do not require the protection of the legal system as they can ‘take care of themselves’.\textsuperscript{14} In this context precarious workers face the risk of falling outside the boundaries of legal protection. The law fails to recognise their subordination because their contracts do not comply with the standard contract of employment. This means that they are judged to be independent contractors and are therefore outside of the law.

In British labour law, ‘subordination’ is judged according to two elements: the level of ‘control’ of an employer over an employee and/or the level of economic dependence exhibited by an employee (in terms of economic risks undertaken by the employee). These elements are assessed on a case-by-case basis according to a number of (factual) indicia, including the ownership of plant and materials\textsuperscript{15}, arrangements for the payment of tax and national insurance,\textsuperscript{16} arrangements for holiday and sick pay,\textsuperscript{17} and the label given to the relationship by the parties.\textsuperscript{18} However, there are considerable problems associated with these elements of ‘subordination’ and their application in practice. The notion of ‘control’ is extremely vague and difficult to determine, especially with the increase in the diversity of production models (out-sourcing, piece-working etc).\textsuperscript{19} For instance, a worker may agree to a general power of direction, but maintain considerable autonomy in the

\textsuperscript{14} Ibid 359
\textsuperscript{15} \textit{Ready Mixed Concrete v Minister for Pensions and National Insurance} [1968] 2 QB 497 (QB)
\textsuperscript{16} \textit{Lane v Shire Roofing Co Ltd} [1995] IRLR 493 (CA)
\textsuperscript{17} \textit{O’Kelly v Trusthouse Forte Ltd} [1983] ICR 728
\textsuperscript{18} \textit{Massey v Crown Life Insurance Company} [1978] ICR 590 (CA)
\textsuperscript{19} H Collins ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’, (1990) 10 (3) \textit{Oxford Journal of Legal Studies} 353, 353
nature of their work. Such a worker may, as a result, consider themselves an independent contractor *in fact*, but actually come closer to the definition of a dependent worker in legal terms. There are also considerable problems with the notion of economic dependence, which attempts to measure how far a worker bears the risk of profit or loss involved in a particular venture. The idea is that ‘independent contractors’ can be identified as those persons who take on these risks, whereas ‘employees’ are protected from these risks by their employers, or are compensated for the risks by payment of a wage.\(^\text{20}\) However, in actual fact, ‘employees’ often bear significant economic risks. One of the most obvious is the risk of job loss,\(^\text{21}\) but many employees also take on the risk of reduced income from poor performance, or stand to benefit from increased effort through profit-related pay schemes.\(^\text{22}\) Furthermore, employees are often not compensated for these risks: employees with less job security are often those with lower wages, and if even where there is some compensation for risk, this is ‘far from being a full and realistic compensation’.\(^\text{23}\)

As we have seen, the narrow view is particularly concerned that the definitions and tests currently used to differentiate employees from independent contractors are unable to identify employees in ‘atypical’ relationships. Such workers are often deemed to be ‘independent contractors’ as they bear many of the risks of economic dependence (such as the unavailability of work) and may not be subject

\(^{\text{20}}\) Ibid 370
\(^{\text{21}}\) G Davidov (n 13) 390
\(^{\text{22}}\) Collins (n 19) 353
\(^{\text{23}}\) Davidov (n 13) 390
to the ‘controls’ associated with employment status.\textsuperscript{24} They therefore fall outside the scope of labour law protection, despite their vulnerability in fact to both oppressive employment terms and the vagarities of the market.\textsuperscript{25} This situation is compounded by the contractual nature of employment rights, even those laid down in statute.\textsuperscript{26} Those with atypical contracts therefore find themselves unable to rely on the terms of their contract to guarantee protection (as these contracts are temporary, poorly constructed or exclude protection), as well as struggling to fulfil statutory criteria regarding the nature of their employment relation. The lack of legal protection for these marginal workers, it is argued, has created an incentive to firms to accelerate the vertical disintegration of production in order to avoid the costs associated with labour law, which in turn has led to greater worker insecurity and vulnerability.\textsuperscript{27}

The problems faced by marginal workers can be illustrated with reference to the requirement under UK law to prove ‘mutuality of obligation’ in order to establish control and economic dependence in an employment relationship. This requirement is particularly difficult to prove in fragmented, ‘atypical’ relationships even where the employment is provided for a single employer. In the case of \textit{Carmichael} for example, casual tour guides attempted to establish that they worked for British Gas under contracts for service.\textsuperscript{28} However, although they were able to convince the court that they were working under such contracts when actually employed as guides, they failed to establish the mutuality of obligation.

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\textsuperscript{24} S Fredman ‘Women at work: the broken promise of flexicurity’ (2004) 33(4) ILJ 299, 300 \\
\textsuperscript{25} Collins (n 19) 372 \\
\textsuperscript{26} B Hepple, ‘Restructuring Employment Rights’ (1986) 15 (1) ILJ 69, 69-70 \\
\textsuperscript{27} Collins (n 19) 374 \\
\textsuperscript{28} \textit{Carmichael v National Power plc} [2000] IRLR 43 (HL)
\end{flushleft}
required for employment status. The court decided that the fact that the employers
did not have the contractual right to insist on the workers’ services on all occasions
meant that they could not have a contractual relationship. Hence, the employer’s
freedom to choose when to offer work, indicative of the employer’s power and
control over the workers, and hence the subordinate position of the workers, was
recognised not in fact as an element of subordination but as a ‘risk’ undertaken by
the ‘independent’ casual workers (in the same way that market risk would be
undertaken by independent contractors). 29

Decommodification of labour

From the previous section, it is clear that under the narrow view, there is a
challenge both to the idea that inequality of bargaining power exists between
employers and employees, and that the aim of labour law should be to equalise
that power to ensure fairness for workers. In a similar way, the narrow view
challenges the second foundational assumption of classical labour law: that labour
law exists to counteract the commodification of labour. In the classical scheme, the
commodification of labour is both inevitable and undesirable. It stems from the
insertion of labour into the capitalist system which tends to treat workers as a
means to an end, rather than as individuals with value in their own right
(unconnected to the capitalist system). This means that commodification is a

29 Fredman (n 24) 312. This reasoning was also followed in the recent case of Stringfellows
Restaurants Ltd v Quashie [2012] EWCA Civ 1735 discussed in footnote 45 below.
dehumanising process which has deleterious consequences for workers, because they are not treated with the dignity that they deserve. This position is echoed in the middle view, but only in the situation where workers are unable to fulfil their potential through work (which is not of itself inevitable).

By contrast, on the narrow view of vulnerability, commodification is inevitable but is also desirable. It is inevitable because this commodification is essential to the functioning of the economy. The labour market operates like other markets, in being determined by the market processes of supply and demand. Workers form the essential elements of the labour market, and are themselves subject to all the normal economic processes. It is because workers are commodities and subject to all the normal economic processes, that they can be part of the wealth generating processes of capitalism, and are ultimately able to fulfil their desires through work. The commodification of labour is therefore desirable because workers can use their labour to satisfy their own individual preferences, and are not beholden to 'external' manipulation by other (political) forces which would disrupt their desires.

Furthermore, the commodification of labour is a useful theoretical tool in the narrow view. This is because the theoretical perspective is essentially an economic one, and economic theory operates by reducing real world phenomena (workers) to theoretical elements (labour), in order to build theoretical models which will predict the most efficient outcome for markets and ultimately for workers. The idea that labour will act as a 'commodity' in a predictable and rational way is essential to these models, because it is only in this way that labour market and economic outcomes can be forecast.
On the narrow view, it is therefore difficult to see commodification as a problem of itself. To view commodification itself as a problem would imply not only a rejection of capitalist processes of production, but also the reliance on economic theory as a whole. Instead, the problems are presented as particular, and as an inability of certain individuals to take the benefit of the advantages of the knowledge economy. The example of ‘atypical work’ is illustrative. Under the narrow view, ‘atypical work’ is not necessarily seen as a problem in itself. This kind of work presents certain distinct benefits to employees (as well as to employers). Firstly, the existence of atypical work means that employers have the opportunity to create more jobs, meaning that there are likely to be more jobs available for the workforce as a whole. Secondly, the existence of atypical work means that workers have more flexibility themselves in determining their work/life balance. Furthermore, many individuals have benefitted from the dissolution of traditional work forms (the ‘knowledge’ workers). Difficulties which arise are particular rather than systemic. For example, individual atypical work contracts may not allow the same access to training that ‘typical’ work contracts allows. For the individuals under these particular contracts, it will be difficult to take advantage of the benefits of the global knowledge economy.

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30 ACL Davies, Perspectives on Labour Law (OUP 2009) 82
3. **Solutions to vulnerability in the narrow view**

The narrow view is politically conservative. It is complicit with modern liberal political views, that the economy is the best means of wealth generation, and that the excessive regulation of the economy can have deleterious effects. It is also complicit with liberal notions that the individual is the most important unit in society, and that the law should ensure individual freedom as far as possible. It follows that the solutions to the problems faced by labour can also be seen as relatively conservative. There has been a focus on ensuring that legal categorisations are accurate in the sense of reflecting and supporting our current economic organisation. There has also been a focus on ensuring that legal regulation stands up to economic theory: that it can be economically justified and does not excessively compromise freedom of contract. The idea is that if legal criteria more effectively match economic ones, then there will be less vulnerability (fewer deserving workers falling outside the system). Those who do fall outside the system will be those suffering ‘abuse’ beyond the bounds of the contractual system, and their needs will be met by other systems of protection, particularly human rights. The following section will therefore firstly discuss in more detail the attempts in the narrow view to provide a better ‘match’ between the economic reality of labour contracts and the laws that support them, both in the detail and the ethos of the law. The second part of this section will focus on the (liberal) human rights approach to labour law, which has increasingly been the response of authors complicit with the narrow view to (the problems of) commodification of labour.
Inequality of bargaining power

Reorganising the notion of ‘subordination’

It is suggested on the narrow view that in order to better protect vulnerable workers in the current economic climate, we need to better understand the nature of ‘subordination’ in modern contracts. This is perhaps more a factual rather than a legal question, but it is hoped that such a discussion will contribute to an understanding of the developing disjuncture between contractual (economic) inequality as opposed to inequality as perceived by the legal system. A greater understanding of the nature of ‘subordination’ would therefore perhaps allow the revision of indicia currently used by the courts to determine employment status, to make these indicia more reflective of the reality of the majority of modern contracts. Indeed, it is precisely the fact that the current indicia (based on the notion of subordination and inequality of bargaining) power no longer reflect the reality of the majority of contracts which mean that they may fail, because indicia are only useful if they are assessing the marginal against a common dominant

32 It is difficult to gain precise figures for the use of ‘non-standard’ contracts in the workplace. However, the recent study states that 25% of workplaces surveyed had some employees on temporary or fixed term contracts, 10% had some agency workers, and 8% made use of zero-hours contracts. B van Wanrooy, H Bewley, A Bryson, J Forth, S Freeth, L Stokes and S Wood, ‘2011 Workplace Employment Relations Study’ 10 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210103/13-1010-WERS-first-findings-report-third-edition-may-2013.pdf> accessed 3 July 2013
type. Otherwise, there is no reference point by which the ‘marginal’ can be tested.33

Davidov suggests that ‘control’ in modern employment contracts must be considered much more broadly than traditional legal tests allow.34 He uses the concept of ‘democratic deficits’ to explain that ‘control’ in modern contracts can refer to any aspect of a working relationship which reduces the ability of a worker to control his/her own working life.35 In modern contracts, control may be exercised ‘directly’ (through the use of supervision, monitoring or commands) in line with the criteria of ‘control’ in current legal indica tests. However, particularly in modern contracts, control may also be exercised much more diffusely or indirectly and still indicate sufficient employee vulnerability to allow qualification for labour law protection. This indirect control can refer to bureaucratic rules pertaining to the evaluation of performance for example, which create incentives for employees to comply with employer directives. It is also argued that in modern contracts, an employer can exercise ‘indirect’ control through the checking of final output. This is an interesting assertion, given that this method of ‘control’ is traditionally associated with business relations and ‘task service’ contracts rather than employment or ‘time service contracts’.36 However, this assertion makes sense in the context of modern homeworking contracts where a buyer (independent of contractual obligation as such) can decide after checking the final product whether or not to take it. This kind of power would appear to indicate that the buyer actually

33 Goldin (n 31) 121
34 G Davidov (n 13) 381
35 Ibid 381
36 Ibid 399; H Collins (n 19) 379
controls the worker in a way which would characterise an employment rather than an independent contractor relationship.\textsuperscript{37}

It has also been argued that the notion of economic dependence as a criterion for deciding employee status needs to be altered in order to capture those actually in need of protection.\textsuperscript{38} As we have seen, the attempt to separate employees from independent contractors on the basis of risk allocation is flawed. This is because the allocation is risk is often imposed by an employer. This means that the assumption of risk does not indicate increased market power (i.e. of an independent contractor over an employee); it can be evidence of a weak bargaining position which would justify more rather than less protection.\textsuperscript{39} Davidov therefore suggests that economic dependency should be judged on \textit{ability} to spread risks, rather than the division of risk in practice. On this scheme, if a person is able to spread risk outside an employment relationship, then he/she will be an independent contractor. A person unable to spread risk in this way would be deemed a worker and in need of protection. Of course, on its own, such a test cannot be a complete indication of employment status; some employees do take on more than one job. It is suggested, however, that this test can be useful when used in conjunction with the control test above. Davidov also suggests that to determine employment status, it is not only ‘control’ and ‘economic dependence’ but also ‘psychological dependence’ which needs to be assessed. He refers to this psychological dependence as the third ‘axis of vulnerability’. This axis represents

\textsuperscript{37} Ibid 406
\textsuperscript{38} Ibid 391
\textsuperscript{39} Ibid 391
the dependency of employees on an employment relationship for the fulfilment of social and psychological needs. Thus an employee might depend on an employment relationship for person expression and creativity, intellectual progress or individual advancement. An employee may also rely on the social standing associated with work which may contribute to feelings of ‘usefulness’ or ‘belonging’.

By way of contrast, independent contractors do not rely on one relationship for the fulfilment of these needs. Rather, whilst independent contractors may have similar needs, they will be able to fulfil those needs through their relationships with a number of different clients.

The problem with these suggestions is twofold. The first is that, brought together, the axes of vulnerability represent another set of indicia to be considered by the courts. Not only are these indicia difficult to measure in practical terms, it is argued that they are unhelpful in the absence of a clear ‘dominant type’ of contract of employment (the standard employment relationship). This is because in the absence of this dominant contract type, indicia have no clear grounding and there is no logical reason why the ‘indica’ referred to cannot be developed, added to etc. These indicia are therefore ineffective at measuring current employment situations, but are also apt to become more and more unwieldy over time and more and more ineffective as more indicia are added.

The second problem with Davidov’s scheme is the absence of priority between the different ‘axes of vulnerability’. This lack of priority has caused injustice in the application of indicia tests in the past, as

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40 Ibid 388
41 Ibid 389
42 Goldin (n 31) 124
can be illustrated in the case of *O’Kelly.*\(^{43}\) Here, despite evidence of a number indicators of dependence for these (casual) workers, the decision that there was insufficient mutuality of obligation between the workers and their employer resulted in the court concluding that no employment relationship existed.\(^{44}\)

This kind of injustice is increasingly dealt with by ‘purposive’ approaches to the determination of the employment relationship in the courts. This means, for example, that the courts have been (increasingly) willing to look beyond the contractual agreement to determine what actually happens on a day-to-day basis between the parties. It could be argued that this is particularly important in the context of modern ‘flexible’ contracts where standard form contracts entered into by the parties at the beginning of the employment relationship are not adequately representative of the ‘bureaucratic’ power exercised by the employer in the determination of the activities of the employee.\(^{45}\) However, there remains great inconsistency in court decisions in this area.\(^{46}\) The main problem is the conflict between the notion of bureaucratic power and the idea of freedom of contract, and certainly this conflict is difficult to reconcile on the narrow view.\(^{47}\) There is also the

\(^{43}\) *O’Kelly* (n 17)

\(^{44}\) Collins (n 19) 379


\(^{46}\) A comparison can be made here between the decision in *Massey v Crown Life Insurance Company* [1978] ICR 590 (CA) and *Fergusson v John Dawson & Partners (Contractors) Limited* [1976] IRLR 346 (CA). In both cases the parties agreed to self-employment status (and took advantage of this status in terms of the payment of tax), but whereas this was deemed to reflect the reality of the situation in the former case, this was not so in the latter case.

\(^{47}\) A good example of this conflict is *Consistent Group v Kalwak* [2008] IRLR 505 in which the Court held that ‘It is not the function of the court or an employment tribunal to recast the parties’ bargain. If a term solely agreed in writing is to be rejected in favour of a different one, it can only be done by a clear finding that the real agreement was to that different effect and that the term was included by [the parties] so as to present a misleadingly different impression. In that regard, a finding that the contract is in part a sham require[s] a finding that both parties intended it to paint in that respect a
problem that of necessity a purposive approach is no guarantee of a particular outcome, as the approach is completely dependent on the facts of the case. The result is that rights for workers can be eroded, just as easily as they can be constructed. These practical effects will be discussed in more detail in chapter 6 (the case study on agency work).

Expanding the categories of dependence

One of the major approaches to the reorganisation of labour law to better cover those in need of protection is to expand the category of ‘employee’ to include those who would traditionally be considered independent contractors. Already there have been attempts to extend this personal scope through the introduction of the intermediate category of ‘worker’. This category was a feature of much legislation introduced by the Labour government in Britain (1997-2010), and appeared for example in the Working Time Regulations 1998 (SI 1998/1833) and the National Minimum Wage Act 1998. The term ‘worker’ includes all employees, plus those who agree to perform work personally, provided that they are not in business on false picture as to the true nature of their respective obligations.” However, this is a slightly different position to the more recent decision in ProtectaCoat Firthglow Limited v Szilagyi [2009] IRLR 365. Here, the court stated that a tribunal should look to the contract first as this is ‘ordinarily where the answer is to be found’ as to the nature of the employment relationship. However if the terms of the contract are brought into question by either party, then it is up to the court to decide the true nature of the relationship (paras 55-56). This position has been followed in the latest decisions, including Autoclenz Ltd v Belcher & Ors [2009] EWCA 1046, and Pulse Healthcare v Carewatch Care Services Limited [2012] All ER (D) 113 (Aug).

48 An example is the recent case of Jivraj v Hashwani [2012] IRLR 827. In this case, it was decided that the arbitrator was an independent provider of services in order that the arbitration clause in the commercial agreement would not be void. However the effect of this decision may be that it is harder for Claimants to fall within the definition of employment under the Equality Act 2010.
their own account.\textsuperscript{49} Its aim is to capture those persons who do not qualify for employee status, as they do not meet sufficient of the indicia necessary (in terms of control, risk etc), but who are nevertheless in a position of dependency vis-a-vis their employer.\textsuperscript{50} In some cases, the worker test has been successful and allowed the courts to push the boundary of protection in the worker’s favour.\textsuperscript{51} On other occasions, dependent status has been denied, despite evidence of personal service and inability on the part of the claimants to spread economic risk.\textsuperscript{52}

The problems associated with the application of the worker test have been blamed on a number of features. The first is that the worker test relies on many of the same indicia as the test for employee status, although the dividing line is supposedly more in the worker’s favour.\textsuperscript{53} Thus, the worker test suffers from the same inconsistencies associated with the application of indicia to reality as the employee test. Furthermore, the use of the same criteria introduces ridgities into the worker test which may not have been intended in the drafting of the definition. An example is the continued use of the concept of ‘mutuality of obligation’ (one of the main tests to determine employee status) to determine worker status in situations where there is more than a single wage-work bargain.\textsuperscript{54} The result is the exclusion of many contracts which may otherwise have been included in the definition. The second problem with the worker test is the lack of explanation in

\textsuperscript{49} G Davidov, ‘Who is a worker?’ (2005) 34 ILJ 57, 59
\textsuperscript{50} Byrne Brothers (Formwork) Limited v Baird [2002] IRLR 96 (EAT), para 2(5)
\textsuperscript{51} Redrow Homes (Yorkshire) limited v Wright [2004] 3 All ER 98
\textsuperscript{52} Firthglow Limited (t/a Protectacoat) v Descombes and Another [2004] All ER (D) 415
\textsuperscript{53} Davidov (n 49) 59
\textsuperscript{54} A C L Davies, ‘The Contract for Intermittent Employment’ (2007) 36 (1) ILJ 102, 105
legislation of what constitutes a ‘business’ for the purposes of the test. This lack of definition can make the use of the worker concept meaningless: a work relationship characterised by significant dependency on a single employer might also involve a business conducted by a worker. The existence of such a ‘business’ might therefore mean that the worker does not qualify for employment rights, despite other conditions of dependency. Thirdly, there are problems regarding the requirement in the worker test for ‘personal service’. This is because there have been cases of employers successfully avoiding a finding of worker status by the use of a ‘substitution clause’, despite personal service existing in practice. An example is provided by the case of Tanton. In this case, the claimant worked under an ‘agreement for services’ which required him to arrange a substitute should he be unable or unwilling to work. The Court of Appeal held that the claimant was not a worker as he was allowed to arrange for another person to carry out his work and could therefore not fulfil the criteria for ‘personal service’ in the worker definition. This decision stood despite the fact that no substitutes were actually used in practice.

The problems with the worker category have led some authors to suggest alternative (and possibly more wide ranging) solutions. Freedland suggested the introduction of a new conceptual category of the ‘personal employment contract’ to capture all those in need of protection. Under his scheme, the labels of ‘employee’, ‘worker’ and ‘independent contractor’ were rejected. Rather, eligibility

56 Ibid 254
57 Express and Echo Publications Limited v Tanton [1999] ICR 693 (CA)
58 Deakin (n 6) 78
for protection was to be decided at the boundary between work carried out in person as opposed to work ‘in the conduct of an independent business or professional practice’. The intention was to narrow the concept of ‘business’ (such as in the worker definition) so that fewer ‘independent contractors’ were excluded from employment protection. The ‘personal employment contract’ could also be used as a vehicle to include a greater number of ‘casual’ or ‘marginal’ workers within the scope of employment protection. This is because, on Freedland’s scheme, an employment contract could exist even where the relationship was not continuous, for example, as a ‘contract for intermittent employment’ or a ‘contract for occasional employment’. This continuity is currently denied on the basis of ‘mutuality of obligation’ arguments, and the lack of the recognition by the courts that a contract of employment might contain a broad power of suspension.

Freedland’s analysis is a good example of an attempt to ensure that labour law is more responsive to the reality of current employment contracts in the global knowledge economy. It reflects the central idea in the narrow view that the legal system can create vulnerability where it fails to respond the realities of the economic system, and that this can fall hardest on those marginal to the functioning of the economy. However, like Davidov’s analysis before it, it also

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60 Ibid 25
61 Ibid 109-11
62 Davies (n 54) 107-8
63 It is also worth noting the development of these ideas in M Freedland and N Countouris, *The Legal Construction of Personal Work Relations* (Oxford University Press 2011). Here the authors present the idea that employment should be viewed as a set of personal work relations. They assert that the idea of a personal work relation should form a new basis for the whole range of ways in which employment contracts are governed. This governance should be through a set of values: dignity, capability and stability which will enable greater fairness and create a more sustainable labour law.
demonstrates the difficulties and limitations of this kind of analysis (for vulnerable workers). Decisions about employment status remain contractual, and there remains a dividing line between those that have sufficient contractual status to be determined an employee/worker, and those that do not. Those workers who are unable to show this contractual status may be able to take the economic risks associated with independent contractor status, but there will also be marginal or precarious workers who continue to fall within this category. If those workers are to take the benefit of employment status, they depend on a purposive approach to employment contracts in the courts. This ‘purposive approach’ is rather unreliable as a source of protection, as is illustrated in the previous section (and may in any event be outside of the narrow view).

*Flexicurity*

The narrow view is concerned to improve individual experience in the labour market. It is argued that this experience can best be improved by law and policy which responds to economic developments. At EU level, this perspective is reflected in the adoption of ‘flexicurity’ as a guiding model for both policy and legal developments. Flexicurity is ‘an integrated strategy to enhance, at the same time, flexibility and security in the labour market.’

It is argued that vulnerabilities created by the new global economic environment can only be addressed by

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combining ‘flexible and reliable contractual arrangements’ with ‘comprehensive lifelong learning strategies’ and ‘active labour market policies’ which foster employment security.\textsuperscript{65} The idea is that employment security is generated through regulation which aids individual development (through training for example) rather than ‘traditional’ employment regulation which aims towards job security (the protection of a particular job).\textsuperscript{66} At the same time, strong social security systems are required which provide adequate security for workers between jobs. In the Commission’s Communication on the subject, reference is made to examples of successful implementation of flexicurity policy, including the reduction in unemployment following the passing of the Flexibility and Security Act in the Netherlands in January 1999 and the ‘Golden Triangle’ of flexible contractual arrangements, generous social security and welfare schemes and extensive active labour market policies implemented in Denmark.\textsuperscript{67}

The ‘flexicurity’ approach can be seen in the development of ‘atypical work’ Directives at EU level (subsequently implemented in the member states), concerning part-time, fixed term and temporary agency work.\textsuperscript{68} These Directives

\textsuperscript{65} Ibid 6
\textsuperscript{66} Here comparison can be made with the idea of ‘regulation for competitiveness’. Particular strategies for the development of such regulation include default rules more appropriate to flexible employment relations than are currently in place. For example, for a knowledge-driven employment relation there must be a requirement for employees to be given detailed information about business plans, production methods, staffing requirements. Employers would, in turn expect employees to use their know-how and skills to help in innovation to improve the competitiveness of the business. Requirements for training would become more stringent, with requirements for employers to provide worthwhile training opportunities, including training in general skills. Collins (n 3) 17 ff
\textsuperscript{67} European Commission (n 64) 20-21
are founded on the recognition of the value of the flexibility in atypical work arrangements, and in relation to part-time and temporary agency work these kinds of contracts are actively encouraged.\textsuperscript{69} At the same time, these Directives aim to improve the position of those atypical workers and the quality of their work through the imposition of a minimum standard of equal treatment (in contractual terms) between atypical workers and their ‘full-time’ or ‘permanent’ colleagues.\textsuperscript{70} The full details of these atypical work Directives will be discussed in chapter 5. However, it is worth pointing out at this juncture that the association of these Directives with the idea of ‘flexicurity’ presents difficulties. There are difficulties in theoretical terms with reconciling an increase in the use of flexible contracts with increasing ‘quality’, where standards are guaranteed only by (quite restrictive) anti-discrimination rights. There is the ever present danger that these statutes encourage flexibility without having sufficient safeguards to ensure ‘security’ for workers.\textsuperscript{71} It is also worth pointing out that the definitional problems associated with atypical contracts (and therefore their employment status) are not dealt with adequately in this legislation.\textsuperscript{72}

\begin{footnotesize}

\textsuperscript{69} Clause 5 (a) PTWD provides that ‘Member states... should identify and review obstacles of a legal or administrative measure which may limit the opportunities for part-time work, and where appropriate, eliminate them, and Article 2 TAWD refers to the need to ‘establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and the development of flexible forms of working’. The FTWD includes more protective elements and there is more emphasis on the restriction of these contracts: Clause 5 FTWD aims to introduce objective limits in the recourse to such contracts, so as to justify the renewal or maximum number of renewals of successive contracts.

\textsuperscript{70} Clause 1 (a) PTWD, Clause 1(a) FTWD and Article 2 TAWD


\textsuperscript{72} For example, in relation to agency workers the UK legislation provides that a ‘contract’ may be implied between a temporary work agency and the agency worker but does not designate the form

\end{footnotesize}
Furthermore, it is to be questioned whether these directives really do meet their economic aims (that the law should mirror and respond to economic reality). The creation of such legislation inevitably requires the standardisation of 'atypical work' relationships, and the categorisation of atypical workers into certain categories or 'groups'. The standardisation process is problematical on the narrow view as does not recognise the diversity of relationships which constitute 'atypical work', which have been shown to fall on a spectrum from standard to non-standard work according to a number of ‘dimensions of precariousness’\(^{73}\), or ‘vulnerability vectors’.\(^{74}\) The categorisation process is further problematical as the protection of certain ‘groups’ of atypical workers only serves to reinforce the marginalisation of workers: this legislation has the function of excluding ‘very’ marginal atypical workers from protection, by purporting to bring ‘marginalised’ groups within the scope of labour law. This can be illustrated by reference to zero-hour contract workers, who have failed to attain employment status and are not directly protected by any atypical worker legislation.\(^{75}\) There is the possibility that some of these workers may fall within the scope of the fixed-term provisions, but this will depend on the particular facts of each case (i.e. whether they work for a single employer or not) and is by no means guaranteed. Rather, it has been suggested that such workers would only really be assisted by ‘flexicurity’ type policies and

\(^{73}\) Rodgers (n 4) 1.


\(^{75}\) P Leighton, ‘Problems Continue for Zero Hours Workers’ (2002) 31(1) ILJ 71, 78
legislation which do not rely on the grouping of workers, but on hours thresholds for employment status qualification.\textsuperscript{76}

\textbf{Commodification and human rights}

On the narrow view, there is an increasing acceptance of the idea that ‘human rights’ values might provide a good way to tackle vulnerability. On the narrow view, vulnerability is not systemic, and although this vulnerability may be caused in part by economic processes, the direct control of these processes is undesirable; these economic processes represent the way in which individuals can achieve wealth and security for themselves. Therefore, the narrow view seeks a solution which only affects those most vulnerable and which does not unduly control economic processes. The discourse on human rights presents the possibility of meeting those aims. On the one hand, human rights as a minimum standard can be useful when it comes to the prevention of extreme abuses in the labour market.\textsuperscript{77} Where that abuse is dramatic, it can interfere with the ‘humanity’ of the worker and therefore engage human rights protection. On the other hand, the human rights regime, where restrictively defined, tends to comply with liberal ideals, and does not unduly interfere in economic functioning. This narrow ‘human rights’ regime involves the protection of ‘first generation’ civil and political rights only, and does

\begin{footnotesize}
\textsuperscript{76} Ibid 78
\textsuperscript{77} A good example is in the case of the protection of domestic workers which will be discussed in more detail in chapter 7
\end{footnotesize}
not extend to the protection of ‘second generation’ social rights.\(^{78}\) Whilst the former may be acceptable on the narrow view, the latter most likely would not be. The protection of civil and political human rights is associated with negative freedom, and does not require extensive state interference. By contrast, ‘social rights’ require much more state intervention to guarantee ‘positive’ freedom, and are more difficult to reconcile with the approach on the narrow view.

There are, of course, limitations to this kind of ‘human rights’ approach in relation to labour law rights. Firstly, only certain labour law rights can be considered civil and political rights. For example, whereas it is possible to argue that protection from discrimination in employment is a civil/political right, it is difficult to apply the narrow human rights reasoning to the ‘right’ to a minimum wage.\(^{79}\) Secondly, even where labour law rights can fit into the human rights regime, their effectiveness may be limited. By way of example, the right to non-discrimination in employment may be seen as a human right, but would extend to a right to ‘formal’ equality only: that all workers in the same circumstances should be treated equally. This would not include the more substantive protections associated with anti-discrimination law.\(^{80}\) Finally, ‘human rights’ can be used to erode the overall protections afforded to workers. This can be seen for example in the provisions deriving from the Employment Law Review in the UK, which will be discussed in detail in chapter 5.


\(^{79}\) It is difficult to see the minimum wage as consistent with the universality of the human rights standard necessary under the civil and political regime (this applies only to workers), or as consistent with a vision of human rights operating as the base standard below which no government should be permitted to operate. For a full discussion see H Collins, ‘Theories of Rights as Justifications for Labour Law’ in B Langille and G Davidov (eds), The Idea of Labour Law (OUP 2011) 142

\(^{80}\) This is discussed in more detail in the context of the middle view of vulnerability in chapter 3.
As part of this review, the UK government is undergoing a process of the
deregulation of unfair dismissal law. As part of the legitimisation of this process,
the government relies on the argument that despite the erosion in unfair dismissal
rights, workers are still protected by anti-discrimination laws. These laws are
‘fundamental’ because they are based on the inviolable (civil and political) rights of
the human rights regime. By contrast, unfair dismissal rights are not ‘fundamental’
civil/political rights and in any event, rely on outdated notions about the functioning
of employment and market relations (that there is an inequality of bargaining power
which needs to be corrected). Thus, individuals are adequately protected even
where unfair dismissal rights are dismantled.

Recently, there has also been an attempt to expand the concept of ‘rights’ on the
narrow view, and to suggest that labour rights as ‘social rights’ should not be
rejected on the basis that they are a drain on economic functioning (unlike
civil/political rights). The most obvious example is the ‘capabilities approach’ first
suggested by Deakin and Wilkinson.81 The idea is that workers are vulnerable
because they do not achieve their economic potential, which results from a lack of
‘capabilities’. This is both a personal problem for workers, and also an economic
problem, because it highlights the absence of (economic) institutions which can
further individual and economic progress. This is particularly the case in the
knowledge economy, where the effective functioning of individuals, and the

81 S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and
Legal Evolution* (OUP 2005)
development of their skills, is essential to economic competitiveness.  

This kind of capabilities argument has been used to suggest particular developments in the way that labour law should be constructed. This includes expanding the ambit of discrimination law so that it guarantees both a level of substantive freedom and formal freedom, where market circumstances allow. This approach has also been developed in the work of Freedland and Countouris on the personal employment contract. They suggest that labour law regulation should be informed by three foundational concepts. The first is ‘dignity’, which is a concept which ensures the ‘protection of the person regardless of the specific arrangements for the performance of his or her work’. This concept aligns itself with the idea of human rights as a minimum standard for labour law. The second concept is ‘capability’, which Freedland and Countouris argue should act as a basis for the development of social rights in the labour law regime. This argument draws specifically on Deakin and Wilkinson’s work. The final concept is that of ‘stability’ which has largely been rejected in the age of atypical work, but which has real economic benefits, and which, Freedland and Countouris argue, is the only way in which to guarantee the recovery of the economy after the recent economic downturn.

83 Ibid 466
85 Freedland and Countouris (n 63) 371
86 Ibid 380
4. Conclusions

This chapter on the narrow view of vulnerability completes the theoretical part of this thesis. It attempts to outline a view of vulnerability in the labour market which contrasts with the ‘wide’ and ‘middle’ views. It is ‘narrow’ in the sense that it is an individualist view of vulnerability, in which vulnerability is experienced only by certain individuals on the labour market (for example certain atypical workers). This contrasts with the wide view, in which all workers are seen as vulnerable, and the middle view, in which vulnerability is characterised primarily in terms of group membership. But more than this, this view of vulnerability is ‘narrow’ in other ways. In terms of the solutions to individual vulnerability, the approach can be seen as narrow in that it is essentially restrictive. The foundations of the narrow view are in liberalism and liberal theory. On this view, economic processes are generally essential and desirable as a means by which individuals can maximise their welfare and their preferences. It does not therefore make sense to limit these economic processes in a systematic way through labour law, by for example the equalisation of bargaining power (the middle and wide views), or the decommodification of labour (the wide view). Current labour law is criticised precisely because it attempts to hang on to these ideals which neither reflect economic reality, nor benefit workers. The majority of workers benefit from free flowing economic systems which allow them to participate in the market as they see fit, and this is particularly the case in the current ‘knowledge economy’.
It is however apparent from the analysis in this chapter that there are dramatic contradictions in relation to the solutions on the narrow view of vulnerability. It is understood on this view that the processes of flexibilisation associated with the move to a global knowledge economy undermine the contractual foundation of labour rights and create vulnerabilities for (precarious) workers. However, the solutions it proposes are essentially contractual, aiming to expand contractual categories so that they capture a greater number of ‘precarious workers’. The result is that although precarious work is identified as a problem, the changes to the law to incorporate these workers will only be incremental, and will be unable to capture all of precarious work. This is worrying for a view which represents itself as the ‘modern’ approach to labour law. In a sense, this conundrum has been resolved by the recourse in the narrow view to human rights. These human rights standards can potentially be adopted to provide protection to those who have suffered severe disadvantage in the labour market (where that disadvantage goes as far as abuse of their humanity). Again though, the limitations to this regime mean that it can only provide partial protection for vulnerable workers. The application of the narrow view (with all its limitations) will be discussed in chapters 5, 6 and 7. In chapter 5, the presence of the narrow view in labour law will be assessed at different geographical levels, and contrasted to the presence of the wide and middle views. Chapters 6 and 7 will discuss the narrow view in the context of two case studies: domestic and temporary agency work.
Chapter 5: Law and Policy on Vulnerability at Work

1. Introduction

In chapters 2, 3 and 4 of this thesis, a theoretical framework was established around the notion of vulnerability at work. It was argued that in labour law literature, three broad schools of thought can be determined: the ‘wide’, ‘middle’ and ‘narrow views of vulnerability. Within these schools of thought there were particular ways of viewing the construction of the vulnerability of workers, as well as particular ways of viewing the solution to that problem. It was asserted that in the ‘wide’ view, vulnerability can be viewed as attaching to all workers as a result of their insertion into a capitalist system of production, of which employment relationships are just one part. This insertion creates two main problems for workers: (i) labour is treated as a commodity to be bought and sold (and hence workers are devalued) and (ii) labour is automatically in an unequal bargaining relationship with employers who own the means of production. In the middle view, vulnerability is not (entirely) economically determined and does not necessarily attach to all workers in the labour market. Rather vulnerability attaches to groups in the labour market and vulnerability depends on the particular strength and experience of those groups. This is not to say that there can never be inequality of bargaining power between employers and workers, or that workers never suffer
from the effects of ‘commodification’; both of these experiences are possible. However, they do not automatically flow from the capitalist system: they flow from inadequate regulation of that system for the benefit of worker groups. Finally, the narrow view challenges fundamentally the idea that the problems of vulnerability stem from the capitalist system. Reference is made to the real benefits of the capitalist system in terms of the creation of wealth and opportunities for workers. On the narrow view, the experience of workers is entirely individual. Whilst some workers are atomised by modern developments of the capitalist system (rather than the capitalist system itself), those developments are positive for the majority of workers who are less likely to experience ‘commodification’ and ‘inequality of bargaining power’ than ever before.

In terms of solutions to vulnerability, each of the different approaches takes a different standpoint. On the wide view, the argument is that the best way to counteract the processes of commodification and inequality of bargaining power inherent in the capitalist system for workers to join together to bargain collectively with their employers. This should be underscored by a favourable regulatory environment. This environment should certainly include ‘auxiliary legislation’ to encourage collective bargaining, but may also include some ‘regulatory legislation’ in areas outside the reach of these bargaining processes. On the middle view, the solution lies in government facilitation of harmonious interaction between social groups. As groups (between the individual and the state) are in the best position to ensure that individuals have the opportunities to achieve their goals, this kind of
social regulation allows social inclusion and a well functioning (economy) and society. A good example of effective legislation to achieve these ends is equality legislation which promotes real (substantive) equality for the target groups, through the use of positive rights and positive discrimination to correct historical and structural disadvantage. By contrast, on the narrow view, there is some scepticism about extensive state interference in this way. As vulnerability is viewed only as a partial and minority problem, state regulation should be provided in only a very minimalist way (for example where there is a dramatic breach of human rights). Any state interference beyond this is an unwanted and unnecessary cost for employers (and workers).

The aim of this chapter then is to assess and analyse the usefulness of this theoretical framework in the context of actual law and policy on vulnerability at work. There will be an assessment of law and policy at three different geographical levels (national, supranational and international), in terms of the adoption at those levels of either the construction or the solutions to vulnerability advocated in the wide, middle or narrow view of vulnerability as explained above. There will be two processes at work: the first is a process of deconstruction of law and policy at the different levels to see whether the different schools of thought identified can be detected; the second is a process of construction to see whether any conclusions can about the adoption of the different approaches at the different levels. This is not to suggest that there is necessarily consistency of approach at the different geographical levels. Indeed at each level it is often possible to discern the
operation of principles derived from each of the three approaches both in construction and solution to the problems of vulnerability. Rather, the interest lies in the identification of these inconsistencies and ultimately whether or not one particular approach comes to dominate at any or each of the levels.

2. UK law and policy on vulnerability at work

In the UK, the introduction of ‘vulnerability’ in employment as a policy tool followed the (then Labour) government’s parliamentary policy paper *Success at Work* in 2006.¹ In this paper, the government promised a ‘new impetus to improve the position of vulnerable workers’,² and constructed the notion of the ‘vulnerable worker’ as follows:

‘We have defined a vulnerable worker as someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse. Both factors need to be present. A worker may be subject to vulnerability, but that is only significant if an employer exploits that vulnerability’.³

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¹ DTI, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers. A policy statement for this Parliament* (March 2006)
² Ibid 8
³ Ibid 25
The construction of this notion of the vulnerable worker appeared to follow a narrow view of vulnerability. That is, vulnerability was not presented as a prevailing characteristic of employment relationships in general, and exploitation was assessed as the result of abuse by some employers of their workers, rather than as an inevitable consequence of the insertion of workers generally into the capitalist system of production. Vulnerability was viewed as a specific experience, and was associated for example with specific sectors: retail, hotels, restaurants, care homes, textiles, construction, security and cleaning. It was also a personal experience, as much determined by worker ‘capacity’ as by any ‘exploitation’. Indeed, the nature of ‘exploitation’ was also narrowly defined. It was limited to the failure of employers to ensure that workers were taking advantage of employment rights. In the *Success at Work* paper a number of examples of this exploitation were given: a worker in the transport or care sector unfairly pressurised into working excessive hours; a worker in a low-pay sector such as cleaning or security being paid below the National Minimum Wage; a construction worker denied his entitlement (then) to 20 days’ paid leave each year; and a migrant worker lacking control over unfair deduction of pay for housing or transport.

That said, the construction of the vulnerable worker in the *Success at Work* paper was not entirely aligned with the narrow view of vulnerability. On a number of occasions, the vulnerable worker policy was referred to in the context of wider

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4 Ibid 30  
5 Ibid 26
policies to promote social inclusion.\textsuperscript{6} In the \textit{Success at Work} paper the government promoted the importance of work to social and personal empowerment, presenting work as allowing people to attain their potential. It was suggested that workers with a lack of capacity or means were unable to attain their potential through work and that this created vulnerability.\textsuperscript{7} Of course, the idea of social inclusion is much more aligned to the middle view rather than the narrow view of vulnerability. The whole idea of the middle view is that a social system can be built which allows economic factors to work to social ends, and that such a social system requires that all workers gain fulfilment through work. Groups between the individual and the state are in the best position to ensure that this system functions properly. The idea of social inclusion does not fit all that well with the theoretical underpinnings of the narrow view. These underpinnings lie in liberal theory, which determines that society functions best with little government interference (only to guarantee a very minimum legal entitlement). Social inclusion (as understood in the middle view) would require more extensive government interference than would be desirable on the narrow view. Furthermore, the idea of a ‘lack of capacity’ or means suggests an inequality of bargaining power for these workers. The idea of inequality of bargaining power is rather difficult to countenance on the narrow view because it does not fit with liberal economic theory or the idea that the employment contract represents a ‘meeting of minds’ between parties on a broadly equal footing.

\textsuperscript{6} For example at page 8 in the \textit{Success at Work} paper there is reference to the fact that the government aimed to create a ‘new impetus to improve the position of vulnerable workers and promote social inclusion, using risk-based principles to avoid penalising good employers’.

\textsuperscript{7} DTI (n 1) 9
Despite the fact that elements of the middle view can be viewed in the construction of the vulnerable worker, the middle view is less obvious when it comes to finding solutions to vulnerability. From the outset, it was made clear in the Success at Work paper, that the vulnerable worker policy would not involve ‘wholesale change to the current system’ of labour regulation. Following a consultation with stakeholders, the government concluded that ‘the present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and rights in different employment relationships. The Government believes that it meets the labour market’s current needs and there is no need for further legislation in this area’. The government therefore did not advocate the depth of change that would be required under the middle view. It did not advocate specific legislation to ensure that all vulnerable workers received equal treatment with non-vulnerable workers. Rather the main aims of the government’s policy were to target specific instances of abuse (for example of certain agency workers) as well as making sure that workers understood the rights to which they were entitled. On the face of it, this appears to fit well with the narrow view: the focus is on the most disadvantaged individuals in the labour market, and the most dramatic forms of abuse.

The actual policy adopted following the publication of the Success at Work paper involved three main strands. The first was the government’s crackdown on ‘rogue employers’ announced in the Final Report of the Vulnerable Worker Enforcement

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8 Ibid 16
9 Ibid 17
10 Ibid 17
Forum in August 2008. In this Report, ‘dark corners’ of the labour market were identified, ‘where more needs to be done to ensure that workers have access to the rights that Parliament intended’. The second was a number of measures to strengthen the position of agency workers in the labour market. This policy was stated in the Vulnerable Worker Enforcement Forum report as follows: (1) revisions to the Employment Agency Conduct Regulations to give agency workers the right to withdraw from services provided without detriment; (2) government commitment to implementation of the Temporary Agency Worker’s Directive; (3) strengthening the powers of the Employment Agency Standards inspectorate. Thirdly, a number of pilot projects were set up to bring together agencies (employers, trade unions, regulators, voluntary and community agencies, local authorities and ACAS) to ‘offer a joint-up package of support that will reach out to vulnerable people’.

Agency workers

In the Success at Work paper, the government noted that agency work could be a locus of vulnerability, and identified a number of issues affecting the ‘most vulnerable agency workers’. As these issues were specific and did not affect all agency workers (again representing a narrow view of vulnerability), they could be tackled ‘in a manner most effective for workers and least burdensome for

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12 Ibid 3
13 Ibid 4
14 DTI (n 1) 32
15 DTI (n 1) 17
industry'. By way of example, the government identified that a small number of agencies were mistreating work-seekers by making offers of work conditional on paying for services such as accommodation and transport. ‘Rogue employers’ were also giving loans to temporary workers, often from overseas, and then deducting loan repayments at high levels of interest from worker salaries. Amendments were therefore made to Regulations 5 and 13 of the CEAEBR 2003 with the effect that (agency) workers taking up additional services could now withdraw from those services without incurring any detriment or penalty (Regulation 3 Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2007 (CEAEBR 2007) in force April 2008). Agencies or employment businesses were required to give a work-seeker a statement of his right to cancel or withdraw from these services (Regulation 4 CEAEBR 2007). Further minor amendments were made to the Regulations simplifying the information agencies had to give to employers in relation to workers supplied for short-term tasks (Regulations 5 and 6 CEAEBR 2007) and increasing the protection available for work-seekers where agencies proposed to charge fees for the inclusion of information about them in a publication (Regulation 7 CEAEBR 2007).

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16 DTI (n 1) 19
17 SI 2003/3319. See BERR, Protecting Vulnerable Agency Workers: Government Response to the Consultation (November 2007)
18 DTI (n 1) 18
19 SI 2007/3575
These changes were followed in August 2008 by the publication of the Vulnerable Worker Enforcement Forum’s recommendations on the enforcement of employment rights. The measures to be implemented as a result of these recommendations included a doubling of the number of Employment Agency Inspectors by the end of July 2008, a campaign to promote awareness of the Employment Agency Standards Inspectorate (EAS), and a sharing of information between the Gangmasters Licencing Agency (GLA) and the EAS. Although these changes were welcomed, it was felt that they did not go far enough. For example, the GLA’s coverage continued to be limited only to certain sectors, and did not address agency worker status ‘which stops their entitlement to many rights and allows an employer to sack them with no comeback if they attempt to enforce the limited rights they enjoy’.20 Further, in the Success at Work paper the government rejected the adoption of the European Agency Worker Directive (TAWD).21 On the latter matter of course, the government’s position did change. In May 2008 an agreement was reached between the CBI and the TUC that agency workers should be given equal treatment after a 12-week qualifying period. On this basis, the government entered into consultation with the social partners about the implementation of the TAWD,22 and drafted the Agency Worker Regulations 2010 (AWR), which came into force in the UK on 1 October 2011.23

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23 SI 2010/93
The TAWD and the AWR will be discussed in more detailed in the case study on Temporary Agency Work in chapter 6. That said, a few points should be noted here in terms of the application of the TAWD in the UK through the AWR. On the face of it, this application appears to comply with the ethos of the middle view of vulnerability. Through these regulations, agency workers, a particular group (of vulnerable workers), have gained the right to equal treatment with those employed directly by the user. However, this 'right' for agency workers is limited in a number of ways. First of all the right is limited in scope as it applies only to 'basic working conditions'. According to the TAWD, these 'basic working conditions' include: the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay. The UK government defines the notion of pay narrowly, and excludes a number of 'payments or rewards' from the scope of application of the AWR (for example occupational sick pay, pension payments, any payment in respect of maternity, paternity or adoption leave and expenses payments). Secondly, the qualification period attached to the AWR dramatically reduces the number of agency workers who can use the regulations. Indeed, according to one survey in the UK, 55% of the agency workforce had been on their assignment for less than 12 weeks. This suggests that in practice, the majority of agency workers would not benefit from the right to equal treatment. The effectiveness of these regulations for the 'group' of agency workers is therefore brought into question and therefore the actual alignment of these regulations with the middle view.

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24 Article 2 TAWD; Regulation 5(1) AWR
25 Regulation 6 (3) (a), (b), (c), (j) AWR
Furthermore, there is also a problem with these regulations for the protection of the most vulnerable agency workers (as might be advocated in the narrow view). For example, there is the potential for ‘unscrupulous’ employers to manipulate the qualifying period to ensure that agency workers are excluded from the regulations. This kind of manipulation is most likely prevented by the regulations in relation to a particular agency worker working on multiple assignments with one employer.\(^\text{27}\) However, the employer remains at liberty to take on different agency workers for a series of 11 week assignments, despite the fact that none of those agency workers would be able to qualify for the AWR as a result.\(^\text{28}\) There is also the possibility that agency workers may be excluded from the AWR because they cannot prove the requisite employment status. To qualify for the AWR, an agency worker must show that they are either an ‘employee’ or a ‘worker’ of a particular agency. It has traditionally been very difficult for agency workers to fall within these statutory definitions given the temporary and short term nature of their work.\(^\text{29}\) There is also the possibility that agencies could exploit this particular weakness by introducing contractual terms or creating contractual arrangements which defeat employment status. If fact, this concern was raised in the Consultation for the AWR, and the government pointed to judicial subversion of this trend in cases finding that the employment relationship (as constructed by the employer) was in fact a ‘sham’.\(^\text{30}\)

\(^{27}\) Regulation 9 AWR
\(^{29}\) See for example James v Greenwich London Borough Council [2008] ICR 545
\(^{30}\) BIS, Implementation of the Agency Workers Directive: Consultation on Draft Regulations (2010) para 3.8
The case law on sham contracts is, however, rather conflicted and does not guarantee protection for agency workers. Arguably then, the result is that the AWR do not meet the premises of the narrow view, because they do not protect the most vulnerable agency workers from abuse.

**The Involvement of Trade Unions**

Interestingly, part of the solution suggested in the *Success at Work* paper was to support the increase in union membership amongst vulnerable workers. This would accord not with a narrow or middle interpretation of vulnerability, but with the wide view. The paper recognised that lack of union representation is a cause of vulnerability, and that unions should ‘extend their reach into new sectors and industries’ to ensure that they can provide help and support to the most vulnerable. A London based Vulnerable Workers Project (VWP) was established, which focused on the building services sector in the City of London and Tower Hamlet areas. In this VWP, workers were given advice about how to join unions and encouraged to do so. The project also aimed to help vulnerable workers to understand and secure their entitlement to employment rights, and to ‘introduce vulnerable workers to opportunities for developing new skills’. An employment

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31 See for example the conflict in the case law between *Firthglow Limited (t/a Protectacoat) v Szilagi* [2009] ICR 835 and *Consistent Group v Kalwak* [2008] IRLR 505.
32 DTI (n 1) 49
34 Ibid 12
35 Ibid 2
rights advice and information service was set up in the Tower Hamlets Law Centre as a means to engage with vulnerable workers. It also collaborated with unions and provided support for non-unionised workers through the establishment of the ‘Vulnerable Worker’s Group’. This group gave workers the opportunity to discuss the issues they commonly faced and how those issues might be addressed.\textsuperscript{36}

Furthermore, the Trade Union Congress (TUC) was involved in a number of ways in the vulnerable worker policy. First of all, the TUC, an active proponent of the partnership approach\textsuperscript{37} was involved in public consultation on the vulnerable worker policy through the Commission on Vulnerable Employment\textsuperscript{38}. Secondly, both the TUC and unions were involved in the Vulnerable Worker Enforcement Forum which was set up to ‘consider evidence on the nature and extent of abuse of worker rights, examine the effectiveness of the existing enforcement framework, and identify possible improvements’.\textsuperscript{39} Thirdly, trade unions have been co-opted to implement the vulnerable worker policy in the area of skills and training. In the Success at Work paper, there is an explanation of the role of government-funded Union Learning Representatives who are involved in helping workers with their training and development needs.\textsuperscript{40} According to the government, ‘basic skills are fundamental to getting a job, and to social inclusion, quality of life and improving

\textsuperscript{36} Ibid 2
\textsuperscript{37} K Ewing, ‘The Function of Trade Unions’ (2005) 34 (1) ILJ 1, 10
\textsuperscript{39} BERR (n 11) 4
\textsuperscript{40} DTI (n 1) 23
Finally, trade unions have been involved in the ‘partnership approach’ of the Vulnerable Workers Projects. In the London based VWP, the union Unite received government funding to train shop stewards to run advice surgeries in the field of employment rights.

Of course, the isolated and temporary nature of these projects means that it is difficult to see them as real solutions on the wide view. Their isolated nature means that, on the wide view, these solutions would be unsuccessful at tackling the vulnerability of all workers, and the inequality of bargaining power between the parties to the employment relationship. Their temporary nature denies the importance of collective bargaining at the heart of all employment regulation. Arguably, a solution on the wide view would require a more radical transformation of the support given to trade unions, and a long-term view of the centrality of trade unions to the bargaining process. That said, it is interesting that through the vulnerable workers policy, the Labour government sought to reach solutions which gave some recognition of the wide and the middle view of vulnerability, against the background of a narrow construction of this idea.

The current stance on vulnerability in employment

With the election of the Coalition government in the UK in 2010, the nuances and appeal in employment law and policy to the wide and middle views of vulnerability

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41 DTI (n 1) 25
have all but disappeared. Employment law and policy appears to have become more and more dominated by the narrow view of vulnerability, both in construction and in application. Furthermore, the Coalition has stretched the narrow view so far, that it is arguable that some of its policies are not about vulnerability at all. As argued in chapter 4, this is the problem with the narrow view. Labour law and politics which rely on liberal and economic foundations have the potential, when taken to extremes, to deny the importance of the regulation of the labour market, and can tend towards deregulation. Arguably such a liberal regime will always involve some minimum protection, but that protection must not undermine too far the values of freedom of contract which the narrow view supports. The result in the case of the UK, is the potential creation of vulnerability, both by the reduction of existing minimum protections, but also the creation of new standards which make workers more vulnerable, and bolster the inequality of bargaining power between employers and workers.

The Coalition introduced the Employment Law Review (ELR) in 2010 to run for the entirety of its Parliament. Through this Review, the government promised a ‘wide ranging examination of laws and regulations that affect the functioning of the labour market’. 42 The foundational premise of this Review was that labour law in the UK was ‘not working’ and needed to be restructured so that it was better equipped to support ‘strong and efficient’ labour markets. This follows the line in the narrow view that employment law needs to stay in line with economic developments in order to be effective. According to the detail of the ELR, there

42 BIS, Employment Law Review Annual Update (March 2012) 5
were three elements to a strong and efficient labour market: flexibility, effectiveness and fairness. A flexible labour market was defined according to job creation and job transition, effectiveness meant enabling productive workforce management, and fairness included some level of employment protection. At the outset of the ELR, the level of protection that the government wanted to achieve was stated as ‘strong’. However, as time has progressed, it became clear that the commitment of the Coalition is to a very minimum level of protection, and there is a preference for deregulation outside that minimum level. The Coalition increasingly presented employment law as an interference in the basic freedom of contract upon which the employment relationship is based. A good example of this position is provided in the recent Consultation entitled *Ending the Employment Relationship*, where it is stated that ‘[W]herever possible, the Government should keep out of individual employment relationships which are developed and managed by the two parties involved’.

The Review has been very fast moving and has already involved a great many changes to labour law in the UK. There are two changes in particular which are worthy of note, as they each demonstrate different elements of the government’s attitude to vulnerability in employment. The first is the extension of the qualification period for unfair dismissal claims from one to two years, and the second is the introduction of employee shareholder status. The extension of the qualification period is interesting as a starting point because this represents a clear and direct

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43 Ibid 5
44 Ibid 5
45 BIS, *Ending the employment relationship: a Consultation* (September 2012) 5
deregulation of unfair dismissal law in the UK (and hence potentially a direct assault on the protection of vulnerable workers under all three views). It is also interesting in light of the rationale given for this deregulation. On the one hand, the government asserted that this measure was necessary in order to improve the flexibility and effectiveness of the labour market, as this would help companies to be able to make an assessment of their staff over a longer time period, without fear of costly employment tribunals. This was presented as a benefit to both employees and workers, as the employees would also benefit from an increase in investment in their training and other needs in the first two years of employment. On the other hand, it was argued that this change would not result, in real terms, in a reduction in protection for workers. Those workers still had the benefit of anti-discrimination law, which was sufficient to ensure the minimum level of protection workers required. This assertion is a reference to the importance of fundamental human rights as the legal backstop of the liberal regime upon which the narrow view is based. Anti-discrimination law (based on the narrow premise of ‘formal equality’) falls neatly into this human rights category, whereas other employment law is more difficult to fit within this regime. This lays open the door for the deregulation of other employment laws (for example unfair dismissal), despite the possibility of this deregulation having discriminatory effect.

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46 BIS, Resolving Workplace Disputes: Government Response to Consultation (November 2011)

47 Ibid 34. Here the government recognised the possibility of this discriminatory effect in relation to the extension of the qualification period for unfair dismissal.
The second change of interest is the introduction of employee shareholder status (with effect from September 2013). This employee shareholder status is to exist alongside the other employment statuses of ‘employee’ and ‘worker’ in UK law. The basis of the scheme is that in exchange for a certain amount of shares in a company, a worker accepting this new status would forfeit certain employment rights, including the right to unfair dismissal (unless the dismissal was automatically unfair), the right to statutory redundancy pay, and certain rights to request flexible working and time to train.\(^\text{48}\) The government explained that the reason for the introduction of this scheme was to increase the flexibility of the labour market, and introduce a further element of choice for employers in the organisation of their affairs. The government was clear (following protracted debate), that this would also be a genuine choice for the employee as well: ‘no one would be compelled to apply for or accept an employee shareholder job’.\(^\text{49}\) This serves only to reinforce the comments made earlier concerning the commitment of the Coalition government to the maintenance of freedom of contract, and the understanding of the vast majority of employment relationships representing a meeting of two equal parties with equal power. In the discussion of the implementing law in the House of Lords, objections were raised to this understanding and the consequences that this would have for the most vulnerable workers.\(^\text{50}\) As a result, the government was forced to concede amendments to its

\(^\text{48}\) BIS, *Implementing Employee Owner Status – Government Response* (December 2012) 6
\(^\text{49}\) Vicount Younger of Leckie, in HL Deb 24 April 2013, col 1442
\(^\text{50}\) Baroness Wheatcroft in HL Deb 20 March 2013, col 620 stated that ‘Throughout our debates, I have emphasised that we on this side strongly support wider employee share ownership... However, that is entirely different from trading shares for basic rights in what is an unequal employment relationship, which is the very reason why employment rights exist in the first place and why they have been built up by Governments of all parties over many decades’.
proposals to include certain protections for (vulnerable) workers. These concessions involved ensuring that workers were provided with a written statement detailing the rights forfeited under the scheme, the right to legal advice (at the expense of the employer) before agreeing to new status, and a 7 day cooling off period upon accepting the contract.  

3. EU law and policy on vulnerability at work

It is possible to argue that early manifestations of employment law and policy at EU level were not grounded in the protection of vulnerability at all (in the wide, middle or narrow senses of the term), or at least that the protection of vulnerability was a secondary aim to more pressing (economic) concerns. The difficulty was that the EU was formed as an economic entity focussed on economic integration through the removal of artificial obstacles to the free movement of labour goods and capital. Policies pertaining to worker protection were seen as elements of social policy and therefore outside the ambit of EU competence. There was a lack of political will to introduce measures to address the vulnerabilities experienced by workers, as this kind of legislation was viewed as the preserve of member states. The result was that the first equality directives were introduced on the basis of a (pure) integrationist logic: that of creating a level playing field for actors and

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51 These changes are implemented through the Growth and Infrastructure Act 2013, section 31, which will occur in the Employment Rights Act as follows: s 205A (1) and (5) (a)-(j) ERA 96; 205A 6(a) ERA 96; s 205 A 6(b) ERA 96

52 C Barnard, EU Employment Law (OUP 2012) 5
preventing unfair business competition.\textsuperscript{53} This integrationist logic was, for example, clearly stated in Directives 75/117 on equal pay and Directive 76/207 on equal treatment. Both of these directives stated that their main aim was the ‘harmonization of living and working conditions’ across the EU, although there was also reference to the need (for member states) to ensure the improvement of those conditions over time.

More recently, the EU has become increasingly willing to become involved in the regulation of vulnerable workers and precarious work. In this section, there will be an analysis of attempts to regulate ‘atypical’ work at EU level.\textsuperscript{54} Of course, this is not the only area in which the EU has concerned itself with vulnerability in employment. For example, a concern with vulnerability may be detected in the more general scheme of EU employment equality law (including protection against discrimination on the grounds of certain characteristics such as race, sex and age). However, atypical work has been chosen for analysis in this section as it fits particularly well with the central theme of this thesis: the regulation of precarious work. The regulation of atypical work has also been chosen as it appears to be founded in the middle view of vulnerability and therefore provides a contrast in


\textsuperscript{54} Atypical work’ can be defined as work which falls outside the ‘standard employment relationship’ (full time, year round employment for a single employer). It therefore covers a wide range of employment forms including temporary, casual and part-time work, as well as disguised or illegal wage employment. For a full discussion of the meaning of this term see G Rodgers ‘Precarious work in Western Europe: the state of the debate’ in G Rodgers and J Rodgers (eds.), Precarious Work Jobs in Labour Market Regulation (ILO 1989), 1.
There have been three ‘groups’ of atypical workers which have been singled out for legislative action at this level: part-time workers, fixed-term workers and temporary agency workers. The first framework directive on part-time work was passed in 1997 (PTWD), followed by the framework directive on fixed-term work in 1999 (FTWD). In 2008, the Temporary Agency Work Directive (TAWD) was finally approved by the European Parliament and became part of EU law. These directives will be discussed in the next section.

The Regulation of atypical work

The regulation of atypical work at EU level follows the middle view of vulnerability in a number of ways. Under the middle view, it is argued that historically, certain groups have been passed over for the purposes of labour law legislation. These groups are therefore vulnerable and need to be brought within the scope of the law. On the middle view, the selection of these vulnerable groups is most effective if the groups themselves are involved, because this involvement implies that their protection is a legitimate state interest. In terms of the regulation of atypical work,

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55 This emphasis is perhaps not surprising given the genesis of the atypical work directives during an era in which member states supportive of social law ideals were influential at EU level. Of particular note is the election of the French politician Jacques Delors to the European Commission Presidency in 1985 with his concern that the EU should have a ‘social face’.  
there has been some attempt at this kind of involvement. The PTWD and the FTWD were created through the ‘collective route’ to legislation. This ‘collective route’ to legislation differs from the traditional legislative route, because the ‘social partners’ (employer organisations and trade unions) are much more involved in the process. Before proceeding with the drafting of legislation, the Commission first consults employer organisations and trade unions on the possible direction of Union action.\textsuperscript{58} Once consulted, the social partners inform the Commission of their wish to deal with the issue by negotiation. If these negotiations are successful, the resulting agreement can be implemented by a directive, and therefore become part of EU law.

The atypical work Directives are designed to improve the position of atypical workers and the quality of their work through the imposition of a minimum standard of equal treatment (in contractual terms) between atypical workers and their ‘full-time’ or ‘permanent’ colleagues.\textsuperscript{59} The commitment in the directives is to ‘formal’ notions of equality, but there is some indication of the more substantive equality which is the goal of legislative action on the middle view. For example, there are measures in the PTWD to promote equality of opportunity for part-time workers, by allowing part-time work at higher levels of the enterprise and by facilitating access to vocational training.\textsuperscript{60} Similar provisions occur in the FTWD and the TAWD, although in the latter, refusal to allow equality of opportunity can be justified on

\textsuperscript{58} Article 154 (2) TFEU  
\textsuperscript{59} Clause 1 (a) PTWD, Clause 1(a) FTWD and Article 2 TAWD  
\textsuperscript{60} Clause 5 (3) (d) PTWD
objective grounds.\textsuperscript{61} It might also be suggested that the interpretation of these provisions has aimed to restrict the scope of the objective grounds to ensure that the reference to non-discrimination does not undermine work quality.\textsuperscript{62} Finally, there is some recognition that the powers of negotiation of these groups needs to be maintained once they have gained legal protection. For example there is reference in the atypical work Directives to ensuring that workers are counted for the purposes of deciding union membership thresholds.\textsuperscript{63}

However, the effectiveness of the atypical work directives has been affected by two different pressures. The first is political pressure which has led to the watering down of some of the provisions of the atypical work directives over time.\textsuperscript{64} The second is the association of the atypical work Directives with the notion of ‘flexicurity’ which has the potential to prioritise the increase in the use of atypical work contracts over concerns that the quality of these contracts should be maintained. In terms of the watering down of provisions, this is well illustrated by

\begin{itemize}
\item \textsuperscript{61} Clause 6 (2) FTWD; Article 6 (4) TAWD
\item \textsuperscript{62} At European level this is demonstrated well by the case of Bruno v Pettini (Cases C-395/08 and C396/08 INPS v Bruno and Pettini, INPS v Lotti and Matteucci [2010] 3 CMLR) which concerned access to pension rights for Italian part-time workers. The workers challenged an Italian statutory rule that qualification for pension rights depended on length of service on the basis that this was contrary to the PTWD. The Court held that this statutory rule was in breach of the PTWD for two reasons. The first was that it was directly discriminatory against part-time workers, and so was in breach of the anti-discrimination provisions of the PTWD. The arguments put forward by the Italian government in relation to the objective justification for this direct discrimination were rejected. The second reason was that this Italian statutory rule ran counter to the aim of the PTWD to promote work quality. This rule made part-time work less attractive, because the effect of choosing part-time work was to postpone the date on which the worker would receive a pension. It was therefore contrary to the ‘fundamental’ quality objectives of the PTWD.
\item \textsuperscript{63} Article 7 (1) TAWD
\item \textsuperscript{64} Indeed, the negotiation of the atypical directives was a long drawn out process. Of the nine draft directives to deal with the perceived problems of ‘atypical work’ put forward between 1982 and 1996, only one was adopted, concerning the (marginal) extension of existing health and safety regulation to temporary workers. The rest were rejected and had to be redrafted. M Jeffery, ‘Not Really Going to work? Of the Directive on Part-time work, Atypical work and Attempts to regulate it’ (1998) 27(3) ILJ 193, 201
\end{itemize}
the original proposals for the TAWD as compared with the wording of the final version. The wording of the first draft directive on the regulation of temporary agency work reflects a desire to provide comprehensive protection for this group. The first concern was the potential for ‘abuse’ of temporary agency workers, which should be tackled through increasing the visibility of atypical work.\footnote{Proposal for a Council Directive concerning temporary work OJ C [1982] 128/2 (TAWD first draft) Preamble para 2} The second concern was that temporary work should be ‘supervised’ and temporary workers should receive strong ‘social protection’.\footnote{Ibid Preamble para 1} The coverage of the regulations was broader than the coverage of the final version of the TAWD. Under the first draft of the regulations, temporary agency workers were to be subject to the ‘the laws, regulations, and administrative and collectively agreed provisions, and the customary practices in force in the user undertaking as regards working conditions’ for the duration of the assignment.\footnote{Ibid Article 9 (1)} In the final version of the directive the equal treatment of agency workers extended only to ‘basic’ working conditions, essentially working time and pay.\footnote{Article 3(1)(f) TAWD} In the first draft, there was also a ban on the use of temporary agency work to fill vacancies due to strike action,\footnote{Article 11 TAWD first draft} which was removed by the time of the drafting of the final version.

The association with the atypical work directives with the notion of ‘flexicurity’ is also potentially problematic (for the middle view). Within the notion of flexicurity (discussed in detail in chapter 4) is the notion of commitment to the expansion of

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\footnote{Ibid Preamble para 1}
\footnote{Ibid Article 9 (1)}
\footnote{Article 3(1)(f) TAWD}
\footnote{Article 11 TAWD first draft}
more flexible form of work. This commitment is present in the preamble of all the atypical work directives. In the PTWD and the TAWD this commitment is translated into substantive provisions to encourage the use of these forms of work. In Clause 1 of the PTWD there is reference to the purpose of the legislation which is to ‘facilitate the development of part-time work on a voluntary basis, and to contribute to the flexible organisation of working time’, and in clause 5 (1) member states are asked to ‘review obstacles of a legal or administrative nature which may limit the opportunities for part time work’. This is in alignment with Article 4(1) TAWD which requires member states to review prohibitions on the use of temporary agency work to ensure that they are justified. The position in the FTWD is more nuanced, and this directive is arguably more concerned with worker protection against the abuse of fixed term work contracts than about the increase in use of these kinds of contract.\textsuperscript{70} In practice however, this Directive has been used to encourage some deregulation in the use of fixed term contracts without adequate consideration of the quality of that work.\textsuperscript{71}

It may be argued that this increase in flexibility is not problematic where it is matched by a concomitant commitment to ensuring ‘security’ for workers. The problem is that, in practice, flexibility has tended to eclipse the security elements of the definition of ‘flexicurity’. In the atypical work directives, the security elements are represented by the principles of non-discrimination and the idea of the improvement in the ‘quality’ of these forms of work. However, these security

\textsuperscript{70} In Clause 1(b) FTWD Member States are required to set up ‘a framework to prevent abuse arising from the use of successive fixed term contracts’.
\textsuperscript{71} Bell (n 53) 36
elements have also become imbued with elements of flexibility, so that their ability to promote security for workers is brought into question. For example, in the atypical work Directives, a level of flexibility is incorporated into the notion of equal treatment which is not normally permitted. This is illustrated by the fact that justification is permitted for direct discrimination (as opposed to indirect discrimination), and both the PTWD and the FTWD identify different instances in which justification is recognised.\textsuperscript{72} These directives also appear to make little contribution either to job or employment security in practice.\textsuperscript{73}

At EU level then, the atypical work Directives illustrate a commitment to a middle view of vulnerability. These Directives rely on the identification of vulnerable groups in the labour market who are in particular need of protection. Once identified, these vulnerable groups are incorporated into the law to ensure that they achieve the same level of advantage as other labour market groups. This involves some level of substantive protection which goes beyond mere formal equality, and it also involves some recognition of the need to maintain the negotiation status of these groups. There are however a number of different pressures at work which have undermined the protection of these workers (on the middle view). These pressures are political, and especially the scepticism of some Member States to comprehensive worker protection based on social law. They are also a function of the institutional commitment to the integration of employment policy objectives (the increase in the quantity of atypical work to reduce unemployment) into the atypical

\textsuperscript{72} See for example Clause 4 (4) PTWD, and clause 4 (4) FTWD
\textsuperscript{73} Bell (n 53) 38
work Directives. This promotion of the increase in the use of atypical work contracts is supposedly balanced with sufficient ‘security’ elements to ensure work quality. In practice however, this has not always been the case.

4. ILO law and policy on vulnerability at work

The foundations of the ILO rest on a wide view of the nature of vulnerability in employment. The constitution is based implicitly on the ‘paradigm of subordinate labour’\textsuperscript{74}, under which work is simultaneously the site of: the greatest social oppression; the greatest inequality of bargaining power; the most revolting excesses of power, and the greatest social conflict.\textsuperscript{75} The preamble to the constitution refers to the existence of ‘injustice, hardship and privation [for] large numbers of people’ forced to work under poor conditions, and calls for an ‘urgent improvement of those conditions’.\textsuperscript{76} These poor labour conditions are stated to be a threat in two ways. Firstly, they represent a threat to ‘justice and humanity’ for workers, and secondly they represent a wider threat to ‘the peace and harmony of the world’ through the unrest amongst workers subject to these conditions.\textsuperscript{77} The ‘fundamental principle’ of the ILO that ‘labour is not a commodity’\textsuperscript{78} derives from these foundations. It recognises the Marxian notion that under capitalism, labour is

\textsuperscript{74} A Hyde, ‘What is Labour Law’ in G Davidov and B Langille (eds), \textit{Boundaries and Frontiers of Labour Law} (Hart Publishing 2006) 46

\textsuperscript{75} Ibid 46


\textsuperscript{77} Ibid

\textsuperscript{78} Ibid 1 (a) Annex to the Constitution: Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)
commodified, and aims to tackle that through the promotion of the ‘dignity of labour and the recognition of its value’. Although it identifies the reality of the buying and selling of labour, it argues that market mechanisms should be subordinate to the ‘higher goals’ of personal well being and social justice for all. Like the classical labour law theorists discussed in chapter 2, the importance of freedom of association and collective bargaining in the achievement of these ‘higher goals’ is recognised.

Indeed, it has been argued that the ILO Conventions on freedom of association and the right to collective bargaining (C 87 and C98) have achieved a ‘special constitutional status’ or a ‘status akin to the rules of customary international law’ as a result of their ‘normative effects’. A particularly pertinent example of this special constitutional status is provided in terms of the enforcement mechanisms available at ILO level. Once a member state has ratified a Convention, then the ILO has a complaints procedure which enables governments, trade unions and employer organisations (in addition to the ILO’s governing body) to initiate complaints for violation of a Convention. In the case of freedom of association violations however, there is a special Committee on the Freedom of Association.

80 Ibid 7
81 ILO (n 76) The Annex to the ILO constitution determines that ‘freedom of expression and of association are essential to sustained progress’ at I (b)
which considers these complaints. As a result of the constitutional status of this right to freedom of association, this Committee hears complaints even where a relevant convention has not been ratified.\footnote{G MacNaughton and D Frey, 'Decent Work, Human Rights, and the Millennium Development Goals' (2010) 7 Hastings Race and Poverty Law Journal 303, 313}

The ILO’s commitment to freedom of association and worker voice may also theoretically be demonstrated by the tripartite nature of the organisation. Within this tripartite structure, worker representatives participate in ILO decisions alongside employers’ organisations and government representatives and therefore, supposedly, have the opportunity to further the interests of workers and to ‘add the perspectives of….workers’ rights to governments’ priorities.’\footnote{Rodgers et al (n 79) 16} However, the tripartite structure has been criticised. It has been argued that the tripartite structure of the organisation has actually inhibited its ability to help those most in need (or the most vulnerable). This structure simply reinforces the global hegemony of capitalism, through the support of organised labour for corporativism and limited social reform (as opposed to the transformation of industrial relations under capitalism).\footnote{L Vosko, 'Decent work: The Shifting Role of the ILO and the Struggle for Global Social Justice' (2002) 2(1) Global Social Policy 19}

Since its inception, the ILO has produced a whole range of Conventions to attempt to protect worker rights and improve working conditions.\footnote{Some examples are ILO Convention 3 ‘Maternity Protection Convention’ (International Labour Office 1921), ILO Convention 47 ‘Forty-Hour Week Convention’ (International Labour Office 1935) and ILO Convention 155 ‘Occupational Health and Safety Convention’ (International Labour Office 1981).}

this thesis are the Conventions concerning marginal workers adopted over the course of the 1990s: the Part-time Work Convention (PWC), the Private Employment Agencies Convention (PEAC) and the Home Work Convention (HWC). These Conventions all aim towards the protection of vulnerable groups in the labour market. In contradistinction to the atypical work directives however, there is a much greater concern in these Conventions with the protection of freedom of association and collective bargaining rights. For example, for part-time workers, ratifying countries are only required to ensure that part-time workers receive the same protection as full-time workers in respect of: (a) the right to organise; (b) occupational safety and health; and (c) discrimination in employment. In terms of other rights, part-time workers can in practice be excluded by the introduction of qualifying thresholds at a national level. The PEAC also permits the exclusion of certain categories of (temporary) worker from its scope so long as no worker is denied the rights to freedom of association and collective bargaining and the right to protection from discrimination. In terms of the HWC, there are specific measures calling for ratifying countries to consult with ‘the most representative organisations of employers and workers, and where they exist, with organisations concerned with homeworkers and those of employers of

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88 ILO Convention 175 ‘Convention Concerning Part-time Work’ (International Labour Office 1994)
89 ILO Convention 181 ‘Convention Concerning Private Employment Agencies’ (International Labour Office 1997)
90 ILO Convention 177, ‘Convention Concerning Home Work’ (International Labour Office 1996)
91 Article 4 PWC
92 Ibid Article 8. This Article allows Members to exclude certain part-time workers from rights such as paid annual leave and paid public holidays, sick leave and rights on termination of employment.
93 Article 2(4)(a) PEAC provides that member states can ‘exclude, under specific circumstances, workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions, provided that adequate protection is otherwise assured for the workers concerned’. However, that does not apply to Article 4 (the right to freedom of association) and Article 5 (protection from discrimination).
homeworkers." The aim of this provision is to give groups concerned with the interests of homeworkers without trade union status the opportunity to be consulted, and hopefully allow this marginal group some voice.

The move away from standard setting

More recently, there has been a retraction at ILO level from a focus on the creation of binding Conventions. Arguably, this change has been driven by a change in the traditional (political and economic) environment in which the ILO originally operated. With ‘globalisation’ and economic liberalisation (evidenced by privatisation, labour market deregulation and the decline of the welfare state), there has been a lack of appetite amongst the member states of the ILO for intervention through the creation of binding legal rights. The results have been two-fold. On the one hand, there has been an increase in the use of non-binding Recommendations to deal with worker rights. On the other hand, there has been an attempt to move away from standard setting completely, towards a broader framework for action. This broader framework for action is represented by the Decent Work agenda and the Declaration of Fundamental Principles and Rights at Work (the Declaration). These elements will be discussed in the next section.

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94 Article 2 HWC
95 Vosko (n 86) 33
96 MacNaughton and Frey (n 84) 314
The preference for the use of Recommendations to cover standard setting is illustrated by the decision to downgrade much of the detail of the HWC to a non-binding Recommendation.\footnote{ILO Recommendation 184, ‘Recommendation Concerning Home Work’ (International Labour Office, Geneva, 1996)} A further example is provided by the attempts to regulate for ‘concealed’ or ‘disguised’ employment. At the 1998 International Labour Conference, there were calls for measures to bring concealed or disguised employment within the scope of employment legislation. However, at this conference, the calls to implement such legislation were rejected, driven by the assertion by Employers Groups that the problem of disguised employment was not a suitable subject for standard-setting activity.\footnote{ILO, ‘Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship: Scope)’ Basic Technical Document (International Labour Office, Geneva 2000) paras 69-70. Employers groups argued that regulation in this area would constitute an unwanted interference in commercial contracts and a threat to ‘economic activity and job creation’. Secondly, they, along with some Government representatives stated that a Convention in this area would create a ‘third category’ of workers, who would have a lower level of protection than dependent workers. This would result not only in lower conditions for these workers, it would also mean that current ‘dependent’ workers would fall into this new third category, to the detriment of their rights. \textsuperscript{101} International Labour Conference (91\textsuperscript{st} session), Report V – The Scope of the Employment Relationship – Fifth Item on the Agenda (Geneva 2003) 75} A Report in 2003 suggested the ‘collection and exchange of information and promotion of good practice’ in the two areas of disguised employment relationships and triangular employment relationships to try to address the perceived legislative lacuna in this area.\footnote{ILO, Report V (I) – The Employment Relationship – Fifth Item on the Agenda (Geneva 2005) 57} This Report suggested that Conventions or Recommendations could be adopted in this area, but when a questionnaire was circulated on this issue,\footnote{ILO, Report V (2A) – The Employment Relationship – Fifth Item on the Agenda (Geneva 2006) 6} the majority of governments would only contemplate a Recommendation and not a binding Convention.\footnote{ILO, ‘Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship: Scope)’ Basic Technical Document (International Labour Office, Geneva 2000) paras 69-70. Employers groups argued that regulation in this area would constitute an unwanted interference in commercial contracts and a threat to ‘economic activity and job creation’. Secondly, they, along with some Government representatives stated that a Convention in this area would create a ‘third category’ of workers, who would have a lower level of protection than dependent workers. This would result not only in lower conditions for these workers, it would also mean that current ‘dependent’ workers would fall into this new third category, to the detriment of their rights. \textsuperscript{101} International Labour Conference (91\textsuperscript{st} session), Report V – The Scope of the Employment Relationship – Fifth Item on the Agenda (Geneva 2003) 75} The outcome was the Recommendation concerning the
employment relationship\textsuperscript{104} which suggested that national policy should include measures to clarify employment status and combat disguised employment\textsuperscript{105} as well as ensure that mechanisms are in place to allow workers in ‘all contractual arrangements, including those involving multiple parties….the protection they are due’.\textsuperscript{106}

**Decent Work and the Declaration of Fundamental Principles and Rights at Work.**

As a result of the increasing lack of appetite for standard-setting at ILO level, the ILO sought alternative means by which to re-emphasise its message and to improve its waning visibility and voice. To that end, the ILO designed the ‘Decent Work’ agenda based around ‘opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity’.\textsuperscript{107} This Decent Work agenda was built around four strategic objectives or pillars: fundamental principles and rights at work; employment; social protection and social dialogue.\textsuperscript{108} Within the first pillar, the ILO pledged to promote the Declaration. This Declaration would set up a system of core labour standards which would focus and improve upon the legalistic standard setting of Conventions (and Recommendations). The second pillar was concerned with the creation of

\begin{flushleft}
\textsuperscript{104} ILO Recommendation R 198, ‘Recommendation Concerning the Employment Relationship’ (95\textsuperscript{th} Conference, Geneva 2006) \\
\textsuperscript{105} Ibid Article 4 (a) and 4 (b) \\
\textsuperscript{106} Ibid Article 4 (c) \\
\textsuperscript{107} ILO (n 97) 1 \\
\textsuperscript{108} Ibid 1
\end{flushleft}
'productive' employment opportunities for all through mainstreaming employment objectives into national policies.\textsuperscript{109} These employment opportunities would be based on an understanding of the mutually reinforcing benefits of work quality and economic productivity, so as to guarantee personal development and the fulfilment of workers' expectations.\textsuperscript{110} The social protection pillar recognised the challenges to national social protection systems of increasingly flexible and unstable employment, arguing that this requires 'more and better social protection, not less'.\textsuperscript{111} The focus was on the developing world particularly: 'Social protection has proved its value in industrial countries. The ILO's task is to develop this economic and social strength in the world as a whole'.\textsuperscript{112} Finally the ILO maintained its commitment to social dialogue through: serving as an effective advocate of social dialogue; strengthening the social partners; forging alliances with groups in civil society and showcasing examples of sound industrial relations practices.\textsuperscript{113} In terms of the central themes of this thesis, the Declaration is worthy of some consideration. This Declaration compelled nations signed up to the ILO constitution to comply with a set of core labour standards in the following areas: (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

\textsuperscript{109} Ibid 25
\textsuperscript{111} ILO (no 97) 36
\textsuperscript{112} Ibid 36
\textsuperscript{113} Ibid 48
occupation. The privileging of these ‘procedural rights’ responded to practical concerns about the ‘unwieldy hotchpotch of complex and overly detailed international labour standards promulgated by the ILO’. It also reconnected the ILO with the heart of classical labour law theory: that the aim of labour law should be to constrain the bargaining power of employers and boost the social power of workers.

Both the content and the effectiveness of the Declaration have been the subject of intense debate. On the one hand, Alston argues that the privileging of a set of core labour standards in this manner detracts from labour rights protection for a number of reasons. First, it creates a hierarchy of standards which did not previously exist, so that rights which are not at the ‘core’ are relegated to secondary status. Second, there is no theoretical consistency in the selection of these core rights. The selection does not stand up to philosophical, economic or legal argument. Third, the focus on ‘standards’ rather than rights is problematic. In international law, using the terminology of ‘principle’ or ‘standard’ denotes a norm of lesser status than a right. The impact is wide ranging. It means that the core labour standards attain only a low priority in international law. As a consequence, all of the other ‘rights’ previously established by the ILO (in the form of Conventions for example) are downgraded. This downgrading is reinforced by the involvement of

115 Langille (n 82) 430
116 Alston (n 114) 488
117 Ibid 485
actors other than the ILO in the use and the enforcement of the ILO core standards (international financial institutions, corporations, NGOs).\(^{118}\)

On the other hand, Langille argues that the core labour standards bring a ‘deeper and better account of international labour law, and the ILO, into view’.\(^{119}\) The core labour standards are theoretically coherent, because they ultimately rest on the ILO’s fundamental commitment to social justice. This commitment denotes not the ‘legal’ enforcement of a range of substantive rights also reflected in the international human rights regime. Rather there is a commitment to procedural rights, most obviously by privileging freedom of association as a core labour standard and extending this to all of the four core rights.\(^{120}\) Langille’s argument proceeds that the protection of procedural rights is much more effective than substantive rights because this ‘turn[es] up the bargaining power on the workers’ side’ and addresses their lack of social power.\(^{121}\) These procedural rights are a necessary precondition for the achievement of a suitable substantive bargain between workers and employers (although they do not guarantee completely equitable bargains).\(^{122}\) Further, Langille argues that the focus of the Declaration on a range of market ‘unfreedoms’ (other than a lack of collective bargaining power), is a development of the traditional concerns of labour law in the protection of procedural rights. In the classical theory, effective collective bargaining is sufficient

\(^{118}\) Ibid 488

\(^{119}\) Langille (n 82) 419

\(^{120}\) Ibid 426

\(^{121}\) Ibid 429

\(^{122}\) Ibid 431. According to Langille, this guarantee cannot be present because procedural rights cannot cater for all the possible unfreedoms that potentially exist in the human condition which might affect their bargaining power (hunger, lack of bargaining expertise).
for workers to create fair workplace norms and processes. However, the ILO’s position is that there are other aspects of labour market unfreedom, other ‘barriers to a bargaining process in which both parties are actors rather than objects’. These other ‘unfreedoms’ (child labour, discrimination, forced labour) exclude workers or force them onto the labour market. In order to achieve the social justice espoused by the classical labour law theorists therefore (and at the core of the ILO vision), these other unfreedoms need to be removed so that the ‘deep ontological Kantian notions of equal humanity’ can be achieved.

In terms of the arguments in this thesis, the above debate illustrates the tensions between the wide view of vulnerability in employment, which has traditionally been at the core of ILO functioning, and the (more modern) narrow view of vulnerability associated with the human rights regime. The concerns of these elements are different. On the wide view, the concern is for the fundamental procedural right of collective bargaining to be widely established (whether as a ‘standard’ or as a ‘right’). Collective bargaining must be available for all workers to enable them to determine for themselves where ‘their self interest actually lies and to assist them in getting there. It is the foundation of social justice and the achievement of other substantive ‘rights’. If the Declaration establishes collective bargaining in this way, then it has achieved its objectives. By contrast, the concerns of the narrow view are different. The concern in the narrow view is that the international system of labour rights as ‘human’ rights is adequately protected. On this view, the fact of

123 Ibid 430
124 Ibid 431
125 Langille (n 82) 420
the designation of a ‘right’ is of fundamental (normative) importance. This ‘right’ status provides the impetus for state action. For this reason the terminology used in the Declaration is problematic (standards not rights), as is the reliance on ‘soft promotional techniques’ to enforce the Declaration principles.

Recent reports emanating from the ILO might suggest that narrow views of vulnerability are becoming more prevalent. In the ILO’s Declaration on Social Justice for a Fair Globalisation, the ILO responded to the concern in the narrow view that insufficient focus was being given to the substantive rights of workers following the Declaration. Through this Declaration on Social Justice, the ILO agreed to apply a mechanism of cyclical review to those rights outside the core labour standards. This was to assure the international community of the ILO’s continued commitment to non-core rights. Likewise in the recent report entitled A New Era of Social Justice, the ILO stated its commitment to the liberalism of the narrow view, and the opportunities presented by globalisation. It presented the core labour standards as a violation of ‘human dignity’, and also recognised that the protection of these core standards served economic goals, namely the increase in market productivity. Indeed, the value of collective bargaining continues to be emphasised, but this is often in the context of the right to collective bargaining as a breach of human rights and a waste of human and economic

resources. The ILO appears to suggest that the narrow and wide views can be used in a complementary way to achieve worker goals:

‘What is fair and equitable in the world of work can be a matter of justifiable disagreement, particularly where equally legitimate competing interests come into play. In such cases, and where fundamental rights at work are respected, societies have worked out mechanisms to arrive at acceptable solutions on labour market issues which meet the criterion of fairness – and the criteria of economic realism too. These are the mechanisms of social dialogue and collective bargaining which together with international labour standards are the defining identity of the ILO’s tripartism.’

5. Conclusions

Specific conclusions

At the UK level, there is certainly compelling evidence that recent policy prescriptions have been founded on a narrow view of vulnerability. The focus has been on the individual labour market participant and changes in law and policy which either do not interfere too far in economic functioning (the Labour Government’s vulnerable worker policy) or actively support economic developments (the Coalition’s Employment Law Review). The latter policies in

\[129\] Ibid para 39
particular demonstrate the difficulties of the narrow view in the context of labour law; the narrow view can result in the deregulation of labour law to the extent that vulnerability is undermined. At EU level, there has been more support for the middle view of vulnerability. This is demonstrated by the design and implementation of the atypical work directives which are concerned with ensuring equal treatment of workers in atypical work groups with permanent or full time employees. More recently, it has emerged that the association of these atypical work directives with the notion of ‘flexicurity’ is problematic, because this labour market ethos tends to emphasise job flexibility over job security. The result is the potential that the more protective elements of the atypical work directives are undermined in the name of the flexibilisation of work relations.

Finally, the foundational ethos of the ILO lies in the Marxist notion that ‘labour is not a commodity’ and that the protection of workers relies on an increase in the social power of workers through collective bargaining. This accords with the wide view of vulnerability and is a message that the ILO seeks to constantly reinforce (most recently in its publication A New Era of Social Justice). Even the ‘standard-setting’ instruments produced by the ILO (for example dealing with the issue of atypical work) include a strong commitment to collective bargaining as the best way to achieve social justice for workers. Despite this strong message, it is impossible to ignore the increase in reference to ‘human rights’ to be used in conjunction with collective bargaining to achieve worker goals. This suggests a certain sympathy with the narrow view (perhaps not surprising given the political
consensus behind this view). For example, the ‘human rights’ in the Declaration are referred to as providing the basic framework for market forces to operate efficiently and fairly.\(^{130}\) This represents the conviction in the narrow view that there should be a basic framework of rights which does not interfere unduly in market operations. *An Era for Social Justice* reinforces this point, by stating that ‘[D]iscrimination, forced labour and the worst forms of child labour violate human dignity and as such are intolerable. They also represent a waste of human resources and productivity’.\(^{131}\)

**General conclusions**

In terms of more general conclusions to emerge from this chapter, it is useful to reconsider the hypotheses as stated in chapter 1. The main aim of this chapter was to consider the third hypothesis: that the theory of vulnerability established in chapters 2, 3 and 4 is useful in understanding and analysing the approach taken to vulnerability in work at different geographical levels. It appears that this hypothesis has been confirmed by the analysis in this chapter. Firstly, this approach is useful because it provides a useful point of distinction between the three different geographical levels. Secondly this approach is useful as it allows a depth of analysis of the law and policy at each geographical level which arguably is not possible under current theoretical frameworks. This depth of analysis shows how approaches to vulnerable/precarious work have changed over time, and aids in the

\(^{130}\) Ibid para 152

\(^{131}\) Ibid
identification of trends in these policies. Thirdly, this analysis is useful as it reveals the conflicts and contentions in the production of the law and policy relating to vulnerability. This serves to confirm the contention in this thesis that there are fundamental differences between the three views of vulnerability which result from very different theoretical perspectives which inform them. Finally, and perhaps most importantly, the analysis of the different views of vulnerability is useful because it helps to understand the effectiveness or operation of the law and policy which results from these views.

The link between the theory and practice of the law relating to vulnerability at work deserves further attention. According to the different views of vulnerability, each of these views attaches itself to a particular solution which allows the particular vulnerability to be addressed (on the wide view, the solution to the vulnerability of all workers lies primarily in collective bargaining for example). It is therefore interesting that there are a number of examples in the above analysis in which the theoretical standpoint on which a policy is based is different from that which informs the particular solution proposed. On the one hand, it might be argued that this inevitable: certain theoretical foundations are aspirational, or hark back to a different political/ economic climate. Thus, it is inevitable that the wide view which informs the Decent Work agenda is translated into policies which reflect the narrow and middle view. This is simply a function of time, and it is the only way in which any practical solution can be reached (given the decline in trade union membership, and the need to find legal rather than voluntary solutions etc). On the
other hand, it is possible to see that having different theoretical foundations in the construction of vulnerability as opposed to the solution can undermine the effectiveness of the resulting legislation. In terms of the atypical work Directives, reference might be made to the conflict between the middle and narrow view in both their construction and operation, meaning that neither is consistently achieved, or that real opportunities to improve the plight of vulnerable workers have been missed.

That said, perhaps the real concern is not the conflicts and pressures which result from trying to mesh together conflicting theoretical perspectives in law. Some of the strength of the different perspectives may be lost, but this may be inevitable in the absence of a radical political climate. Rather, the real concern may be (national) policies which are hardly about vulnerability at all. On the one hand, this failing may stem from within the scheme proposed. For example, the Employment Law Review in the UK may be seen as a dramatic extension of the narrow view of vulnerability; the narrow view taken to its extreme but natural end. On the other hand, this Review may be seen as falling outside all of the vulnerability schemes mentioned in the theoretical chapters of this thesis, and this may be the real threat to improving the position of vulnerable/precarious workers. In the following two chapters, law and policy in relation to two particular groups of ‘vulnerable’ workers will be assessed: temporary agency work and domestic work respectively. It is hoped that this will further help to strengthen these conclusions, and/or provide new insights into the effectiveness of the regulation in this area.
Chapter 6: Temporary Agency Work

1. Introduction

In this chapter, the theory of ‘vulnerability in employment’ developed in the previous chapters will be applied to the regulation of one labour market group: temporary agency workers. This group has been selected on the basis that temporary agency workers are generally considered amongst the most ‘vulnerable’ on the labour market.\(^1\) In economic terms, temporary agency work – characterised as a triangular employment relationship involving a temporary work agency, a client company and a temporary agency worker – is presented as a typical example of the ‘new’ forms of work organisation associated with the globalisation of the economy.\(^2\) Vulnerability arises when temporary agency work is used primarily as a cost saving measure for firms seeking to maximise flexibility. The use of temporary agency work in this way means there is no incentive for companies to invest in these workers, which leaves the potential for temporary agency work to be poorly paid, low quality and lacking in job security.

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\(^1\) The TUC has been particularly vocal in its assertion of the vulnerability of agency workers: ‘It is our view that vulnerable employment cannot be discussed without reference to legally permissible inequalities in the treatment received by many atypical ‘workers’ in the UK.....Temporary workers are more likely than permanent workers to be low paid, and are much less satisfied with their job security. While some forms of temporary employment have been shown to act as stepping stones to permanent jobs, this is unlikely to be the case for those in low-paid and poorly protected posts.’ TUC Commission on Vulnerable Employment, ‘Hard Work Hidden Lives: The Full Report of the Commission on Vulnerable Employment’ (2008) 167 <http: www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf> accessed 19 August 2011

agency workers are also poorly organised as companies have become global players who have no incentive to invest in ‘local’ collective bargaining mechanisms (which often exclude agency workers in any event).

In fact, this description is rather simplistic and misleading. There is some evidence that temporary agency work is on the rise, as between September 2009 and May 2013, the percentage of agency workers as a percentage of the temporary workforce increased from 16.4% to 18.9% in May 2013.³ It is difficult however to see temporary agency working as entirely ‘new’, as temporary agency working has long been a feature of the UK labour market,⁴ and despite marginal increases in the number of temporary agency workers, the absolute number of these workers remains low (in the UK temporary workers made up only 6.3% of the workforce in July 2013)⁵. Furthermore, this characterisation of agency worker vulnerability does not take into account the diversity of temporary workers or of temporary agency work. Certainly, although some agency work is poorly paid and low skilled and associated with strategies of cost-saving and numerical flexibility, in fact, there is a growing demand for high-skilled or ‘gold-collared’ workers to meet the demands of the knowledge-based flexible economy.⁶ These ‘gold-collar’ workers are able to

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⁶ P Leighton, M Syrett, R Hecker and P Holland, Out of the Shadows: Managing self-employed, agency and outsourced workers (Butterworth-Heinemann 2007) 19
attract high salaries for their specialist skills, and although it may be temporary, this work does not meet the stereotype of low quality work.

The ‘economic’ vulnerability of agency workers identified above is traditionally coupled with a ‘legal’ vulnerability arising from the exclusion of (all) agency workers from legal rights. As a form of work associated with the ‘new economy’, temporary agency work has a number of features which do not fit easily with the ‘standard employment relationship’ upon which labour law protection was established. As a tripartite rather than a traditional bipartite employment relationship, agency workers often have difficulty establishing employment status for the purposes of labour law. On a strict contractual analysis, there is the possibility that an agency worker will not have rights against either the agency (as an intermediary the agency has no mutuality or control) or the end-user (the company does not pay the worker). Furthermore, even where the agency worker does establish a relationship in law against the end-user or the agency, the status of that relationship is far from clear. Certainly, agency workers have difficulty establishing ‘employee’ status, and may not even achieve the status of ‘worker’. This is a function of the temporary nature of the assignments and, particularly for those at the lower end of the spectrum of agency workers in low-paid, low quality jobs, a function of the manipulation of contractual terms or arrangements by companies and agencies seeking to avoid costs.

7 M Wynn and P Leighton, ‘Will the real employer please stand up? Agencies, client companies and the employment status of the temporary agency worker’ (2006) 35 (3) ILJ 301, 303
This presentation of the legal problems associated with agency work may also overstate the case. There is the argument that given the benefits that the ‘knowledge’ workers receive from agency contracts, and their market power, it is only right that they should be considered ‘self-employed’.\(^8\) Thus the problem is only for those at the lower end of the spectrum, who have no power to negotiate favourable contractual terms. There is also the argument that legal protections for agency workers have dramatically increased over the last few years, and so the confusion in the case law on agency status is only a peripheral issue. For example the passing of the Agency Worker Directive (TAWD)\(^9\) means that in the EU agency workers will be entitled to equal treatment with permanent workers in terms of basic working terms and conditions. This is added to the already long list of protections for ‘workers’ who do not achieve ‘employee’ status.\(^10\) Furthermore, in the UK agency workers are protected by legislation which regulates the conduct of agencies. Although there have been problems with enforcement of this legislation in the past due to understaffing and underfunding of the Employment Agency Standards Inspectorate (EASI), there have recently been moves to increase the numbers and powers of the EASI inspectors with the hope that this will lead to a greater number of prosecutions against ‘rogue’ employment agencies.\(^11\)

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\(^8\) AL Bogg, ‘Sham self-employment in the Court of Appeal’ (2010) 126 *Law Quarterly Review* 166, 166


\(^10\) For example, workers are included within the scope of the National Minimum Wage Act 1998, and can also take advantage of the provisions on working time under the the Working Time Regulations 1998 (SI 1998/1833) and Working Time Regulations 1999 (SI 1999/3372).

The challenge of this chapter is to deal with agency work and the issues presented above in terms of the theory of vulnerability presented in the early part of this thesis. My aim is not to show how far agency workers are vulnerable in fact. Rather my aim is to highlight the particular way in which agency workers are considered in the wide, middle and narrow views of vulnerability. This is interesting as each view will emphasise different aspects of that vulnerability (if agency workers are considered vulnerable at all) and will engage in different ways with the ‘economics’ and ‘rights’ arguments above. For instance, whilst the wide view might emphasise the failure of agency workers to organise, the narrow view might argue that such organisation is impossible given the diversity of agency relationships. It is also hoped that this analysis will provide a point of reflection on the theory of vulnerability itself, and whether as a whole this presents a comprehensive and cohesive way of looking at solutions to labour law problems. With this in mind, criticisms of the different ‘views’ of vulnerability will be presented at each stage of the analysis, as well as in the concluding paragraphs.

2. Overview of legal and policy instruments concerning agency work

Before discussing in depth the possible application of the different views of vulnerability in the field of temporary agency work, it is perhaps just worth recapping on the main legal and policy instruments in this field. Certainly, temporary agency work has been given considerable political and legal attention
over the last few years, and the volume of new legal instruments is significant (in contrast to the position of domestic work which will be discussed in chapter 7). The first instrument to emerge was the Private Employment Agencies Convention (PEAC) at ILO level.\textsuperscript{12} This instrument aimed to ensure that private employment agencies were properly licensed, as well as ensuring a set of minimum standards for all temporary agency workers. These minimum standards were broadly defined, including access to training and maternity protection as well as ‘basic’ working conditions (pay, working time etc).\textsuperscript{13} There was a particular emphasis on ensuring that temporary agency workers were given proper access to collective bargaining mechanisms and freedom of association.\textsuperscript{14} Unlike other rights, the right to collective bargaining was not subject to the possibility of derogation by member states.\textsuperscript{15}

The Private Employment Agencies Convention was not well ratified, possibly because of the breadth of its scope.\textsuperscript{16} Certainly, the UK has not ratified the Convention, and for a long time, there was very limited regulation of agency work in this country. There were instruments regulating the conduct of employment agencies, which were strengthened during the Labour government’s vulnerable worker policy from 2006 onwards.\textsuperscript{17} The vulnerable workers policy also attempted

\textsuperscript{12} ILO Convention 181, ‘Convention Concerning Private Employment Agencies’ (International Labour Office, Geneva 1997)
\textsuperscript{13} Article 12 PEAC
\textsuperscript{14} Article 4 PEAC
\textsuperscript{15} The exclusion under Article 2 (4) (a) PEAC does not apply to Articles 4 (freedom of association) or Article 5 (non-discrimination).
\textsuperscript{16} To date, only 27 countries have ratified this convention. This data is available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312326:NO> accessed 30 May 2013
\textsuperscript{17} For a full discussion of these instruments, see section 4 below.
to strengthen the relationship between (the most vulnerable) temporary agency workers and trade unions, and to improve access for agency workers to other centres of support and advice. But the introduction of legal protections and minimum standards for agency workers was largely resisted on economic grounds. Indeed, during the early stages of the vulnerable worker policy, the government made clear that it was not in support of the introduction of EU wide minimum standards for agency workers, and obstructed the introduction of the Temporary Agency Work Directive (TAWD) at EU level. It became clear however, that the flexibilities within the TAWD meant that it could accommodate the UK position, and the TAWD was finally adopted in November 2008. The implementing legislation came into force on 1 October 2011, in the form of the Agency Worker Regulations (AWR). The AWR guaranteed, for the first time, equal treatment rights for temporary agency workers with permanent employees in respect of certain ‘basic’ working terms and conditions.

3. The wide view of vulnerability

The wide view of vulnerability: problems and solutions

On the wide view, vulnerability is a function of the inequality of bargaining power between employers and (all) workers. Firstly, this inequality is created by the

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18 This is discussed in detail in chapter 5, section 2
19 SI 2010/93
operation of the capitalist system under which labour becomes a ‘commodity’ to be bought and sold on the market. In Marxist terms, workers are exploited by capitalist employers, who use their superior economic bargaining power and ownership of the means of production to ensure that ‘surplus value’ created by those workers is siphoned off by employers for their own ends. Workers are forced into this relationship by the lack of real alternatives to meet their need for subsistence, and because they are alienated both from their own labour and from other workers, are maintained in an inferior position compared to the ‘bourgeoisie’. Secondly, this inequality of bargaining power between workers and employers is created by the reality of the employment relationship which necessarily involves a ‘power to command and a duty to obey’, aptly disguised by the institution of the ‘contract of employment’. This contract of employment appears to be freely negotiated, but is in fact an ‘element of subordination’ which the worker has little power to change. The existence of these inbuilt inequalities means that workers have the need, and in democratic societies, the right, to combine in autonomous trade unions to modify this imbalance of power by collective action. Indeed, it is only through the operation of collective power that there can be any autonomy or dignity achieved for the individual worker.

21 O Kahn Freund, ‘Some Reflections on Law and Power’ in P Davies and M Freedland (eds), Kahn Freund’s Labour and the Law (Stevens and Sons 1983) 18
22 Ibid 18
23 Lord Wedderburn, ‘Collective Bargaining or Legal Enactment: the 1999 Act and Union Recognition’ (2000) 29 (1) ILJ 1, 3
operation of this ‘labour power’ is essential in the recognition of workers as human beings rather than simply a commodity or article of commerce.\textsuperscript{24}

On this view, agency workers would be seen as vulnerable. The wide view would adopt the Marxist perspective that like other workers of the ‘proletariat’, agency workers are subject to alienation and exploitation by the exigencies of a capitalist system co-opted by the ‘bourgeoisie’ for its own ends. Indeed, on this view, the characteristics of some agency work (low paid, lacking in job security) would be recognised as a typical example of the worst features of capitalist exploitation. More than this, agency workers would be seen as particularly vulnerable as they have been largely unable to organise to counteract the power of capital and management. Certainly, the statistics show that trade union density for temporary workers falls considerably below that for permanent workers. For example in 2010, 27.2\% of permanent workers were members of trade unions, whilst this figure was only 17.3\% for temporary workers.\textsuperscript{25} The difference was particularly stark in the private sector. Here trade union density for temporary workers was only half that of permanent workers.\textsuperscript{26}

According to the wide view, the solution to the vulnerability of agency workers is to increase the coverage of collective bargaining. Collective bargaining is preferred to the setting of legal standards as it achieves much more for workers. It has a role in establishing workplace democracy through the ‘civilizing’ impact of collective

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} Ibid 4
\item \textsuperscript{25} BIS, ‘Trade Union Membership 2010’ (April 2011) 23<
\url{http://stats.bis.gov.uk/UKSA/tu/TUM2010.pdf} \textsuperscript{\textless} accessed 19 August 2011
\item \textsuperscript{26} Ibid 23
\end{itemize}
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agreements.\textsuperscript{27} Under the collective agreement, management must conform to certain rules, and therefore management actions are bound to be less arbitrary.\textsuperscript{28} Another ‘democratic’ feature of well established collective bargaining mechanisms is the chance for workers to voice their views, and particularly to voice concerns which might otherwise carry the threat of dismissal.\textsuperscript{29} This does not mean that there is no role for the ‘law’ and the setting of minimum legal standards for agency workers, but the argument is that standards alone cannot be effective because they ‘cannot do much to modify the power relation between labour and management.’\textsuperscript{30} Workers with no social power have no means to enforce them. Rather, in order for legal (or other) norms to be effective, they need to be backed by ‘social sanctions’, that is by ‘the countervailing power of trade unions and other organised workers asserted through consultation and negotiation with the employer, and ultimately if this fails, through withholding their labour’.\textsuperscript{31} Therefore, collective bargaining needs to be established \textit{a priori} because without collective bargaining mechanisms there is no guarantee that legal standards can be enforced.

The central importance of collective bargaining in improving the position of agency workers (in line with the wide view of vulnerability) is given expression in the PEAC. Article 4 provides that ‘measures shall be taken to ensure that the workers recruited by private employment agencies ...are not denied the right to freedom of

\textsuperscript{27} G Davidov, ‘Collective Bargaining Laws: Purpose and Scope’ (2004) 20 (1) \textit{International Journal of Comparative Labour Law and Industrial Relations} 81, 89
\textsuperscript{28} Ibid 89
\textsuperscript{29} Ibid 89
\textsuperscript{30} Kahn-Freund (n 21) 19
\textsuperscript{31} Kahn-Freund (n 21) 20
association and the right to bargain collectively’. The fact that there is no derogation permitted from this article shows that these rights are considered foundational at ILO level, again in accordance with the argument on the wide view. At EU level, reference to collective bargaining is more nuanced, and there is no provision in the TAWD which (re)states the right of all temporary agency workers to bargaining collectively. That said, the TAWD is infused with the ethos of flexicurity, in which the social partners are deemed to have a central role. Article 5 (3) TAWD is a good example of a provision which aims to involve the social partners in the furtherance of these flexicurity principles. It introduces flexibility into the legislation by allowing the social partners to negotiate terms and conditions for agency workers which ‘whilst respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions which may differ’ from the equal treatment principle. On the one hand, this provision has the potential to allow the social partners to obtain standards over and above those provided in the Directive, and increase security for workers. On the other hand, this provision allows the possibility for trade unions to reduce the protection of agency workers, and in practice, this has created real problems for agency workers. This also provides a real challenge to the theory of vulnerability on the wide view, and this will be discussed in more detail in the next section.

Criticisms of the wide view

The Marxist foundations of the wide view create severe problems when it comes to applying this theory in the real world and specifically to agency workers. Marxist theory tends to present all workers as part of the mass ‘proletariat’ and has no means of distinguishing between different individual situations. However, as we have seen, the labour market position of agency workers differs immensely. Some workers are indeed in low paid, low-skilled jobs and have little labour market power. Increasingly though, agency work is becoming a choice for highly qualified professionals, who have considerable market power. In this context, the (Marxist) metaphors of ‘alienation’ and ‘exploitation’ appear unsuitable. The metaphor of ‘alienation’ is best understood in terms of the factory system under which the creative and imaginative capacities of workers are reduced by mechanisation and repeated mundane tasks. However, as far as the ‘gold collar’ workers are concerned, they are part of the ‘knowledge economy’ and have the opportunity to use their creative and imaginative capacities. There is evidence that these workers have jobs which stimulate and challenge them. It might also be difficult to argue that these workers suffer ‘exploitation’ on the labour market. ‘Gold collar’ workers

33 Evidence for this proposition is provided in B van Wanrooy, H Bewley, A Bryson, J Forth, S Freeth, L Stokes and S Wood, ‘2011 Workplace Employment Relations Study’<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210103/10-WERS-first-findings-report-third-edition-may-2013.pdf> accessed 3 July 2013. In this study, it was found that as a result of the ongoing recession in the UK, only 3% of workplaces had increased the use of temporary agency staff, whereas 16% had reduced it. This suggests a reluctance to rely on ‘numerical’ flexibility strategies (using low paid temporary agency staff as a cost-saving measure in difficult economic circumstances). The profile of temporary agency worker bringing claims also suggests a set of ‘gold-collar’ temporary agency workers: see Evans v Parasol Limited [2011] ICR 37.
34 Belliotti (n 20) 145
35 Leighton (n 4) 20
are highly mobile and arguably have a great number of labour market opportunities to choose from. They are therefore not ‘forced’ to stay in one position if the terms of that employment are not suitable. This takes away the power of employers to ‘exploit’ these workers, and to extract over and above the labour equivalent of what they produce.\(^{36}\)

There are further theoretical problems for the wide view. As a general rule, this view assumes that workers have sufficient commonality of interest around which they can effectively organise, and that trade unions are effective at serving the interests of all these workers. \(^{37}\) In the context of agency workers, these two assumptions are difficult to sustain. For a start, the commonality of interest under the wide view relies on an understanding of workers in a ‘standard employment relationship’\(^{38}\) supported by other labour and social institutions. \(^{39}\) Agency working is a seminal example of a set of relationships which do not correspond with this standard employment relationship, and as such there is often no commonality of interest \textit{within} the agency worker group. There is also a lack of communality of interest \textit{between} agency workers and the wider working population. This poses difficulties for the placing of temporary agency workers within established traditional trade unions (assuming that permanent full time workers still make up the core of those traditional unions). The interests of agency workers often conflict with those of permanent full time workers, and so the trade union would not be

\(^{36}\) Belliotti (n 20) 146
\(^{37}\) J Fudge, ‘Reconceiving employment standards legislation: labour law’s little sister and the feminization of labour’ (1991) 7 Journal of Law and Social Policy 73, 77
\(^{39}\) Ibid 35
able to serve both sets of interest. A particularly pertinent example is in relation to redundancy, where in times of economic crisis temporary agency workers tend to be the first to be dismissed. In this situation, if a trade union gives support to temporary agency worker members, the risk of redundancy would transfer to its permanent members, which would not be an acceptable situation for the union.

The question is then whether specific unions could be formed outside of the traditional union structure which would best serve the interest of just agency workers. Indeed, it has been argued by some modern authors that the establishment of collective bargaining in this way is essential for agency workers. As these workers often have very little market power, they have the least opportunity to take advantage of legal protection even where it exists.\textsuperscript{40} They are particularly in need of collective bargaining to improve their market position. However, the evidence is that these kinds of specific unions have not been popular, and most agency workers, where they have become members of trade unions are members of the most representative trade union in their sector.\textsuperscript{41} Furthermore, there is evidence that where these specific trade unions have been established they have reduced the protection afforded to temporary agency workers. This position would clearly undermine the whole scheme of the wide view. A good example is provided in Germany. Here, new legislation was introduced which included a provision in line with Article 5 (3) TAWD (above), namely that equal protection rights for temporary agency staff could be avoided by

\textsuperscript{40} N Smit and E Fourie, ‘Extending Protection to Atypical Workers, Including Workers in the Informal Economy, in Developing Countries’ (2010) 26(1) \textit{International Journal of Comparative Labour Law and Industrial Relations} 43, 53

collective agreement. This led to the establishment of a number of new unions, formed specifically for the purpose of maintaining lower wages and conditions in the temporary agency work sector.\textsuperscript{42} The result was a reduction in standards for temporary agency workers across the sector, such that the original legislation had to be repealed.\textsuperscript{43}

The above analysis lends weight to the argument that for temporary agency workers, collective bargaining simply cannot be an effective solution. Collective bargaining does not fit with temporary agency work as a new work form, and there is insufficient trade union membership amongst temporary agency workers for collective bargaining to fulfil its functions under the wide view (the increase in social power of workers vis-a-vis management) That said, there is some evidence that trade unions have been involved in increasing the visibility of temporary agency workers despite the low trade union density amongst these workers. This action is rather difficult to explain on the wide view, but is rather better explained under the middle view of vulnerability. For this reason, these trade union activities are discussed in the next section.

\textsuperscript{42} Schlachter (n 32) 195
\textsuperscript{43} The new legislation is the Erstes Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes, 28.4.2011, BGBl.I.642
4. The middle view of vulnerability

The middle view of vulnerability: problems and solutions

The middle view of vulnerability is based on the premises of social law, which emerged as a response to the defects of liberal theory. Social law is particularly concerned that jurisprudence based on liberal theory (classic private law) is unable to deliver justice. Under the scheme of classic private law, the subjects of the law are individuals, and the role of the state is to create general and abstract rules which allow a framework within which individual free will and freedom of contract can be exercised. According to the premises of social law, the problem with this scheme is that it fails to account for power relations between groups, and institutionalised differential treatment of those groups. Social law aims to correct these defects by recognising that human action is fundamentally collective and therefore groups, rather than individuals, should be the subject of the law. It aims for a level of substantive equality between groups, and a basic subsistence level for all. It is perhaps best exemplified by the operation of social rights which are ‘positive’ and require government action, demand government expenditure and are ‘abstract’ in the sense that their content changes with the particular political compromise guaranteeing their operation.\(^{44}\)

According to the middle view of vulnerability, workers are vulnerable if they are not organised as a ‘group’ and if they are not recognised as a group in need of

\(^{44}\) C Gearty and V Mantouvalou, *Debating Social Rights* (Hart 2011) 109
protection (by the state). This is because, as we have seen, under the social law scheme it is groups rather than individuals that are the subject of the law, and the law is not merely a formal ‘right’ based on high philosophical or moral ideals. Rather the law is a policy response recognising a particular settlement reached between social groups. If the state has intervened to guarantee a certain level of protection to a group therefore it is because the state has recognised that the maintenance of the relationship (i.e. between employers and agency workers) is important for society, and therefore it is in the interest of the state that the ‘burdens and profits’ produced by their activities are equally distributed. The pervasiveness of the state and the law under the social law scheme means that rights have much more ‘power’ for groups in a practical sense than rights under a liberal regime. They can be utilised on a day-to-day basis to gain advantage: rights are a ‘weapon, a strength, an advantage one should seek to have’. Therefore under the social law scheme, groups that are the subject of legislation have significantly more power than those outside the law. Of course, as the law is simply the recognition of social compromise between groups, it is subject to manipulation and change, but association remains the only way to achieve status and power and to neutralise social conflict.

As far as agency workers are concerned, it has already become clear that agency workers have not been particularly successful at forming specific groups to represent their interests at work. However, more traditional unions have been

46 Ibid 46
involved in promoting the interests of these workers, and the ‘visibility’ of the group has increased in this way. In the UK for example, the TUC promoted the adoption of the TAWD and negotiated for a reduction in the length of the qualification period for these rights.\textsuperscript{47} Furthermore, the Communication Workers Union has been involved in highlighting the ‘exploitation’ of agency workers in the UK, and promoting the correct implementation of the TAWD in the UK.\textsuperscript{48} Under the middle view, the development of the rights under the TAWD and subsequently the AWR would indicate the success of group action in increasing the visibility of temporary agency workers vis-a-vis the state and reducing their vulnerability.

However, the middle view would be uncomfortable with the \textit{nature} of the equality granted by the agency legislation. The TAWD and the AWR are founded on the notion of formal equality; that is ‘likes must be treated alike’.\textsuperscript{49} The idea of formal equality is inspired by liberal notions of state neutrality, individualism and the promotion of autonomy.\textsuperscript{50} This formal equality does not guarantee any particular outcome for agency workers, and particularly it does not guarantee the improvement of the position of agency workers generally. This is because all that formal equality demands is consistency of treatment; there is no distinction between treating agency workers just as \textit{badly} as other workers as opposed to treating them equally \textit{well}. This problem is compounded in the AWR by the requirement that the ‘comparator’ for determining the terms and conditions for

\begin{itemize}
\item \textsuperscript{48} L Peacock, ‘Protests begin over agency workers cheated on pay’ The Telegraph (16 January 2013) <http://http://www.telegraph.co.uk/finance/jobs/hr-news/9803866/Protests-begin-over-agency-workers-cheated-on-pay.html> accessed 19 July 2013
\item \textsuperscript{49} B Hepple and C Barnard, ‘Substantive Equality’ (2000) 59(3) \textit{Cambridge Law Journal} 562, 562
\item \textsuperscript{50} S Fredman, ‘Equality: A New Generation’ (2001) 30 (2) ILJ 145, 154
\end{itemize}
agency workers need only be an ‘employee’ engaged in the ‘same or broadly similar work’. In theory, then the comparator could be a worker engaged on a (short) fixed-term contract who may in fact be working under less favourable conditions than a full-time worker.\(^{51}\) Therefore there must be serious doubt as to whether this legislation will achieve social law ideals, which aim for group empowerment and the correction of inequality through granting previously ‘passed over’ groups a level of material or substantive equality with other social groups.

The second problem is that the equality granted in the TAWD and the AWR is limited not only in terms of type, but also in terms of its scope. According to the provisions of the TAWD and AWR, agency workers are entitled to the same ‘basic working and employment conditions’ as ‘employees’ at the end-user. These basic working conditions refer to pay and working time benefits.\(^{52}\) However, the definition of ‘pay’ adopted in the AWR is very restricted and excludes a long list of benefits available to company employees. Benefits excluded in the definition of ‘pay’ are (amongst others): occupational sick pay, pension payment, payment in respect of maternity paternity or adoption and payment in respect of redundancy.\(^{53}\) The TAWD and AWR further provide that agency workers should have the same right of access as ‘comparable workers’ to collective facilities and amenities, which include canteen, childcare and transport services.\(^{54}\) These rights are also limited however, as less favourable treatment of agency workers as regards access to


\(^{52}\) Article 3 (1) (f) TAWD and Article 6 (1) AWR

\(^{53}\) Article 6 (3) AWR

\(^{54}\) Article 6 (4) TAWD and Regulation 12 AWR
these services can be justified on objective grounds.\footnote{Article 6 (4) TAWD and Regulation 12 (2) AWR} Finally, the provisions in the TAWD and AWR do not guarantee equality of status for agency workers. In the TAWD, article 2 provides that the Directive aims to ‘ensure the protection of temporary agency workers and to improve the quality of temporary agency work ....by recognising temporary-work agencies as employers.’ It is possible to argue from this statement that there is a presumption that agency workers are employees of their temporary work agency.\footnote{E McGaughey, ‘Should Agency Workers be Treated Differently?’ (July 2010) LSE Law, Society and Economy Working Papers 07/2010, 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610272> accessed 12 August 2011.} However, the Directive is drafted ‘without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker’.\footnote{Article 3(2) TAWD} On translation of the provisions of the TAWD therefore, the UK government has not used this opportunity to clarify the status of agency workers. The AWR simply provide that an ‘agency worker’ is an individual who works either under a contract of employment with the agency or has ‘any other contract to perform work or services personally for the agency.\footnote{Regulation 3 (b) AWR} The result is that agency workers will continue to be denied a range of rights associated with ‘employee’ status (for example rights to claim unfair dismissal).

From the above discussion, it appears that the equality legislation in place for agency workers does not meet the premises of social law. The liberal foundations of this legislation and its reliance on formal equality mean that it is unable to guarantee any level of substantive equality. The question is how substantive equality for agency workers could be achieved without over compensating some
agency workers, given the diversity in their situations. Certainly, some agency workers already receive the same or better conditions than permanent workers. Furthermore, the idea of privileging agency workers is controversial in the context of scepticism about the desirability of this particular form of working. This scepticism is exemplified by comments at European level that ‘stable’ employment contracts of indefinite duration are the ‘general form of employment relationship’ in the EU, and that protecting workers against instability of employment is a valid aim of EU law.\(^\text{59}\) It could therefore be suggested that reducing the ability of companies to resort to agency work could be more in line with achieving substantive equality than creating conditions favouring it.

Perhaps the solution that would best fit in practice with the ethos of social law is the regulation of employment agencies rather than agency workers. This involves state interference in ‘private’ affairs, a situation which would be objectionable by a liberal view, but which fits well with the socialisation of economic processes promoted by social law. The tighter regulation of agencies would also presumably go some way to levelling the playing field \textit{between} agency workers, rather than between agency and permanent workers. Indeed, it has been recognised at both national and international level, that there is the potential for agencies to ‘abuse’ workers. At international level, the PEAC was set up on the basis of the ‘need to protect workers against abuses’. The PEAC recognised in particular the often poor treatment of migrant workers by employment agencies. In Article 8, the PEAC provides that ratifying countries should ensure that in relation to agencies dealing

\(^{59}\) Joined cases C-378/07 to C-380/07 Kiriaki Angelidaki and Others v Organismos Nomarkhiaki Aftodiikisi Rethimnis and Dimos Geropotamu, [2009] ECR I-03071, para 99
with migrant workers there are ‘laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices in abuses’.

In the UK, the government does regulate private employment agencies to a certain extent. As early as 1973, the Employment Agencies Act (EAA) prohibited the charging of upfront fees to agency workers (with a number of exceptions). The EAA also gave discretion to the Secretary of State to ban agencies for regulatory breach. More recently, the EAA was amended by the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (CEABR 2003) which (further) restricted the activities of employment agencies. For example, there are now restrictions on agencies selling other services, using agencies workers during industrial disputes and giving false information to agency workers about the nature of their business. However, by 2006 it was clear that ‘whilst the majority of agencies treat their workers fairly’ there were still a significant number of agencies which were mistreating agency workers. Further amendments were made to the CEABR 2003 in 2007 and again in 2010. The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010 made it easier for agency workers to withdraw from agency contracts and provided specific requirements for information to be given to agency workers on commencement of

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60 s 6 EAA
61 s 13 EAA
62 SI 2003/3319
63 Regulations 5, 7 and 9 CEABR 2003
64 DTI, Success at Work: Protecting Vulnerable Workers, Supporting Good Employers. A policy statement for this Parliament (March 2006) 18
65 SI 2010/1782
their contracts.\textsuperscript{66} However, despite these amendments, there remain serious problems with the package of legislative measures for agency workers. The first problem is that there is no consistency on the issue of licensing. Licensing is required only in certain restricted industries and licences are regulated by the Gangmasters Licensing Agency rather than the EASI. This is unfortunate, given that the threat of licence revocation is a real incentive for agencies to comply with the regulations.\textsuperscript{67} Secondly, there remain exceptions to the prohibition on agency fees. Fees can still be charged in relation to actor, modelling musician and sports jobs. These fees are detrimental as they ‘can reach high levels without any promise of work’ and can be a barrier to jobs.\textsuperscript{68} The third problem is that of enforcement. The enforcement of the agency regulations traditionally relies on public bodies which are under-staffed and underfunded, although some moves have been made to increase the productivity and number of inspectors in recent years. It also appears to be inefficient to have two public bodies (GLA and the EASI) operating in this field.\textsuperscript{69}

\textsuperscript{66} Regulation 4 and Regulation 6 CEABR 2010
\textsuperscript{67} McGaughey (n 56) 12
\textsuperscript{68} Ibid 12
\textsuperscript{69} The CEABR 2010 are again subject to consultation under the Employment Law Review in the UK: BIS, ‘Consultation on reforming the regulatory framework for employment agencies and employment businesses’ (January 2013) <https://www.gov.uk/government/consultations/consultation-on-reforming-the-regulatory-framework-for-employment-agencies-and-employment-businesses> accessed 30 May 2013. Although this consultation closed on 11 April 2013, the government has not yet produced a response to the consultation.
Criticisms of the middle view

On the middle view, it is assumed that agency workers have achieved a certain negotiation status because of their inclusion in (equality) legislation, and therefore a certain equality of bargaining power. What is clear however from the AWR is that the negotiation position of groups favouring industry has been preferred (by the state) over groups favouring agency workers. This is particularly apparent in the compromise reached on the ‘qualifying period’ for the application of the AWR. Despite the fact that in the consultation for the AWR, groups representing agency workers felt that there should not be a qualifying period for this legislation, the UK government conceded to industry pressure and drafted the AWR on the basis of a qualifying period of 12 weeks. The evidence is that this qualifying period will automatically exclude over half of agency workers from benefitting from the provisions of the legislation. Indeed, it is possible to argue that the whole ethos of the TAWD and AWR is rather industry focussed. The Preamble to the TAWD is dominated by references to ‘flexicurity’, which in theory seeks a balance between employer flexibility and worker security, but in practice allows employers to proceed unhindered with practices which undermine job (and other types of) security for workers.

71 Regulation 7 (1) AWR
72 Countouris and Horton (n 51) 333
The scheme under the middle view can be criticised for both its vagueness and its temporary nature. On the middle view, there is nothing permanent either about groups or about group protection. From the perspective of both the wide view and the narrow view this is troubling. Both the wide view and the narrow view would support the idea that there is a persistence in the nature of vulnerability which cannot be addressed by temporary means. For the wide view, this persistence requires a procedural system (guaranteed by the state) which will ensure that the weaker party in the employment relationship will always have the chance to alter their position. For the narrow view, the persistence of precarious employment (associated with temporary agency work) is an institutional fact of the new economy and needs to be addressed on a more permanent basis than suggested in the middle view. On the narrow view, there would be scepticism about the conversion of all rights into ‘social rights’ as might be suggested on the middle view. The former view places greater faith in the ability of immutable human rights to protect those most persistently and categorically excluded from taking the benefits of the current economic system. This view will be discussed in more detail in the next section.
5. The narrow view of vulnerability

The narrow view of vulnerability: problems and solutions

The narrow view of vulnerability focuses on the individual labour market participant. On this view, vulnerability attaches to certain individuals on the labour market as a result of their labour market position. It is fundamentally a liberal view, which values above all freedom of contract and economic process, autonomy and diversity. The narrow view differs radically from the wide view of vulnerability, which relies on the combination of workers to achieve ‘social power’ as against employers. On the narrow view, collective bargaining violates equal autonomy and freedom because it does not allow workers to individually negotiate higher wage rates. The narrow view also differs significantly from the middle view of vulnerability. According to the narrow view, the theory of social law, and the reliance on the (nation) state cannot be sustained in the face of economic processes which are increasingly global, and the related fracture of traditional industrial groupings. Rather, the narrow view attempts to embrace (or at least recognise) the increase in diversity brought about by the ‘knowledge economy’ and to suggest regulation which accords with the needs of these (new) economic processes and the needs of individual labour market participants to deal with them. Only where there are instances of real or severe abuse of agency workers which go beyond a mere economic power imbalance should there be comprehensive

protection for agency workers (for example through the scheme of human rights or protection against ‘rogue’ employers).

On the narrow view of vulnerability, there would certainly be some agency workers who would be seen as vulnerable. These would be workers recruited by companies as part of a strategy of numerical flexibility, with no investment in the employability of those workers. They are trapped in low quality low skilled jobs which offend against the principles of the knowledge economy, and do not allow them to progress. On the other hand, certain agency workers would not be seen as vulnerable. These agency workers would be represented by ‘gold-collar workers’ who use their knowledge and expertise to command high salaries and favourable working conditions. Such workers have high level of autonomy and are able to use their skills and knowledge to ensure that a job is performed efficiently. They have a high level of employment security and are able to ensure continued investment in their expertise. This kind of ‘flexible employee’ is the most valued on the narrow view, as both a contributor to and beneficiary of the flexible knowledge economy.

There is a recognition on the narrow view that labour law fails to recognise the diversity of agency workers, and neither supports vulnerable agency workers nor encourages the development of gold collar workers essential to the new economy. Labour law regulation is based on an outdated understanding of the functioning of the contract of employment represented by the ‘standard employment relationship’.

75 H Collins, ‘Regulating in the Employment Relation for Competitiveness’ (2001) 30(1) ILJ, 29
76 Ibid 24
Agency work contracts do not correspond to this kind of relationship, because they are for a limited period, and they are also characterised by a trilateral employment relationship between an agency, an agency worker and company end-user. There is also a wide diversity of agency work situations within the agency work category. Therefore regulation associated with traditional contractual analysis based on the standard employment relationship fails to support agency workers, and also fails to recognise the different positions in which individual agency workers find themselves.

The difficulty is the kind of reregulation which should follow from this analysis on the narrow view. These difficulties are both theoretical and practical. On a theoretical level, the narrow view is a liberal view, and hence tied into a contractual analysis which upholds freedom of contract for the majority of workers (although this freedom may be modified where there is evidence of severe abuse). There are real flaws in this contractual analysis for agency workers. On a purely contractual analysis, agency workers are denied the employment status required to gain access to any employment rights. In terms of the relationship between the agency and the agency worker, the pure contractual analysis can be used to argue that the agency simply acts as a recruitment vehicle with no long term control over (or mutuality of obligation with) the agency worker.77 This kind of argument has been used in the UK courts to deny any contractual status between agency and agency worker.78 In terms of the relationship between the end-user and the agency worker,

77 Leighton and Wynn (n 4) 303
78 Montgomery v Johnson Underwood Ltd [2001] IRLR 269, Brook Street Bureau (UK) v Dacas [2004] IRLR 358 and Bunce v Postworth Ltd [2005] IRLR 557. These cases appear to call into
it can be argued through a contractual analysis that the fact that the end-user does not pay the agency worker means there is no ‘work-wage’ bargain on which to found mutuality of obligation.\textsuperscript{79}

In the UK, recent court decisions have followed this approach, calling into question previous decisions which suggested that a contract could be implied between temporary agency worker and end user.\textsuperscript{80} In \textit{James v Greenwich Council} the court held that there should be no assumption of a contract between an agency worker and end user, unless there was some particular action over and above ‘normal’ conduct by either the agency or the company to justify that assumption.\textsuperscript{81} A contract should only be implied where it was necessary to do so to reflect the business reality of the relationship.\textsuperscript{82} This case served to affirm the contractual analysis and has been referred to consistently in later cases. For example, in the case of \textit{Tilson v Alstom Transport}\textsuperscript{83} the court applied the ‘necessity’ test outlined in \textit{James} to conclude that there was no contract between the agency worker and client. The court was keen to point out that employment status could not be found without the existence of a contractual relationship.

\textsuperscript{79} Leighton and Wynn (n 4) 301
\textsuperscript{80} Historically, there have also been instances where the courts have been open to the argument that an employment relationship exists between an agency worker and client or end user. Prior to 2006, there was no direct authority for this position, although \textit{Franks v Reuters Ltd} [2003] IRLR 423 did suggest that an implied contract could be found between an agency worker and client where there was a relationship which proceeded for a considerable time. There were also obiter comments in \textit{Dacas v Brook Street Bureau} [2004] IRLR 358 that a finding of a contractual relationship between an agency worker and client was possible. In 2006, the courts moved from suggesting a possible relationship between client and agency worker to finding a relationship as a matter of fact. However, in \textit{Cable & Wireless v Muscat} [2006] IRLR 354 the court held that Muscat was an employee of the end user, based on the specific facts (a highly paid worker in the IT services industry who provided his services through a limited company to the client via an agency).
\textsuperscript{81} [2008] ICR 545, para 51
\textsuperscript{82} Ibid para 52
\textsuperscript{83} [2010] EWCA Civ 1308
simply on the basis of ‘public policy’ or because the arrangement resembled an employment contract. Something more was needed. Furthermore, in the case of *Eric Muschett v HM Prison Service*\(^{84}\), the Claimant failed to establish status with the end-user (or the agency) on the basis that there were insufficient facts upon which to infer that the implication of contract for services was necessary.\(^{85}\)

The necessity test may be avoided where there is evidence of a ‘sham agreement’ deliberately created to avoid statutory protection for the worker. This may aid agency workers in establishing worker status, although it has not necessarily been helpful to agency workers in the past. In the case of *Consistent Group v Kalwak*\(^{86}\) for instance, the agency workers were unsuccessful in proving that their contract with the agency was a sham (and therefore establishing contractual status) because the Court of Appeal required proof that both parties intended to paint a false picture as to the true nature of their respective obligations. This followed the approach adopted in relation to commercial contracts, where the ‘freedom’ of the parties of the contract was considered paramount. However in the later case of *Firthglow Limited (trading as Protectacoat) v Szilagi*\(^{87}\) the Court required only that one party intended to misrepresent the relationship (i.e. the employer) in order to show that there was a sham contract, and the worker was able to prove status in this case. Furthermore, in the recent case of *Autoclenz v Belcher*\(^{88}\), the Court of Appeal suggested that the vulnerability of the worker should be taken into account when considering the existence of a sham agreement: ‘So the relative bargaining

\(^{84}\) [2010] EWCA Civ 25  
\(^{85}\) Ibid para 38  
\(^{86}\) [2008] EWCA Civ 430  
\(^{87}\) [2009] IRLR 365  
\(^{88}\) [2011] IRLR 820
power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only part.’ This suggests that if agency workers are considered particularly at risk in the labour market, the court may look beyond the contractual documentation to avoid agency workers being excluded from labour law rights. Despite the fact that this denies freedom of contract, this solution may be acceptable to the narrow view, given that it is only activated in certain extreme cases where there is a real risk of abuse.

On a practical level, it is very difficult to create policies which recognise the diversity of agency worker situations: to simultaneously support ‘gold-collar’ workers and protect vulnerable agency workers. One attempt to provide this simultaneous support and protection has been to institute training programmes which improve employment security for all (agency) workers. This falls under the ambit of ‘regulation for competitiveness’ or regulation for ‘flexicurity’; the idea is that a reduction in rigid employment protection mechanisms associated with ‘jobs for life’ operates within a framework consisting of strong social security systems and investment in ‘lifelong learning’ which allows workers to achieve their (individual) goals and ensures they are adequately supported in a ‘flexible’ knowledge-based economy. In practice however, ‘flexicurity’ policies which have attempted to improve ‘employment’ security for all (agency) workers in the knowledge economy have, at best, tended to aid gold-collar workers and neglect

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the more vulnerable agency workers. In Denmark, which is viewed as having a progressive government training policy compliant with the ethos of ‘flexicurity’, there is a wide disparity between workplaces and the type of workers receiving vocational training. There seems to be reluctance here amongst companies to invest in training for unskilled workers, with most of the training budget reserved for top managers, skilled workers and salaried employees. In the UK, a legal right to request training came into force on 6 April 2010. However, this right is restricted to ‘employees’ with 26 weeks’ service and agency workers are specifically excluded from the legislation. The effect of this exclusion is to increase rather than reduce the vulnerability of some agency workers, and undermine the provisions of the AWR. For example, although under the AWR, agency workers are to be given the same opportunities as permanent staff to apply for vacancies in the user undertaking, if they are excluded from training opportunities (within the firm), they are perhaps less likely to obtain a permanent position even if aware of a vacancy.

The difficulty of addressing all agency workers might lead to the conclusion that it is the vulnerable agency workers who should be given targeted support to ensure that they can take the benefits of the knowledge economy. In the UK, a number of specific measures targeting particularly vulnerable agency workers were

90 Ibid 201
91 The main provisions are contained in a new Part 6A of the Employment Rights Act 1996 comprising sections 63D to 63K. These Regulations are supplemented by two statutory instruments: the Employee Study and Training (Procedural Requirements) Regulations 2010 (SI 2010/155) and the Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010 SI 2010/156.
92 Regulation 2 (1) Employee Study and Training (Qualifying Period of Employment) Regulations 2010 SI 2010/800
93 Section 63 D (7) (d) Employment Rights Act 1996
introduced in the vulnerable worker policy. A ‘Vulnerable Worker Enforcement Forum’ was set up to make a number of policy recommendations and reflect on strategies to improve the position of the most vulnerable agency workers. The main recommendations consisted of improving institutional structures to ensure the most vulnerable workers were fully aware of their employment rights (rather than suggesting that they needed new rights). There were also a number of measures to try to improve the regulation of ‘rogue’ agencies through increasing the number and power of inspectors connected to the EASI. However, the ‘pilot’ projects implementing the new institutional structures were temporary and never fully followed through, and the regulation measures have only had a minor influence on improving the position for agency workers. Furthermore, any positive outcomes of these pilots have now been severely undermined by the reduction in funding for Citizens’ Advice Bureau and the closure of some branches as a result of public sector finding cuts.

Criticisms of the narrow view

The fundamental problem with the narrow view is that it stands in a paradoxical situation in relation to agency workers. On the one hand, it upholds the (liberal)

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94 BERR (n 11) 28
95 Ibid 49. This provides information on the pilots. They were commissioned in 2007 and ran for two years. One was based in London (City and Docklands) and focused on the cleaning and building services sector. The other was based in Birmingham and focussed on the hospitality sector.
belief in the value of economic and contractual freedom and the flexibilisation of contractual relations. It recognises that there is real value in having agency workers and the diversity of these relationships. The narrow view is sceptical of the ability of labour law as traditionally formulated to provide any solution to this problem, given that this labour law is based on outdated notions of the form of employment contracts and how they operate. On the other hand, regulation under the narrow view is constrained by the contractual framework which denies employment status to agency workers. For example, on the narrow view, it would not make sense to legislate to allow all agency workers employment status, as this would undermine employee choice and the flexibilisation of employment relationships. Regulation therefore is focused on finding exceptions to this contractual framework for the most vulnerable (the finding of sham contracts for example). However, because these exceptions are still essentially part of the contractual framework, they rely on progressive judicial interpretation which is recognised as providing insufficient protection for these workers.  

There have been some attempts at providing targeted protection for agency workers who fall outside of the contractual scheme. A good example is provided by the policies under the vulnerable workers policy in the UK. However, these policies have tended to be piecemeal and sporadic and have not stood the test of time.

97 In the case of Studders v Secretary of State for Business Innovation and Skills UKEAT/0571/10/M which concerned the employment status of an agency workers, Serota J stated the following (para 2): ‘The factual background [of this case] is largely uncontroversial and concerns the vexed question of the status of agency workers and in what circumstances and agency worker might be an employee of the employment agency. The courts on a number of occasions have expressed concern as to the need for Parliament to intervene to clarify the law in this regard, and although various statutory instruments including new regulations ....have provided additional rights for persons on the books of employment agencies, I am not aware that Parliament has in fact done anything to clarify the law as to the status of agency workers.’
Furthermore, the access to the human rights scheme for the most vulnerable agency workers appears to be through the social rights established under equality statutes. These social rights do not operate in the same way as human rights protection for, say the most vulnerable domestic workers. They are contractually constructed, and the rights are for equality of treatment in contractual conditions. There is no scope for the argument that the difficulties faced by agency workers go beyond the contractual difficulties and towards the abuse of humanity. It could be argued that this particular function is met by the criminalisation of ‘rogue’ employers, but this of course is a scheme over which individual agency workers have no control.

6. Conclusions

It appears from the discussion in this chapter that assessing the position of agency workers according to the wide, middle and narrow view of vulnerability is useful. The narrow view is useful because it exposes the diversity of situations encountered by agency workers, and the economic phenomena which create vulnerability for (certain) agency workers. This view has also been very influential in practical terms, and many of the solutions to the vulnerability discussed in this chapter can be associated with the narrow view (at least to some extent). However, this view also has significant downsides when it comes to a consideration of the vulnerability of agency workers and the solutions to that vulnerability. Certainly, the achievement of a more consistent contractual status for
agency workers has not been achieved, and this can perhaps be explained according to the fundamental commitment in the narrow view to freedom of contract: the parties to an agency work contract should be free to decide on its terms (subject to limitations in instances of severe abuse). This failure to achieve contractual status is not just evident in case law; it is also reinforced by the provisions of the TAWD and AWR which fail to deal properly with these issues. It could also be argued that many of the other limitations of the TAWD and AWR can be traced back to liberal commitments endorsed in the narrow view. For example, there is a commitment in both the TAWD and AWR to narrow readings of equality, and the introduction of the qualifying period in the AWR can be seen as evidence of the lack of will at state level to interfere too far in business and economic freedom.

Indeed, although the analysis of the wide and the middle view have largely been marginalised in discussions of agency work, these views are also useful. For example, although collective bargaining mechanisms may be considered unsuitable for temporary agency work because of the lack of commonality of interests between agency workers and the working population as a whole, there is some evidence that trade unions have been active in promoting the rights of agency workers. On the one hand, this may be evidence that the wide view still has relevance to the consideration of agency work. On the other hand, an analysis of this trade union action does not in fact fit well with the wide view. It is unclear from the perspective of the wide view why a trade union may promote interests which are not those of its majority membership. In fact, it is the middle view which
provides a better explanation of this action. The middle view is committed to the assertion that ‘group’ action can proceed in a number of different ways, but that ultimately this has favourable outcomes for vulnerable groups and for the associations which promote them. On the middle view, rights are a function of group visibility however that visibility is achieved. This discussion is also interesting in the context of the next chapter on domestic workers. These workers have employed a number of diffuse and diverse group strategies to enable them to get their voice heard, and these actions have had favourable outcomes for this group.
Chapter 7: Domestic Work

1. Introduction

This chapter applies the theory of vulnerability in employment developed in chapters 2, 3 and 4 to a second labour market group: domestic workers. This group has been chosen because in a similar way to temporary agency workers, domestic workers have been identified in academic and political literature as one of the most vulnerable groups on the labour market. Conversely, this group has also been chosen because it provides an interesting contrast to the previous case study on temporary agency work: the position of domestic workers raises particular challenges both in terms of legal theory and practical legal regulation which differ from the challenges raised by temporary agency work. Indeed, domestic work can be viewed as representing a more significant departure from the ‘standard employment relationship’ than even temporary agency work. First of all, domestic work is carried out in private homes, and domestic workers are often employed not by companies but by private individuals.¹ Secondly, this type of work is largely carried out by women rather than men: of 18 countries surveyed by the ILO, women represented over 90% of total domestic employment.² Men tend only to be involved in those tasks less likely to be viewed as ‘women’s work’, such as

¹ ILO, *Report IV - Decent Work for Domestic Workers – Fourth Item on the Agenda* (Geneva 2010)
² Ibid 6
gardening, driving or gardening. Thirdly, the percentage of domestic workers with permanent contracts tends to be very low. This is either because of the very casual nature of the work, or because the contracts exist only informally. Finally, the consideration of domestic work is complicated by issues of race, class and citizenship which are not considered in the standard employment relationship model.

Domestic work is extremely heterogeneous in form. Workers may be employed directly by private employers or may be self-employed and work for more than one employer. Workers may be hired by an agency to carry out domestic work, in which case the employer-employee relationship becomes more formal and less personal than those hired directly. Occasionally, domestic workers are members of cooperatives who jointly negotiate contracts to provide domestic services. Of these groups, it is the ‘live-in’ domestic workers who are considered the most at risk of abuse. Live-in domestic workers face greater isolation and more limited mobility than other domestic workers and are potentially subject to longer hours for less pay. They are also at greater risk of physical and sexual abuse by their employers. Live-in migrant domestic workers face even greater challenges. Not only do they have to endure the conditions of live-in domestic workers, they are also subject to abuses within the recruitment system and from the police and immigration authorities. According to a report by Kalayaan in 2010, 65% of Migrant Domestic Workers stated that their passport had been withheld and 18% reported physical

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4 In Latin America, only 20 percent of domestic workers have a labour contract compared to 58 percent of the total urban workforce. Ibid 171
abuse by their employer, whilst 3% claimed they had been sexually abused.\textsuperscript{5} The difficulties faced by these workers are compounded by the transnational nature of their recruitment and placement, which makes regulation difficult. This has allowed unscrupulous practices of employment agencies to proliferate, including the charging of advance commission fees.\textsuperscript{6}

The low status of domestic work is reinforced by the exclusion of domestic work from many areas of regulation of the employment contract. The reason for this exclusion is not only the lack of economic value associated with this type of work, it is also because of the ‘personal relationship’ of domestic workers and their employers in the ‘private sphere’.\textsuperscript{7} Under liberal theory, which has been very influential in the development of both national and international legislation, the private sphere is not suitable for legislative intervention. This is because under this theory individuals should be ‘free’ to pursue their own view of the ‘good life’ (in the private sphere), as long as those actions do not infringe someone else’s rights (as defined in the public sphere). This separation of the public and private sphere is essential to the operation of liberal theory, as it allows liberals to demonstrate that the law in the public sphere is determined by universal, rational and neutral principles and is not affected by arbitrary desires of individuals or groups (in the realm of the private sphere).\textsuperscript{8} Furthermore, it is argued that the distinct separation

\textsuperscript{5} Kalaayan, \textit{Ending the abuse: Policies that Protect Domestic Workers} (May 2011) 13
\textsuperscript{7} E Albin and V Mantouvalou, ‘The ILO Convention on Domestic Workers: From the Shadows to the Light’ (2012) 20 (2) ILJ 67, 76
\textsuperscript{8} JW Singer, ‘The Player and the Cards: Nihilism and Legal Theory’ (1984) 94 (1) \textit{The Yale Law Journal} 1, 42
of the public and private sphere is necessary to preserve the functioning and characteristics of the private sphere. Just as the private sphere should not inform public legal rights, ‘public’ legal regulation should not govern the ‘private sphere’ because this risks harming the institution of the family, by contaminating this ‘safe haven’ with economic interests. This ‘commodification anxiety’ has resulted in the low coverage of domestic workers by protective employment legislation, and also the low enforcement of legal rights by domestic workers where they do exist. If domestic workers are instituted as ‘one of the family’, this tends to make employment law seem irrelevant or inapplicable to the relationship. Labour inspections are also uncommon in the field of domestic work, because of the potential for such inspections to conflict with the rights to privacy held by the domestic employer.

The aim of this chapter is to consider the particular situation of domestic workers in the context of the theory of vulnerability set out in chapters 2, 3 and 4. Perhaps more than any other group, domestic workers presents challenges to the theorisation of vulnerability and its regulatory solution in each of the wide, middle and narrow views. There are a number of ‘new’ issues that these views need to deal with in respect of domestic work. For the wide view, the isolation of domestic workers and the intimate relationship with their employers means that the organisation of these workers is potentially difficult. On the middle view, there are major challenges to the construction of ‘equality’ for domestic workers, because of

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9 G Mundlak and H Shamir, ‘Bringing Together or Drifting Apart? Targeting Care Work as ‘Work Like No Other’ (2011) 23 Canadian Journal of Women and the Law 289, 296
10 Ibid 297
the diverse identities and situations faced by this group. There is also the challenge of deciding what ‘equality’ means for a group with such specific and historically embedded problems. Finally, the effectiveness of the narrow view is to be questioned in the context of domestic work. As the dominant modern view of vulnerability, the construction of legal subjects is bound up with liberal and economic ideology which largely excludes domestic work from legal consciousness. To some extent this visibility has been improved by the recourse to human rights law, but this resort to human rights law has also further obscured the need to deal with domestic work as a distinct and vulnerable group.

2. Overview of legal and policy instruments concerning domestic work

In contrast to the position in relation to temporary agency work, domestic work has not traditionally been the subject of specific regulation at any geographical level. At the national level, domestic workers have, on occasion, been implicitly included in legislation, but in many countries these workers have been either explicitly or implicitly excluded.\(^{11}\) In the recent ILO Report on Domestic work, the following countries were found to explicitly exclude domestic workers from legislation: Jordan, Lebanon, Yemen, Egypt, Turkey, Bangladesh and Korea. Those countries implicitly excluding domestic work were found to be (amongst others): China, Switzerland, India, Indonesia and Pakistan.

\(^{11}\) ILO (n 1). In this report the following countries were included in those explicitly excluded domestic workers from regulation: Jordan, Lebanon, Yemen, Egypt, Turkey, Bangladesh and Korea. Those countries implicitly excluding domestic work were found to be: China, Switzerland, India, Indonesia and Pakistan.
Switzerland, India, Indonesia and Pakistan. Furthermore, even where domestic workers are considered to be implicitly included in legislation, there are often a number of exceptions which mean that domestic workers are not, in practice, fully included in labour law. A good example is the case of the UK, which is classified the ILO as implicitly including domestic workers within its legislative scheme. In the UK jurisdiction, domestic workers are in fact explicitly excluded from legislation on working time and health and safety. \(^{12}\) They are also exempted from the national minimum wage if they are treated as family members, and are entitled to be paid less than the minimum wage if they live in tied accommodation. \(^{13}\) These provisions have been the subject of a number of recent controversial (and rather conflicting) decisions in the UK courts. \(^{14}\) These decisions will be discussed in more detail later in the chapter.

At EU level, there has also been no specific regulation of domestic work, although the EU has advocated for the inclusion of domestic workers in national legislation, and has voiced its support for the ILO Conventions and Recommendations on domestic work (discussed below). \(^{15}\) The European Court of Human Rights (ECtHR) has also considered the scope of article 4 ECHR in relation to domestic work. The ECtHR has found not only that the actions of employers towards


\(^{13}\) Regulations 2 (2) and 2(3), 36 and 37 National Minimum Wage Regulations 1999 (SI 1999/584)

\(^{14}\) Cf Ms T Nambalat v Mr Taher and Mrs S Tayeb [2012] EWCA Civ 1249 and Ms P Onu v Mr O Akwiwu, Ms E Akwiwu 2013 WL 1841654

\(^{15}\) The European Commission states that ‘Domestic workers are often excluded from the protection of labour laws or are treated less favourably than other wage workers. National labour laws should be better assessed and strengthened implementing the basic principles embodied in Convention No. 189’ [the Domestic Work Convention]. It has posted the ILO publication ‘Effective Protection for Domestic Workers: a guide to designing labour laws’ on its Together for Trafficking Website < http://ec.europa.eu/anti-trafficking/entity.action?path=%2FPublications%2FEffective+Protection> accessed 18 June 2013.
domestic workers may breach the human rights protection under the Convention, but also that (domestic) workers may be entitled to compensation where government fail to provide sufficiently for sanctions against employers in breach of their article 4 obligations.\(^{16}\) Furthermore, there are a number of measures which have been introduced under the EU’s recently reinvigorated anti-trafficking policy, which may have relevance for the protection of some domestic workers. Firstly, there is a Directive providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals.\(^{17}\) As many domestic workers are migrant workers, this Directive may be relevant. Where employers are found to be guilty of employing third country nationals illegally, they are to be subject to a fine, and are required to pay the worker back pay (in accordance with the relevant minimum wage requirements) and cover costs of repatriation. It must be noted, however, that the UK, Ireland and Denmark are not parties to this Directive. Secondly, there is a new Directive on the prevention and combating of trafficking of human beings,\(^{18}\) which requires member states to instigate criminal sanctions against those persons found to be traffickers under the Directive. This Directive has a wide definition of trafficking, and specifically includes (domestic) servitude.\(^{19}\) The date for implementation of this directive was 6 April 2013, and the

\(^{16}\) See for example *CN v United Kingdom* (2013) 56 EHRR 24

\(^{17}\) Directive 2009/52/EU providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals OJ [2009] L 198

\(^{18}\) Directive 2011/36/EU on the prevention and combating of trafficking against human beings OJ [2011] L101/1

\(^{19}\) Article 3 defines trafficking as including: ‘the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.’
UK government made amendments to the Asylum and Immigration Act 2004 to comply with this Directive.\(^\text{20}\)

However, by far the most comprehensive regulatory proposals in relation to domestic work have come from the ILO. At its 100th International Labour Conference, the ILO proposed a Convention\(^\text{21}\) and Recommendation\(^\text{22}\) providing for decent work for domestic workers. The aim of these texts was to ensure that employment standards reached as many domestic workers as possible leading to the ‘improvement of domestic workers’ working and living conditions and access to social security’.\(^\text{23}\) It was also hoped that the Convention and Recommendation would provide ‘sufficient guidance and incentives to enable the provisions to be meaningfully implemented in practice.’\(^\text{24}\) By 5 September 2012, this Convention had been ratified by two countries (Uruguay and the Philippines), and is therefore due to come into force on 3 September 2013, according to ILO convention. A further 4 countries have ratified the Convention to date (Bolivia, Italy, Mauritius, Paraguay and Nicaragua)\(^\text{25}\)

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\(^{20}\) Whether these amendments have gone far enough to comply with the Directive are to be questioned, as there is still no reference to the specific offence of ‘servitude’ in the Asylum and Immigration Act. However, there are provisions in the Coroners and Justice Act 2009 (section 71) which do bring into force criminal sanctions for the offence of ‘servitude’. For a discussion of the failings of the UK in having criminal sanctions for servitude (prior to the entry into force of s 71 CJA) see \textit{CN v United Kingdom} (2013) 56 EHRR 24.

\(^{21}\) ILO Convention 189 'Domestic Workers Convention' (International Labour Office, Geneva 2011)

\(^{22}\) ILO Recommendation 201 ‘Domestic Workers Recommendation’ (International Labour Office, Geneva, 2011)

\(^{23}\) ILO (n 1) 95

\(^{24}\) Ibid 95

3. The Wide View of Vulnerability

The ‘vulnerability’ of domestic workers: problems and solutions

The wide view represents the constitutive narrative of employment and labour law, namely that labour law exists to counteract the inequality of bargaining power ‘which is inherent and must be inherent in [any] employment relationship.’

Advocates of the wide view differ in the acceptable balance to be struck between ‘auxiliary’ legislation (legislation which permits and encourages collective bargaining) and ‘regulatory law’ (statutory rights), and some advocates (particularly Kahn-Freund) question the effectiveness of the law at all in equalising power relations. However, it is possible to say that on this view it is understood that the equalisation of power between employee and employer is the only way in which dignity, fairness and freedom can be achieved for workers. Underlying this understanding is the recognition of the worker as a human being; that ‘labour is not a commodity’. To this extent the working relationship is characterised as one of subordination, and is bound up with the operation of the capitalist economy. The wide view pursues the Marxist notion that the ownership of the means of production on the part of employers means that they are able to maintain workers in an inferior position and continually exploit them. This relationship of exploitation is obscured by the ‘contract of employment’ which, although on the face of it freely negotiated, is in fact simply a means by which workers can be maintained in their

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26 P Davies and M Freedland, 
*Kahn-Freund’s Labour and the Law* (Stevens 1983) 18
inferior position. The aim of the law, and more importantly collective bargaining, is to free workers from this subordinate relationship and enable them to recapture their status as human beings (rather than legal persons).\textsuperscript{27}

In the context of domestic work, it is obvious that only some elements of the wide view of vulnerability will be useful, and that the situation of domestic workers was not contemplated within this theory (this will be discussed in more detail in criticism of this approach below). However, it is still useful to analyse the wide view of vulnerability in the context of domestic work because it provides insights which have perhaps been forgotten with the modernisation of labour law and the attempt to find a normative underpinning which does not rely on the conjunction of the ideas of ‘inequality of bargaining power’ and ‘labour is not a commodity’.\textsuperscript{28} In fact the conjunction of these two normative insights appears relevant to the situations for some domestic workers. Certainly, ‘subordination’ and ‘exploitation’ are experienced on a daily basis by some members of this group, and this is profoundly bound up with inequality and power relationships (although not necessarily in the economic sense understood in the wide view). In the most extreme situations, the commodification of domestic labour has extended to every area of a domestic workers’ life, and has been designated ‘slavery’,\textsuperscript{29} which brings to mind Marx and Engels’ description of the situation for the working classes in the factory system in the nineteenth century:

\textsuperscript{27} H Sinzheimer, \textit{Arbeitsrecht und Rechtssoziologie} (Europaïische Verlagsanstalt 1976) 117
\textsuperscript{28} B Langille, ‘Labour Law’s Theory of Justice’ in G Davidov and B Langille (eds) \textit{The Idea of Labour Law} (Oxford University Press 2011) 105
Everyone who has served as a soldier knows what it is to be subjected even for a short time to military discipline. But these operatives are condemned from their ninth year to their death to live under the sword, physically and mentally. They are worse slaves than the Negros in America, for they are more sharply watched, and yet it is demanded of them that they shall live like human beings, shall think and feel like men!\(^\text{30}\)

The case of *Siliadin v France*\(^\text{31}\) provides a stark example of the ‘slavery’ to which some domestic workers are subjected. In this case Ms Siliadin, a Togolese national, worked as a general housemaid for a French couple. She worked seven days a week and was never allowed a day off. Her working day began at 7:30am and ended at 10:30pm. She slept on a mattress in the same room as the couple’s baby, and was required to look after him if he woke up. She was not paid for the work that she carried out. The French couple confiscated Ms Siliadin’s passport and her situation only came to light after she spoke to a neighbour about her treatment. Proceedings were brought against the French couple under the French Criminal Code, and they were sentenced to 12 months imprisonment, a conviction which was later quashed. However, the case was also pursued in the civil courts and the couple were order to pay Ms Siliadin damages for her unpaid work, and she was also awarded an amount for her salary arrears, notice period and holiday leave. Likewise, the abusive treatment of domestic workers was reported in the UK


\(^{31}\) (73316/01) (2006) 43 EHRR 16 (ECHR)
case of *R v K (S)*. In this case the Claimant alleged that she had been made to work almost 24 hours by the employer, was poorly fed, was never allowed out on her own and seldom with others, and had little contact with her family. Of the 10 pounds a month she was supposed to receive whilst in the UK, she in fact received very little.

Both of these cases considered whether the treatment of the domestic workers in this way amounted to ‘slavery’, ‘servitude’ or ‘forced or compulsory labour’ under Article 4 of the European Convention on Human Rights. In *Siliadin*, the Court held that Ms Siliadin’s labour was ‘forced’ because she had no option but to carry out the work (her passport having been withheld) and she was effectively ‘under the menace of penalty’ because she feared arrest by the police if she did not continue to work (on the grounds of her illegal immigration status). The Court also found that Ms Siliadin had been subject to ‘servitude’. She was under an obligation not only to provide her services but also to stay with her employer, and was not in a position to change this situation. The Court stopped short of a finding that Ms Siliadin was a ‘slave’. Such a finding would require that Ms Silidain’s employers exercised a right of ownership over her, rather than simply a finding that her personal autonomy had been restricted. The Court held that in this case, the restriction of the applicant’s autonomy did not amount to a reduction of her status to that of an object and therefore did not amount to ‘slavery’.

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32 [2011] EWCA Crim 1691
33 *Siliadin* (n 31) para 118
34 *Siliadin* (n 31) para 129
35 *Siliadin* (n 31) para 122
Central to the wide view is the understanding that in order to challenge the ‘slavery’ of work, workers have to have the opportunity to equalise the power relations to which they are subject. The most effective way in which to do this is to join together with other workers so that workers can effectively negotiate with their employers, and ultimately impose the ‘social sanction’ of withholding labour if that negotiation fails. On this view, domestic workers would be seen as particularly vulnerable where they have not been successful at organising in trade unions and therefore have not had the opportunity to equalise power relations at work. In terms of evidence for this ‘vulnerability’, gathering statistical evidence for the low trade union density of domestic workers is challenging. For example in the UK, ‘domestic work’ does not appear as an occupational category for the purposes of measuring trade union density. However, there is value for ‘home workers’, which could include domestic workers (but could also include a number of other professions). The trade union density for home workers is very low and in 2010 was at 10.6% overall. For women home workers that value was only 7.3%, and there was no value entered for part-time home workers.\(^{36}\)

The obstacles that domestic workers face in attempting to organise are both practical and legal. In some countries, domestic workers are specifically excluded from the right to organise. For example, the National Labour Relations Act in America, which gives employees the right to organise and join a trade union,

excludes this group.\textsuperscript{37} Even where domestic workers are not specifically excluded, trade union density often remains low either because domestic workers are implicitly excluded (for example the casual nature of their work means that they do not have ‘employee’ status) or because of other practical issues. Those practical issues include the fact that domestic workers work in one-on-one relationships with their employer and so it is difficult to have ‘collective’ negotiation for terms and conditions. There is also the associated problem that trade unionism may not seem relevant in a household setting where the domestic worker is designated ‘one of the family’.\textsuperscript{38} Coupled with the isolation of domestic workers from one another, it is easy to see why traditional trade union organisation amongst domestic workers has remained low.

The wide view pursues the idea that despite these difficulties trade union organisation is the most effective way in which vulnerability can be challenged. Indeed, outside the UK, there is some evidence that domestic workers have been able to take advantage of trade union support. In some instances, domestic workers have been able to join with the main unions to gain legal rights and advantage (in accordance perhaps with the vision of the wide view). For example, domestic workers have been able to join unions with a wider focus in Kenya (the Kenya Union of Domestic, Hotel, Education Institutions, Hospitals and Allied Workers’ Union) and India (the Self Employed Women’s Association). Furthermore, in terms of outcomes, there are a number of instances where

\textsuperscript{37} 29 U.S.C s 152 (3)
\textsuperscript{38} P Smith, ‘Organizing the Unorganizable: private paid household workers and approaches to employee representation’ (2000) 79 North Carolina Law Review 45, 54
traditional trade unions have taken up the cause of domestic workers to considerable effect. In Brazil, the affiliation of FENETRAD (the national federation of domestic workers) to one of the main trade unions (CUT) has boosted its political influence and has resulted in a number of improvements to the legal regime for domestic workers. In Spain, two of the main trade unions – the UCT (the General Workers union) and the CCOO (Trade Union Confederation) – have achieved significant legal improvements for domestic workers. They obtained the Spanish government’s commitment to the reform of social security law to include domestic workers, and negotiated with government and employers association to achieve the Royal Decree 1620/2011. This Royal Decree is important as it includes provisions for the inclusion of domestic workers in minimum wage provisions and advocates a certain amount of annual leave for these workers. It also potentially guarantees greater job security for domestic workers because it ensures that (temporary) domestic work contracts must be terminated with just cause.

Specific domestic workers unions have also been formed to further the domestic worker cause. These kinds of worker unions exist in South Africa (the South African Domestic, Service and Allied Workers’ Union) and in Hong Kong (the Hong Kong Domestic and General Workers Union). Moreover, some groups of

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40 Ibid 16
domestic workers have formed outside the confines of trade union status. Increasingly evident on a global scale are member-based organisations, which like trade unions are democratic and representative and have due paying members but have not achieved trade union recognition. An example of such an organisation is the Mujeres Unidas Y Activas or Women United and Active in California. This group was formed by a group of immigrant women to provide support for immigrant, women and workers' rights. Although these groups do not have the membership base or credibility of union organisation to effect national changes, they provide a platform for the mobilisation of (domestic) workers and, and can provide information and advocacy at the local level. However, these groups are perhaps better analysed in terms of the middle view of vulnerability. They do not fit with the wide view's position that trade unions provide the best means of organisation, and the outcomes sought for these groups extend beyond the labour law field. They therefore look more like the 'occupational associations' of social law than the trade unions of the wide view.

**Criticisms of the wide view**

It is clear from the above discussion that the wide view does not provide an immediate 'fit' to the problems of domestic work. To understand this lack of 'fit', it is important to look at the conceptual underpinning of the theory of vulnerability in the wide view. As has been explained, the wide view relies on a Marxist view of

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42 Ibid 6
exploitation: exploitation arises through the operation of the institutions of the capitalist system. This capitalist system creates power relations which act to subordinate workers. As the ‘bourgeoisie’ own the means of production they have a ‘right of command’ over workers who rely on wages to live. However, for many domestic workers and their employers, the idea of ‘inequality of bargaining power’ seems very alien. Although that inequality is perhaps in evidence for live-in domestic workers, many domestic workers are now employed in day work and job work. They work for many different employers and for a very low number of hours every week, and the amount of control that employers have over this work is low. The main problems with this type of work are not ‘exploitation’ at all, but the extreme informality and precariousness of this work which leaves workers ‘vulnerable to abuse and the whims of employers’. These workers share the problems of isolation and invisibility of live-in domestic workers, and the lack of coverage of legal rights, but this is a problem of informality rather than exploitation as such.

The conceptual problems of the wide view in relation to domestic work extend not only to the way in which vulnerability is characterised but also to the preferred solution to counteract that vulnerability. As we have seen, under the wide view, the preferred solution to vulnerability is collective organisation to counteract the social power of the owners of capital and to therefore exact economic justice for workers. However, the tangential and indirect relationship between domestic workers and

44 P Smith (n 38) 56
the wider economy creates problems for both of these theories. More than this, the
diversity and informality of domestic work contracts mean that the unity of interests
assumed under this industrial relations model is subject to challenge (parallels can
be drawn here in relation to the situation with temporary agency work). These
conceptual problems with collective organisation are only compounded by the
practical problems associated with the isolation of domestic workers from each
other. Moreover, collective organisation may be seen as a very low priority for a
number of domestic workers, particularly those migrant workers whose interest lies
in obtaining as many jobs as possible in order to send money back to their home
countries. It may also be that collective organisation may be a disadvantage for
some workers, as this would act to change the relationship from ‘one of the family’
to a more formalistic and contentious relationship and so it may be a conscious
decision amongst domestic workers to avoid this organisation.

It is also possible that the wide view is over sceptical about the ability of the law to
aid the plight of domestic workers. According to the wide view, the law cannot be
central to the equalisation of power relations between employers and workers
because law is itself a social power which is made by the ruling classes and is
used to ‘subordinate’ weaker members of society. It replicates rather than
counteracts the social power imposed on workers by capitalist employers.
Furthermore the law is the law of ‘individuals and ‘knows nothing of a balance of
collective forces’. It can therefore never represent the ‘public interest’ and it can

46 P Davies and M Freedland, Kahn Freund’s Labour and the Law (Stevens 1983) 12
also never control absolutely the ‘orderly development of labour relations’. 47 This is useful in the modern context of domestic workers, as it is clear that even where the law implicitly includes domestic workers, they are often excluded in practice. It is also clear that currently the law has been ineffective at addressing the myriad of specific problems encountered by domestic workers, because these problems are not seen as legal problems at all. However, it is possible to argue that certain legal guarantees are necessary in order that workers can start to counteract the equality of bargaining power enforced over them. Indeed, in practice, trade unions organisations sympathetic to the plight of domestic workers have tended to try to include domestic workers in the legal regime.

4. The Middle View of Vulnerability

The vulnerability of domestic workers: problems and solutions

The middle view of vulnerability does not recognise the (permanent) vulnerability of all workers under a capitalist system of production in the same way as the wide view. Rather, this view is based on the premises of social law, under which labour, and society in general, is seen as consisting of a series of (more or less vulnerable) sub-groups who are, or should be, in a continuous battle to ‘win’ social and labour rights. It envisages a major role for the state as the arbiter of these

47 Ibid 12
competing interests and the guarantor of group rights (for example in the guise of discrimination law). However, social law is sceptical of a strict ‘top-down’ approach to the constitution of labour rights; the social law ideal is to allow social groups the power to effectively bargain for their own rights. There are thus two elements to counteracting vulnerability on the middle view. The first element is the recognition of the interests of vulnerable groups by the state (as the guarantor of group rights). The second element is the recognition of those interests in a way which promotes the empowerment of those groups and allows them to bargain for their own interests.

On the face of it, this middle view provides insight into the vulnerable position of domestic workers in relation to the law. On the one hand, domestic workers have not been recognised as a group in need of protection and have been explicitly excluded from the law. On the other hand, the construction of legislation can act to implicitly exclude these workers, because the categories of ‘employment’ do not cover these workers. Examples of these types of exclusions are present in a number of jurisdictions throughout the world, but this section will focus on the EU, because there are relevant examples of both implicit and explicit exclusion of domestic workers here, and because the EU legislation has had a very great impact on the structure of UK law. At EU level, the explicit exclusion of domestic workers is evident in the European Framework Directive on Health and Safety at Work (EFDSH)48. This sets the benchmark for health and safety standards across the EU, and forms the basis of a number of more specific individual health and

48 Directive 89/391/EC on the introduction of measures to encourage improvements in the safety and health of workers at work OJ [1989] L 183/1
safety directives (in relation to chemical agents and chemical safety\textsuperscript{49}, physical hazards\textsuperscript{50} and biological agents\textsuperscript{51}). Article 5 of the EFDSH states that ‘employers shall have a duty to ensure the safety and health of workers in every aspect related to the work’. However, in Article 3(i) domestic workers are specifically excluded from the scope of the worker definition. In the more specific individual health and safety directives, the term worker is not further defined, and so it is assumed that the definition in the EFDSH applies, and domestic workers are also excluded from these directives. Domestic workers are also specifically excluded from UK health and safety legislation in line with the EU position.\textsuperscript{52}

On the middle view, this explicit exclusion would lead to the identification of domestic workers as a vulnerable group, as their interests have not been recognised, or recognised as important by the state. On this view, the exclusion of domestic workers is recognised as political, and bound up with liberal ideology and the separation of the public and private spheres. Liberal ideology represents the ‘private’ world of the family (and the domestic workers who serve them) as outside the scope of ‘public’ law, and presents the home as a ‘safe haven’ free of environmental risks. In fact, the view of the domestic work environment as a ‘safe haven’ has been questioned by a number of empirical studies which demonstrate

\textsuperscript{49} For example Directive 2009/148/EU of 30 November 2009 on the protection of workers from the risks related to asbestos at work OJ [2009] L 330/28
\textsuperscript{50} For example Directive 2003/10/EC of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to risks involving physical agents (noise) at work OJ [2003] L 48/32
\textsuperscript{52} Section 51 Health and Safety at Work Act 1974 provides that ‘Nothing in this Part shall apply in relation to a person by reason only that he employs another, or is himself employed, as a domestic servant in a private household.’
the very real risks to health and safety faced by domestic workers. Workplace hazards have been shown to include exposure to harmful cleaning chemicals, faulty electrical wiring, as well as verbal, physical and sexual harassment.\textsuperscript{53} For live-in domestic workers, these problems are compounded by unsuitable and unsafe living accommodation which provides further threats to their health, safety and well being. It may be therefore that the middle view of vulnerability is useful as a starting point to analyse the vulnerability of domestic workers.

As well as facing explicit exclusion from legislation at EU level, domestic workers are also implicitly excluded. In the Working Time Directive\textsuperscript{54} derogations are permitted ‘when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves’. Specific examples of permitted derogations under this section are stated as managing executives (article 17 (a)), family workers (article 17(b)) and workers officiating at religious ceremonies (article 17 (c)). Domestic workers are not mentioned specifically, but are implicitly included within the scope of possible derogations. This is demonstrated by the specific exclusion of ‘domestic’ service from the scope of the Working Time Regulations 1998, which implement the EU Working Time Directive.\textsuperscript{55} Domestic workers could also be deemed to be implicitly excluded from the definitions of ‘employment’ and ‘worker’ at EU level. The definition of employment requires both some element of

\textsuperscript{53} P Smith (n 45) 310
\textsuperscript{54} Directive 2003/88/EC concerning certain aspects of the organisation of working time OJ [2003] L299/9
\textsuperscript{55} SI 1998/1833, Regulation 19
subordination and ‘control’ by the employer.\textsuperscript{56} ‘Workers’ must also show that they are engaged in a ‘genuine and effective’ economic activity. Domestic workers will often face difficulties in satisfying these criteria, although the jurisprudence is not clear cut.\textsuperscript{57} For example, in \textit{Levin}\textsuperscript{58}, the Court held that a chambermaid who worked part-time could be a ‘worker’ despite earning less than the subsistence wage. By contrast, in the case of \textit{Raulin}\textsuperscript{59}, the Court doubted whether an on-call worker who was not guaranteed a particular level of work, and often only worked a very few days per week would satisfy the definition of worker for the purposes of EU law.

In any event, the middle view of vulnerability predicts the failings of laws based on general and abstract legal categorisations to provide adequate protections for vulnerable groups. According to this view, the ‘natural’ distribution of rights according to such general categorisations acts only as a smokescreen to obscure dominant social and political interests. As rights are sociologically determined, such exclusion simply represents the fact that a certain set of interests (workers engaged in the 'standard employment relationship' perhaps) hold sway over others (those of domestic workers). Therefore, the only way in which domestic workers will gain access to ‘justice’ is to have their own specific rights protected. What domestic workers should aim for then, is the recognition by the state that their interests are so important that they should be specifically protected.

\textsuperscript{56} ‘Employment’ was defined in the case of \textit{Lawrie-Blum} as existing where ‘for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’. Case 66/85 [1986] ECR 2121, para 17

\textsuperscript{57} C Barnard \textit{EC Employment Law} (OUP 2006) 173

\textsuperscript{58} Case 53/81 \textit{Levin} [1982] ECR 1035

\textsuperscript{59} Case C-357/89 \textit{Raulin v Minister van Onderwijs en Wetensuur} [1992] ECR I-1027
One attempt to develop specific rights for domestic workers is demonstrated by the ILO’s Convention and Recommendation on Decent Work for domestic workers. The Convention recognises that in some ways, domestic work is ‘work like no other’ and there are specific structural and cultural issues which have led to domestic workers experiencing particular sectoral disadvantage. Such specific issues require specific and tailored regulation. Article 10 of the Convention and paragraphs 8-13 of the Recommendation recognises the particular problems domestic workers experience over the allocation of ‘working time’. Many domestic workers, particularly live-in domestic workers, find that there is insufficient distinction between work and rest time and that they have little access to annual leave or weekly rest. This is a function of their work as ‘one of the family’ inside the home and their personalised relationship with those in their care.⁶⁰ Article 10 seeks to address this by requiring member states to ensure that annual leave, hours of work and overtime compensation are regularised and that ‘periods during which domestic worker are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work.’

The Convention also seeks to deal with the particular problems experienced by domestic workers in terms of occupational health and safety, by requiring that Members take appropriate measures ‘with due regard to the specific characteristics of domestic work’ to protect domestic workers from workplace hazards. The particular problems associated with ‘live in’ accommodation are dealt

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⁶⁰ Albin and Mantouvalou (n 7) 13
with in paragraph 16 of the Recommendation which provides the minimum conditions that should be fulfilled in this respect (access to suitable sanitary facilities, adequate lighting, heating and/or air conditioning and the provision of adequate and good quality meals). Finally, the Convention also seeks to deal with the particular problems that domestic workers experience in terms of access to justice. Article 14 of the Convention provides that Members should take measures which ensure that domestic workers have easy access to courts, tribunals and other dispute resolution procedures. This is recognition that, even where domestic workers are covered nominally by (equality) law, there are many hurdles for domestic workers in obtaining redress.

The ILO Convention is an important milestone in the recognition of specific rights for domestic workers and addresses vulnerability in many of the ways envisaged by the middle view. For a start, domestic workers are recognised as a group in need of protection. Having a specific piece of legislation for domestic workers means that not only are they no longer excluded from the law they also do not have to attempt to fit into legal categorisations designed by a liberal system (which is blind to domestic work as a valuable economic activity). However, it is to be remembered that justice under the social law scheme requires groups not only to have their rights recognised but to be empowered to maintain those rights. Therefore it is to be questioned whether standard setting at international level can ever achieve the aims of social law. For this legislation to be effective it would have to be enacted at a local level and adopted by the domestic workers themselves as a basis for their own empowerment. Arguably, this requires the specific
encouragement of the trade union and member-based organisations identified in the previous section.\(^{61}\)

**Criticisms of the middle view**

The social law scheme can be criticised for its reliance on the idea that the state should act (only) *a posteriori* in order to guarantee the relationships and hence compromises between groups. It could be argued that in order for groups to form successfully there need to some principles of justice already established (freedom of association for example). For ‘special’ rights to be granted to groups, they need to be treated in the first instance like any other group. This is the argument made by the ILO in the design of its Convention on domestic work. The ILO’s Convention recognises that in order for employment protection to be extended effectively to domestic work it must be recognised not only as ‘work like no other’ but also as ‘work like any other’.\(^{62}\) Therefore the ILO seeks to ensure that domestic workers are covered by human rights in the same way as other individuals and employment rights in same way as other workers. The ILO Convention refers to human rights instruments in its Preamble, and Article 3(1) seeks to ensure ‘effective protection of the human rights of all domestic workers’. Indeed, it has been argued that this human rights focus complements the sectoral focus of the

\(^{61}\) The ILO Convention does recognise the importance of freedom of association and in Article 3 (2) requires ratifying nations to ‘respect, promote and realize freedom of association and the effective recognition of the right to collective bargaining’ for all domestic workers. However, such ‘rights’ must successfully and positively enacted at local level if they are to be meaningful for this group.

\(^{62}\) ILO (n 1) 13
instrument, and it is only in the combination of these two approaches that the plight of domestic workers can be addressed.\textsuperscript{63}

This is of course a very optimistic view of this instrument, and there is a danger that the inclusion of human rights prevents further thinking about the way in which the specific rights of the instrument can be improved. Certainly, it could be argued that the specific rights in the Convention need to be extended to cater for the particular vulnerability of certain \textit{elements} of the domestic worker group. For example, the Convention also does not consider the complexities and implications of ‘cash-for-care’ schemes for domestic workers. These schemes, which exist in various forms throughout Europe and the United States allow the users of social-care support to receive cash in place of services and to spend that money on the direct employment of ‘personal assistants’ who deliver care for them in their own homes.\textsuperscript{64} In some parts of Europe, the work of these carers is highly regulated, and they require specific qualifications in order to be engaged by the service users.\textsuperscript{65} However, in the UK, under the Direct Payments scheme, service users recruit their ‘personal assistants’ directly, and they can therefore choose the skills and qualifications that they wish their personal assistants to possess. There is no formal requirement that these ‘personal assistants’ have any formal caring qualifications, despite the fact that they often perform caring functions. Furthermore, under the Direct Payments scheme, personal assistants are often

\textsuperscript{63} Albin and Mantouvalou (n 7) 11
\textsuperscript{64} C Ungerson, ‘Whose empowerment and independence? A cross-national perspective on ‘cash for care’ schemes (2004) 24 \textit{Ageing and Society} 189, 190
\textsuperscript{65} In France for example, the Prestation Spécifique Dépendance can be used to employ carers, but because of the limitations of this dependency benefit, the workers are largely employed through agencies which require a basic care qualification. Ibid 200
employed just by one employer, due to their care needs.\textsuperscript{66} This situation can work very well, and service users and personal assistants can build strong relationships. However, this organisation of work can subject domestic workers to real difficulties and there are real problems with the enforcement of legal rights if the relationships break down.

Certainly, the very close and personal relationship with the service user can create major problems for personal assistants. A good example of this is given in the case of \textit{Mr MP Cooper v Monzur Miah t/a Monty’s Care}.\textsuperscript{67} In this case, Mr Miah, the service user, employed 2 personal assistants to help with basic personal care, housework, shopping and general physical assistance. They were also tasked with carrying out general administrative duties and dealing with Mr Miah’s financial affairs. However, after a year, the relationship started to break down because Mr Miah felt that the personal assistants were being ‘overbearing’ towards him and that they were threatening his independence (he cited the fact that he had stopped feeding himself and was letting them do it for him). He also stated that there were irregularities in his financial affairs, and that this was due to the fact that the personal assistants were not paying his bills on time. The personal assistants disputed these allegations, but the vulnerability of the service user and the personal nature of their duties greatly increased their potential liability. Furthermore, the personal assistants did not have any independent qualification or training as care professionals to fall back on and to show that they had followed the correct procedures in dealing with this service user.

\textsuperscript{66} Ibid 203
\textsuperscript{67} Case ET/1305328/2006
There are also often problems for personal assistants in relation to the governance of the employment relationship and difficulties of communication between the parties. Contracts are often poorly constructed and often do not reflect the nature of the duties involved. Disciplinary procedures may not be used effectively; this was one of the complaints raised by the personal assistants in the *Miah* case above. Variation of contracts may proceed informally, which causes problems when these variations are challenged. Furthermore, in some situations problems arise because of the involvement of a number of different parties in the employment relationship, all giving different accounts about agreements reached. This involvement is a function of the extreme vulnerability of some service users, who rely on a number of different parties for their overall care (for example the service user’s support worker, independent living centres, friends and relatives who also undertake care work). This only serves to exacerbate communication difficulties. This is well demonstrated by the case of *Mrs S Bicknell v Miss I Hughes*68. This case concerned an extremely vulnerable service user with a complex of disabilities which affected her ability to communicate both orally and in writing. She was assisted by a number of friends, as well as a number of personal assistants, including Mrs Bicknell. Mrs Bicknell contended that she was told by other personal assistants and Miss Hughes’ relatives that her day time shift activities were changing and she was not happy with these changes. She decided that she had no option but to relinquish her day shifts, and this led her to claim constructive dismissal against Miss Hughes.

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68 Case ET/1305506/2007
The *Bicknell* case also illustrates a final point: the difficulty of enforcement of legal rights against service users, particularly in a Tribunal setting. For a start, the nature of Miss Hughes’ disability meant that she was not able to attend Tribunal and relied on a friend to represent her. Secondly, it is clear that the Tribunal saw Mrs Bicknell’s claim against Miss Hughes as rather unsavoury and in the mediation on this case, the Tribunal chairman commented that the Tribunal was not the proper place for the resolution of such disputes.\(^{69}\) Thirdly, direct payment recipients have only a very restricted income (the direct payments money and other benefit needs to cover often complex needs) and so would have difficulty paying any compensation awarded. Indeed, in the *Miah* case, Mr Miah had so overspent his income that he was technically insolvent and repaying his creditors under a voluntary agreement.

This analysis of the particular problems faced by direct payment personal assistants highlights a number of (further) difficulties with the middle view. In order for domestic workers to achieve protection under this view, they need to be recognised as a group in need of protection and have available instruments which empower them to maintain their status. However, domestic work is extremely heterogeneous in form, and the interests of different ‘groups’ of domestic workers varies considerably. This is a considerable problem for the solutions to vulnerability in the middle view. It is a problem for the recognition of domestic workers as a ‘group’ with similar interests. It also creates a problem for the design of instruments which lead to their empowerment. Even if instruments are designed with the

\(^{69}\) These comments were made in the mediation of this case in December 2007.
intention of creating specific rights for these workers, it could be argued that even specific rights will never cover all the situations in which domestic workers find themselves. Furthermore, there is the problem of their empowerment. Labour law instruments may allow these workers ‘freedom of association’ and the right to collective bargaining, but the question is how to encourage associations outside the traditional trade union structure given the massive practical and administrative hurdles associated with trade union organisation. This may involve legislation beyond the scope of labour law, and ‘positive’ action which goes beyond the scope of traditional labour law instruments.

5. The Narrow View of Vulnerability

The vulnerability of domestic workers: problems and solutions

The narrow view of vulnerability differs from both the wide and middle views because at base the subject of analysis is the individual labour market participant. It is a liberal view which seeks to understand how current market processes (particularly processes of globalisation and the flexibilisation of work relations) have acted to marginalise certain workers and how far institutions of the ‘old’ regime are implicated in this process. In particular the narrow view is sceptical of the value of continuing to base labour law on the ‘standard employment relationship’. This standard employment relationship represents the traditional
bilateral, full-time permanent employment relationship of the Fordist factory regime. It no longer corresponds to the majority of work contracts in the flexible knowledge economy. Rather, developments in the global economy have, on the one hand, resulted in greater opportunities for individuals to enter into tailored work arrangements which more effectively meet the needs of employers and workers. On the other hand, processes of globalisation and the flexibilisation of work contracts have resulted in some workers being employed in more precarious jobs, which are of low quality, low paid and are not recognised in law.

On the narrow view, domestic workers would be viewed as vulnerable where they are unable to take advantage of the opportunities of the flexible knowledge economy and therefore end up in precarious jobs of low quality. The disadvantages faced by domestic workers would not be viewed as systemic. For if the vulnerability of domestic workers were to be systemic, then this would mean that the whole foundations of the narrow view in the premises of liberalism would have to be reassessed. The narrow view is complicit in the distinct separation of the public (economic) and private (non-economic) spheres. Rather, in terms of gender issues, the narrow view is far more likely to point to the advantages of the growing labour market participation of women as a whole (both for individuals and for the economy) rather than the plight of domestic workers as women. Indeed, many on the narrow view would fail to make the connection between the increased labour market participation of women and the problems faced by domestic workers. As stated in the UK government’s Success at Work paper, the main gender issue is that ‘there are still too many whose skills and potential are not
realised. For instance, if more women were to participate in the labour market and make full use of their talents, the UK would be up to £23 billion better off. On this view, unemployment is seen as a greater problem than any faced by those in work: ‘There is still more that needs to be done to break down the barriers that prevent many people from moving off benefits and into work’.  

The foundations of the narrow view are represented in the solutions that it presents to worker vulnerability. The vulnerability of domestic workers is neither systemic, nor does it extend to the whole group. Rather the argument is that, for many domestic workers, this kind of arrangement will be a choice which is useful, rational and deliberate. Some workers will chose and gain advantage from the informality of domestic work arrangements. The position on the narrow view would therefore not be to attempt to ‘improve’ the position for all domestic workers. Rather, the idea would be to tackle those at particular risk of abuse. On the narrow view, the human rights regime is especially useful because it not only captures a liberal conception of rights (these rights are individualistic and enforceable through the courts), those rights are only applicable in the most extreme instances of abuse. Indeed, in the domestic worker field, human rights are more easily engaged than in the field of temporary agency work for example, because of the close and personal nature of many domestic relationships which make the connection between employment and personal dignity both obvious and pertinent. There have been a number of instances of domestic workers successfully having reference to

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70 Department of Trade and Industry, Success at Work: Protecting Vulnerable Workers, Supporting Good Employers. A policy statement for this Parliament (March 2006) 8
71 Ibid 8
the human rights regime, and these were discussed in section 4. Domestic workers have also used human rights to argue that a government needs to do more to ensure those human rights are respected.

There have also been other instruments which may aid those domestic workers at particular risk of abuse. As stated in section 2, there are two main Directives at EU level which are worthy of discussion. The first is the Directive providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals.\(^72\) There is the argument that migrant domestic workers are particularly vulnerable because of the coincidence of the lack of residence status as well as the often very personal and isolated notion of the domestic employment relationship. Arguably this Directive is useful as it encourages member states to have proper criminal and civil sanctions for harbouring illegal immigrants, and therefore ensures that employers aid domestic workers in the achievement of both residence and employment status. The second Directive concerns criminal sanctions for the trafficking of human beings.\(^73\) This includes the ‘harbouring’ of domestic workers for the purposes of servitude. Of course, neither of these statutes are specifically employment statues designed to improve the working conditions of domestic workers. They are essentially part of the criminal law, and are short term measures to eliminate abuse. Their effect may be to make domestic work even more insecure than it might otherwise be.

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\(^73\) Directive 2011/36/EU on the prevention and combating of trafficking against human beings OJ [2011] L101/1
Criticisms of the narrow view

The first failing of the narrow view in the context of domestic work is its reliance on the premises of liberal theory. Running through liberal theory is the distinct separation of ‘public’ and ‘private’ spheres of action. In the public sphere, the concern is for a freely functioning market supported by a set of universal, rational and abstract legal rules. By contrast, the private sphere is neither determined by economic or legal rules; these rules become important only when private functions become public. The problem is that domestic work acts precisely at the juncture between ‘public’ and the ‘private’, and does not fit neatly into either of these categories. The second failing of the narrow view, which is connected inevitably with the first, is the characterisation of all legal and economic subjects as individuals, who act rationally and according to their choice. In this sense, the narrow view upholds the idea that domestic workers make a choice between the flexibility and informality of domestic work in the private sphere (and the benefits of a ‘safe haven’ etc) and formal contractual arrangements which are subject to legal rules. This suggests that informality is not a problem per se, as there are usually ‘economic reasons for the tendency to employ informal workers and to take on informal work, as this kind of work is more favourable than registered work for both sides.\textsuperscript{74}

In the same way, the illegality of work contracts is presented as a choice which is simultaneously undertaken by both parties. This argument was essentially

\textsuperscript{74} European Economic and Social Committee Opinion on ‘The Professionalisation of Domestic Work’ OJ [2011] C21/39 para 3.1.4.3
presented in the case of *Houn ga*.75 This case concerned a domestic worker, Ms Hounga, who arrived in the UK on a visitor visa which was illegally obtained (and did not in any event give her the right to work). She claimed that her employers treated her less favourably because of her status as a (Nigerian) illegal immigrant and sought to rely on the provisions in the Race Relations Act 1976. The case turned on whether Ms Hounga’s status as an illegal immigrant barred her from making a statutory claim (clearly she was barred from making a contractual claim because the contract was illegal). The question was essentially whether Ms Houga’s claim was so inextricably linked with her illegality in obtaining and continuing employment that her claim should be barred (on the grounds of public policy). The EAT found that the involvement Ms Hounga in the illegality of her actions was outweighed by the illegal action of her employers. This decision was overturned on appeal, with the Court of Appeal holding that there was a direct link between her claim of discrimination and her illegal conduct: her discrimination case was based on her particular vulnerability as a result of her illegal employment contract.

This case serves to demonstrate the controversial nature of assuming choice in relation to illegal and informal contracts. The EAT’s findings demonstrated that Ms Hounga’s choice was in fact compromised by a number of elements, including her age (she was only 14 when she came to the country) and her status in Nigeria. Furthermore, the EAT found that the obtaining of an illegal passport and visa was ‘masterminded’ by her previous employers in Nigeria in conjunction with her

75 *Houn ga v Allen* [2012] EWCA Civ 609
employers in the UK. She would not have known on her own how to get the documentation to get to the UK. To say that Ms Hounga had a choice suggested the availability of other options, which in practical terms simply did not exist. The case also demonstrates the difficulties of relying on discrimination law in these instances, a fact reiterated in the case of *Ms P Onu v Mr O Akwiwu*\(^{76}\). Here it was decided that there could not be race discrimination because the real cause of discrimination was immigration status rather than race. This was a 'socio-economic' characteristic rather than a protected characteristic under the Race Relations Act 1976.

It might be argued on the narrow view, that it is right that these kinds of considerations should be excluded from legal protection, and that they should only be overridden where there is a clear breach of human rights. This allows for the correct separation of both law and economic functioning. However, the human rights regime does not necessarily represent a panacea for very vulnerable domestic workers. The cases referred to in section 3 demonstrate the difficulty of bringing human rights claims, and the length of time involved in their enforcement (Ms Siliadin only became aware of her rights after interference by her neighbour). These cases also demonstrate the very specific function of human rights in dealing with the most extreme forms of abuse. Therefore despite the clear restriction on Ms Siliadin’s liberty in the case of *Siliadin v France*, she did not fall within the definition of a ‘slave’ because her personal autonomy was not sufficiently compromised. It might therefore perhaps be suggested that it is only with a more

\(^{76}\) [2013] WL 1841654
systematic approach to the regulation of domestic work that their working conditions may be improved in practice.

6. Conclusions

The case study on domestic work illustrates well the challenges facing labour law theories of worker vulnerability. In particular, domestic work presents profound theoretical challenges to the narrow view, which arguably represents the basis for current assessments of worker vulnerability and the protection which workers should be afforded. The reasons for the blindness of the narrow view to the particular problems of domestic workers relates to a number of factors. Firstly, the narrow view relies on liberal theory which separates private family activity from public economic activity. It therefore cannot deal with private family activities which have an economic basis and a public function. Secondly, the narrow view relies on the notion of rational choice, and does not sufficiently take into account restraints on that choice (for example immigration rules, lack of resources). Thirdly, the narrow view sees law as acting best as a universal guarantor of ‘human’ rights. On this view, there is nothing special about the ‘social’ considerations in labour law rights to distinguish them from other social rights considerations (the right to social assistance etc), and labour law rights have a secondary status to more important political and civil rights considerations. In practice, although domestic workers have been able to use human rights to some degree to improve their position, this can only ever be a partial solution, given the difficulties in accessibility of human
rights law, and the very specific problems displayed in the vast diversity of situations in which domestic workers find themselves.

The benefit perhaps of the wide view over the narrow view is that it can incorporate the extremes of exploitation experienced by some domestic workers into the labour law consciousness. It does not rely on the regime of human rights to protect workers against such exploitation. The problem is, that the exploitation envisaged on the wide view relies on a Marxist interpretation of the functioning of the capitalist system, and does not directly translate to the situation of domestic workers (who are only indirectly part of the system of capitalism). Furthermore, the solution offered by the wide view, namely the equalisation of power relations by the organisation of workers into trade unions, does not appear to be feasible for many domestic workers. There are many practical barriers for domestic workers seeking to organise, including their isolation and employment in a ‘family’ setting seemingly outside the sphere of industrial relations. That said, there are a number of instances of the successful organisation of domestic workers outside of the confines of the trade union system. This appears to show that power does indeed stem from collective organisation, and that this collective organisation can help to improve the terms and conditions of domestic workers generally (particularly where the law fails).

It appears that the middle view has considerable potential as a framework for the consideration of the vulnerability of domestic workers. It completely rejects the liberal foundations of the narrow view, and exposes the dangers of the reliance on liberal theory for groups historically passed over by the liberal regime. As law on
the middle view is not formulated as a system of abstract ideals created by the political elite, but as a ‘social’ law determined by social groups themselves, it is potentially empowering for domestic workers. According to this theory, domestic workers do not have to fit within legal structures to enforce their rights (which is problematic where those legal structures do not support them), rather they can create their own rights simply by joining together and making it clear that their position is one that should be protected by the state. Furthermore, the middle view allows the potential for domestic workers to claim certain resources for themselves, so that rights are of immediate practical use. The danger of course is that the administrative resources needed to sustain this redistribution and the constant conflict of the claims of domestic workers with all the other interests that people have, leads to an unwieldy and unworkable system which ultimately controls more than it empowers.
Chapter 8: Conclusions

1. Research questions

The central research question of this thesis concerns the regulation of precarious work. It asks: Can a legal theory of ‘vulnerability in employment’ be constructed and how far does this contribute to our understanding of the regulation of precarious work? In essence the question attempts to determine the scope of the presentation of the problems and solutions to precarious work in labour law theory and labour law literature. In this thesis, the concern is to show that although precarious work is often represented as a distinctive modern problem with distinctive modern solutions, the problems of precarious work can usefully be aligned with more general attempts in labour law to determine the problems and solutions to vulnerability at work. In the first part of this thesis, the analysis proceeds by the construction of a ‘theory’ of vulnerability based around a ‘wide’, ‘middle’ and ‘narrow’ view. It is argued that each of these views of vulnerability has a particular take on the problems and solutions to be adopted in the regulation of precarious work (and often in the regulation of work more generally). The second part of this thesis looks at the application of those theories to different geographical levels of analysis, and to two case studies in the field of precarious work. The specific research questions to be addressed are therefore as follows:
1. Can a legal theory of ‘vulnerability in employment’ be constructed consisting of a wide view, middle view and narrow view of vulnerability?

2. Is this legal theory a useful framework for analysing the approach at UK, EU and ILO levels to the problems of precarious work?

3. Is this legal theory is a useful framework for analysing the problems and solutions to groups of ‘vulnerable’ or ‘precarious’ workers?

2. **The identification of the different views of vulnerability in employment**

In terms of the first question, the thesis identifies three main views of vulnerability in employment which are of relevance to labour law. The first is the ‘wide’ view, the second is the ‘middle’ view and the third is the ‘narrow’ view of vulnerability. It is argued in this thesis that there is a certain internal consistency within these different views. Each ‘view’ has its own particular way of analysing the problems of vulnerability in employment and the solutions to that problem. In the wide view, all workers are equally vulnerable, as a result of their insertion into the capitalist mode of production. All workers have the same chance to counteract that vulnerability in theory, so long as they are given access to appropriate collective bargaining, and where necessary complementary legal standards. In the middle view, vulnerability is not an inevitable outcome a worker’s acceptance of employment. Rather, vulnerability depends on the attachment of a worker to a particular social group.
That social group defines access to legal rights for each worker, because it is social groups which form the main point of contact between workers and the state. Finally, in the narrow view, vulnerability is a very personal characteristic. It attaches to workers as individuals, and particularly those workers who are unable to take the benefits of the developments in the global economy. For the narrow view, labour law should concentrate on matching economic needs and strong ‘human’ rights to support those cast aside by the pressures of globalisation.

It is argued in this thesis that in theoretical terms, this analysis has the potential to make a significant contribution to the study of the regulation of precarious work. It suggests that modern thinking about precarious work has been concentrated in the narrow view of vulnerability, and that this view of vulnerability has tended to eclipse other ways of thinking about labour law.¹ This dominance can be explained in a number of ways. The first is that this view introduces the problems of precarious work as a new problem, and therefore a focal point for the development of labour law. Second, the narrow view attaches itself to ‘modern’ ways of thinking about labour law. It is sympathetic to the concerns within labour law to move away from a concentration on collective bargaining as the main way to resolve the problems workers face. It recognises the strategic importance of this move, and the need of workers to attach themselves to ‘human’ rights given the global hegemony of human rights language. Finally, the narrow view of vulnerability is politically legitimate, in that it fits with the neo-liberal political outlook shared by the most influential global actors. The narrow view advocates that the problem of

¹ This argument is in sympathy with the main premises of the arguments of Alexander Somek in A Somek, Engineering Equality (Oxford University Press 2011)
vulnerability is not a general failure of the economic system; it is the failure of certain individuals to take advantage of that system. Solutions can therefore be introduced which do not unduly interfere with economic functioning, and are broadly in line with liberal ideals.

It is argued in this thesis that this dominance of the narrow view needs to be highlighted, and the difficulties and contradictions within this view. Particularly problematic is the association of this view with liberalism and the ethos of the ‘freedom of contract’. This doctrine does not recognise inequalities between employers and workers and is thus problematic for workers who attempt to argue that their contract does not represent the reality of their work relationship. This is particularly a problem for precarious workers who often fall outside contractual protection as a result of the structure of their work relation. This is one of the greatest ironies of the narrow view. Under the narrow view precarious work is a result of the restructuring of the global economy and the ability of legal regulation (based on contract law) to deal with this kind of development. However the solutions to this problem are either based on economic grounds (for example the ideal of flexicurity) or they are based on adjustments in the contractual system to ensure that those workers excluded by the (labour law) system now fall within it. This is the very contractual system which caused the exclusion in the first place, and can therefore not provide a solution to this problem. Even the reference to the system of human rights within the narrow view is problematic. This regime (in the narrow sense) only protects a certain set of those rights traditionally considered to be labour rights, and it tends only to protect in the most extreme cases of abuse.
The human rights regime also has liberal foundations, and as a result, the protections tend to be 'balanced' away by reference to government priorities (which may be outside labour rights protection).

As a result, it is argued in this thesis that there needs to be a rethinking of the regulation of precarious work. It is suggested that there needs to be a serious consideration of the 'middle' and 'wide' views of vulnerability as presented in this thesis. The wide view is worthy of consideration as it represents a challenge to the foundation of labour rights on human rights as suggested in the narrow view. It suggests that the human dignity which is the stated aim of human rights legislation cannot be achieved for workers through human rights alone. Rather, this dignity involves recognising the commodification processed of capitalism and the inequality of bargaining power between employers and workers. It suggests that vulnerability is economically determined, and so that in order to find a solution to vulnerability, the social power of workers must be increased. Although there may be a role for legal standards in finding these solutions, by far the most effective solution is in ensuring that all workers have access to collective bargaining. This collective bargaining allows workers to find solutions which best fit their individual needs. This system has the inherent flexibility to solve both the general (lack of bargaining power) and specific (the determination of rights and voice in the workplace) problems faced by precarious workers. The middle view is particularly interesting in that it rejects liberalism as the foundation for labour law. Rather it suggests that the focus on the individual worker in the narrow view is unhelpful,
and is one of the reasons for the failure of legislation accounting for precarious work to deliver a real improvement for precarious workers.

The value of the problems and solutions of the wide, middle and narrow views of vulnerability will be discussed in more detail in the next section. In particular, the next section will focus on the application of the different ‘views’ of vulnerability, not only in terms of their prevalence but also in terms of their usefulness to addressing precarious work. This application will relate to both the general law and policy relating to precarious work (discussed in chapter 5), and in more specific application to vulnerable groups (discussed in chapters 6 and 7). There is then the question whether the theory of vulnerability consisting of the three views identified above can be used as combined tool for the analysis of precarious work. This question will be considered in section 4 of these conclusions. The final section will consider the implications of this thesis for further research projects.

3. The application of the different views of vulnerability

The Wide View of Vulnerability

The wide view of vulnerability presents the classical labour law position. On this view, worker vulnerability is created by the combination of ‘inequality of bargaining power’ and the commodification of labour. This vulnerability is systemic and applies to all workers; there is no automatic distinction between precarious workers
and the general vulnerability of the working population as a whole. It is a function of, firstly, the operation of capitalism, which serves to alienate workers from their own labour; labour is simply a commodity to be bought and sold on the labour market. This draws on Marxist theories of exploitation and subordination of the ‘proletariat’ by the bourgeoisie. The second factor is the ‘fictio juris’ of the contract of employment. Although this contract appears to be freely negotiated, it is in fact just a tool through which employers can maintain their position of power over workers.² The notion of ‘vulnerability’ outlined here constitutes the traditional narrative of the labour law’s foundation: inequality of bargaining power between employer and employee and the commodification of labour result in the subordination and exploitation of workers, which must be addressed by legal intervention.

However, in the wide view, the solution to worker vulnerability is not (simply) the application of legal standards to the labour market. Indeed, authors on this view tend to be sceptical about the power of the law, on its own at least, to really improve working conditions. Rather, on the wide view, the aim is a solution through which all workers can be involved in the management of their working lives. Therefore, first and foremost, the solution lies in the constitutionalisation of labour relations, and particularly allowing workers to have a voice through institutionalised collective bargaining to boost their social power. Authors within this view differ on the particular form of this constitutionalisation, and how far this should involve state intervention and legislation. At the one extreme, Kahn-Freund suggests a system

² P Davies and M Freedland, Kahn Freund’s Labour and the Law (Stevens and Sons 1983) 17
of ‘collective laissez-faire’, whereby collective negotiation operates almost exclusively in the private sphere. Under this system, legislation is only required as ‘auxiliary law’ to support collective bargaining, rather than as a means to create labour standards through ‘regulatory law’.

At the other extreme, Sinzheimer suggests that the system of industrial relations should be entirely governed by an economic constitution, which is backed by the state acting in the public interest.

Between these two positions, authors suggest systems of collective bargaining rights which support the proper operation of trade unions and promote trade union membership (Ewing, Wedderburn).

In theoretical terms, there are a number of useful elements to the wide view. At the very least, it sets out the ‘basic’ position with which other theories of labour law can be contrasted; namely that labour law is underpinned by the conjunction of the ideas of ‘inequality of bargaining power’ and ‘labour is not a commodity’. Moreover, it does not shy away from highlighting the failings of capitalism and law based on liberal ideology. It only goes so far in this of course, because the theorists in this position do not suggest that this capitalist system should be replaced (in the Marxist sense), and some of these ideas have in practice turned out to be

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3 Ibid 37
6 According to Sinzheimer, liberal direction of the economy has its limits: ‘Die Gemeinschaft kann nicht mehr darauf vertrauen, daß ihr Wohl passiv aus den Selbstbestimmungen der einzelnen folgt’ (Society can no longer passively rely on the self-interest of individuals) H Sinzheimer, ‘Die Reform des Schlichtungswesens (1930)’ in H Sinzheimer (n 4) 237
compatible with liberal ideology. However, the concern is still with the combination of economic and social power which comes to be exerted by capitalists, which, if left unchecked, is both bad for the economy and for workers as part of society as a whole. This view reminds us that the economic cannot be separated from the social order, and that labour law cannot just be about the private relations between parties. In Sinzheimer’s ‘economic constitution’ for example both employers and workers organisations make decisions together, so that workers are not only economically involved in production, but also are involved democratically. This means that workers are not only economic but also political subjects, and become ‘labour citizens’ embued with real social power.

However, there are questions about the practical relevance of the wide view. The reliance of the wide view on trade unionism is problematic. The density of trade unions has declined in many nation states in recent years, and there is also the problem of the very national focus of trade union bargaining, which does not fit with the need for supranational regulation of global production processes. These two factors, among others, explain the lack of reference to the wide view at either UK or EU level. At UK level, the decline in trade union membership has reinforced the argument that it is not practical for worker issues and rights to be determined

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9 Ibid 64
10 By way of example, in the UK a report for the Department of Business, Innovation and Skills in 2011, found that trade union density had declined in the period of 1995 to 2011, from 32.4 per cent in 1995 to 29.8 per cent in 2000 and 26.0 per cent in 2011. BIS, Trade Union Membership 2011, 2011, 7 <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/t/12-p77-trade-union-membership-2011.pdf> accessed 15 August 2012
11 R Dukes (n 8) 66
through collective bargaining, and, in any event, there has been no political will to engage with collective action as a meaningful bargaining tool. At EU level, there has been the problem of the lack of a transnational social dialogue process, so that collective bargaining issues are dealt with in an isolated fashion, in terms of individual breaches of human rights to freedom of association. This is dogged with problems, given the complexity of the proportionality tests involved when determining the balance to be struck with these ‘rights’ to freedom of association in contradistinction to other EU rights (particularly under the ambit of the fundamental freedoms of the EU constitution). This is not to say that the development of transnational solidarity is non-existent, but it is certainly at an early stage.

By contrast, the wide view is fundamental to the establishment and policies of the ILO. The first of the ‘fundamental principles stated in the ILO’s constitution is that ‘labour is not a commodity’, and the starting point of the ILO is to address ‘conditions of labour [that] exist involving such hardship and privation to large numbers of people’. In terms of solutions to vulnerability, the ILO has also traditionally aligned itself with the wide view in espousing the fundamental importance of collective bargaining: the second fundamental principle of the ILO’s constitution states that ‘freedom of expression and of association are essential to sustained progress’. However, the ILO has also faced difficulties in maintaining its

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12 On the strikes planned by teaching unions over pay and conditions in late 2013, Michael Gove, Secretary of State for Education stated that that the ‘direction of travel’ on the issue of pay and pensions was ‘fixed’, implying a lack of willingness to seriously negotiate change. See A Harrison, ‘Teachers announce one day national strike’ <http://www.bbc.co.uk/education/-23285445> accessed 15 July 2013.

13 S Sciarr, ‘Notions of Solidarity in Times of Economic Crisis’ (2010) 39 (3) ILJ 223

commitment to the wide view, given a number of factors. The first is the difficulty of coordinating and maintaining a programme which attempts to deal with all the diverse situations in which workers find themselves. For example, the ILO’s Decent Work programme\textsuperscript{15} has faced a number of problems of legitimacy, and in 2008, the ILO Declaration on Social Justice for a Fair Globalisation\textsuperscript{16} was introduced to reassert the importance of the decent work agenda and to promote the more successful coordination of its different elements. Furthermore, the tripartite structure of the ILO (and its commitment to traditional trade union membership) has hindered the progress of its programmes. A good example is the resistance of both employers and governments to the decent work programme, and the resistance of employers, governments and trade unions to involving organisations outside the tripartite structure in the coordination and management of its programmes.\textsuperscript{17} The result has been to fall back on the set of core labour standards as set out in the Declaration of Fundamental Rights and Principles at Work\textsuperscript{18}. On the one hand, it has been argued that these core labour standards allow the effective reassertion of the ILO’s message (in the wide view) because there is a focus on the ‘procedural’ right to collective bargaining. On the other hand, it has been argued that the concentration on a narrow range of core labour

\textsuperscript{17}G Rodgers, E Lee, L Sweepston and J van Daele, \textit{The ILO and the Quest for Social Justice 1919-2009} (International Labour Office 2009) 227
\textsuperscript{18}ILO, \textit{ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up} (International Labour Office, Geneva 1998)
standards reduces the protection afforded to workers by the international (human rights) regime.

In terms of the two case studies, there are a number of difficulties of application in terms of the wide view. The first is the relevance of the particular version of vulnerability espoused by the wide view. The idea of ‘inequality of bargaining power’ is fundamentally linked to the model of the ‘standard employment relationship’ which is difficult to apply to employment relationships which are flexibly designed. Secondly, the wide view of vulnerability assumes homogeneity of employment relationship types, whereas both domestic work and temporary agency work exist in extremely heterogeneous forms. Finally, the wide view assumes that all forms of work relationship can be adequately represented through collective bargaining. For temporary agency workers and domestic workers, both face great difficulty in accessing and joining the traditional trade union organisations with which the wide view is associated. However, the wide view remains useful in the analysis of both of these work types. There is some evidence in both of these case studies that affiliation with trade unions can achieve improvements in work conditions for precarious workers, and provide some means by which to counteract the degrading processes of commodification associated with the global capitalist system.

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19 Figures suggest that in 2010, 27.2% of permanent workers were member of trade unions, as opposed to 17.3% of temporary agency workers. BIS, ‘Trade Union Membership 2010’ (April 2011) 23 <http://stats.bis.gov.uk.UKSA/tu/TUM2010.pdf> accessed 19 August 2011
20 See for example the influence of trade unions in Brazil and Spain in improving work conditions discussed in chapter 7
The Middle View of Vulnerability

The middle view of vulnerability in employment presents a challenge to the traditional understanding of vulnerability in classical labour law. It is concerned with social inequality, and certainly the relationship between workers and employers could be seen as one of those relationships of inequality. It does therefore have the capacity to recognise the ‘inequality of bargaining power’ between workers and their employers. However, it is more concerned with what has been referred to as the ‘third’ function of labour law, that is in the function of labour law to ‘influence the distribution of rents, power, rights, resources and economic risks...between workers (broadly defined)’. On the middle view, vulnerability is not (just) defined according to the relationship between workers and their employers, but is a function of group status and position generally. Both legal and social protection for vulnerable workers depends on their ability to join groups which represent their interests. Firstly, group associations provide the means to lobby the state for legal recognition in a form which will boost their social position. Hence the legal protections sought under the middle view tend to go beyond ‘formal’ equality rights towards more substantive (social) rights. Second, these groups provide (further) insurance against the potential commodification processes of capitalism by providing community functions beyond those directly connected to work. The idea on the middle view is that power is placed back into the hands of society to

determine the most favourable legal outcomes, and it is only when this process is achieved, that there will be stability in the social system as a whole. 22

In a way, this middle view is useful in the consideration of precarious work because it provides a rationalisation for the distinction between groups of ‘precarious workers’ and the wider working population. The rationalisation for this distinction is the failure of these groups to find access to forms of legal and social protection in the past, and this forms a focal point for the promotion of equality between precarious workers and other groups. Certainly, the visibility of ‘precarious work’ has meant that a number of equal treatment rights or standards have emerged at all the geographical levels of analysis considered in this study. At ILO level, there are Conventions concerning temporary agency workers, home workers, part time workers, and more recently domestic workers.23 At EU level, there are directives concerning part-time, fixed-term and temporary agency work,24 all of which have been transposed into national legislation at UK level.

However, the question is whether these state guarantees actually function in the ways envisaged by the premises of social law. Social law implies certain assumptions about the nature of equality rights and about the role of law in society generally. The argument is that equality law will function effectively only if the state actively recognises and enforces equality rights, that social groups are given

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22 F Ewald, L’Etat Providence (Grasset 1986)
23 Respectively: Convention 181; Convention 177; Convention 175; Convention 189 and Recommendation 201.
powers of negotiation to ensure those rights, and that the rights go beyond the formal equality of the liberal regime. In practice, the social law scheme has not been realised through the ILO Conventions or the EU atypical work directives because of the failure of these rights to match up to the standards set by social law. At ILO level, the effectiveness of the Conventions covering precarious work has to be doubted given the lack of political commitment to their enforcement. Indeed, the most recent Convention concerning marginal workers, the Domestic Work Convention\textsuperscript{25}, has so far been poorly ratified by member states. At EU level, the focus has been on the creation of rights to formal equality between atypical work groups and their permanent counterparts. Whilst this may be useful in a liberal regime, this concentration on formal equality is problematic for the social law regime. These rights are individual rights and tend to reinforce the individualised nature of social organisation and discourage the formation of community.

According to the middle view of vulnerability, the formation of community is particularly important for those groups traditionally cast adrift by the legal system (such as precarious workers). This group association gives social power to these groups not just through legal recognition but in the further functions of these groups as the basis of social life. These further functions allow the negotiation power of the group to be sustained so that the inequalities that they face can be consistently and continually renewed. This is of more than theoretical importance for precarious workers. As has been demonstrated in relation to the case studies,

\textsuperscript{25} ILO Convention 189 ‘Domestic Workers Convention’ (International Labour Office 2011)
associations of many different types have been successful in negotiating for enhanced rights for precarious workers.  

Like the professional associations envisaged by the original proponents of social law, these associations have been particularly successful in the context of domestic work when they have taken on further functions which have helped precarious workers in other ways (through the contribution of these association to education and training etc). These further functions allow vulnerable workers the means and support to allow them to further access to justice for their group.

The application of the middle view of vulnerability to the law and policy on precarious work shows that, in general terms, the influence of the middle view has only been tangential to our current labour law. For example, the ILO Conventions concerning precarious worker groups do set out comprehensive legal protections but there are real problems with enforcement of these Conventions. The atypical work directives do contain some reference to substantive rights, and there are some associations which have been allowed the space to contribute to the negotiation of protective rights. However, the middle view arguably requires a more fundamental realignment of law, policies and priorities in the field of precarious work than is currently the case. For example, it might be suggested that for the middle view to be realised, the nature and form of anti-discrimination law needs to be fundamentally changed to realise the redistributive and substantive elements of

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26 For example the TUC and the Communication Workers Union in relation to temporary agency work in the UK
27 For example the Women United and Active association in California
this legislation. Furthermore, community organisations need to be given proper (governmental) support to ensure their survival, and must be given proper and sustainable channels through which to attain relevant legal rights.

The Narrow View of Vulnerability

The narrow view is the most recognisable in terms of its analysis of the problems of precarious work. On the narrow view, it is understood that economic changes present a real challenge to the traditional design and functions of labour law. In the ‘knowledge economy’, workers select flexible strategies which mean that relationships with employers are diffuse, or short term, and many have much more labour market power than ever before (based on the acquisition of skills which are transferable between employers). These relationships no longer correspond to the ‘standard employment relationship’ upon which labour law is based. Furthermore, ‘inequality of bargaining power’ is not present in all cases in these flexible relationships: some of these strategies make workers vulnerable (precarious workers) and others do not (gold-collar employees). It follows that labour law based on inequality of bargaining power is standard employment relationships is necessarily both over and under inclusive, and fails to capture those precarious workers in need of protection (who are not able to take the benefits of the

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28 A Somek suggests that the problem with anti-discrimination law is that it prioritises direct over indirect discrimination. This furthers neo-liberal aims and means that it cannot truly work as a force for group protection. Somek (n 1) 17
flexibilisation of work relations). The narrow view is also critical of the commodification of labour as the foundation of labour law regulation. On some level, there is a rejection of the very idea that labour is not a commodity, because of the support given on the narrow view to economic understandings of law. Certainly, there is a rejection of the idea that the commodification of labour is necessarily degrading or should be systematically regulated. Such regulation has the potential to interfere unduly in economic processes and go beyond the bounds of liberal law.

On the narrow view then, there is the understanding that labour law should generally stay out of employment relationships apart from those instances where workers have been unable to take advantage of the economic benefits that the global economy can bring. For instance, labour law can be extended to a certain extent to cover those in ‘dependent’ relationships which do not necessarily conform with the standard employment relationship but which are still deserving of protection. But labour law should not be extended too far in such a way that it interferes with freedom of contract and economic functioning. Rather, the human rights regime should be left to deal with the more dramatic instances of abuse in employment relationships. These human rights are desirable because they are individualistic, formal (rather than substantive) and do not prejudice the wider operation of the global economy. That is not to say that there is no overlap

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29 G Davidov, 'The Reports of my Death are Greatly Exaggerated: 'Employee’ as a Viable (Though Over-used) Legal Concept’ in G Davidov and B Langille (eds), The Boundaries and Frontiers of Labour Law (Hart 2006)

30 From an economic perspective, labour can be viewed as a commodity which is ‘bought and sold daily’. This is discussed in A Alchain and W Allen, University Economics (3rd edition, Wandsworth 1972) 407 quoted in B Langille, ‘Labour Law’s Theory of Justice’ in G Davidov and B Langille (eds), The Idea of Labour Law (Oxford University Press 2011) 105
between human rights and labour law. Increasingly, there is the understanding that many labour rights function in the same way as human rights and human rights can form the foundation of some labour law legislation.\(^{31}\) This is true of anti-discrimination rights which both embed the employment relation with humanity and also allow proper economic functioning (discrimination on the basis of personal characteristic can create economic inefficiencies). Freedom of association is also a 'right', so long as it does not disproportionately interfere with other more important economic freedoms (such as freedom of movement). More recently, there has also been the suggestion that social rights may be compatible with the narrow view. These rights can function to ensure the skill set and the mechanisms for human development which will ensure that individuals can function more efficiently on the labour market.\(^{32}\)

In terms of the application of the narrow view, this view can be discerned in the labour law and policy of the UK. The designation of the ‘vulnerable worker’ in the UK’s vulnerable worker policy (2006-10) was an individualistic notion, which blamed the ‘lack of capacity’ of workers for their vulnerable position. This vulnerability was deemed not to be systemic, and only experienced by a small minority of workers. The proposed solutions were therefore targeted only towards these workers, and involved only incremental changes in the law. Likewise, the Coalition government’s Employment Law Review (2010-2015) was founded on the idea that the majority of workers are not vulnerable. Rather workers are economic


\(^{32}\) B Langille (n 30) 112
actors involved centrally in the management of their own employment relations. For the majority of employment relationships therefore, the best strategy of the government is to let the parties have the ‘freedom to arrange their employment relationships in ways that work for them.’\textsuperscript{33} This attitude is particularly in evidence in the creation of the new optional employee shareholder status for workers. The idea is that this new status will allow increased flexibility for employees and employers in the running of their affairs (despite the fact that it will also erode employment protections for those that select it). Interestingly, policies have recently been introduced which aim towards the protection of businesses as the weaker party to the employment relationship. For example, in the summer of 2013, a new fee structure will be introduced to enable employees to ‘think more carefully’ about whether they should bring an employment tribunal claim which is costly to employers.\textsuperscript{34} The aim is to tackle ‘vexatious’ claims made by employees which threaten to sue businesses ‘out of existence’.\textsuperscript{35}

At EU level, the narrow view can be seen in the commitment to the ethos of ‘flexicurity’ in the design of labour law. ‘Flexicurity’ represents the notion that individual labour market participants should be able to use the flexibility of work relationships to their own advantage. This requires a level of ‘employment’ security through a commitment to training and ‘life-long learning’. This employment security will support workers by allowing them to easily make the transitions between the

\textsuperscript{33} BIS, \textit{Employment Law Review 2013: Progress on Reform} (March 2013) 4

\textsuperscript{34} Ibid 24

more flexible forms of work in the global economy. In the EU, the idea of ‘flexicurity’ has become pervasive, and was instrumental in the (later) design of the atypical work directives. However, the difficulty is that the association of these directives with the narrow view has undermined their protective elements to a certain extent: arguably the Temporary Agency Work Directive (TAWD) and the Part-Time Work Directive were as much about the promotion of atypical work, as they were about the protection of workers in these types of relationships. At ILO level, the narrow view can be discerned in the attempts to strengthen legislation on precarious work through aligning labour rights with ‘human’ rights. This policy aim was made explicit in the Declaration, and is reflected in the wording of the ILO’s Convention on Domestic Work.³⁶ It has to be questioned however, what the effect of this policy will be, given that the Declaration proceeds by means of the ‘soft’ enforcement of rights, and there is a lack of political commitment towards the enforcement of standard setting conventions emanating from the ILO.

In terms of the case studies, the narrow view has been useful in exposing the particular problems faced by precarious workers, and in identifying why they have been excluded from legislation. It has also been useful in suggesting that these workers should be brought within the scope of the law, whether that is labour law or human rights law. However, the narrow view is inherently conflictual and there are problems with the solutions on the narrow view in practice. On the one hand, the narrow view recognises that many of the problems faced by precarious

³⁶ In article 3 of the ILO Domestic Work Convention (Convention 189), it is stated that ‘Each Member shall take measures to ensure the effective protection of the human rights of all domestic workers’.
workers are a result of the structure of their employment relationships, and the failure of contract law to deal with these issues. However, there is no desire to overhaul the contractual basis of employment relations, because of the fundamental position of freedom of contract in liberal law. This means that in the case of temporary agency work, the status issues which have resulted in their exclusion from labour law have not been addressed systematically either in legislation or in case law. In terms of the application of human rights standards, there has been some progress; the Court of Justice has alluded to the fact that the rights in the atypical work directives (including the TAWD) are ‘fundamental’ and therefore have the ‘trumping’ strength of human rights. It remains the case however that these rights are limited in scope. In the context of domestic work, there are now instruments which have created human rights for domestic workers, but currently the application of those standards remains an aspiration rather than concrete reality.

4. Is there a theory of vulnerability in employment?

The previous section looked in detail at the different views of vulnerability and their application in law and policy at different geographical levels, and in the case studies. Largely the different views were considered separately although there was some recognition that the different views of vulnerability were applied concurrently. The aim of this next section is to make final conclusions about whether there is any
value in considering all of the different views together to create a complete theory of vulnerability which could be used as a tool in any analysis of precarious work.

In a sense, the combination of the different views of vulnerability is both inevitable and useful. First, each of the ‘views’ of vulnerability has a different historical context. For example, in relation to the wide view of vulnerability, Kahn Freund’s work on ‘collective laissez-faire’ relies on the particular form of labour, social and political organisation at the end of the Second World War. That form of organisation has been subject to fragmentation since that time, so it is inevitable there is an attachment to more ‘modern’ theories to try to make the theory more relevant to the current labour market context. The adoption of the understanding of human rights as a means to further collective bargaining by authors sympathetic with the wide view is a case in point. The middle view is also historical in a sense: its foundations lie in the understandings of the social law scholars at the end of the nineteenth century. Again, it might be suggested that this view is most successfully combined with more modern theories to make it relevant to the present day. For example it can be used to supplement the liberal ideals present in anti-discrimination law. Second, there are certain difficulties with each of the different views of vulnerability when it comes to their application to precarious work which make their association within a general theory of vulnerability useful. The social law ideals present in the middle view are rather vague and aspirational rather than concrete policy prescriptions. Therefore their association with the wide view (the value of collective bargaining) or with the narrow view (the attachment to ‘rights’) means that they can have some practical meaning. The wide view has no way of
distinguishing between precarious work and non-precarious work and so the association with the middle view and narrow view is helpful in that regard. Finally, the narrow view is too bound up in the isolation of precarious work as a modern phenomenon to recognise that the problem is actually systemic and requires systemic change. It is at this point that the association with the wide and middle view becomes important; it allows the expansion in the perspective of liberal law.

However, it appears that in some ways the different views are fundamentally incompatible and that the combination of the different views can be more harmful than useful. Many of the aspirations of the wide and middle views have been lost in their combination with liberal narrow views. From the perspective of the narrow view, the wide view is problematic as trade unions have been obstructive to the achievement of liberal goals (for example the establishment of temporary agency unions to subvert the TAWD), and the privileging of the wide view at ILO level has reduced the potential protections of the international human rights regime. The middle view may also be seen to be obstructive on the narrow view, because the focus on substantive rights detracts from the establishment of basic protections for the most severely abused workers. In terms of the relationship between the middle and the wide view, the wide view would see community and professional associations as much less effective than trade unions, because they have no direct power to challenge the ‘democratic deficit’ in the workplace. By contrast, the middle view would argue, that it is precisely the width of the ambit of these associations, and their attachment to society as a whole, which is the foundation of their effectiveness (and this has been borne out to some extent in practice).
5. Implications for further research

There are a number of avenues for further work here. There could be a more in-depth investigation into the links between the three views of vulnerability in theoretical terms. As a starting point, some of the theorists in the wide view appear inspired social law ideas, and Sinzheimer uses the term social law in his design of the model of the economic constitution. There are also links between the middle and the narrow views which need to be explored. In particular, the arguments against the premises of liberal theory appear in the work of Critical Legal Scholars, who associate themselves with some of the elements of the middle view.\(^{37}\) It would be interesting to investigate where these critical legal scholars position themselves in the debate. Finally, the links between the narrow and the wide view are interesting. Although on the face of it these theories are polar opposites in fact, the categorisation of ‘freedom of association’ as a fundamental (human) right requires investigation, in terms of whether this categorisation can ever meet any of the demands of the wide view as far as collective bargaining is concerned.

Perhaps the most interesting further work would be an examination of the more radical propositions of the middle view in dealing with the problems of precarious work. It has already been illustrated in this thesis that the middle view is useful in

combination with the other views of vulnerability. It has real practical value in increasing the horizons of liberal law. It is also particularly useful in providing some understanding of ‘new’ forms of the collective organisation of workers which do not align themselves particularly well with the trade union structure. However, the middle view is essentially radical, in that it challenges the very foundations of our law, and involves a number of aspirations about the best way to make law which is more responsive to society (workers). A good starting point perhaps might be the work of Somek in his book *Engineering Equality*. In this book, Somek presents a challenge to the foundations of (anti-discrimination) law in liberal ideology, by suggesting that these foundations create ‘normative deficiencies’ and antinomies in our law. He suggests that there needs to be a (re)attachment to the distributional functions of law, and a reconsideration of the role of the law in its contribution to social functions generally.

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38 A Somek (n 1)
39 Ibid 18
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