THE RIGHT TO WORK
IN INTERNATIONAL LABOR LAW
AND THE CASE OF TURKEY

A Ph.D. Dissertation

by

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To my parents

THE RIGHT TO WORK
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The Graduate School of Economics and Social Sciences
of
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by

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I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Doctor of Philosophy in Law.

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ABSTRACT

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AND THE CASE OF TURKEY

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The right to work is an internationally recognized social human right. Due to its pivotal position in the lives of the individuals and at the same time being vulnerable against possible exploitative actions, work is adopted as a realm that requires special protection. The source of this protection reaches further into the international human rights instruments, which set the minimum standards concerning the rights and principles deriving from work. Accordingly, the right to work is commonly situated at the top of the list of economic and social rights within such international instruments. Nonetheless, it is observed that there is not a clear adopted definition of the right to work. A number of characteristics and functions are bestowed on the right to work, albeit the absence of clear borders to identify the right. In particular, the right to work is mostly referred to in terms of its instrumental character as ensuring the enjoyment of other economic and social rights. The objective of this dissertation is to provide a liberal definition of the right to work that not only adopts the interests it protects as a social human right, but also satisfies the contemporary trends and notions. It further analyzes the conformity of the Turkish law with the international principles on the right to work and how it correlates to the definition proposed in the dissertation.

Keywords: Employment, Employment Protection, Right to Work, Unpaid Work, Value of Work

ÖZET

ULUSLARARASI İŞ HUKUKUNDA ÇALIŞMA HAKKI
VE TÜRKİYE ÖRNEĞİ

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Çalışma hakkı, uluslararası platformda tanınmış bir sosyal insan hakkıdır. Bireylerin yaşamındaki önemi karşısında ve aynı zamanda olası istismarlara karşı savunmasız olması sebebiyle çalışma, özel bir koruma gerektiren bir alan olarak kabul edilmektedir. Bu korumanın kaynağı, çalışmadan doğan hak ve ilkeler konusunda asgari standartları belirleyen uluslararası insan hakları belgelerine kadar gitmektedir. Bu doğrultuda çalışma hakkı, çoğunlukla bu gibi uluslararası belgelerde ekonomik ve sosyal haklar listesinin en başında yer almaktadır. Buna karşın, çalışma hakkının kabul edilmiş açık bir tanımının bulunmadığı görülmektedir. Çalışma hakkını tanımlayacak belirgin sınırların bulunmamasına karşın bu hakka çeşitli özellikler ve işlevler yüklenmektedir. Çalışma hakkı özellikle, diğer ekonomik ve sosyal haklardan yararlanmaya olanak sağlaması bakımından araç hak özelliği ile gündeme gelmektedir. Bu tezin amacı, sosyal bir insan hakkı olarak koruduğu menfaatleri belirleyen ve aynı zamanda güncel gelişmeleri ve kavramları da karşılayan, özgürlükçü bir çalışma hakkı tanımı oluşturmaktır. Tezin devamında ise Türk hukukunun çalışma hakkına dair uluslararası ilkelere uygunluğu ve tezde önerilen tanımla nasıl ilişkilendirileceği değerlendirilmektedir.

Anahtar Kelimeler: Çalışma Hakkı, Çalışmanın Değeri, İstihdam, İş Güvencesi, Ücret Karşılığı Olmayan Çalışma.

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LIST OF ABBREVIATIONS

CCPR : International Covenant on Civil and Political Rights

CEACR : Committee of Experts on the Application of Conventions and Recommendations

CEDAW : Convention on the Elimination of All Forms of Discrimination against Women

CESCR : International Covenant on Economic, Social and Cultural Rights

CFA : Committee on Freedom of Association

CFR : Charter of Fundamental Rights of the European Union

CRPD : UN Convention of the Rights of Persons with Disabilities

ECHR : Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)

ECtHR : European Court of Human Rights

ESC : European Social Charter (revised)

ECSR : European Committee of Social Rights

GAATW : Global Alliance Against Trafficking in Women

HRS : Human Rights Standards for Treatment of Trafficked Persons

ICJ : International Court of Justice

IHRLG : International Human Rights Law Group

ILC : International Labour Conference

ILO : International Labour Organisation

İŞKUR : Turkish Institution for Employment

NES : National Employment Strategy

STV : Foundation Against Trafficking in Women

UDHR : Universal Declaration of Human Rights

UN : United Nations

INTRODUCTION

Work is central to the life of human beings. It reveals the productive quality of persons. It is necessary for individual as well as for social subsistence and development. It is the basis of how ideas are developed, how inventions are made, how the societies function and how they evolve. It is also a very personal activity with its baseline being the intellect or the physical body of the individual. In this respect, from the person's right over his/her body derives the person's right over the work of his/her mind and body.

Work's significance in the lives of individuals and in sustaining the functioning of the societies has been recognized throughout history, despite the differences in identifying what activities constitute work. The historical ideas and experiences have revealed that work is a dynamic concept both in terms of its definition and in terms of the value given thereto. The value bestowed on work by the ideas dominating the present-day phenomena has praised it as a human right. The intertwined relationship between the concepts of work, subsistence, income and human dignity have presented work with a right of the individual that requires protection from possible acts of exploitation. In fact, it is such a delicate issue that even the establishment of work as a right leaves it vulnerable against being utilized for the disadvantage of the individual.

In order to avoid any abuse of the right to work, what is required is to fill in the gaps concerning the normative content of the right to work, as well as the work definition in terms of this right. As a result of the absence of a clear understanding of what the right to work entails, particularly in terms of the states' obligations, and the controversies arising out of different ideologies, the right to work remains as a recognized right in the relevant international instruments and is kept from being clarified either by the legal scholarship or the international bodies. It is only in the last decade that the number of studies on this right has encountered a significant increase.

The risks that may be derived from the recognition of work as a right in the absence of a clear normative content is increasingly being recognized. In the words of Mundlak, the right to work "can be used as a justification for forcing workers to make difficult and unattractive life choices under the disguise of consent. Instead of asking why individuals make such life choices and what they stand to gain by making them, the right to work merely holds them responsible for their own actions and absolves the state of responsibility."[1] In other words, glorifying work as a right inexplicitly presents the individual with the perception of "something good", while that is not necessarily always the case. Therefore, the interest protected by the right to work needs to be clearly identified and a well-established definition and borders of the right have to be established.

[1] Guy Mundlak, "The Right to Work – The Value of Work," in *Exploring Social Rights: Between Theory and Practice,* ed. Daphne Barak-Erez and Aeyal M. Gross. (Portland: Hart Publishing, 2011), 351.

Having recognized the risks that entail the right to work, the objective of the present study is to establish a clear and substantive normative content of the right to work and an inclusive definition of work within the framework of the right to work. In this regard, the first chapter will focus on the value of work and how it evolved to its current status throughout history. In the second chapter, the most significant international instruments that govern the right to work will be observed and their definitions of the right to work will be analyzed. In the third chapter, a *de lege feranda* of the right to work will be presented that highlights the deficits of the right to work definitions of the international instruments analyzed in the second chapter. Finally, with a view to establish a concrete analysis of the proposed aspects of the right to work, the conformity of the Turkish law and practice with the formulated right to work will be assessed in the final chapter.

CHAPTER 1

THE VALUE OF WORK

Throughout history, work has been a subject of numerous studies of different natures, including sociology, economy, theology, literature, philosophy, social policy, social economics, and law. All of these ideas had their contributive parts in the development of the concept of *work* and how it became to be perceived today.

In order to understand the *right* to work, it is significant to lay the foundations of *work* itself before establishing it as a right. The fact that work today is categorized as a social human right has its grounding in the values attached thereto. The interests protected through the right to work emerge from the value given to work in the common present understanding. However, work only began to attain its present value in the late nineteenth and the early twentieth centuries and has been developing ever since.

Starting from the philosophers of Ancient Greece, who saw absolutely no intrinsic value in work, to today's glorification of work as a provider of a long list of interests, the value of work has encountered a long evolutionary journey. This Chapter will provide a glance at the ideas on value of work which had significant historical impact on the evolution of work itself.

1.1. WORK AS AN INHUMAN ACTIVITY

The earliest forms of slavery appear both as social practices and legal practices of forced labor. As a result of the fact that slavery was a very common notion in the early societies, the value of the work performed by slaves and the nature of slaves were issues examined and assessed in the works of significant authors, among which are the famous Plato and Aristotle.

It is understood from the works of the Ancient Greek philosophers that slavery was a means of escaping the necessities of life while at the same time pursuing a "good life". Work was indeed accepted to be a requisite to survive and to satisfy one's humanly needs; however, it was not considered to be an activity that ought to be executed by human beings *per se*. In fact, according to this understanding, human being should not be performing work because work is not a part of the "conditions of human life"[2]. In other words, according to the perceptions of the Ancient Greek philosophers, "[w]ork itself is valued for its practical consequences, but it is not valued in itself"[3] – these practical consequences being the necessities for survival, including food and shelter among other things. The traces of these perceptions are

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[2] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 84.
[3] Kory Schaff, "Introduction," in *Philosophy and the Problems of Work: A Reader,* ed. Kory Schaff (Oxford: Rowman & Littlefield Publishers, 2001), 5.

clearly stated in the works of both Plato and Aristotle. In Book II of *Republic*, Plato presents a discussion between Socrates and Adeimantus about a theoretical city where the necessities of life are clearly underscored:

“Come, then, let’s create a city in theory from its beginnings. And it’s our needs, it seems, that will create it.

It is, indeed.

Surely our first and greatest need is to provide food to sustain life.

Certainly

Our second is for shelter, and our third for clothes and such.

That’s right.

How, then, will a city be able to provide all this? Won’t one person have to be a farmer, another a builder, and another a weaver? And shouldn’t we add a cobbler and someone else to provide medical care?”[4]

In the dialogue, Plato refers to the basic needs of human beings and emphasizes that the provision and satisfaction of these needs are dependent on the existence of those who perform the work required thereto. In the further parts of the discussion, Plato takes the issue to the point where he creates “a rigid caste system in his ideal polis, which permanently excludes from all part in government the *demiourgoi* (craftsmen)

[4] Plato, *Republic,* trans. G.M.A. Grube, revised C.D.C. Reeve (USA: Hackett Publishing Company, 1992), 44.

and *georgoi* (farmers)."[5] He distinguishes between craftsmen and the creators, which include poets, artists and inventors, in terms of virtuousness having regard to the criterion of performing manual labor. He believes that ideally manual labor, and therefore craftsmen, can be virtuous but the reality is that manual labor is a degrading activity which has a negative impact on the souls and bodies of the craftsmen. Therefore, craftsmen shall be led by those with virtue.[6]

Accordingly, Plato established three main activities that shall be carried out in his state. These consist of the necessary services, state protection and government. The former is performed by what Plato identifies as workers, whereas the classes that perform the latter two are the guardians and the philosopher king.[7] In terms of distribution of work, he claims that the most effective way of performing work is by creating for masses instead of a system where everyone is doing everything. The work shall be divided according to the capacities of the performers and the easiest way of providing services is for people to specialize and create in quantities for others as well as for themselves. With this system proposal, Plato lays the foundations of the theory of division of labor.

Accordingly, Plato generates a distinction between *labor*, which is carried out by workers, and *other activities* that serve the purposes of protecting and governing the state, the performers of which are not referred to as "workers". In other words, Plato's perception of labor merely covers activities which are necessary for survival

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[5] Maurice Balme, "Attitudes to Work and Leisure in Ancient Greece," *Greece & Rome* 31.2 (1984): 141.
[6] Gustave Glotz, *Ancient Greece at Work: An Economic History from the Homeric Period to the Roman Conquest,* trans. M.R. Dobie (London: Routledge, 1996), 162.
[7] P.D. Anthony, *The Ideology of Work* (Bristol: Tavistock, 1977), 16.

and not those which are at governmental level. Although Plato's notion of work is rather limited and thus, does not establish Arendt's distinction between labor and work[8] or any other types of activities other than "work and other activities", this division of labor of his is regarded as the basis of the later established distinctions between work and labor, productive and unproductive labor, skilled and unskilled labor and manual work as well as intellectual work.

Coming from the same grounds and notions as Plato's, Aristotle also does not see any value in work and considers it as an activity that precludes citizens from a "human" way of life by forcing them into performing vulgar activities that lead to their corruption, instead of enabling them to focus on pursuing their virtue.[9] In fact, he does not even see the virtue of work or the craftsmen in a theoretical world, as did Plato. His position is that all workers, whether slaves or laborers, who work to provide necessities are not worthy enough to be citizens. Their existence is necessary for the fulfillment of basic needs but they shall not be freemen. Work is such an unvirtuous activity that according to Aristotle, all work shall be carried out by non-citizens and the citizens shall be devoted to contemplation and politics.

The reason why work shall be performed by slaves finds its grounds in the definition and status of a slave. Accordingly, a slave is "a living possession"[10] and the state of being a slave is a natural status rather than a legal one. Aristotle's position in the matter is emphasized in the following words of his: "Hence we see what is the nature

[8] Arendt's definition of *labor* refers to the physical effort required for survival and preserving, whereas that of *work* underscores human beings as creators. Arendt, *The Human Condition.*
[9] Anthony, *The Ideology of Work,* 17.
[10] Aristotle, *Politics,* trans. Bejamin Jowett (Kitchener: Batoche Books, 1999), 7.

and office of a slave; he who is by nature not his own but another's man, is by nature a slave; and he may be said to be another's man who, being a human being, is also a possession. And possession may be defined as an instrument of action, separable from the possessor."[11] It is seen here that Aristotle identifies the slave as the property of the master. His position is focused on the idea that, the slave acquires its identity from being a slave to the master, whereas the vice versa is not the case. In other words, the master is not identified by his/her position as a "master". Other characteristics and activities of the person that serve a specific function (such as the profession, skills and familial duties) are utilized in creating the identity of the master.[12] This position of Aristotle actually gives a hint as to the nature of a slave. Due to the fact that slaves were property by their nature, they were not human beings. Since the only subjects of rights and freedoms were human beings, slaves did not have the capacity of being subjects of rights and freedoms.

This reasoning explains why labor was bestowed on slaves. It was because slaves were not considered as persons that resulted in them being utilized for work, and not the other way around. They were not named as slaves because of the work that they were forced to do; instead, they were given work because they were slaves by nature. The reasoning did not focus on work because it was not relevant to the status of a slave. Work was a consequence, not a reason. A slave was a slave because it was in their nature and slaves performed work because work was not natural to human beings.

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[11] Ibid*.,* 8.

[12] Kostas Vlassopoulos, "Greek Slavery: From Domination to Property and Back Again," *Journal of Hellenic Studies* 131 (2001): 122.

The practice of work being performed by slaves is also found to be irrelevant with the resentment to work in the ancient times. The reasoning worked the other way around. Namely, it was because work was not considered to be a part of the good life and that the nature of good life was described as “contemplative and morally self-sufficient”[13], that work was done by the slaves. Work did not create an end that placed it within the discourse of a good life. Thus, the social construction that relied on slaves to perform work was found to be “not only appropriate, but also ‘natural’.”[14] Still, human necessities depended on a certain level of work and work which satisfied human necessities was considered slavish by its nature. Therefore, people of the ancient times depended on slaves to perform work that served the realization of human subsistence.[15] In order for the citizens to contribute to their city through their intellect, their labor demanding daily necessities had to be satisfied by other means. Therefore, the practice of slavery in Ancient Greece evolved around the household. Slaves were utilized for domestic work, so that freemen can devote themselves fully to the city. Therefore, it was this logic that justified slavery and hindered the questioning of the phenomenon of slavery in Ancient Greece. Slaves were a must for a well-functioning society.

The approach of the Ancient Greek philosophers also points to their understanding of *work*. Although they do not make any distinction between types of work (such as productive work and unproductive work or laboring and working) it is clear from their assertions that neither working for the government nor contemplation, which is

[13] Schaff, “Introduction,” 6.
[14] Ibid.
[15] Arendt, *The Human Condition,* 83.

named to be the key element of a good life, is considered as *work*. According to the notions which dominate these ideas, work in itself has a slavish nature, meaning that it requires a certain level of physical activity. Hence, the ancient conception of work is limited to manual labor, which explains why Plato's "division of labor" involves categorization according to the groups performing a specific task rather than a categorization of the type of effort, i.e. manual labor and intellectual work.

1.2. DUTY TO WORK

The idea of duty to work was introduced by the Christian understanding of the value of work. The basis of dogmatic Christianity lied within the notion of work as a curse, although encouraged due to the realities of life and a requirement for earning one's own bread. On the other hand, work as a value and a *moral* duty was particularly emphasized by the Protestant school, the basis of which lies within the interpretation that adopts fulfilling worldly affairs as a moral duty to God.

In the early years of Christianity, work was irrelevant to life because the preaches of Christ were built around the idea of accepting life as a station before heaven. According to this understanding, people's objectives in life shall be directed towards preparing for the afterlife through prayer and contemplation and not dealing with worldly affairs of enriching one's wealth.[16] However, with the New Testament, work

[16] Joanne B. Ciulla, *The Working Life: The Promise and Betrayal of Modern Work* (New York: Times Books, 2000), 40.

became more involved in the preaches of the monks and the clergy, although not as a moral duty to God but as a significant aspect of life.[17]

Nonetheless, a significant part of the early Catholic doctrine did in fact produce its unique theory on work by naming it a curse. Due to work's nature as an effort-consuming activity that creates a burden on the performer, work was seen as a curse brought down by God "for human imperfection and weakness"[18] – for which the forbidden apple anecdote is used as an analogy. However, it should be noted that not all views of Christian theology accepted work merely as a curse of God. Some also embraced its nature as a blessing.[19]

By twelfth century, the change in the relationship between theology and work and the increase in craftsmanship leading to the establishment of guilds "theologically connected personal identity and morality with work"[20]. The eventual development of trade and the accessibility to a wide range of goods and the increasing emphasis on aesthetics evolved into the conflict between the worldly pleasures and the Church's preaches on disregarding them and facing divinity. With Renaissance, this conflict became resolved in favor of the worldly pleasures, which recognized that "God created man, who was a creator of art, music, and other things of beauty."[21] All worldly pleasures and aesthetics assumed legitimacy with the ideas introduced during Renaissance. Finally, with Reformation and Protestantism, worldly affairs

[17] Ibid.
[18] John W. Budd, *The Thought of Work* (New York: Cornell University Press, 2011), 20.
[19] Ibid., 21.
[20] Ciulla, *The Working Life: The Promise and Betrayal of Modern Work*, 45.
[21] Ibid., 48.

preceded the afterlife and the value of work reached its peak point within the Christian schools.

The Protestant school viewed work as a moral duty to God and to the community and referred to work as a "calling" *(Beruf)* from God. This was the first time that work was named as such and regarded as a gift from God. This school endorses the idea that God was a working God and people had to work to fulfill their duties to God by fulfilling their callings that were bestowed on them by God. Individuals were charged with the duty to perform their worldly functions within the worldly morality rather than isolating themselves in asceticism.[22] According to the Protestant school, people were praised with their callings, which consisted of personal skills and capabilities of the individuals, and it was God's commandment – and therefore their duty to God – to perfect them. This approach not only bestowed value on work but also made it bearable for the performer. This way, the pain and burden that were associated with work, a heritage from the Ancient Greek perception of work, was replaced by the spiritual meaning that was attributed to work by the Protestant school.

It should be noted that under the Protestant school, work did not have an intrinsic value. Its value came from its reflection to God. God blessed individuals with their calling and the value of the calling lies with the fact that it was presented to them by

[22] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Routledge, 2005), 40.

God. “Labour in a calling meant participating in the work of God.”[23] The performance of the duty through work was not considered a value but an obligation.

The duty and service to the *community* through work is based on Luther’s association of work and “brotherly love”[24] which was later developed through Calvinism. Luther asserts that by working, the individual not only performs their duty to God but also serves the community since their labor would be part of the division of labor. Calvinism takes this approach a step further and legitimizes it with the objective of glorifying God. Accordingly, the purpose of a Christian in the world is to fulfill the commandments of God, among which lie “social achievement”, i.e. living according to God’s commandment concerning order in social life.[25] Hence, social achievement, which is realized through “brotherly love”, is intended to be realized with a view to glorify God and not to satisfy material needs.

The “social achievement” commandment of God affects the construction of a social system by providing it with division of labor. “For the wonderfully purposeful organization and arrangement of this cosmos is, according both to the revelation of the Bible and to natural intuition, evidently designed by God to serve the utility of the human race.”[26] Calvin and Luther, among the pioneers of this movement, regarded not only idleness and vagrancy but also unemployment as a “moral deficiency” rather than an economic consequence.[27] People ought to work and prayer was no longer considered as complying with the duty to work. “The monastic life is

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[23] Catharina Lis and Hugo Soly, *Worthy Efforts: Attitudes to Work and Workers in Pre-Industrial Europe* (Boston: Brill, 2012), 151.
[24] Weber, *The Protestant Ethic and the Spirit of Capitalism,* 41.
[25] Ibid., 64.
[26] Ibid.
[27] Ciulla, *The Working Life: The Promise and Betrayal of Modern Work,* 50.

not only quite devoid of value as a means of justification before God, but [Luther] also looks upon its renunciation of the duties of this world as the product of selfishness, withdrawing from temporal obligations."[28] Furthermore, work as a calling received equal value and the former dogmatic Christian belief that the work of the clergy had a higher value than that of the ordinary Christian was abolished.[29] Unlike the former pre-Renaissance envision, the Protestant school glorified wealth and depicted it as a praise of God. This approach is claimed to be among the foundations of the capitalist ideas.

The traces of duty to work as a service to God was also found in the social and economic developments in the countries where Protestantism was adopted. Among these, the codification of the 1601-1834 Poor Laws in England, which are based on the idea of eliminating vagrancy and ensuring that all those who are capable are working, could be presented as a significant anecdote coinciding with this era. This legislation was legitimized by the principle of duty to work.[30]

The religious explanation of work as a duty had significant impact on the further developments, although it lived through its own evolution. Duty to work eventually became secularized in many communities and appeared as a national duty. In addition to the constitutions of the former (and present) Communist countries, some

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[28] Weber, *The Protestant Ethic and the Spirit of Capitalism,* 41.

[29] Lis and Soly, *Worthy Efforts: Attitudes to Work and Workers in Pre-Industrial Europe*, 150.

[30] Bruno Veneziani, "The Evolution of the Contract for Employment," in *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945,* ed. Bob Hepple. (Portland: Hart Publishing, 2010), 34.

of the modern constitutions of the neo-liberal world also adopt work as duty of the citizen/individual to their state and/or society.

1.3. WORK AS A SOURCE OF PRIVATE PROPERTY

The idea that work is the source of private property was initially developed by John Locke (1632-1704) in Chapter Five of his *Second Treatises of Government*, being among his most famous works. Before dealing with the details of the idea, it shall be indicated that Locke uses the phrase “labor” without actually providing a clear distinction between types of activities that amount to work and/or labor. Therefore, in order to maintain coherence with his work, the term “labor” will also be used here without any implication of any specific distinction between work and labor.

John Locke’s position concerning labor has its foundations in the idea that the creator of mankind is God and it is God who provided the earth to human beings. However, when presenting human beings with the earth, God did not make a distribution of land by providing private property for each human being. The earth was offered for common use to all human beings as a whole.

According to Locke, “God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience.”[31] This means that Locke’s law of reason, which finds itself within the

[31] John Locke, “Two Treatises of Government,” in *Locke: Two Treatises of Government,* ed. Peter Laslett (Cambridge: Cambridge University Press, 2000), 286.

framework of the law of nature, is evolved around the notion that God not only gave the earth to human beings but also gave them the necessary abilities, namely reason, to use and improve it. Human beings, as a result of natural law, have the right to preservation and therefore, need the resources provided to them by nature. To put it in other words, in order for human beings to enjoy their natural right to preservation, there has to be a means of appropriation of the earth's resources among human beings.

At this point, Locke introduces the *labor theory of property* with a view to justify his claim. "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person.* This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property.*"[32]

Locke's sequence of reasoning indicates that first of all, human beings have the right to property on their own personalities. Since a human being's actions and work are part of what makes them a "human being", the ends of their actions shall amount to their private property. Accordingly, due to the fact that both earth and reason were provided to human beings by God and that both of these combined generate private property, private property is also an aspect of natural law and derives from God.[33]

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[32] Ibid., 287-88.
[33] Manfred Brocker, *Arbeit und Eigentum: Der Paradigmenwechsel in der neuzeitlichen Eigentumstheorie* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1992), 186.

Furthermore, Locke, who actually values the consent of the common, argues that it would be against the law of reason for a person to have the consent of all human beings when appropriating the resources of the earth. An application as such would be impractical and result in starvation. He argues that the only way to benefit from the natural resources is through an act of labor; in the simplest form, picking an apple from a tree. When a person picks an apple from the tree, he/she removes and obtains a part of the common from its state of nature and initiates his/her *property.* It is the characteristic of the capability of converting into property that attributes meaning to the *common.*[34] The added labor to the natural resource is the property of the human being in the first place because human beings own their labor. The added labor is the "labor of their body and work of their hands" that belong to the person, making the earth's resource the property of that person.

After establishing the right to property as a derivative of labor, Locke furthers his assessment to what constitutes the limit of this appropriation and what God actually intends by allowing such appropriation. Locke believes that the limit of appropriation is what is necessary for self-preservation. Laboring to the extent that results in excessive products that are eventually left to spoil exceeds a person's right to private property. In other words, a person's share from the common is limited to the extent he/she can consume; whereas all the surplus that exceed the consumption capabilities of an individual and therefore, go to waste are the share of others.[35] Yet, self-preservation is not the only command of God. God also demands development. The earth is provided by God not for the mere survival of human beings but also for

[34] Locke, "Two Treatises of Government," 289.
[35] Ibid., 290.

development and improvement of conditions. When people add their labor to the earth, they increase the amount and the value of what is common to human beings. For example, in order for a piece of bare land (a common resource) to give crops, it should be cultivated by the labor of human beings. When crops are grown on the land as an end product of labor, the value of the land increases. Therefore, according to Locke, "'tis *Labour* indeed that *puts the difference of value* on every thing"[36]. Namely, labor adds value to things.

As can be seen from Locke's reasoning, the value of work lies with its consequence, namely the added value to the common resource. Labor "is purposeful activity, directed to useful ends, and which secures preservation in primitive state and improves human life once basic necessities have been met. Understood this way, it therefore adds to the value of resources by increasing their productivity."[37] This means that Locke does not define each and every activity as labor but only "those actions directed towards the preservation or comfort of our being."[38]

It shall be noted here that as stated above, Locke found the limit to appropriation in the wasting of resources. It may seem at this point that adding value to and increasing the amount of the common would actually exceed one person's needs, and in fact, it certainly does. However, Locke argues that the use of money has entered the lives of human beings with a view to actually avoid spoilage of products. Through the usage of money, the amount exceeding the needs of a person will be

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[36] Ibid., 296.
[37] Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon, 1991), 150.
[38] Ibid., 151.

sold off in exchange of money – an instrument which does not bear the risk of spoiling. As Buckle points out in this regard, money economy precludes spoilage because through money, surpluses that exceed the consumption capabilities of persons may be preserved as money, which is not something that can perish.[39]

To sum up, it is well apparent that Locke's approach to labor is completely different than that of the ancient philosophers. Although neither actually go deep into the distinction of labor and work – therefore disregarding the modern understanding of skilled and unskilled work or manual and intellectual work – Locke provides the initiation of a different approach towards labor, where labor is not regarded as an element of poverty executed by the slaves and the lower class, but rather as a source of wealth – or in Locke's case, private property.

1.4. LABOR THEORY OF VALUE

Following John Locke's understanding of labor as a productive activity which eventually leads to wealth, the modern age discussions were furthered in this respect by distinguishing useful labor from plain labor and valuing work within a capitalist society according to the usefulness of the end product.

With regard to the labor theory of value, the most commonly quoted author appears to be Karl Marx. While dealing with labor and productiveness, Marx, together with Friedrich Engels, establishes different grounds than Locke for the source of human

[39] Ibid., 155.

beings and the human nature. In a later deleted sentence in their work *Die deutsche Ideologie (The German Ideology)*, Marx and Engels establish that unlike what Locke had argued, it is not the capacity to think and reason, rather producing, namely labor, that distinguishes human beings from the animals.[40] Parallel to this approach, Engels indicates in his work *Anteil der Arbeit an der Menschwerdung des Affen (The Part Played by Labor in the Transition from Ape to Man)* that labor is the primary condition of life and that it is labor that created human beings.[41]

Unlike the insights of the ancient philosophers, who did not see the value in the work itself rather in its ends, Marx argues that the value of a commodity, which is something useful and a result of labor power, is measured in terms of the labor that lies in the given commodity. In his reasoning, Marx starts off by distinguishing the term “use value” from “exchange value”. Accordingly, the utility of a thing makes it a use value and since a commodity is a material thing, it is a use value, regardless of the amount of labor required to benefit from the utility of the given commodity. Exchange value on the other hand, is the market value of a commodity, which is subject to alterations depending on time and place. Therefore, commodities as use

[40] Karl Marx and Friedrich Engels, *Die deutsche Ideologie,* vol. 3 of *Karl Marx Friedrich Engels Werke,* ed. Institut für Marxismus-Leninismus beim ZK der SED (Berlin: Dietz Verlag, 1969), 10. (The original German text: “Der erste *geschichtliche* Akt dieser Individuen, wodurch sie sich von den Tieren unterscheiden, ist nicht, daß sie denken, sondern, daß sie anfangen, *ihre Lebensmittel zu produzieren.*”)

[41] Friedrich Engels, *Die deutsche Ideologie,* vol. 20 of *Karl Marx Friedrich Engels Werke,* ed. Institut für Marxismus-Leninismus beim ZK der SED (Berlin: Dietz Verlag, 1969), 444. (The original German text: “[Die Arbeit] ist die erste Grundbedingung alles menschlichen Lebens, und zwar in einem solchen Grade, daß wir in gewissem Sinn sagen müssen: Sie hat den Menschen selbst geschaffen.”)

values are of different qualities; whereas as exchange values, they are of different quantities and do not include any use value.[42]

Upon establishing that use value is totally different from exchange value - where the former is measured in terms of quality and the latter in terms of quantity - Marx moves on to the essence of a commodity when it is abstracted from its use value. In this respect, he argues that the only common characteristic of commodities, when they are abstracted from their use values, is the fact that they are the products of labor. When the use values of products are abstracted, the useful character of labor is also dissolved and what remains common in all these products is the abstract human labor.[43]

This remaining element of the abstracted products is the labor power used thereto. Marx defines labor power as the existing intellectual and physical abilities that a person uses while producing a use value.[44] This remaining used labor power is what Marx calls as "value". In other words, when the use value of commodities is abstracted, what remains is the value itself and it is in fact this value which forms the

[42] Karl Marx, *Das Kapital: Kritik Der Politischen Ökonomie Erster Band Hamburg 1872,* vol. II/6 of *Karl Marx Friedrich Engels Gesamtausgabe (MEGA),* ed. Institut für Marximus-Leninismus beim ZK der KPdSU and Institut für Marxismus-Leninismus beim ZK der SED (Berlin: Dietz Verlag, 1987), 71-72. (The original German text: "Als Gebrauchswerthe sind die Waaren vor allem verschiedner Qualität, als Tauschwerthe können sie nur verschiedner Quantität sein, enthalten also kein Atom Gebrauchswerth.")

[43] Ibid*.,* 72. (The original German text: "Sieht man nun vom Gebrauchswerth der Waarenkörper ab, so bleibt ihnen nur noch eine Eigenschaft, die von Arbeitsprodukten. Jedoch ist uns auch das Arbeitsprodukt bereits in der Hand verwandelt. Abstrahiren wir von seinem Gebrauchswert, so abstrahieren wir auch von den körperlichen Bestandtheilen und Formen, die es zum Gebrauchswerth machen. (…) Mit dem nützlichen Character der in ihnen dargestellten Arbeiten, es verschwinden also auch die verschiednen konkreten Formen dieser Arbeiten, sie unterscheiden sich nicht länger, sondern sind allzusammt reducirt auf gleiche menschliche Arbeit, abstrakt menschliche Arbeit.")

[44] Ibid*.,* 183. (The original German text: "Unter Arbeitskraft oder Arbeitsvermögen verstehn wir den Inbegriff der physischen und geistigen Fähigkeiten, die in der Leiblichkeit, der lebendigen Persönlichkeit eines Menschen existiren und die er in Bewegung setzt, so oft er Gebrauchswerthe irgend einer Art producirt. ")

common substance, which presents itself as an exchange value when the commodities are exchanged.[45] The expenditure of labor power, which creates the main substance of value, is also the reason why a useful material has value. This is because a use value has value in the first place because it includes abstract human labor.

Nevertheless, what gives a commodity its value is the labor quantity and labor time it requires. The commodities that require the same amount of labor and labor time are of the same value. Since the productiveness of labor determines the amount of labor and time required for producing a commodity, the value of a commodity is directly proportional to the amount of labor contained in the commodity and inversely proportional to the productiveness of labor. In other words, the more productive the labor is, the less amount of labor is required and thus, the less the value of a given commodity is.[46]

After reaching the above conclusion, Marx moves on to explaining the double characteristic of labor which is embodied in commodities. In this respect, labor is on one hand the physical expenditure of human labor power, which – as explained above – creates the value and gives shape to commodities and is measured in terms of quantity; on the other hand, it is the expenditure of human labor power in a

[45] Ibid., 72. (The original German text: "Das Gemeinsame was sich im Austauschverhältniß oder Tauschwerth der Waaren darstellt, ist also ihr Werth. (…) Ein Gebrauchswerth oder Gut hat also nur einen Werth, weil abstrakt menschliche Arbeit in ihm vergegenständlicht oder materialisirt ist.")

[46] Ibid., 74. (The original German text: "Die Werthgröße einer Waare wechselt also direkt wie das Quantum und umgekehrt wie die Produktivkraft der sich in ihr verwirklichenden Arbeit.")

specific form and for a specific purpose, which produces the use value of commodities and is measured in terms of quality.[47]

Although a commodity's essence is hypothetically abstract human labor, namely value, Marx's reference point always appears to be the utility of the thing. If the thing does not have any utility, it shall not embody any value, regardless of it being a product of abstract human labor. If the end thing has no use, neither does the labor that is embodied in it. The abstract human labor which does not create a useful thing is not counted as labor and therefore, does not create any value.[48] This is why Marx examines the aspects of a commodity, which is by its nature a useful thing, and tries to distinguish the values that are contained in it, namely the exchange value and the use value. It also explains why Marx argues that there are two *characteristics* of labor embodied in a commodity rather than two *types* of labor. This sequence of reasoning leads to the conclusion that a commodity embodies both *abstract human labor* and *useful labor*. Whether or not a thing embodies useful labor is measured by its utility. In the simplest form of explanation, if a thing is useful, it embodies useful labor; if it is not useful, neither the thing nor the human labor embodied in it are of any value.[49] This leads to the conclusion that the value of work according to Marx is measured according to the utility of the product, produced as a result of human labor.

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[47] Ibid., 79-80. (The original German text: "Alle Arbeit in einerseits Verausgabung menschlicher Arbeitskraft im physiologischen Sinn und in dieser Eigenschaft gleicher menschlicher oder abstrakt menschlicher Arbeit bildet sie den Waaren-Werth. Alle Arbeit ist andrerseits Verausgabung menschlicher Arbeitskraft in besondrer zweckbestimmter Form und in dieser Eigenschaft konkreter nützlicher Arbeit producirt sie Gebrauchswerthe.")

[48] Ibid., 74. (The original German text: "Endlich kann kein Ding Werth sein, ohne Gebrauchsgegenstand zu sein. Ist es nutzlos, so ist auch die in ihm enthaltene Arbeit nutzlos, zählt nicht als Arbeıt und bildet daher kein Werth.")

[49] This does not mean that all useful things are a product of labor. Marx does not disregard the fact that there may be materials in nature which are useful without any human labor contained in them.

Next, arises the question of productive and unproductive labor. Obviously, in order to speak of productive labor, the labor at hand shall be useful labor. Talking about plain labor's productivity would in fact be a contradiction. Yet, when the useful labor is abstracted from the productive activity, what remains behind is nothing more than an expenditure of human labor power.[50] It shall be indicated here that recognizing the practical distinction between skilled labor and simple labor, Marx argues that whether or not the commodity is a product of skilled labor or simple labor is irrelevant and that a commodity is valued in terms of the amount of simple labor because skilled labor is merely a compile of simple labor. A certain amount of skilled labor is equal to a more amount of simple labor.[51]

To sum up, it is clear that Marx identifies labor as the source of value within a commodity. He sees labor as a value in itself as long as its end product has a use value. Therefore, although it seems at first sight that Marx's reference point is the labor within a product, it is actually the end product that he initially considers. If the end product is something useful, then the claim is that the value of this product comes from the labor that lies within. If the end product is a useless thing, then the product has no value and hence, the labor within that thing has no value.

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[50] Ibid*.,* 77. (The original German text: Sieht man ab von der Bestimmtheit der produktiven Thätigkeit und daher vom nützlichen Charakter der Arbeit, so bleibt das an ihr, daß sie eine Verausgabung menschlicher Arbeitskraft ist."

[51] Ibid*.,* 78. (The original German text: Komplicirtere Arbeit gilt nur als *potenzirte* oder vielmehr *multiplicirte* einfache Arbeit, so daß ein kleineres Quantum komplicirter Arbeit gleich einem größeren Quantum einfacher Arbeit. (…) Eine Waare mag das Produkt der komplicirtesten Arbeit sein, ihr *Werth* setzt sie dem Produkt einfacher Arbeit gleich und stellt daher selbst nur ein bestimmtes Quantum einfacher Arbeit dar."

1.5. FREEDOM OF CONTRACT *(laissez-faire)*

The relationship between labor and the object has been described by Marx's labor theory of value. What emerges as a further problem is the labor productivity in a capitalist economy with *laissez-faire* policies. At this point, Marx's critique of capitalism as a system of exploitation comes into surface, where he establishes that productivity of labor "does not lie in any of labor's products but in the human 'power,' whose strength is not exhausted when it has produced the means of its own subsistence and survival but is capable of producing a 'surplus,' that is, more than is necessary for its own 'reproduction.'"[52] In respect of Marx's labor theory of value, this surplus amounts to a profit on the part of the capitalist, where more value is created by workers than what they are compensated for.[53] This definition of the reality brought up the discussions on exploitation and alienation within the capitalist economy under *laissez-faire* policies.

The founding father of the *laissez-faire* policies is commonly believed to be Adam Smith, who appears to have in fact laid down the foundations of the labor theory of value before Marx. In his *Wealth of Nations,* he claims, just as Marx, that "[t]he value of any commodity (…) to the person who possesses it, and who means not to use or consume it himself, but to exchange it for other commodities, is equal to the quantity of labour which it enables him to purchase or command. Labour, therefore, is the real measure of the exchange value of all commodities."[54] In establishing his own labor theory of value, Smith appears to have already reached the similar

[52] Arendt, *The Human Condition,* 88.
[53] Schaff, "Introduction," 9.
[54] Adam Smith, *Wealth of Nations* (New York: Prometheus Books, 1991), 36.

conclusions that Marx later provided, but through a rather distorted reasoning that is based on the idea of self-interest. This reasoning of Smith formed the foundations of the Marxist critique of capitalism.

In establishing the conclusion that individuals are dependent on work to subsist and the wage shall accordingly be adequate to ensure their subsistence,[55] Smith starts off by describing the state before private property. Accordingly, in the state of nature where neither land appropriation nor the piling of surpluses had initiated, the laborer did not have the landlord or the master to share their labor with. The entire labor of the individuals belonged to the individuals themselves, amounting to a property of their own.[56] With private property, laborers are forced to give almost all of their produce to the landlord as rent and profit. What laborers receive in return for their labor, namely wages, shall be adequate not only for their subsistence, but also for them to raise and support a family. Only this way can further generations of workers be secured. "If this demand [for labor] is continually increasing, the reward of labour must necessarily encourage in such a manner the marriage and multiplication of labourers, as may enable them to supply that continually increasing demand by continually increasing population."[57]

Smith continues with this *self-interest dominated approach* by testing the cost of slaves for the masters compared to a free servant. He begins his discussion by comparing the "wear and tear of a slave", a risk borne by the master, with the wages provided to journeymen and servants in order to provide them with the means to take

[55] Ibid., 72.
[56] Ibid., 68.
[57] Ibid., 84.

care of themselves and their families and concludes that the perfectly healthy slave costs the master the same as a perfectly healthy journeymen or a servant. However, Smith furthers his argument by stating that the "wear and tear" of a slave is handled poorly by the masters whereas it is handled by the free persons themselves. Therefore, the work and the cost of free workers are experienced to be amortized and hence, cheaper in the end than that performed by slaves.[58]

A similar grounding is also seen in Smith's views on leisure. He asserts that excessive labor would wear the laborers so much that they would no longer be productive and would be in need of relaxation, which would be of a higher cost for the master in the long run. Therefore, moderate working hours of the workers would more likely keep them healthy and accordingly, enable the extraction of more labor from them, resulting in higher amount of product in terms of quantity.[59]

As can be seen, Smith appears to constantly reach humanly conclusions through a rather odd method of reasoning. This pure *self-interest approach* to labor brings about its exploitative and alienating consequences within a capitalist economy of *laissez-faire* policies, which forms the basis of Marx's critique. In a capitalist system, which is dominated by self-interest and profit, division of labor is considered to be the most productive way of performing work. According to Smith, "[t]he greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is any where directed, or applied, seem to have been the effects of the division of labour."[60] It can be derived from these words of

[58] Ibid., 85.
[59] Ibid., 87.
[60] Ibid., 9.

Smith that he finds productivity not primarily in pure labor power but in division of labor. He argues that division of labor's effectiveness comes from the combination of three advantages: "it leads to an increase in the dexterity of workmen, it leads to the saving of time by avoiding the workers having to move from one place to another, and it leads to the development of machines 'which facilitate and abridge labour'"[61].

In response to Smith's argument on productivity, Marx puts forward the disadvantages of production that is based on division of labor. Although he agrees with Smith on the fact that division of labor results in the most productive results, i.e. the most profit, for the capitalist, the laborer is destined to suffer exploitation and alienation within division of labor. According to Marx, labor in a capitalist society is a commodity and together with all other commodities that are bought with money (such as machines, equipment, raw material, energy), constitutes productive capital. The usage of these commodities creates a new commodity. However, apart from labor power, these commodities do not affect the size of the capital and therefore, they are not the source of profit for the capitalist. Instead, their values merely pass on to the new commodity. On the other hand, the selling and buying of labor power is directly related to the amount of profit the capitalist will make.

As previously indicated, labor power is a commodity within a capitalist economy. Therefore, labor power itself has an exchange value and just like other commodities, its exchange value is measured in terms of the labor time required for its reproduction. Laborers, who need the money to reproduce, sell their labor power in exchange for a wage. The wage is the amount of money that equals to the laborers'

[61] Anthony, *The Ideology of Work,* 54.

reproduction. This means that all work performed by the worker that exceeds the amount of work he/she is required to do in order to reproduce will be for the advantage of the capitalist. In this equation, Marx divides the daily working time of a laborer into three divisions. The first part of the laborer's work compensates for the commodities that make up the productive capital. In the second part, the laborer works for their reproduction by selling their labor power to the capitalist. All other work of the laborer, which constitutes the third part of the laborer's daily working time, is done for the capitalist, which Marx names as the surplus which expands the capitalist's capital and generates profit. Furthermore, with the help of the technology and division of labor, the necessary working time for the reproduction of the laborer shortens; meaning that more of their labor power is benefitted by the capitalist.[62]

Furthermore, since the capitalists' main objective is to increase profit, they promote division of labor, which not only increases productivity of labor power but also decreases the cost of the worker for the capitalist. With division of labor inserted into manufacture, the necessity for skilled laborers diminishes in favor of unskilled laborers. "This, of course, results in a fall in the value of labour, the reduced cost of training increases the amount of surplus value available to the capitalist."[63] Such system of selling labor power for the capitalist's profit in exchange for a wage for reproduction, results in exploitation. Despite the fact that laborers in a capitalist economy is a free persons, the circumstances force them to sell their labor. If laborers refrains from this, they and their family have no source of reproduction.

[62] Marx, *Das Kapital: Kritik Der Politischen Ökonomie Erster Band Hamburg 1872,* 183-192.
[63] Anthony, *The Ideology of Work,* 125.

The second critique of Marx states that a capitalist system which elevates division of labor, results in *alienation* on the part of the laborers. The alienation of the laborer occurs in four stages: “man is (1) alienated from nature; (2) from himself, from his own vital activity; (3) from his human essence; and (4) from other men.”[64] Marx reaches this conclusion by stating that in a capitalist economy, labor becomes alienated from its end product.[65] As a result of the self-interest policies driven by the capitalist, the laborers produce more than they can consume meaning that “the more the worker produces the less he has to consume, the more values he creates, the more valueless and worthless he becomes, the more formed the product the more deformed the worker, the more powerful the work the more powerless becomes the worker, the more cultured the work the more philistine the worker becomes and more of a slave to nature.”[66] Because of the fact that the laborers do not possess most of what they produce, they become alienated to what their labors had created. Since according to Marx, the creator of the world is the labor of human beings and therefore, the owners of the world are human beings, this alienation of labor from the product is against nature, resulting in the fact that humans are alienated not only from nature but also from their labor, namely, from the unique feature that makes them human.

Moreover, since the product is alien to its laborer, it shall belong to another person who in fact does not contribute to the production with his/her labor power. This means that when labor is alienated from the individual, the individual ends up yielding a product that does not belong to him/her (because he/she is alienated from

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[64] Ibid., 130.
[65] Ibid., 129-130.
[66] Ibid., 130.

it) to someone who had not taken part in the production process of such product, but who owns the whole process.[67] This is a complete contrast to Locke's and Marx's understanding of nature, where laborers have a right to property over what they achieve with their own labor.

Finally, Marx argues that because of the fact that capitalism is founded upon the principle of self-interest, it generates competition between people, resulting in them being alienated from each other. This creates social alienation, effecting the functioning of the society in favor of individualism as opposed to collectivism.

1.6. FORMULATION OF WORK AS A SOCIAL HUMAN RIGHT

The 1789's *laissez-faire* approach to human rights was based on the idea of individualism. The first human rights documents considered individuals as abstract beings that were free from the state's and the society's involvement. In the field of employment, the ideas of the French Revolution constituted the anti-thesis of the state-run economic and social affairs. The former understanding of the right to work as "the idea of state intervention aimed at maintaining an inflexible labour market by assigning compulsory work to the needy"[68] was put through criticism and was challenged by the new idea of freedom of contract. The emphasis was on individualism and the role of the state as a passive institution vis-à-vis the individuals' human rights. However, the results of individualism-oriented human

[67] Ibid., 131.
[68] Bruno Veneziani, "The Evolution of the Contract of Employment," 34.

rights did not meet up to its objectives. On the contrary, it resulted in great injustices and hindrances against the enjoyment of human rights for the unfortunate non-elites. Those who needed protection and means to ensure their subsistence were left alone and with no possibility to enjoy their freedoms guaranteed within the context of human rights.[69]

As a result of the inadequacy of the rights listed in the 1789 Declaration of the Rights of Man and the necessity for the state to actively protect its people with a view to ensure full and equal provision of rights, an absolute individualist approach to human rights was deserted and replaced by the notion of *individuals in need*.[70] Thus, the foundations of economic and social rights were laid. The first step in the recognition of social rights was taken in the updated Declaration of the Rights of Man and Citizen of 1793, which states in article 21 the following: “Public relief is a sacred debt. Society owes maintenance to unfortunate citizens, either procuring work for them or in providing the means of existence for those who are unable to labor.” This undertaking of the state was also reflected in the following French Constitutions.

Nonetheless, the French initiative in the recognition of economic and social rights did not create the expected results and impact worldwide. Only after the First World War did the ideas become global and entered national Constitutions. They, however, reached their peak point with the acceleration of the international human rights organizations and their rights guaranteeing documents after the Second World War.

[69] Münci Kapani, *Kamu Hürriyetleri* (Ankara: Yetkin, 1993), 51.
[70] Ibid*.,* 52.

The same gradual progress also had its reflections in the field of employment. The Industrial Revolution and the notion of individualism of the eighteenth century resulted in the rise of capitalism and commodification of labor, leading to severe injustices and violations of human dignity. The acknowledgment of the degrading working conditions and the realization of the fact that there were interests higher than profit and production that needed to be protected contributed to the presentation of work as a human right. In justifying human rights, Bales argues that the basis of human rights lies with the societal recognition of the *victim's* definition of an offense, which eventually leads to the codification as a human right of the interest of the victim that is harmed with the respective offense.[71] An action that was once considered as normal becomes a human right only when the society acknowledges from the point of view of the victim that it is harmful, even if it is considered to be economically beneficial. This was the case for all economic and social rights, among which was also the right to work. As a result, the slow but eventually dominating human rights discourse had its impact in the world of work contributing to the idea of state intervention into employment relationships.

Furthermore, the global effect of industrialization and recognition of labor exploitation as a universal issue paved the way for the establishment of the International Labour Organisation (ILO) in 1919, with a view to secure social justice. The emphasis on human dignity in the criticisms against the capitalist usage of labor generated a list of rights that are required to be ensured in order to secure human

[71] Kevin Bales, "Slavery in its Contemporary Forms," in *The Legal Understanding of Slavery: From the Historical to the Contemporary,* ed. Jean Allain. (Oxford: Oxford University Press, 2012), 300.

dignity, which emerged as a second category of human rights, namely the economic and social rights.

This movement accelerated following the World War II and the idea that "all people have rights to provision for their physical needs"[72] became highly endorsed, which resulted in the inclusion of economic and social rights in the agenda of the United Nations (UN). The connection of the right to provision of physical needs and the right to life have established the interests arising out of economic and social rights worthy of being protected within the framework of human rights.

The emergence of economic and social rights after the adoption of civil and political rights have allowed economic and social rights to be referred to as the *second generation rights* following the first generation rights of civil and political rights. Both categories of rights fall within the scope of human rights, yet their so-called distinction has alleged justifications that go beyond chronology.

The classical view establishes a distinction between civil and political rights and economic and social rights through the claim that the protection of the former merely requires the state to refrain from infringing them; whereas the protection of the latter requires the state to take positive actions. The first generation rights and freedoms are claimed to generate negative obligations on the state to avoid interfering with the enjoyment of the rights and freedoms in this category. On the other hand, the enjoyment of the second generation rights are allegedly dependent on the state assuming a variety of positive obligations, the realization of which may be restricted

[72] James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (California: University of California Press, 1987), 147.

by the economic resources and the level of development of the state. For this reason, the justiciability of the latter is also a matter of dispute, with the classical view claiming that they cannot be.

Nonetheless, this classical view on the distinction between the generations of rights is commonly deserted. The contemporary positions on the issue refute the claims of the classical view in favor of the economic and social rights. In fact, they reject the distinction between positive and negative rights indicating that *all* rights are positive rights requiring positive actions by the state.[73] The state has to provide the necessary environment for its people for *all* rights, *including* civil and political rights, among which participatory rights have a special place in terms of positive obligations of the states. In order for the individuals to enjoy their rights, necessary means shall be enabled to them by the state. Full realization of civil and political rights also requires an established infrastructure and a well-functioning legal system that is also highly dependent on the level of development of the state concerned. The provision and effective protection of *all* types of rights incur costs.

Therefore, the difference of civil and political rights to that of economic and social rights cannot be explained through the assertions of the classical view. In fact, a clear categorization may not even be made in the enjoyment of the rights.[74] Enjoyment of

[73] Wiktor Osiatyński, "Needs-Based Approach to Social and Economic Rights," in *Economic Rights: Conceptual, Measurement, and Policy Issues,* ed. Shareen Hertel and Lanse Minkler (New York: Cambridge University Press, 2007), 59.

[74] The indivisibility of human rights is also confirmed by the Proclamation of Teheran, Final Act of the International Conference on Human Rights of 1968. Article 13 of the Proclamation states the following: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development". United Nations, A/CONF.32/41, "Final Act of the International Conference on

civil and political rights may be dependent on the economic and social rights or vice versa. Depending on the circumstances, a right may not always be categorized as either a civil and political right or an economic and social right, but may include traces of both. Furthermore, human rights make sense only within the realm of *social.* "By definition, it would seem obvious that all human rights are social in the minimal sense that recognition, enunciation, enforcement, enjoyment and realization of rights define and describe social/societal processes; human rights make little sense outside human societal frameworks or networks of meaning and interaction."[75] Therefore, *social* cannot be isolated from the notion of human rights and all human rights serve the satisfaction of a social interest, even if they are not scholarly categorized as social rights *per se*.

Returning to the issue of work, the right to work also went through all of the above historical processes and legal disputes along with other economic and social rights. The interests protected by work and the value of work made it worth being named among human rights. The modern value of work derives from its significance in a variety of areas. Prast makes a compilation of the dimensions of work and indicates that he can at least name six: guarantee of subsistence dimension, personal dimension, socialization dimension, dimension in the functioning of the national economy, enterprise contributing dimension and finally, societal dimension.[76]

Human Rights," 22 April to 13 May 1968, http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf.

[75] Upendra Baxi, "Failed Decolonisation and the Future of Social Rights," in *Exploring Social Rights: Between Theory and Practice,* ed. Daphne Barak-Erez and Aeyal M. Gross (Portland: Hart Publishing, 2011), 42.

[76] Franz Prast, "Leben ohne Arbeit? Arbeitslosigkeit als sozialpolitische Herausforderung," in *Menschenrecht auf Arbeit? Sozialethische Perspektiven,* ed. Johannes Rehm and Hans G. Ulrich (Stuttgart: Kohlhammer, 2009), 39.

The first of these highlights the commonly accepted *income generating character* of work, which serves the purpose of providing the workers and their families with a means to pursue a life of human dignity. Of course, this income generating aspect of work is true only for paid work and not all forms of work. In this respect, one of the interests adduced to be protected concerning the right to work becoming a human right is the interest of the individuals in regular income that would provide them and their families with at least a certain minimum for subsistence. Furthermore, work also has an instrumental function in the enjoyment of other economic and social rights. Firstly, a certain level of economic security ensures individuals and their families with the necessary financial resources to secure their other economic and social rights. For example, enjoyment of the right to healthcare services or the right to education provided by private facilities is dependent on the payment for such services. Regardless of whether it is the duty of the state to provide these services free of charge and at the highest possible quality, the reality indicates that both are dependent on the level of development of the state concerned. Furthermore, the states tend to encourage people to ensure their own subsistence through paid work rather than being dependent on the resources of the state. Secondly, various economic and social rights are structured to be dependent on the present or past work, such as pension schemes.[77]

The personal dimension of work refers to the personal gains of the individual from work. These include the feeling of self-satisfaction and self-dignity, contribution to

[77] This approach to the right to work, although still the prevailing one, is increasingly generating challengers who define the right to work more than the right to employment but also to include the right to unpaid work. The latter understanding of the right to work is what is also endorsed in the following chapters of the present study.

self-development and its impact on the formation of identity. Work contributes to the skills and capabilities of individuals and presents them with an opportunity to reach self-realization. In this respect, work is representative as regards the existential and fundamental interests of a person.[78] This is combined with the social dimension of work, which underscores work's significance in the participation to the society. Social participation in the narrow sense represents the workers' working environments in which they have the opportunity to socialize and develop their social skills. Whereas in the broad sense, participation in the social life recognizes the individual's contribution to the society as an element of division of labor. The latter is also covered by work's involvement in the functioning of the national economy. The production of goods and services can be realized through work, meaning that work ensures the functioning of the national economy. Similarly, the societal dimension of work points out to the benefits of the work of an individual to the society as a whole. These consist of taxes and other state imposed deductions from wages that are used communally to finance the social security system. On the other hand, the enterprise contributing dimension of work emphasizes work's significance in the functioning of the enterprises. Only through workers who are qualified for required positions can an enterprise conducts its functions.

The above list consists of only some of the more outstanding dimensions of work that represent the interests protected through the right to work. The contemporary view concerning work is established by the human rights discourse concerning

[78] Winfried Brugger, "Freiheit des Berufs und Recht auf Arbeit im Verfassungsrecht," in *Das Recht des Menschen auf Arbeit,* ed. Hans Ryffel and Johannes Schwartländer (Strassburg: N.P. Engel, 1983), 128.

economic and social rights. The lessons from history have proven work to be valuable due to its nature of being nested in human beings. Locke’s position that every individual owns their labor is adopted and advanced by the realization that an individual’s labor is so intrinsic for that person that it is directly relevant in the protection of human dignity. In other words, work has an intrinsic value because it represents the value given to human dignity.

1.7. ASSESSMENT

The purpose of this Chapter was to provide an insight into the ideas and principles that changed the flow of history and perceptions of work. There are countless other ideas on work apart from those covered here, both old and current; however only those that contributed to the change of history were taken within the scope of this study. The evolution of work and the values given thereto prove that work has a dynamic character and has a tendency to be subject to alterations with the ideas introduced in a given era. Work’s position in the life of human beings is so central that the ideas that affect the perceptions on work form a wide range of subjects, including but not limited to philosophy, economy, sociology, theology and law.

In this respect, the value attributed to work has a long phase of evolution. The early ideas put emphasis on its burdensome and undesirable nature, but always accepted its necessity for human survival. In Ancient Greece, work was a dishonorable, inhuman activity that had no intrinsic value, although the value of its ends were recognized. The early Christianity considered work as a curse from God, but also condemned laziness and was inclined to accept work as a blessing. Although Locke did not discredit work, his reference point was work's significance in survival. Even today, the most emphasized dimension of work is its income generating aspect ensuring the individual and their families with the means of subsistence and enjoyment of other economic and social rights.

Marx's critique concerning commodification of labor is perhaps the most influential development in the formation of the contemporary view on the value of work. His work contributed to the enlightenment of the unfairness and inequalities of the commodification of labor, which was a consequence of a capitalist society. It is his emphasis on the issue that had led to the adoption of the anti-thesis that "labor is not a commodity" – one of the earliest adopted principled of the ILO.

Today, work's value is based on the value given to human dignity and human dignity is established as the source of the human rights discourse. Apart from the importance of work in the life and identity of an individual, it is also so close to their personality that any abuse on their labor is likely to compromise their dignity. It is this dependence of human dignity on the work of the individual that raises work to a level of a human right.

CHAPTER 2

OVERVIEW OF THE INTERNATIONAL SOURCES OF LAW ON THE RIGHT TO WORK

It has been established in the previous chapter that the interests enshrined in work are found to be an integral part of human dignity and that therefore, work became a pivotal point for economic and social rights. The recognition of work as a human right was realized through the codification of the right during the twentieth century in the human rights instruments that set forth economic and social rights.

This chapter will provide four right to work regulations in four different instruments. Accordingly, the right to work under the Universal Declaration of Human Rights (UDHR), the UN Covenant on Economic, Social and Cultural Rights (CESCR), the relevant conventions and recommendations of the ILO, and finally as a regional document, the European Social Charter (ESC) will be analyzed. The universal character of the former three, alongside being among the most ratified instruments on the issue, points to their significance and relevance as sources of international law. The European Social Charter's significance lies with the fact that, being a regional document, it governs the relevant rights in more detail and with higher standards.

Furthermore, as an introduction to the quest in Chapter 4 to assess the Turkish law on the right to work, it has been found relevant to provide the international sources, to which Turkey is a party.

2.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

2.1.1. General Information

The first international human rights document which directly and explicitly stipulates a right to work is the Universal Declaration of Human Rights of 1948. Being among the most intensely disputed provisions during the drafting process, article 23(1) of the UDHR sets forth the following: “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”

The article on the right to work is systematically placed on the top of the list of economic and social rights in the UDHR. As one of the first and most influential – although less legally than morally – human rights documents, the UDHR may be regarded as the forerunner of a broader human rights discourse which includes economic and social rights as well as civil and political rights.

The increasing dependency on the state in the early twentieth century due to high unemployment rates have spread awareness in the western world concerning social justice. The intensified human rights discourse at the end of the Second World War also provided an opportunity to consider thoroughly economic and social rights within the same discourse. The increased poverty and unemployment generated the requirement for the realization of economic and social rights with a view to ensure freedom and democracy.[79] Therefore, the intention of integrating these rights to be a part of the whole UN package of human rights was present from the beginning. With a view to realize this intention, the UN Commission on Human Rights, which was established in 1946, passed a decision in 1947 presenting its objective of establishing an International Bill of Rights. This International Bill of Rights was intended to consist of one human rights declaration and one convention compiling both categories of human rights and measures of implementation. The first phase came to life in 1948 with the UDHR. On the other hand, the intention of drafting one convention covering economic and social rights as well as civil and political rights could not be actualized. Instead, the second phase of the International Bill of Rights was realized through the formation of two separate conventions, one being the International Covenant on Civil and Political Rights (CCPR) and the other, the International Covenant on Economic and Social Rights.[80]

Being the first of this package, the UDHR's significance was voiced in the international platform as the main source of compilation of fundamental human rights. The UDHR became such an effective instrument in the following years that its nature and whether or not it had a binding character became highly discussed among

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[79] Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights," in *Economic, Social and Cultural Rights: A Textbook,* ed. Asbjørn Eide, Catarina Krause, and Allan Rosas. (Dordrecht: Martinus Nijhoff, 1995), 29.

[80] United Nations Office of Public Information, *The United Nations and Human Rights* (New York: United Nations, 1978), 22.

scholars as well as the relevant international bodies. While some asserted that the UDHR has nothing more than a moral value, others attributed certain degrees of legality and binding character to it.[81] Among the supporters of the former, "[i]t has been argued and very forcibly that, since the Universal Declaration of Human Rights took the form of a resolution of the General Assembly, it can have no binding legal force. In its own words, it is merely a proclamation of 'a common standard of achievement.'"[82] Yet, this position also confirms that it should be taken into consideration by the peoples and governments of the world and that it generates a moral burden on the states to be implemented.[83]

The group that attributes a certain degree of legal character to the UDHR does not appear to be in harmony in terms of their justifications. One view indicates that the UDHR is a unique interpretation of the UN Charter provisions on human rights by the General Assembly, and therefore, by the member states of the United Nations,[84] and that therefore, as an instrument for defining the fundamental rights and freedoms set forth in the UN Charter, it is "an extension of the Charter"[85]. In other words, according to this justification, the binding character of the UDHR arises from being the extension of the UN Charter and thus, having the same legal status as the UN Charter. A second view argues that the UDHR establishes the "general principles of

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[81] Helle Kanger, *Human Rights in the U.N. Declaration* (Uppsala: Acta Universitatis Upsaliensis, 1984), 27.
[82] John P. Humphrey, "The Universal Declaration of Human Rights," *International Journal* 4 (1949): 357.
[83] Cahit Talas, "Çalışma Hakkı ve Türkiye'deki Durum," *Ankara Üniversitesi SBF Dergisi* 46 (1991): 418.
[84] Humphrey, "The Universal Declaration of Human Rights," 357.
[85] Kanger, *Human Rights in the U.N. Declaration,* 29.

law" [86] and therefore, is adopted as a source of international law.[87] Since general principles of law are accepted to have binding effect, the argument that the UDHR provides general principles of law thereby establishes the UDHR as possessing a binding character. The final view argues that the UDHR is at least binding for the United Nations and its organs, regardless of the obligations it may create for the states.[88]

Whatever stance is taken as to the nature of the UDHR, it cannot be argued otherwise that *to the least*, it generates a moral burden on the international community, the States and the peoples of the world, in addition to establishing the general value of how human beings shall be treated. The UDHR is a symbolic instrument in the field of international human rights as the pioneer of the likes of it and the subsequent binding documents. It is taken as the main point of reference within the context of human rights discourse, whether in the international community or in the scholarly literature. Therefore, its morally binding character cannot be disregarded even in the case where it is not acknowledged as a legally binding instrument.

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[86] Humphrey, "The Universal Declaration of Human Rights," 357.

[87] According to article 38(1)(c) of the Statute of the International Court of Justice, "general principles of law" is among the sources of international law. Other sources of international law are international conventions, international custom, and as non-binding subsidiary means, judicial decisions and teachings.

[88] Humphrey, "The Universal Declaration of Human Rights," 357.

2.1.2. Economic and Social Rights under the UDHR

Before moving on to analyzing the right to work provision of the UDHR, some mention shall be made on article 22, which sets forth the general principles concerning economic, social and cultural rights. The article provides the following: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Article 22 of the UDHR is considered as the preamble of the economic, social and cultural rights, which are further governed in articles between 23 and 27. The rights of this category hold a common characteristic of being entitled to individuals as a result of their membership to society. The article underscores these rights as "indispensable" for the individual's "dignity" and "free development of personality" and thus, initiates the first link between economic, social and cultural rights and the newly emerging human right to development.

The language of article 22 refers to two set of rights: a substantive right to social security, and economic, social and cultural rights in general. There appears to be a deviation of logic and systematization due to the fact that the right to social security is categorically an economic and social right and it is rather contradictory to regulate a substantive right in an umbrella article of economic and social rights. However, the term "social security was intended to mean social justice in a 'broad and humanitarian sense.'"[89] Considering the fact that the term "social security" falls short of actually providing the meaning of "social justice", it could be rightly concluded that there was an apparent wrong choice of words, whether intentional or not.

Another aspect of this umbrella article is that it establishes the realization of economic, social and cultural rights not only as an obligation for states *per se* but for the entire international community by highlighting international co-operation as an equally significant means of realization alongside national effort. This vague and general usage of language, and the article itself as a whole, reflects a compromise of two opposing views – where one group of governments formed mostly of communist states urged for a clear definition of state obligations concerning economic, social and cultural rights; whereas the second group of more liberal states insisted on not referring to any state obligations at all.[90] Through this method of using general phrases in an umbrella article and avoiding any specific reference to a formulation of state obligations in articles dealing with substantive rights, the intention was to allow a space for different interpretations concerning states' duties. This view also supported the making of article 28, which states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Although this final provision of economic, social and cultural rights covers all rights and freedoms regulated under the UDHR, the real intention

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[89] Bård-Anders Andreassen, "Article 22," in *The Universal Declaration of Human Rights: A Common Standard of Achievement,* ed. Gudmundur Alfredsson and Asbjørn Eide. (The Hague: Kluwer Law International, 1999), 474.
[90] Ibid., 473-474.

behind the drafting of this article was to solidify the economic, social and cultural rights covered in the UDHR.[91]

The final component of article 22, which somehow serves the controversy on state obligations, is the fact that these rights are made conditional on "the organization and resources of each State", meaning that it is not expected for every state to immediately and fully realize the economic, social and cultural rights provided in the UDHR and that they shall be achieved gradually and within the limits of their national resources.[92]

2.1.3. The Right to Work under the UDHR

The right to work provision in article 23 of the UDHR falls right in the center of the discussions and reservations that surround the UDHR's stance on economic, social and cultural rights. As discussed in the first chapter, the classical but old-fashioned view holds the position that the economic and social rights create economic burdens on states. Among these rights, the right to work is regarded as the most burdensome of all. On one side, work is the primary source of income and hence of the life of individuals and their families in modern societies and on the other, it requires active participation on the states' part to create a feasible economic and social environment

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[91] Asbjørn Eide, "Article 28," in *The Universal Declaration of Human Rights: A Common Standard of Achievement,* ed. Gudmundur Alfredsson and Asbjørn Eide. (The Hague: Kluwer Law International, 1999), 598-599.

[92] This component will be further analyzed under 2.2.2.

where adequate jobs that comply with the principle of decent work are created for those who are in search of one.

This dilemma of states' responsibility to provide an atmosphere where individuals can work to maintain their lives and the tendency to abstain from assuming responsibility in the area of employment resulted in serious discussions in formulating the right to work provision of the UDHR. The opposing parties of this discussion were the communist states on one side, which argued for the formulation of a right to work that creates an obligation on the part of the states to ensure work for all its citizens,[93] and on the other side, the remaining other states which put emphasis on creating a passive role for the state by pushing forward the *free choice of employment* principle. It is in fact this principle that is eventually formulated in article 23.

The wording of article 23(1) of the UDHR is drawn up to be understood as covering four substantive rights: "the right to work", "the right to free choice of employment", "the right to just and favourable conditions of work", and "the right to protection against unemployment". Despite this formulation of the provision as four different rights, the follow-up conventions and the tradition of the relevant international instruments reveal that the latter three rights stipulated in article 23(1) are interpreted as the components of the right to work rather than separate rights. Therefore, article 23(1) of the UDHR shall be read as regulating the right to work, which is implemented through realizing the rights to free choice of employment, just and

[93] Kent Källström and Asbjørn Eide, "Article 23," in *The Universal Declaration of Human Rights: A Common Standard of Achievement,* ed. Gudmundur Alfredsson and Asbjørn Eide. (The Hague: Kluwer Law International, 1999), 494.

favorable conditions of work, and protection against unemployment, among other rights that are further dealt with in other paragraphs of article 23 and in the following articles.

In this regard, the meaning and scope of the right to work under this provision may be divided into two categories as “the right to work in the strict sense” and “the right to work in a broader sense”. The former represents the right to (free choice of) employment; whereas the latter indicates the whole package of rights that entail the right to work. The right to work in the strict sense of the word is subject to different interpretations by different ideologies. “To the socialist, it is an affirmation of Marxist doctrine: it tells the capitalist that he has no right to exploit the toiling masses by maintaining a pool of unemployment, and threatening to throw them into it if they refuse to do his bidding. To the liberal, it is the affirmation of individualism: the state may not prevent anyone from working if he so pleases, however much it may dislike him or what he does, says and believes.”[94] In other words, the socialist view on the right to work clearly establishes an obligation for the state to create and provide employment for the employment seekers; whereas the liberal interpretation of the right is basically a freedom to work without the interference of the state and a free access to the labor market, subject to certain restrictions, which demonstrates that it is adopted as a negative right rather than a positive one.

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[94] Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Oxford University, 1985), 123.

Furthermore, the difference in ideologies also generated the discussion on whether or not the right to work also implied the duty to do socially useful work.[95] The duty to perform socially useful work and the proposed right to self-development had their basis in the socialist ideas that recognized socially useful work as being beneficial for the general welfare, as well as having individual gains that appear in the form of full development of personality.[96] Despite the fact that this approach was generally rejected by the drafting states, the absence in the UDHR of a detailed and strictly structured right to work enabled a space for both interpretations. In other words, merely stating that "[e]veryone has the right to work" and the absence of a direct supervisory body of the UDHR that enhances this right generated a compromise between the two approaches which from the start had different coverage for the right to work. This meant that article 23(1) of the UDHR reinforced the duty to do socially useful work for the states (mostly consisting of those coming from a socialist ideology) which accepted the definition of the right to work as comprising the duty to do socially useful work, in addition to the states' obligation to provide work for its people. On the other hand, states with a more liberal tendency criticized this interpretation indicating that an obligation as such created the idea and risk of forced labor and contradicted with the principle of free choice of employment. It shall be further indicated that the absence of an explicit duty of the individual to do socially useful work as well as the extra emphasis on free choice of employment suggest that there was a tendency to have the UDHR take the side of the liberal states. In this

[95] Duty to do social work was present at the time in most Latin American constitutions and in some European ones, including the French Constitution of 1946 and the Weimar Republic's Constitution of 1919.

[96] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania, 1999), 161.

regard, the duty to work was left out of a legal context to remain as a social and a moral issue.

The following part will provide an assessment of the aspects of the right to work mentioned in the UDHR, i.e. the right to free choice of employment, just and favorable conditions of work and protection against unemployment of article 23(1) and although not mentioned in the same article, “the right to social security in the event of unemployment” of article 25(1).

2.1.3.1. The Right to Free Choice of Employment

As previously underlined, what is implied by the right to free choice of employment is foremost, prohibition of slavery and forced labor. When read together with the prohibition of slavery clause of article 4, the explicit emphasis on free choice of employment enhances this vision, in addition to confirming the liberal approach of the right to work. The liberal approach’s understanding of the right to work is built around free market policies which function in the absence of any interference by the state and where work is recognized as an activity performed by free choice and any form of forced or compulsory work is prohibited. The right to work in this sense does not grant the individual with the right to choose work.[97] This means that the individual does not actually have a positive right which generates an obligation on the part of the states to provide labor. On the contrary, the states’ obligation is

[97] Källström and Eide, “Article 23,” 494.

limited to refraining from interfering with the labor market and creating obstacles for individuals in taking part in the labor force. In other words, this approach reaffirms the freedom of contract principle under the disguise of the right to work.

Nonetheless, what detach the right to work from a strict freedom of contract approach, which has historically proven to be exploitative for the workers, are the following elements of the right to work, also covered under the UDHR: the right to just and favorable conditions of work, protection against unemployment and the right to security in case of unemployment.

2.1.3.2. The Right to Just and Favorable Conditions of Work

The first element of the right to work which distinguishes the employment relationship from that of an ordinary civil law contractual relationship is the right to just and favorable conditions of work. Although not dealt in detail, the UDHR provides an insight on what is meant by "just and favorable conditions of work" in the following paragraphs of article 23 and in articles 24 and 25. Accordingly, the components of just and favorable working conditions covered under the Declaration are the following: the right to a just remuneration, the right to form and join trade unions, and the right to rest and leisure.

The second paragraph of article 23 provides that "[e]veryone, without any discrimination, has the right to equal pay for equal work." Hence, the first aspect of the just and favorable conditions of work is prohibition of discrimination in remuneration. Secondly, this remuneration shall be in the amount that will ensure "for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." This provision draws the line at "human dignity" for workers and their families. What the UDHR implies by the human dignity standard is clarified in article 25(1) which ensures the right to an adequate standard of living for the individual and their family.[98] Therefore, the UDHR requires the states to ensure a labor market where the remuneration for the workers shall be, at the very least, adequate to provide the worker and their family a certain standard of living that will ensure their survival.[99]

The second component of just and favorable conditions of work dealt with under the UDHR is the "right to form and to join trade unions for the protection of his interests", governed in article 23(4). The systematic positioning of this provision - namely being covered under the article on the right to work and other labor rights - together with the fact that article 20 of the UDHR separately provides freedom of association leave no doubt that article 23(4) was intended to recognize the essential aspect of collective labor rights, i.e. the right to organize. Despite remaining silent on the right to collective bargaining and to collective action, there are certain clues which lead to the interpretation that the UDHR implicitly recognizes these complementary rights.

[98] The article reads as follows: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services (…)".

[99] This of course is an old-school minimalistic approach which does not necessarily meet the more modern understanding of the right to a certain standard of living, which allows for a margin of personal development. However, considering that the UDHR is the first universal instrument which actually deals with the problem, it should be regarded as a positive leap towards social rights for its time.

Firstly, the mere fact that the right to form and join trade unions (article 23(4)) is regulated separately from freedom of association (article 20) indicates that the drafters attribute a unique significance and meaning to associations established within the context of industrial relations and recognize their specificities.[100] It is without any doubt that this uniqueness lies with the fact that trade unions have the power of concluding collective agreements as a result of negotiations under the influential threat of collective action against the employer. Furthermore, the wording of the article clearly states that the purpose of organizing is for the protection of one's interests. These interests, as clearly accepted by the modern constitutions and international instruments, refer to the economic and social interests of the parties of an employment relationship. The protection of these interests goes through collective bargaining and collective action. Otherwise, mere grouping under an organization named as a "trade union" does not provide protection on its own.[101] As a result, it may be concluded that although the UDHR does not directly cover the right to

[100] Morsink, *The Universal Declaration of Human Rights,* 168-174.

[101] This is the current adopted international interpretation of freedom of association in the sense of article 23(4). According to the Freedom of Association Committee of the Governing Body of the ILO: "The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes." ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) ed. (Geneva: ILO, 2006), 177, para 881. This confirms that the ILO considers the right to collective bargaining an integral part of the right to organize and underscores that the violation of the former will amount to the violation of the latter.

The same goes for the right to collective action, among which the most common is the right to strike. The Freedom of Association Committee repeatedly indicates that "[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87." Ibid., 109, para. 523. This is of an additional significance considering the fact that none of the ILO's Conventions explicitly regulate the right to strike. However, this interpretation of the Committee makes it clear that despite the absence of explicit recognition of the right to strike, it creates an obligation for the states to recognize this right within the context of the right to organize.

collective bargaining and the right to collective action, the indirect and modern reading of the right to form and join trade unions of article 23(4) has a broader meaning which covers both of these rights.

Finally, in article 24, the UDHR provides for the right to rest and leisure, "including reasonable limitation of working hours and periodic holidays with pay." It appears that the UDHR makes a distinction between the right to rest and the right to leisure and supports them with two additional rights, namely the right to reasonable limitation of working hours and the right to periodic holidays with pay. As adopted during the drafting of the UDHR, rest and leisure were intended to have different meanings: "rest was a real interruption of activity, whilst leisure was only a period of time at one's disposal. A period of rest offers a person the possibility of regaining his/her lost strength, while during leisure he/she can increase his/her knowledge."[102] It may be derived from this interpretation that the right to rest is directly linked with an activity and indicates the amount of time required to recover the body and the mind, that are exhausted as a result of performing such activity. Therefore, the right to rest refers to a reasonable break from a physical or intellectual activity, whether physical or mental. On the other hand, leisure is understood as indicating the free time of the individual which can be invested to self-development. It should be noted here that the UDHR's regulation of these rights in separate articles from that of the right to work and the fact that the UDHR explicitly provides these rights to "everybody" confirms the supposition that the right to rest and leisure are not

[102] Bert Isacsson, "Article 24," in *The Universal Declaration of Human Rights: A Common Standard of Achievement,* ed. Gudmundur Alfredsson and Asbjørn Eide. (The Hague: Kluwer Law International, 1999), 513-514.

intended merely for workers but for everybody. In other words, these rights shall not be interpreted merely within the context of the right to work but within the context of all sorts of activities.[103]

In support of the above two rights, the UDHR provides for the right to reasonable limitation of working hours and the right to periodic holidays with pay, as the forms of implementing the rights to rest and leisure for the workers. By explicitly setting forth these supporting rights, the UDHR requires states to take positive action and legislate and implement working hours and paid holidays. Additionally, it also generates, to the very least, a negative obligation for states to refrain from interfering with and infringing the individuals' right to rest and leisure, outside the context of an employment relationship. The UDHR's wording and position supports the idea that the "reasonable limitation of working hours" and the "periodic holidays" shall be established in such a way that they would ensure both rest and leisure for the worker. Furthermore, the UDHR makes it clear that workers shall be paid their usual pay during periodic holidays, since they are considered both as a compensation for their work and a time for recreation and self-development.

2.1.3.3. The Right to Protection against Unemployment

The second element of the right to work, which reveals that an employment relationship is not strictly governed by the principle of freedom of contract, is the

[103] Morsink, *The Universal Declaration of Human Rights,* 186.

right to protection against unemployment governed under article 23(1). This principle, which is also adopted by the ILO's relevant Conventions, seeks to guarantee workers a certain level of protection from being dismissed by their employers. Protection against unemployment is of extra significance in countries where the state is not considered to be under the obligation of ensuring work to its people. Since the UDHR also reaches out to such states, the UDHR bestows on them the obligation to "take effective action by means of economic measures to prevent unemployment."[104] Accordingly, although states are not obligated under the UDHR to provide work to their people, they are however under the obligation to ensure protection of employment through interference and to restrict arbitrary dismissals in all employment relationships, including those in the private sector. With this provision, the UDHR sets forth the obligation of the states to protect workers against violations of the right to work by third parties. In other words, the UDHR's position with regard to the right to work is that arbitrary dismissals or threats thereof are possible infringements of the right to work. In this respect, their obligation "to protect" requires states to protect the fundamental right to work from being violated by employers in the form of unfair dismissals.

2.1.3.4. The Right to Security in the Event of Unemployment

The final element of the right to work governed under the UDHR is everyone's "right to security in the event of unemployment" secured in article 25(1). This right

[104] Ibid., 163.

is different from the right to protection against unemployment in the sense that the latter is a right of workers, namely those who are already a part of a standing employment contract; whereas the former is a right granted in the event of unemployment. The right to security in the event of unemployment is actually a sub-category of the right to social security. The right to social security finds its significance in the case of incapability of ensuring self-subsistence as a result of unemployment, old age or disability.[105] This right's relevance to the right to work appears in the acceptance of work as the primary source of the right to a standard of living adequate for the health and well-being of the individual and their families. As covered above, the main component of the right to work is freedom to work. However, the existing realities of life force individuals to engage in paid work with a view to realize a certain standard of living for themselves and their families. In order to overcome this *de facto* obligation of persons, states are obligated to secure such a standard of living for their people, in the case where they are unemployed. This obligation of states is intended to serve freedom to work in the sense that a person who is granted a right to social security in the event of unemployment would more likely have a freedom to choose by having the opportunity to wait for a more suitable job for him/herself and will not be forced into the labor market or engaging in work at a time or in a job he/she would otherwise not desire.

[105] Asbjørn Eide and Wenche Barth Eide, "Article 25," in *The Universal Declaration of Human Rights: A Common Standard of Achievement,* ed. Gudmundur Alfredsson and Asbjørn Eide. (The Hague: Kluwer Law International, 1999), 534.

2.1.4. Assessment

In conclusion, the UDHR has a special significance for being the first step in integrating economic and social rights into the human rights discourse. Furthermore, it is the first international instrument which expressly governs the right to work. Although the UDHR is not generally accepted to have a legally binding character and does not have a direct supervisory mechanism, it is referred to as a fundamental instrument for human rights both at national and international levels, including the relevant judiciary and supervisory bodies. As the UDHR itself describes in the Preamble, it is "a common standard of achievement for all peoples and all nations". It promotes and underlines the importance of international cooperation in realizing human rights.

With regard to the right to work, the UDHR provides for a general and comprehensive understanding of the concept. Accordingly, the right to work is accepted to cover free choice of employment, just and favorable conditions of work, protection against unemployment and the right to social security, particularly in the event of unemployment. However, as the first international instrument to govern this right and taking into account the clashing ideologies that were surrounding during the formulation of the right, the hesitancy in stipulating clear rights and state obligations can be clearly observed. Although the conceptualization of the right to work has gradually developed until today, the right to work definition of the UDHR became established as an economic right, rather than a civil right, imposing on the state the obligation to grant the individual with free access to the labor market, without generating an economic burden on the part of the states.[106]

2.2. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

2.2.1. General Information

The United Nations' International Covenant on Economic, Social and Cultural Rights (CESCR), which was adopted by the General Assembly in 1966 and entered into force ten years later in 1976, is the third component of the International Bill of Rights after the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (CCPR). It is the first legally binding global[107] instrument which governs economic, social and cultural rights. As previously explained[108], the intention behind the International Bill of Rights was the adoption of one declaration and one convention. However, during the drafting of the convention, the Commission on Human Rights altered this plan by distinguishing civil and political rights from economic, social and cultural rights. As a result, two separate conventions with separate supervision mechanisms were adopted.

[106] Källström and Eide, "Article 23," 493-94.
[107] As a regional instrument, the European Social Charter of 1961 precedes the CESCR.
[108] See 2.1.1 above.

As to the reasons why such distinction between the two sets of rights was created, Trubek seems to draw a clear picture. Accordingly, the first reason he presents, which is also affirmed by the drafting reports, was the perception that it would not be possible to implement both sets of rights within a common system.[109] The difference between the methods of implementation was believed to be present at both national and international levels. While civil and political rights solely involved legislative actions, economic and social rights required states to additionally adopt policies and programs.[110] A permanent Human Rights Committee was established by the Commission for the international implementation of the covenant enabling inter-state[111] complaints.[112] However, this complaints procedure was limited to the supervision of civil and political rights, whereas economic, social and cultural rights were left out of scope. The distinction between the supervision of the categories of rights was considered to be due to the difficulty in hearing and making decisions on complaints regarding certain economic, social and cultural rights, among which lies the right to work.

The second important factor underlined by Trubek for dividing rights into two conventions is based on political reasons. A number of states did not want to be bound by the obligation to ensure "social welfare rights[113] and thus to specific social

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[109] David M. Trubek, "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs," in *Human Rights in International Law: Legal and Policy Issues,* ed. Theodor Meron. (Oxford: Clarendon Press, 1985), 211.
[110] Ibid.
[111] An optional individual complaints procedure for CCPR was adopted simultaneously with the Convention pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights, which was adopted on December 12, 1966 and came into force on March 23, 1976.
[112] Matthew C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995), 18.
[113] Turbek refers to economic, social and cultural rights as "social welfare rights". For reasoning, see: Trubek, "Economic, Social and Cultural Rights in the Third World," 205-206.

welfare programs"[114], albeit agreeing to a covenant on civil and political rights. By having two conventions, the states were given discretion in ratifying one and avoiding the other.

This non-holistic approach to human rights is also noticed in the difference in the use of language in the two conventions. In terms of obligations of the states, CCPR stipulates in article 2(1) that each state "undertakes to respect and ensure to all individuals" the rights recognized under the Convention; whereas article 2 of CESCR has the states undertake "to take steps (…) with a view to achieving progressively the full realization of the rights". This distinction reveals that while the obligation concerning civil and political rights is *guaranteeing* these rights to the individual, the mere obligation concerning the economic, social and cultural rights is *aiming at* fully realizing them through real actions, but not necessarily immediately ensuring them. Consequently, most rights governed under the CCPR are recognized to be secured as a result of the declaration stating that individuals *have* those rights and the obligations are formed through the indication that the rights *shall* be protected. For instance, article 6(1) of the CCPR states the following: "Every human being ***has*** the inherent right to life. This right ***shall*** be protected by law. No one ***shall*** be arbitrarily deprived of his life."[115] On the other hand, the majority of the rights governed under the CESCR mostly create the obligation to be *recognized* by the states and the relevant provisions list the non-exhaustive steps that may be taken in moving towards attaining full realization of such rights. Article 6 on the right to work, which

[114] Ibid., 212.
[115] All three emphases added.

will be assessed below in detail,[116] is a typical example of this language and structure.

Nevertheless, despite the representation of the initial concerns regarding the implementation of the two sets of rights in articles 2 of both conventions, the Committee on Economic, Social and Cultural Rights (the Committee) does not adopt this distinction to be absolute and employs an integrated approach when comparing the obligations arising from either of the conventions.[117]

Two of the state obligations which require immediate effect concerning economic, social and cultural rights are established in the General Comment No. 3 on the Nature of States Parties' Obligations to be firstly, the undertaking in article 2(2) "to guarantee that the rights (…) will be exercised without discrimination", and secondly, the "to take steps" part of the undertakings, which is present in a number of provisions in the CESCR. The former can be regarded as a rather structural claim, considering that the prohibition of discrimination is traditionally categorized as a civil right. The single fact that it is provided in an article of the CESCR may not come out as a convincing argument to justify that the CESCR includes rights of immediate effect as well. This is also the case concerning the immediate undertaking

[116] See 2.2.3 below.

[117] In General Comment No. 3 on The Nature of States Parties' Obligations, the Committee states the following: "While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect." UN Committee on Economic, Social and Cultural Rights, E/1991/23, "General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)," January 1, 1991, para.1.

“to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights” in article 3 of the CESCR.

On the other hand, the second state obligation “to take steps” may be considered as a stronger argument. Although the achievement of certain rights set forth in the CESCR are not required to be realized immediately, the steps taken thereof require immediate action. In other words, in order for states to comply with their obligations arising out of such provisions, states shall take the required steps immediately. This affirms that despite the stance of the drafters concerning the economic, social and cultural rights and the wording of article 2(1) of the CESCR, there exist various rights in the CESCR which require immediate effect. More importantly, this fact is recognized by the Committee itself.

Before moving on to the provisions of CESCR, mention should be made on the supervision mechanism of the CESCR. Unlike for CCPR, the means of supervision for CESCR were not created with the CESCR but developed eventually. Although there was a monitoring mechanism of the CESCR between 1979 and 1987, it involved a “thoroughly ineffectual monitoring by a succession of Working Groups set up, nominally at least, as a part of the [Economic and Social] Council’s own machinery.”[118] When the Committee on Economic, Social and Cultural Rights was established in 1985 and had its first meeting in 1987, a new phase started regarding the implementation of the CESCR. Even though the Committee undertakes a wide range of duties, the two central and among the most important ones are monitoring

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[118] Philip Alston, “The Committee on Economic, Social and Cultural Rights,” in *The United Nations and Human Rights: A Critical Appraisal,* ed. Philip Alston. (Oxford: Clarendon Press, 1992), 473.

through the periodic reports of the contracting states and the adoption of the General Comments. The periodic reporting obligation of the states is aimed at providing assistance to the states in performing their obligations arising out of the CESCR and monitoring their compliance thereto.[119] In response to these reports, the Committee issues concluding observations which provide the given state with the Committee's concerns and recommendations.

The second means of monitoring the implementation of the CESCR is the individual communications procedure, which was adopted by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and came into force on May 5, 2015. According to article 2 of the Protocol, "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party." In other words, the Protocol allows for an individual application procedure before the Committee and against the State Parties. However, as article 1 of the Protocol affirms, the Committee's competence in receiving and hearing such communications is limited to those States Parties to CESCR which have ratified the respective Optional Protocol. As the name implies, this protocol is optional and states are not under any obligation to ratify it.[120]

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[119] UN Committee on Economic, Social and Cultural Rights, E/1989/22, "General Comment No. 1: Reporting by States parties," January 1, 1989, para.1.

[120] As of February 2017, the following twenty two states have ratified the Protocol: Argentina, Belgium, Plurinational State of Bolivia, Bosnia and Herzegovina, Cabo Verde, Central African Republic, Costa Rica, Ecuador, El Salvador, Finland, France, Gabon, Italy, Luxembourg, Mongolia, Montenegro, Niger, Portugal, San Marino, Slovakia, Spain and Uruguay.

Another significant task of the Committee is to adopt General Comments on the articles of the CESCR. Through these General Comments, the Committee clarifies and presents its interpretation of the relevant provisions of the CESCR. The General Comments aim at resolving any disputes concerning the interpretation of the rights and principles secured under the CESCR. This way, a uniform understanding of the articles is intended to be established.

2.2.2. States Parties' Obligations under the CESCR

As indicated above, the implementation and monitoring of the provisions of the CESCR brought up many concerns among both the drafters and the implementers. In order to understand the CESCR's provisions on the right to work and its complementary rights, it is crucial to observe and analyze the general provisions on the States' duties under the CESCR.

Article 2(1) of the CESCR on the states' obligations states the following: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." This article establishes the general principles concerning states' obligation arising out of the CESCR. Its formulation represents the perception of economic, social and cultural rights as rights that cannot be achieved with immediate effect. In order for the states parties to comply with their obligations arising out of the CESCR, they shall satisfy the following aspects provided in the article, which will be analyzed separately:

a) undertake to take steps
b) with a view to achieving progressively the full realization of the rights
c) to the maximum of available resources
d) by all appropriate means

2.2.2.1. "undertake to take steps"

The phrase "undertakes to take steps" is different from an obligation to guarantee in the sense that it does not require immediate results. Since most of the rights governed under the CESCR are not achievable in a short period of time due to many determinants that include but are not limited to the states' economic and social development, it is found necessary and more realistic to formulize states' obligations as such, rather than to demand immediate effect. Therefore, the statement of "taking steps" implies an obligation of conduct, rather than an obligation of result. In this respect, although not as clear and precise as "guaranteeing", "taking steps" still generates a legal obligation on the part of the states and this obligation, although does not create one of an immediate *result,* creates an obligation of immediate *action.*[121] This means that although states are *not* under an obligation to immediately fully realize the rights under the CESCR, they *are* under an obligation to

[121] Philip Alston and Gerard Quinn, "The Nature of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9, no. 2 (May 1987): 165-166.

immediately start taking steps in achieving this goal, regardless of their level of development.[122]

States are under the obligation to head for the full realization of the rights set forth in the CESCR. As stated above, although they are not under an obligation to immediately achieve the full realization of the rights, they have the obligation to *aim at* achieving full realization. The fact that article 2 seeks for a progressive achievement endorses the position of "taking steps" rather than "ensuring".

2.2.2.2. "with a view to achieving progressively the full realization of the rights"

The progressive achievement clause of the CESCR was and still is subject to many disputes. On one hand, it is seen necessary and inevitable against the nature of economic and social rights – that they require positive actions by the state and not just mere recognition in the legislation – and on the other, it is criticized for creating a vague flexibility to the states. Even among the drafters was a group objecting to the clause claiming that it could be utilized as a pretext for justifying failures to perform the obligations arising out of the CESCR.[123]

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[122] According to the General Comment No. 3, "[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3," para. 2.

[123] Alston and Quinn, "The Nature of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," 175.

However, looking from a different perspective, the same risk would also have been applicable had the CESCR not sought a "progressive" achievement. It is a fact that states, regardless of their level of development, cannot fully realize the relevant economic and social rights in an instant and with mere recognition and a statement of the right in the legislation. Full realization and justiciability of these rights require active measures, which seek relevant policies that create financial burden on the states. The word "progressively" generates a basis of measurement in assessing conformity. In other words, the CESCR seeks partial obligation of result by requiring states to make progress in achieving this goal.[124] Thus, the Committee evaluates conformity with a given article of the CESCR by requesting and analyzing data that would provide insight to the progress a state party has achieved and considers deliberate retrogressive measures as violations of the CESCR, unless they are "fully justified"[125]. Furthermore, it requires states to achieve full realization as speedily as possible.

Despite the absence of an immediate effect obligation concerning the rights governed under the CESCR, in its General Comment No. 3, the Committee introduces for the first time "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights"[126] By "minimum core", the Committee refers to a floor, which the states parties are obligated to immediately

[124] This position is affirmed by the Committee in General Comment No. 3 as follows: "the phrase must be read in the light of the overall objective, indeed the respect of the full realization of the right in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal." UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3," para. 9.
[125] Ibid., para. 9.
[126] Ibid., para. 10.

achieve and then to build on through progressive achievement of full realization. According to Young, this minimum core principle has three main objectives.

Firstly, it "initiates a common legal standard, disassembling the inherent relativism of the programmatic standard of 'progressive realization' set out in the text of the Covenant."[127] This way, the minimum core gives substance to the state obligations and creates a guideline to the states in performing their obligations. The second objective of the minimum core principle is "to advance a baseline of socioeconomic protection across varied economic policies and vastly different levels of available resources."[128] In other words, it aims at creating a standard that would be valid for different political systems and for economies at all levels. Whereas the level of progress is highly dependent on the level of development of a state, the obligation to create the minimum core is irrespective of a given state's economic situation. Finally, "for commentators wishing to introduce a manageable legal impetus to global redistributive debates, the minimalist connotations of the minimum core concept signal an acceptable moderation."[129] This argument is relevant with regard to the obligation of the states with a higher development level to assist those who do not have the adequate national resources to provide their people with the opportunity to enjoy their economic and social rights. Through this minimum core principle, the obligation of international assistance obtains substance and a basis for the Committee

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[127] Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content," *The Yale Journal of International Law* 33 no. 1 (2008): 121.
[128] Ibid.
[129] Ibid., 122.

to assess whether a given state with adequate resources complies with its obligation to assist others.

2.2.2.3. *"to the maximum of its available resources"*

At this point, it is essential to understand what is meant with the usage of the "maximum available resources" mentioned in article 2(1) of the CESCR. The relationship between the available resources and the obligation to achieve progress is that they exist simultaneously and the lack of gross resources cannot be the grounds for not complying with the obligation to achieve progress. The states parties are under the obligation to utilize their existing resources to the most of their abilities.[130]

Pursuant to article 2(1) of the CESCR, states are required to achieve their obligation to fully realize the rights governed in the CESCR by utilizing their available resources. In other words, the available resources are the means of performing the obligations. In this case, it is important to specify what is meant by "resources". Although the list of resources is obviously non-exhaustive and "a wide measure of discretion"[131] is given to the states in determining these resources – although not unlimited – Robertson presents five categories of resources which comply with the

[130] This is also affirmed in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1987, which preceded the General Comment No. 3. It is stated under the 23rd principle that "[t]he obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available." UN Commission on Human Rights, 43rd Session, E/CN.4/1987/17, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," January 8, 1987, para. 23.

[131] Alston and Quinn, "The Nature of States Parties' Obligations," 177.

meaning of the article: financial resources, natural resources, human resources, technological resources and information resources.[132] Accordingly, what should be understood from "resources" is not limited to the monetary capacities of a state but involves a lot more. Consequently, the absence of financial means as a claim is not legitimate on its own in justifying non-compliance with the CESCR.

Furthermore, the available resources are not limited to the national ones but also cover international support. Article 2(1) provides that the undertaking of the states shall be realized "individually and through international assistance and cooperation, especially economic and technical". This means that the CESCR regards international assistance and cooperation as resources of a state in realizing economic and social rights.[133] Therefore, a state's willingness to cooperate and accept assistance from other states is considered as a measurement of compliance with the CESCR. In other words, a state which denies or obstructs any such help shall be deemed in violation of the CESCR.[134]

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[132] Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights," *Human Rights Quarterly* 16 no. 4 (Nov. 1994): 695-96.

[133] The 26th principle of Limburg Principles also confirms the issue providing that the "available resources" "refers to both the resources within a State and those available from the international community through international co-operation and assistance." UN Commission on Human Rights, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," para. 26.

[134] Nonetheless, although disputed, this clause is not necessarily interpreted as creating a general legal obligation for states under better conditions to provide support and assistance to the under developed countries. However, special conditions may create specific obligations thereof with a view to promote certain rights. Alston and Quinn, "The Nature of States Parties' Obligations," 191.

2.2.2.4. "by all appropriate means"

The final aspect of article 2(1) of the CESCR is the last part of the provision which states that progressive achievement shall be realized "by all appropriate means, including particularly the adoption of legislative measures." This undertaking also signifies the special character of economic, social and cultural rights when compared to the civil and political rights. Pursuant to article 2(2) of the CCPR, states undertake "to adopt such laws or other measures as may be necessary to give effect to the rights recognized". This demonstrates that while the CCPR requires adoption of the relevant legislation, the CESCR seeks other means of implementation, if applicable, in addition to the adoption of relevant legislations.

The extra emphasis given to the adoption of legislative measures underscores its importance in realizing the rights governed under the CESCR, but does not necessarily create an obligation for states to act accordingly, as long as they insert other appropriate means of implementation. However, if the legislation in force is not in conformity with the states' obligations arising out of the CESCR, then a legislative action with a view to override the non-conforming legislation shall be taken.[135] Otherwise, it would be a violation of the states' obligation to utilize all appropriate means concerning the rights set forth in the CESCR.

Article 2 does not indicate what the "appropriate means" may be and thus, gives discretion to the states in this regard. It is up to each state to establish what such

[135] Ibid., 167.

measures shall involve taking account of their unique parameters[136] such as the legal system, their natural or financial resources, demography, etc.[137] As long as they are "consistent with the nature of the rights"[138] governed in the Covenant, all measures are considered appropriate within the context of article 2.

2.2.3. The Right to Work under the CESCR

In line with the principles adopted with the UDHR, the CESCR expands, gives substance and undisputed legal binding to the economic, social and cultural rights recognized in the former. In this respect, the first substantive right governed under the CESCR is the right to work, which is set forth in article 6. The fact that it is systematically accepted as the first economic and social right demonstrates its characteristic of being essential in the enjoyment of other economic and social rights is acknowledged by the drafters.[139] This perspective coincides with the idea that work is the main source of income, which not only ensures a source of basic needs for the individual and their family, but also the degree of enjoying other economic, social and cultural rights. Furthermore, work is considered as a means of social

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[136] The General Comment No. 3 gives a non-exhaustive list of possibilities, which consists of "administrative, financial, educational and social measures." UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3," para. 7.

[137] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Utrecht: Intersentia, 2003), 336.

[138] UN Commission on Human Rights, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," para. 17.

[139] Colm O'Cinneide, "The Right to Work in International Human Rights Law," in *The Right to Work: Legal and Philosophical Perspectives,* ed. Virginia Mantouvalou. (Portland: Hart Publishing, 2015), 104.

inclusion, both in terms of ensuring a certain level of economic status and an opportunity to be an active and a social member of a working community.

The CESCR's article 6 on the right to work is formulated as follows:

"(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his[140] living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

The article begins by stating that the states parties "recognize" the right to work and continues by creating an obligation for the states to "take appropriate steps to safeguard this right". The second paragraph of the article provides a non-exhaustive list of the steps that shall be taken by the states with a view to effectively realize the right to work. Such formation of the article matches the general approach of article

[140] A criticism that should be indicated here is about the constant use of the pronoun "he". As an international instrument which sets forth social rights and repeatedly underlines prohibition of discrimination of any kind (article 1(2)), and in fact separately regulates equality between men and women in article 3 as part of its general provisions, it seems contradictory for the drafters to adopt such a usage of language in the CESCR. The Committee also seems to acknowledge this problem and therefore, uses the pronouns for both genders as "he/she".
Article 1(2), CESCR: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3, CESCR: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

2(1), where state obligations are recognized as not expecting immediate results but immediate actions *towards* the results. Since the article explicitly provides the steps that shall be taken in order to fully realize the right to work, there is a clear obligation of conduct for the states parties. Furthermore, when it is read together with article 2(1), there exists an obligation of result in the sense that states are under the obligation to achieve progress. In other words, the states are obligated to provide results of progress through complying with their obligation of conduct, which requires them to take the appropriate measures thereof.

The first paragraph of the article seeks to briefly define the right to work by providing a non-exhaustive list of what constituents make up this right. Accordingly, the right to work includes, among others, *the right to the opportunity to gain one's living by work* and *the right to a freely chosen and accepted work*.

2.2.3.1. The Right to the Opportunity to Gain One's Living by Work

The first aspect of the right to work is the right to the opportunity to gain one's living by work. The fact that article 6 refers to "gaining one's living by work" can be assumed to indicate that the right to work is understood by the CESCR within the framework of paid work, excluding from the definition any unpaid work that falls outside of the scope of an employment relationship. However, although there is no reference to unpaid work in the CESCR, the fact that the right to work is not limited to the opportunity to gain one's living but only "includes" this right leaves space to be interpreted otherwise. The existing facts indicate that the CESCR's approach to work *primarily* involves work within the framework of employment, despite the fact that the wording of the article is available to be interpreted otherwise.

The absence of a clear understanding of types of work the right to work includes has also not been enlightened by the Committee's General Comment No. 18 on Article 6, which was released in 2005. The General Comment No. 18 only provides that the right to work in terms of the article "encompasses all forms of work, whether independent work or dependent wage-paid work"[141] and does not make any reference to unpaid work. The General Comment initially makes a general statement of "all forms of work", which is followed by a definition that involves paid work and an unclear "independent work". Whether "independent work" refers to self-employment or any type of work that is paid or unpaid is not clarified in the General Comment.

On the other hand, in the recently adopted General Comment No. 23 on The Right to Just and Favourable Conditions of Work of 2016 the Committee recognizes this absence and admits that it is "aware that the concept of work and workers has evolved from the time of drafting the Covenant to include new categories, such as self-employed workers, workers in the informal economy, agricultural workers, refugee workers and *unpaid*[142] workers."[143] It further enhances this position and refers to these additional groups of workers, including unpaid workers, in the

[141] UN Committee on Economic, Social and Cultural Rights, E/C.12/GC/18, "General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights," November 24, 2005, para.6.
[142] Emphasis added.
[143] UN Committee on Economic, Social and Cultural Rights, E/C.12/GC/23, "General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (article 7 of the International Covenant on Economic, Social and Cultural Rights)," April 27, 2016, para. 4.

normative content of the right to just and favorable conditions of work, indicating that the beneficiaries of this right involve “workers in all settings”[144].

A second issue that is worth mentioning is that article 6 clearly seeks for an *opportunity* to gain one’s living by work. This wording underlines the voluntary nature of work and that the right is intended towards enabling all job-seekers to have opportunities to access the labor market. Naturally, and as in the case of the drafting of the UDHR, there were discussions on what kind of obligations this provision generated for the states parties. While a group of states interpreted the right to work as creating an obligation on the part of the states to match all job-seekers with employment, others rejected to perform such a burdensome obligation and read the right to work as creating a negative obligation of refraining from interfering with a person’s choice of work and a positive obligation of being responsible for enhancing employment opportunities.[145] This dilemma was resolved in favor of the latter group, when the Committee clarified the issue in its General Comment No. 18, by stating that “[t]he right to work should not be understood as an absolute and unconditional right to obtain employment.”[146] This means that the CESCR and the Committee are hesitant in generating a positive right out of the right to work, which would grant the individual the right to demand employment from the state. Consequently, such interpretation constitutes a limitation on the justiciability of the right to work.

Another point that requires attention regarding the opportunity to gain living by work is that despite the discussions and different interpretations of the provision by the

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[144] Ibid., para. 5.
[145] Craven, *The International Covenant on Economic, Social and Cultural Rights,* 197.
[146] UN Committee on Economic, Social and Cultural Rights, “General Comment No. 18,” para. 6.

drafting states, the article clearly adopts a liberal approach in favor of the market economy states.[147] According to the liberal approach, the fact that the article states "opportunity to gain his living by work" gives a hint about the relationship between the state and the individual. In this respect, the CESCR initially portrays a system where the individual earns their own living, without being dependent on the support of the state. Work within the framework of the right to work is one that enables the worker to "gain his living" and thus, not creating a burden on the state to ensure their and their families' survival.[148] It appears to be accepted by the CESCR that work, and not the resources of the state, should be the primary means of satisfying basic needs. The state is expected to step in only in case such rights and needs are not satisfied through work.

Nevertheless, the CESCR should not be interpreted as to mean that there is a sub-intention of creating a disguised duty to work for the individuals, whether legal, social or moral. The mere obligation of the states should be to take steps in creating the *opportunity* to work and to avoid interfering with the individuals' choice in ceasing the opportunity or not. The only way for states to actually grant individuals this choice is to establish strong social security systems, where states undertake to support and take care of individuals and their families. Only this way can work actually be freely chosen and accepted, as article 6(1) requires it to be.

[147] As previously mentioned – and discussed in more detail under the UDHR – the communist states were inclined to interpreting the article as creating an obligation for the state to ensure employment for all those who were willing. Such interpretation is eliminated with the General Comment No. 18, resulting a more liberal interpretation of the right to work.

[148] The fact that the right to work is governed before all other economic, social and cultural rights, and particularly even before the right to social security (article 9) and the right to adequate standard of living, including adequate food, clothing and housing (article 11), seems to be supportive of this claim.

It should also be noted that despite the wording of article 6(1) as “to gain *his*[149] living by work”, the provision shall be understood as meaning the worker and their family. The indicators thereof can be found in articles 10 and 11 of the Covenant and the General Comment No. 18. While article 10 defines *family* as “the natural and fundamental group unit of society” and creates an obligation for states to provide the “widest possible protection and assistance” to families and seeks a special protection for mothers and children, article 11 provides for “the right of everyone to an adequate standard of living for himself and his family”. When article 6 is read together with these articles, it should be concluded that the right to the “opportunity to gain his living” shall be understood as the “opportunity to gain *their and their families'* living”. The same conclusion is also reached by the Committee, which states in General Comment No. 18 that “[t]he right to work contributes at the same time to the survival of the individual and to that of his/her family”[150].

2.2.3.2. The Right to a Freely Chosen and Accepted Work

The second aspect of the right to work is that work should be freely chosen or accepted by the individual. This statement refers foremost to prohibition of slavery and forced labor and creates a freedom to work, eliminating any possibility in interpreting the right to work as a duty to work for the individual. Since work is a right and a freedom, it shall be the right-holders who decide if they want to work or

[149] Emphasis added.
[150] UN Committee on Economic, Social and Cultural Rights, “General Comment No. 18,” para. 1.

not. In this sense, the right to work means the right to choose to work or not, and when affirmative, the right to choose the occupation.

However, the right to a freely chosen and accepted work has an even broader meaning. Although not fully applicable in practice, "[i]n theory, the concept of freely chosen employment extends to ensuring the fullest opportunity for each worker to use his or her skills in a suitable job."[151] Therefore, recognizing the right to work and taking steps thereof creates the obligation for the states to achieve progressively creation of not any types of jobs, but those that are productive and meet the skills and qualifications of the job-seekers. This is mandatory to establish a right to work understanding that complements human dignity and the right to self-development. In General Comment No. 18, the Committee also adopts and acknowledges this approach by indicating that such definition of the right to work "underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice of work, while emphasizing the importance of work for personal development as well as for social and economic inclusion."[152] Within this framework, any situation or environment, whether legal, economic or even social, that result in the compulsion of an individual to work at a job, which he/she would otherwise not accept, will be considered as violating their right to work.

Furthermore, although not stipulated in the article, the Committee considers the right not to be deprived of work unfairly as part of the right to a freely chosen or accepted work by often referring to the relevant ILO Conventions.[153] The latter aspect not only

[151] Craven, *The International Covenant on Economic, Social and Cultural Rights,* 217.
[152] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 18," para. 4.
[153] Ibid.

enhances freedom to work as a negative right but also builds a practical consequence of ensuring job security for the workers. This primarily generates the obligation for the states to pass legislations – and ensure the implementation thereof – that will secure the existing jobs of the individuals, as well as provide proportional remedies against unfair dismissals and ensure social security in cases of unemployment.

2.2.3.3. Decent Work

An issue that cannot be separated from the right to work is that work in terms of the right to work should be decent work. When defining the right to work, General Comment No. 18 makes it clear by repeatedly stating that article 6 of the CESCR shall be read together and is "interdependent"[154] with articles 7 and 8 on the right to just and favorable conditions of work and the collective labor rights, respectively. According to the Committee, "[t]he right to work is an individual right that belongs to each person and is at the same time a collective right."[155] Furthermore, the right to just and favorable conditions of work is described in General Comment No. 23 on The Right to Just and Favourable Conditions of Work of 2016 as "the corollary of the right to work"[156].

It should be noted that unlike in the case of the UDHR, the CESCR does not make a direct reference to decent work as an aspect of the right to work. Whereas, the

[154] Ibid., para. 8.
[155] Ibid., para. 6.
[156] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 23," para.1.

General Comment No. 18 on one hand, refers to decent work as *interdependent* to the right to work and on the other hand, indicates that the *individual dimension* of the right to work is developed in article 7 and the *collective dimension* in article 8.[157] This is an apparent contradiction. One phenomenon can either be interdependent with another phenomenon or be a dimension thereof. It cannot be both. Interdependency requires two separate concepts that have a close relationship with each other, whereas a dimension is an aspect of a concept and cannot be separated from it. Therefore, General Comment No. 18's position concerning the relationship between the right to work and decent work requires enlightening.

In terms of the approach which adopts decent work as a dimension of the right to work, General Comment No. 18 establishes the individual nature of the right to work as deriving from article 7, which creates obligations on the part of the states to "recognize the right of everyone to the enjoyment of just and favourable conditions of work". After establishing this general obligation, the article provides a non-exhaustive list of rights that shall be realized in respect of ensuring just and favorable conditions of work. These rights consist of the following: fair wages and equal remuneration for work of equal value, remuneration adequate for the workers and their families to pursue a decent living, safe and healthy working conditions, equal opportunities for promotion in employment and finally, the rights to rest and leisure and reasonable working hours. Whereas the collective nature of the right to work is emphasized in article 8, which, without directly referring to the right to collective bargaining, secures freedom of association and the right to strike. The Committee has

[157] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 18," para.2.

established six core obligations concerning the right to just and favorable conditions of work in General Comment No. 23. These consist of the following: prohibition of discrimination of any kind in exercising this right, fighting against gender discrimination at work, establishing non-discriminatory minimum wages through a process of social dialogue, adoption and implementation of a national policy on occupational safety and health, prohibition of all kinds of harassment at work and finally, establishing minimum standards for rest, leisure and working hours.[158]

It should be noted that neither article 7 nor the Committee's six core obligations thereof make any reference to protection against unfair dismissal. However, considering the fact that the Committee includes this protection in its General Comment No. 18 as a condition of the right to a freely chosen or accepted work can be interpreted as to mean that according to the Committee, protection against unfair dismissals is not a right within the framework of rights at work. Instead, this protection is directly related to securing the right to work.[159]

Another point of significance here is the *decent work* definition of the Committee. In the General Comment No. 18, the Committee describes decent work as "work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the CESCR. These fundamental rights also include respect for the physical and

[158] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 23," para.65.
[159] Marita Körner, *Das internationale Menschenrecht auf Arbeit: Völkerrechtliche Anforderungen an Deutschland* (Berlin: Deutsches Institut für Menschenrechte, 2004), 23.

mental integrity of the worker in the exercise of his/her employment."[160] The Committee's definition appears to restrict the established content of decent work by leaving collective labor rights out of the scope of decent work and merely refering to the individual right aspect of the right to work. However, the concept of decent work shall be understood within the framework of its contents as established by its formulators, i.e. the ILO,[161] as including freedom of association and the right to collective bargaining among the fundamental principles and rights at work.[162] Within the framework of the ILO's formulation of decent work, the Committee should revise its definition, and hence article 8 of CESCR, and expressly include freedom of association and the right to collective bargaining, as components of decent work and not only of the right to work.

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[160] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 23," para. 7.

[161] The concept of decent work was declared for the first time in the Report of the Director General to the 87th session of the International Labour Conference (ILC) in June 1999 and later developed in a variety of ILO instruments, with special emphasis in the ILO Declaration on Social Justice for a Fair Globalization of June 10, 2008, which established the "Decent Work Agenda". Under these instruments, decent work has four strategic objectives: promotion of employment, social protection, social dialogue and fundamental principles and rights at work. ILC, 87th Session, "Report of the Director-General: Decent Work," Geneva: June, 1999; ILC, 97th Session, "ILO Declaration on Social Justice for a Fair Globalization," Geneva: 10 June 2008.

[162] This is confirmed by the 2008 Declaration itself which underlines that "freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives" and by the ILO Declaration on Fundamental Principles and Rights at Work of June 1998, which considers "freedom of association and the effective recognition of the right to collective bargaining" as the first of the four fundamental principles and rights at work. ILC, "ILO Declaration on Social Justice for a Fair Globalization,"; ILC, 86th Session, "ILO Declaration on Fundamental Principles and Rights at Work," Geneva: June 1998.

2.2.4. Steps to be taken in realizing the Right to Work

After defining the right to work and providing a non-exhaustive list of aspects of the right to work in the first paragraph of article 6, the CESCR stipulates in the second paragraph of article 6 the steps that shall be taken by the states in order to achieve progressively the full realization of the right to work. The provision of the means of realizing the right to work is one of the striking developments of the CESCR in comparison to the UDHR. While the UDHR's stipulation of the right to work remains limited to the listing of aspects that constitute the right, the CESCR takes this further and sets forth a guideline for the states.

The steps that need to be taken in order to realize the right to work are: "technical and vocational guidance and training programs", "policies and techniques to achieve steady economic, social and cultural development" and "policies and techniques to achieve full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual". Again, the steps indicated in the provision are not exhaustive and states have the discretion of adopting and implementing other means of realizing this right.

The first of these steps require provision of technical and vocational guidance and training programs. Such programs shall be established with a view to give the job-seeker and the worker the necessary foundations while performing their work in the labor market. The purpose of this provision is to ensure the realization of the right to a freely chosen or accepted work by creating a labor market where the worker has the chance and opportunity to make use of their skills, qualifications and interests and is not forced into any kind of work.[163] As previously explained, this is an important aspect of freedom to work, which lies in the core of the right to work.

Secondly, the CESCR builds a direct relationship between the right to work and economic, social and cultural development. It considers that policies and techniques which serve steady development in these areas will be considered as progress in realizing the right to work. This approach derives from the understanding that the right to work lies at the core of all economic, social and cultural rights and that the higher the development is the more and better the right to work is realized.

The final step that states undertake is to develop policies and techniques that lead to "full and productive employment". Although states are not under an absolute obligation to achieve full employment – considering it is far from a realist ambition – they are under the obligation to *aim at* full employment by creating policies towards that direction. This involves the adoption of economic and social measures that aim at full employment as speedily as possible. Secondly, while taking measures to aim at full employment, the states' objective should be to create employment that is productive and seeks to satisfy the skills and aptitudes of the workers. The Committee requires states to create employment that is contributive to the society. Mere increase in the employment level in terms of numbers is not adequate to satisfy the obligations arising out of the CESCR. Measures that exclusively focus on increasing employment in quantities without having regard to the quality of the jobs creates is not found compatible with the CESCR.[164] Creation of productive

[163] Martin Ochs, *Indikatoren und Benchmarks in UN-Menschenrechtsverfahren – eine rechtliche Analyse* (Stuttgart: Boorberg, 2011), 227.
[164] Craven, *CESCR,* 209.

employment shall be complemented with productive and skilled workers, who have access to "technical and vocational guidance and training programs".

2.2.5. Assessment

Regarding the issue on what elements constitute the right to work, General Comment No. 18 categorizes these elements into three groups: Availability, Accessibility, and Acceptability and Quality.[165] Among these, "availability" refers to providing "specialized services to assist and support individuals in order to enable them to identify and find available employment"[166]; whereas "accessibility" requires free access to the labor market which includes prohibition of discrimination of any kind, "physical accessibility" for persons with disabilities, and access to information on how to access the labor market through multi-level data networks.[167] Finally, "acceptability and quality" indicates the right to decent work.

General Comment No. 18 provides a clear understanding of the obligations the article bestows on states. The General Comment adopts the tripartite typology of states obligations, which is adopted by Asbjørn Eide and is commonly accepted in the international human rights scholarship. This typology introduces three levels of obligations with regard to rights: obligation to respect, obligation to protect and obligation to fulfill.[168] In the most updated version of Eide's work on these obligations, these levels are defined as follows: "States must, at the primary level, *respect* the resources owned by the individual, her or his freedom to find a job of

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[165] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 18," para. 12.
[166] Ibid.
[167] Ibid.
[168] Ibid., para. 22.

preference and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her needs."[169] At the second level is the obligation to *protect,* which involves protection of the individuals from third-party violations. In this sense, the essential duty of the states is to adopt legislations that prohibit interference by third-parties.[170] At the third level lie the obligation to assist and the obligation to fulfil. The obligation to assist refers to creating means of achieving the realization of a right, whereas the obligation to fulfil creates the obligation on the part of the states to ensure the enjoyment of the rights of persons who lack the means of realizing them in the absence of the state's support.[171]

General Comment No. 18 applies this typology to the right to work and categorizes the obligations of the states accordingly. In this respect, the states' obligation to respect includes, among others, the obligation to ensure prohibition of forced or compulsory labor, the obligation to refrain from interfering with the right to equal access to decent work for all groups, particularly the disadvantaged.[172] This is also one of the immediate obligations of the states parties. They are under the obligation to refrain from intervening in the freedom to work, particularly of groups that are likely to be discriminated against. The obligation to protect, as previously indicated, mainly consists of adopting legislations and other measures to avoid third party violations of the right to work. The purpose of such protection shall be to ensure equal access to work, as well as to vocational training, and "to ensure that privatization measures do not undermine workers' rights."[173] Whereas the obligation

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[169] Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights," 37.
[170] Sepúlveda, *The Nature of the Obligations under the CESCR,* 161.
[171] Ibid., 162.
[172] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 18," para. 23.
[173] Ibid., para 25.

to fulfil requires direct provision of the right by the states in the case where individuals are not capable of realizing their rights themselves. In terms of the right to work, the obligation to fulfil requires states to integrate the right to work into their legal systems and adopt measures and policies that aim at full realization of the right.[174]

2.3. INTERNATIONAL LABOUR ORGANISATION

2.3.1. General Information

The International Labour Organisation (ILO) was founded in 1919 as part of the Treaty of Versailles, which was the ending treaty of the World War I. Section 1 of Part XIII of the Treaty, which governed the provisions on labor and became the original Constitution of the ILO, called for the foundation of an organization which aims at improving working conditions. The Preamble of Section 1 recognizes that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony to the world are imperilled". Hence, an organization with the objective of promoting and realizing social justice was found necessary to secure lasting peace in the world.

In this respect, the Treaty of Versailles established the ILO with a tripartite structure, where apart from the member states, their employers' and workers' representatives

[174] Ibid., para 26.

are also granted membership. Accordingly, article 389(1) of the Treaty of Versailles states the following: “The meetings of the General Conference of Representatives of the Members (…) shall be composed of four Representatives of each of the Members, of whom two shall be Government Delegates and the two others shall be Delegates representing respectively the employers and the workpeople of each of the Members.” The same provision is still preserved in article 3(1) of the Constitution of the ILO of 1974.[175] This tripartite structure unique to the ILO aims at realizing social justice through the involvement of social partners and through the means of social dialogue. Currently, the ILO has a total of 186 members.

The two basic legal instruments that are adopted by the ILO are Conventions and Recommendations. Conventions are legally binding instruments that create obligations for states that ratify them; whereas Recommendations are detailed guidelines that provide an understanding of the implementation and interpretation of the Conventions.[176] Recommendations are not binding on the members and are not open for ratification. Both of these instruments are adopted by the International Labour Conference (ILC), which corresponds to a general assembly. The ILC meets annually and consists of delegates from governments, workers’ and employers’ representatives, with a view to discuss and adopt international labor standards.

As to the supervision of the application of Conventions and Recommendations, the ILO provides two supervisory mechanisms: *the regular system of supervision* and *the*

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[175] The Constitution of the ILO has been subject to amendments six times following the original Constitution of 1919, which was situated in Part XIII of the Treaty of Versailles.
[176] Lee Swepston, “International Labour Law,” in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies,* ed. Roger Blanpain. (Alphen aan den Rijn: Kluwer Law International, 2014), 159.

special procedures. The regular system of supervision is based on the periodic reports submitted by the member states regarding the Conventions which they have ratified and the observations of the workers' and employers' organizations thereof. [177] This is a two-tiered supervision, where in the first part, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) prepares comments on the reports submitted by the governments in the form of either observations or direct requests. Observations consist of comments on the application of a given convention for questions that have been directed by a state and they are published in the annual report of the CEACR. Direct requests, which are communicated directly to the states concerned, are either requests for more detailed information on an issue or consist of technical questions.[178] The second part of the supervisory mechanism consists of the submission of the Committee's annual report to the ILC. Here, the report is examined by the Conference Committee on the Application of Standards, which consists of delegates of the governments, employers and workers. Upon examining the report, the Conference Committee opens various observations for discussion and requests relevant governments to respond and provide information on the issue before the Conference Committee. This procedure generally concludes with the Conference Committee's conclusions that include a

[177] "ILO supervisory system/mechanism," ILO, accessed October 26, 2015, http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm.

[178] "Committee of Experts on the Application of Conventions and Recommendations," ILO, accessed October 26, 2015, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

recommendation for taking steps to resolve a specific issue or to refer to ILO missions or technical assistance.[179]

The second system of supervision within the ILO is the special procedures, which consist of “procedure for representation”, “procedure for complaints”, and the “procedure for complaints regarding freedom of association”.[180] As per article 24 of the ILO Constitution, “In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.” Accordingly, the procedure for representation makes it possible for any industrial organization, whether employers or workers, to make a representation to the International Labour Office against any Member who is claimed to have failed to secure “the effective observance within its jurisdiction of any Convention to which it is a party.” When the Governing Body considers the representation receivable, it establishes a tripartite committee which examines the representation and prepares a report for the Governing Body thereof. Upon receiving the report and deciding that the representation is substantiated, the Governing Body has two ways of moving ahead with the procedure. It may either publish the government’s representation and

179 “Conference Committee on the Application of Standards,” ILO, accessed October 26, 2015, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm.
180 “ILO supervisory system/mechanism.”

the statement or initiate the procedure of complaint against the government concerned.[181]

The second method of special procedures is the “complaints procedure”. This method diverges from the procedure for representation firstly in terms of the competent initiators. According to article 26 of the ILO Constitution, groups that can file a complaint against a Member State for not complying with an ILO Convention are:

1. Another Member State of the ILO which had already ratified the Convention,
2. A delegate to the Conference, and
3. The Governing Body in its own capacity.

Complaints are submitted to the Governing Body, which decides under article 26 of the ILO Constitution on whether to appoint a Commission of Inquiry in order for the complaint to be considered and reported on. As a highest level investigative procedure, a Commission of Inquiry is appointed when a state encounters an accusation of a serious and continuing violation where the state concerned refrains from taking measures thereof.[182] Under article 28 of the ILO Constitution, the

[181] “(a) Under the conditions laid down in article 25 of the Constitution, the Governing Body may publish the representation received and, if applicable, the statement made by the Government concerned; in the event that it so decides, the Governing Body also decides the form and date of publication. (b) The Governing Body may, at any time, in accordance with article 26, paragraph 4, of the Constitution, adopt, against the Government concerned and with regard to the Convention the effective observance of which is contested, the procedure of complaint provided for in article 26 and the following articles (article 10 of the Standing Orders).” ILO Governing Body, “Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organisation,” April 8, 1932 (57th Session), modified at 291st Session (Nov. 18, 2004), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcm_041899.pdf.

[182] “Complaints,” ILO, accessed January 12, 2016, http://www.ilo.org/global/standards/applying-and-

Commission of Inquiry considers the complaints and adopts a report with recommendations on the steps to be taken in order to address the issue and the time frame within which the steps shall be taken. Pursuant to article 29, the Director General shall communicate the report to the Governing Body and to the member states concerned and have it published. The member state concerned shall then either accept the report or challenge it before the International Court of Justice (ICJ), the judgment of which shall be deemed final.

Article 33 of the ILO Constitution stipulates that if the member state concerned fails to comply with the recommendations within the time frame given by the report of the Commission of Inquiry or with the judgment of the ICJ, "the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." In case the member state in question complies with the recommendations and obviates the issue which became the subject matter of the complaint or complies with the decision of the ICJ, it may inform the Governing Body thereof and may request for the formation of a Commission of Inquiry for the verification of its compliance.[183]

The third method of special procedures is the special procedure for complaints regarding freedom of association. The founding principles of the ILO are mainly based on the two fundamental collective labor rights and freedoms: freedom of association and the right to collective bargaining. Given their importance as

promoting-international-labour-standards/complaints/lang--en/index.htm.

[183] Under article 34 of the ILO Constitution, "if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33."

fundamental labor rights, the ILO established a special supervisory system specifically for infringements concerning freedom of association and the right to collective bargaining. In this respect, the Committee on Freedom of Association (CFA) has been established with a view to consider complaints on violations of freedom of association and the right to collective bargaining. The CFA is a tripartite committee of the Governing Body and receives complaints against a member state from the workers' and employers' organizations. The striking point here is that complaints may be lodged against a member state regardless of whether the member state in question has ratified the relevant ILO Convention on trade union rights.

The working method of the CFA is distinct from a regular supervisory body that acts as a judge. The objective of the supervisory mechanism executed by the CFA is to promote a tripartite social dialogue with a view to promote and expand legislative respect for trade union rights, as well as to ensure its implementation in practice.[184] Therefore, the CFA's observance of a complaint is conducted through dialogue with the member state concerned. If the CFA finds that there has been a violation of the trade union rights in the member state concerned, it issues a report with recommendations and the member state in question is requested to report on the progress it achieves in complying with the recommendations. If the member state concerned had ratified the ILO Convention which is alleged to be violated, the legislative issues of the case may be brought before the CEACR. The CFA is also competent to propose to the government concerned a direct contacts mission with a

[184] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* 8, para 6.

view to resolve the issue directly with the government and with the contribution of the social partners.[185]

In order to have a better understanding of the ILO's principles and functioning, it is worth mentioning here that the ILO has declared 8 of its numerous Conventions as "fundamental", and is showing extra effort in achieving full ratification and implementation of these Conventions. Through the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which was adopted on June 18, 1998, the ILO has made the declaration that all member states, *regardless of whether they have ratified the relevant Conventions*, are under the obligation "to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions". According to the Declaration, this obligation of the states arises from their membership to the ILO and hence, their obligation as members to comply at least with the fundamental principles of the ILO.

The Declaration has established four areas as fundamental and declared the Conventions on these areas as binding on all member states. These four areas and the respective Conventions are as follows:

1. Freedom of association and the effective recognition of the right to collective bargaining

[185] "Committee on Freedom of Association," ILO, accessed January 12, 2016, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm#P10_4015.

a. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

b. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

2. Elimination of all forms of forced and compulsory labor

a. Forced Labour Convention, 1930 (No. 29)

b. Abolition of Forced Labour Convention, 1957 (No. 105)

3. Effective abolition of child labor

a. Minimum Age Convention, 1973 (No. 138)

b. Worst Forms of Child Labour Convention, 1999 (No. 182)

4. Elimination of discrimination in respect of employment and occupation

a. Equal Remuneration Convention, 1951 (No. 100)

b. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

The initiative concerning the above listed topics and the relevant conventions point to the issues that are at the top of the agenda for the ILO. The rights and freedoms present in the list are considered to be so fundamental that it is expected from all member states to respect and promote them.

2.3.2. The Right to Work under the ILO

All of the above indicated general information about the ILO make it clear that the right to work is regulated and protected under the rules of the ILO, whether directly or indirectly through the regulation of other rights and freedoms that are either the components of the right to work or its complementary rights. In order to avoid a long list of conventions and recommendation, only those instruments of the ILO that *directly* involve the right to work will be presented as part of the present study.

Since labor is at the center of the ILO's mandate, it would be expected to encounter a mention of the right to work in its Constitution. Yet, there are only two *indirect* references to this right in the Constitution, one of which is in the Preamble and the other, provided with a reference in article 1 to the Declaration Concerning the Aims and Purposes of the International Labour Organisation known as the Declaration of Philadelphia of May 10, 1944.

Accordingly, the Preamble of the ILO Constitution considers "the prevention of unemployment, the provision of an adequate living wage, (…) [and] the organization of vocational and technical education" as being among the means of overcoming injustice and establishing "peace and harmony" in the world. The Declaration of Philadelphia, having the characteristic of establishing fundamental principles through stipulating substantive rights and freedoms, provides a more specific formulation of the right to work. The Declaration considers "full employment and raising of standards of living" and "the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being" as being among the goals to be achieved by states, through the programs of the ILO.

The above statements of the Constitution draw a general picture of what the ILO considers fundamental in terms of the right to work. These general principles are confirmed in the relevant subsequent conventions and recommendations of the ILO, some of which will be analyzed hereunder. In this regard, among these documents, The Employment Policy (Supplementary Provisions) Recommendation (No. 169) of 1984 and article 7 of the Employment Promotion and Protection against Unemployment Convention (No. 168)[186] of 1988 create a compilation of the ILO's defining aspects of the right to work, which are generally distributed among other ILO instruments. The former stipulates that "The promotion of full, productive and freely chosen employment provided for in the Employment Policy Convention and Recommendation, 1964, should be regarded as the means of achieving in practice the realization of the right to work."; whereas the latter states the following: "Each Member shall declare as a priority objective a policy designed to promote full, productive and freely chosen employment by all appropriate means, including social security. Such means should include, inter alia, employment services, vocational training and vocational guidance."

When this provision is read together with the ILO Constitution and the Declaration of Philadelphia, it can be concluded that the right to work under the principles of the ILO consists of the following aspects, with employment services and vocational

[186] As of February 2017, this convention has been ratified only by the following eight countries: Albania, Belgium, Brazil, Finland, Norway, Romania, Sweden, and Switzerland.

training and guidance being the tools for implementation: promotion of full employment, free choice of employment and productive employment.

2.3.2.1. Promotion of Full Employment

The first aspect of the right to work in terms of the ILO is "promotion of full employment". This aspect indicates that the goal of the member states shall be to adopt policies that undertake the goal of ensuring work for everyone who is available and seeking work.

Despite the fact that the Declaration of Philadelphia talks about "full employment", it can be derived from the Preamble of the ILO Constitution and the relevant subsequent ILO instruments that today, it is understood as *promotion* of full employment and also includes prevention of unemployment. This so called *promotional character* of the full employment clause, which may be found in numerous ILO instruments, including the Employment Policy Convention and Recommendation of 1964, the Employment Policy (Supplementary Provisions) Recommendation of 1984, the Employment Promotion and Protection against Unemployment Convention of 1988 and the 2008 Declaration on Social Justice for a Fair Globalization, is used as a descriptive instrument for Conventions or provisions thereof. It signifies the establishment of active programs to reach the targets, rather than taking a passive position and merely adopting rules and standards thereof.[187]

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[187] ILC, 67th Session, Report III (Part 4A), "Report of the Committee of Experts on the Application of Conventions and Recommendations," Geneva: 1981, para. 36.

The promotional character within the meaning of the ILO corresponds to the "progressive achievement" provided in the CESCR and therefore, implies that the member state in question is under the obligation to establish active programs that aim at achieving full employment. In no way is it interpreted as creating the obligation for states to provide immediate results. A goal as such "requires a coordinated policy in a wide range of economic and social fields and even when it has been achieved at a given point in time, calls for continuing measures to ensure that it is maintained in the face of constantly changing national and international conditions."[188]

The ILO's understanding of promotion of full employment is considered as a means of achieving economic development and raising standards of living. Therefore, despite the fact that the supervision of "promotion of full employment" is difficult *per se*, various data on economic growth and social development of member states serve as the tools for supervision. This is also affirmed in the Recommendation No. 169 which stipulates that the member states should aim at providing individuals with at least the minimum requirements for subsistence through the means of increasing production and adopting policies and programs that aim at boosting production and ensuring fair distribution of basic goods and services, as well as income.

Furthermore, the "promotion of full employment" aspect of the right to work within the meaning of the ILO also includes protection from unemployment and protection in case of unemployment. According to article 2 of the Convention No. 168, "Each Member shall take appropriate steps to co-ordinate its system of protection against unemployment and its employment policy. To this end, it shall seek to ensure that its

[188] Ibid.

system of protection against unemployment, and in particular the methods of providing unemployment benefit, contribute to the promotion of full, productive and freely chosen employment, and are not such as to discourage employers from offering and workers from seeking productive employment." This indicates that economic and social policies that include an employment policy aimed at full employment shall involve a system of protection against unemployment and protection in case of unemployment with a view to fully realize the right to work. A system of protection against unemployment, by its nature, serves the purpose of full employment by securing the jobs of the workers and avoiding unfair dismissals, resulting in the loss of primary income of the workers and their dependents.

On the other hand, protection in case of unemployment serves the purposes of providing the population with their basic needs when they are unable to satisfy them by their own means and securing freedom to work by ensuring individuals with the environment in which they can engage in an employment on their free will and not as a result of desperation. Therefore, as the Employment Policy Recommendation (No. 122) of 1964 indicates, "Each Member should, to the fullest extent permitted by its available resources and level of economic development, adopt measures […] to help unemployed and underemployed persons during all periods of unemployment to meet their basic needs and those of their dependents and to adapt themselves to opportunities for further useful employment." It should be noted that the ILO specifically regulates the situation of the disadvantaged groups who encounter difficulty in finding lasting employment and hence, are in need of special protection.[189] The ILO imposes an obligation on the member states to provide such groups protection as a result of their unemployment as well as to adopt economic and social policies that aim at integrating these disadvantaged persons into the labor market and placing them in productive employment.

2.3.2.2. Free Choice of Employment

The second aspect of the right to work within the meaning of the ILO is free choice of employment. The aforementioned aspect on promotion of full employment is directed towards ensuring work for everyone who is seeking work; whereas according to Employment Policy Convention (No. 122) of 1964, the member states are also under the obligation to ensure that “there is freedom of choice of employment and fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.”

In this respect, free choice of employment refers on one side to freedom of establishment and on the other, employment of individuals in jobs which they have freely accepted. The former is covered in the ILO instruments which create an obligation on the part of the member states to pursue active policies that aim at full employment. Within this framework, such active employment policies shall also include promotion of self-employment. The Employment Promotion and Protection against Unemployment Recommendation (No. 168) of 1988 states that “Members

[189] These groups, under article 8 of the Convention No. 169, consist of persons “such as women, young workers, persons with disabilities, older workers, the long-term unemployed, migrant workers lawfully resident in the country and workers affected by structural change”.

should, as far as possible, offer to unemployed persons who wish to set up their business or take up another economic activity, financial assistance and advisory services under prescribed conditions.” An assistance by the state to encourage those who seek to create self-employment opportunities for themselves serves not only to the ending of the unemployed status of the person in question, but also to creation of new employment opportunities for the other unemployed persons.

As in the case of many international instruments, the ILO’s interpretation of employment in freely accepted jobs also consists of a variety of components. Apart from the most obvious principle of prohibition of forced and compulsory labor[190], this aspect of the right to work requires the taking of further expansive measures. The right to free choice of employment bears a broader meaning than the requirement of the presence of the individual’s consent at the time of the conclusion of or during the employment contract.

Firstly, individuals shall not feel compelled to accept any job offered to them as a result of concerns for their and their families’ survival. In order to ensure this, the ILO regulates in detail the protection of the unemployed, underemployed and their dependents and obligates the member states to ensure that the unemployed and underemployed persons and their dependents are granted social security which at least aims at satisfying their basic needs.

Secondly, the employment shall provide the worker and their dependents with an adequate living wage and possibilities to improve their standards of living. In other

[190] See 3.2.1 below.

words, an employment shall ensure the individual with an opportunity for at least economic development and the member states are under the obligation to ensure the realization thereof. This is explicitly regulated under article 5 of the Social Policy (Basic Aims and Standards) Convention (No. 117)[191] of 1962 which stipulates that: "(1) Measures shall be taken to secure for independent producers and wage earners conditions which will give them scope to improve living standards by their own efforts and will ensure the maintenance of minimum standards of living […] (2) In ascertaining the minimum standards of living, account shall be taken of such essential family needs of the workers as food and its nutritive value, housing, clothing, medical care and education."

Thirdly, the employment should be suitable. What is meant by this is that the available employment opportunities should create a working environment in which the workers can put to use and improve their qualifications, skills and endowments, without being subject to any kind of discrimination. This understanding of the right to work not only encourages people to invest in their education and training but also calls for creation of productive and qualified workers requiring employment. Hence, the the *suitable employment* interpretation is entailed by the obligation of the states to create productive employment in which the workers can put into use and improve their skills and qualifications, as well as the obligation to provide individuals with vocational training and guidance.

In addition, the ILO appears to give specific importance to employment services and the provision of vocational training and guidance and regulates this issue in many of

[191] As of February 2017, this Convention has not been ratified by Turkey.

the previously referred instruments. The ILO's Employment Services Convention (No. 88) of 1948 requires the establishment of free public employment services and adopts this measure "as an integral part of the national programme for the achievement and maintenance of full employment and the development and use of productive resources" in article 1(2).

With regard to vocational training, Article 15(1) of the Convention No. 117 stipulates that "Adequate provision shall be made to the maximum extent possible under local conditions, for the progressive development of broad systems of education, vocational training and apprenticeship, with a view to the effective preparation of children and young persons of both sexes for a useful occupation." This provision presents the clear link between free choice of employment, promotion of productive employment and the significance of vocational training and guidance thereof. Accordingly, an active policy which aims at promoting full employment should be regarded in terms of creating productive work. In order to serve the employment requirements of the productive work created, workers with relevant training and thus, suitable skills and qualifications will be needed. Therefore, the obligation of the states to provide vocational training and guidance serves the aim of promoting full employment.

Furthermore, provision of employment services alongside vocational training and guidance bears a special significance with regard to groups of persons who require special protection. In this sense, the ILO Recommendation No. 169 of 1984 calls for an adoption by the member states "measures to respond to the needs of all categories of persons frequently having difficulties in finding lasting employment, such as certain women, certain young workers, persons with disabilities, older workers, the long-term unemployed and migrant workers lawfully within their territory". Such measures *inter alia* include employment services and vocational training and guidance which seek to integrate these groups into the labor market.

The final component of freely accepted work is that work should be performed under just and favorable conditions. In other words, the work done shall be "decent work" and shall, to the least, satisfy the fundamental principles and rights at work.

2.3.2.3. Productive Employment

The final aspect of the right to work within the framework of the ILO's definition is that the work that is created as part of the employment policy and which is conducted by the worker shall be "productive". Productive employment "is that which contributes to the production of goods and services, for the market and outside market, for consumption or fixed capital formation."[192]

As previously mentioned, the ILO values employment in which workers can put into use and improve their qualifications and skills and promotes the creation of qualified work. This is also linked to decent work in the sense that workers cannot be compelled to engage in work in which they cannot invest in self-development and requires the usage of absolutely no special skills or qualifications. In the light of this

[192] Jean Mayer, "The Employment Policy Convention: Scope, assessment and prospects," *International Labour Review* 130, no. 3 (1991): 348.

view, article 16(1) of the Convention No. 117 of 1962 states that "[i]n order to secure high productivity through the development of skilled labour, training in new techniques of production shall be provided in suitable cases." This provision not only promotes vocational guidance and training, but also seeks development in the production itself investing in the enhancement of skilled labor.

2.3.3. Assessment

Although the ILO does not appear to have one instrument which exclusively deals with the right to work, the ILO's definition of the right to work can be derived from the Employment Policy (Supplementary Provisions) Recommendation (No. 169) of 1984 which stipulates that "[t]he promotion of full, productive and freely chosen employment […] should be regarded as the means of achieving in practice the realization of the right to work." However, this provision on its own is not adequate in understanding its aspects and for this reason, its interpretation requires the analyses of a variety of ILO instruments.

According to the ILO, the realization of the right to work is based on an active policy to be adopted by the member states taking into account their levels of economic development and national conditions. This is affirmed by the Employment Policy Convention (No. 122) of 1964, which provides for a relativity clause in article 1(3), stating that an active policy which aims at full, productive and freely chosen employment "shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices." This provision underlines the impossibility of the adoption of a global employment policy that can be valid in all parts of the world. Therefore, the ILO seeks to establish various standards and principles, which the national employment policies shall be based on.

The difference of economies and levels of development is also emphasized through a reference to the promotional character of the goal of full employment. By accepting such differences, the notion of *promotional character* results in country based supervision in terms of realizing the right to work and mainly seeks economic development as an indicator of progress.

Considering the significance of the ILO within the world of work and therefore, its relevance in developing a definition for the right to work, it is rather disappointing to see that it falls short in satisfying the contemporary ideas of the right to work. Naturally, this compromising definition is a result of the opposing views of the member states, where the socialist countries clashed with the liberal economies. The former desired the recognition of the right to work at the center of a government policy, whereas the latter did not even find it necessary to be regulated and identified it as a goal.[193]

Yet, it is a point of criticism that despite ensuring protection in case of unemployment, the ILO appears to be oriented around the notion of employment, rather than freedom to work. The ILO's approach is humane in the sense that it tries

[193] Jean Mayer, "The Concept of the Right to Work in International Standards and the Legislation of ILO Member States," *International Labour Review* 124, no. 2 (1985): 237.

to ensure the most decent work for workers and therefore, calls for vocational training and employment opportunities which require productive work. However, all of these aspects are directed towards putting individuals in jobs. It deifies employment and does not appear to consider the possibility of voluntary unemployment as a right on its own.

2.4. THE EUROPEAN SOCIAL CHARTER

2.4.1. General Information

The European Social Charter (ESC) was adopted by the Council of Europe in 1961 and was revised in 1996. Its particularity lies in the fact that it is the first legally binding international instrument that governs economic and social rights. It focuses on individual and collective labor rights and social security rights, with a view to establishing detailed standards for these rights and freedoms. Similar to the relationship between the two UN Covenants, the European Social Charter is a complementary of the European Convention on Human Rights (ECHR) of 1950, which regulates civil and political rights. The supervisory body of the ECHR is the European Court of Human Rights (ECtHR); whereas the ESC is supervised by the European Committee of Social Rights (ECSR). The ESC has been ratified by 43 states out of a total of 47 member states.[194] However, out of the 43 ratifying states,

[194] The four member states which have ratified neither the 1961 Charter nor the Revised Charter of 1996 are: Liechtenstein, Monaco, San Marino and Switzerland.

nine have ratified the European Social Charter of 1961, but not the Revised European Social Charter (ESC) of 1996.[195]

The supervisory system of the ESC consists of two pillars. The first of these is the mandatory reporting procedure and the second one is the optional collective complaints procedure. Under the reporting procedure, the states parties to the ESC undertake to provide annual reports on how they implement the provisions of the ESC. In order to achieve an effective reporting system, the Governmental Committee of the European Social Charter has adopted a procedure on May 3, 2006 which divides the provisions of the Charter into four thematic groups. States are under the obligation to submit reports concerning the group on the agenda of that year. This way, each group becomes supervised every four years. These four thematic groups[196] are established as follows:[197]

- Group 1: Employment, training and equal opportunities
- Group 2: Health, social security and social protection
- Group 3: Labor rights
- Group 4: Children, families, migrants

The country reports are expected to include the *legal framework* concerning the issue, *measures taken* for its implementation and the *supporting data* that could be utilized as an indicator and measures for the extent of application of the legal

[195] These states are: Croatia, Czech Republic, Denmark, Germany, Iceland, Luxembourg, Poland, Spain and United Kingdom.
[196] The resemblance of these thematic groups with the subjects of the ILO's Fundamental Conventions appears to be worth highlighting.
[197] Governmental Committee of the European Social Charter, CM(2006)53, "New System for the Presentation of Reports on the Application of the European Social Charter," May 3, 2006.

framework.[198] The legal framework covers all legislations, judicial decisions, collective agreements and other relevant legal instruments. The measures taken for the implementation of the legal instruments deal with the administrative actions, adopted policies, measures taken for executing these policies, etc. The required supporting data may consist of any instrument for measurement including, but not limited to, statistical data and relevant figures. This reporting procedure seeks to meet up to the requirements of an efficient supervision of economic and social rights, which cannot be realized merely by adopting legislations. Therefore, the ESC has supported its reporting procedure with measures and means of implementation, rather than limiting the object of its supervision to the legal framework.

The examination body of the country reports is the European Committee of Social Rights. The ECSR assesses the conformity of the states parties with the relevant provisions of the ESC and publishes conclusions thereof. The conclusions are reached for each paragraph of the ESC's articles separately and may cover one of the three conclusions: conformity, inconformity or deferral. The ECSR concludes deferral for cases where the ECSR cannot reach a conclusion of conformity or inconformity due to reasons such as lack of information on the issue. The decisions of the ECSR are compiled in "conclusions" which are published annually. These conclusions indicate whether or not the state party in question is in conformity with the ESC.

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[198] Council of Europe Committee of Ministers, "Form for the Reports to be Submitted in Pursuance of the 1961 European Social Charter and the 1988 Additional Protocol," March 26, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804922f6.

The second method of supervision of the ESC is the collective complaints procedure. This procedure was introduced in 1995 with the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints and entered into force in 1998. Unlike the reporting system, this procedure is not mandatory and is subject to the ratification of the respective Additional Protocol.[199] The collective complaints procedure integrates the social partners and various non-governmental organizations within the supervisory system and gives them the opportunity to file complaints against the contracting states. According to article 1 of the Additional Protocol, the organizations which are entitled to file complaints are the following:

> a) international organizations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter;
> b) other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee;
> c) representative national organizations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

Furthermore, article 2(1) of the Protocol stipulates that "Any Contracting State may also, when it expresses its consent to be bound by this Protocol, in accordance with the provisions of Article 13, or at any moment thereafter, declare that it recognises the right of any other representative national non-governmental organisation within

[199] As of February 201, the states which have accepted the collective complaints procedure are Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden.

its jurisdiction which has particular competence in the matters governed by the ESC, to lodge complaints against it." So far, the only state that has given a declaration to this effect is Finland.

The deciding body of the collective complaints is again the ECSR. Upon finding the case admissible, the ECSR moves on to deliberating the merits of the case, at the end of which it decides whether the ESC has been violated or not.

2.4.2. The Right to Work under the ESC

The European Social Charter, like the CESCR, is a legally binding instrument that exclusively focuses on economic, social and cultural rights and regards them as human rights. Following the Preamble, the ESC directly begins by stipulating the substantive rights, with the right to work as the first article. Again, the fact that the right to work is governed as the first article reaffirms the view that the right to work is an essential right in realizing other economic, social and cultural rights. This position is also endorsed by the ECSR in its first Conclusion (Conclusions I, 1969-1970) on article 1, which states the following: "In the Committee's opinion, it is of fundamental importance, in the general context of the Charter, for the effective exercise of several essential rights set forth in the Charter is inconceivable unless the right to work is guaranteed first"[200]. Furthermore, article 1 is considered among the

[200] Council of Europe, European Committee of Social Rights, "Conclusions I – Statement of Interpretation – Article 1," 1969, http://hudoc.esc.coe.int/eng/?i=I_Ob_-1/Ob/EN.

fundamental nine articles[201], six of which the ESC explicitly requires the ratification of in article A(1)(b). It should also be noted that with the sole exception of Czech Republic's reservation concerning article 1(4), all provisions of article 1 have been accepted by all 43 member states.

Article 1 of the ESC which regulates the right to work is as follows:

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

The article reveals that the ESC puts emphasis on the employment policy aspect of the right to work by requiring states in the first paragraph to aim at achieving a high and stable level of employment. The ESC provides for a freedom to work only subsequently in the second paragraph. It then introduces the obligations concerning free employment services and vocational guidance, training and rehabilitation.

[201] These articles are: articles 1(the right to work), 5 (the right to organize), 6 (the right to bargain collectively), 7 (the right of children and young persons to protection), 12 (the right to social security), 13 (the right to social and medical assistance), 16 (the right of the family to social, legal and economic protection), 19 (the right of migrant workers and their families to protection and assistance) and 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

2.4.2.1. *Full Employment*

The first undertaking of the states parties in realizing the right to work is adopting the goal of full employment. Undoubtedly, this provision cannot be interpreted as creating an obligation for the states to ensure full employment, nor does it create grounds for a legal claim on the part of the individual to demand from the state placement to a job. The ECSR interprets this provision as obligating the states parties to "adopt and follow an economic policy which is conducive to creating and preserving jobs" and to "take adequate measures to assist those who become unemployed in finding and/or qualifying for a job."[202] In this respect, the full employment provision of article 1 has two aspects. The former requires the establishment and pursuance of economic policies that aim at achieving full employment through creating jobs and preserving the existing ones. The latter focuses on ensuring the implementation of the economic policies at the individual level, where in addition to pursuing economic policies thereof, states are required to fulfill their obligations to their people by actively assisting them in finding and qualifying for a job.

The ESC does not make reference to any legitimate limitation similar to the availability of resources as provided by the CESCR. If the wording of the ESC were to be taken literally, it may have been concluded that the states parties were under the obligation to prove development in the employment policy area regardless of their

[202] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

economic situations. However, the ECSR abstained from making a literal interpretation and since Conclusions I, the ECSR established the position which resembles the CESCR's “progressive achievement” obligation and presumed it in its following decisions. Having characterized article 1(1) as dynamic, the assessment of conformity focuses on the efforts taken in the direction of development, rather than concrete results.[203] To make these assessments effectively, the ECSR requests from the states parties figures and information for both the previous reporting cycle and the existing one, with a view to compare and conclude on conformity.[204] This also points out to the fact that each country is assessed on its own merits and that there is no established threshold for compliance with the provision. The ECSR refrains from forming a list of criteria for the achievement of full employment due to sovereignty concerns. Aiming at full employment is an issue that is directly regulated through the economic and social policies of the states, for which the ECSR does not consider itself competent in making suggestions.[205]

The ECSR does not interpret article 1(1) as requiring the achievement of full employment. It considers the full employment provision as creating “an obligation as to means rather than an obligation as to results”[206]. In this respect, the ECSR requires states to take adequate measures in the way of achieving full employment having regard of the national economic situation and the measures. It does not require

[203] David Harris and John Darcy. *The European Social Charter* (New York: Transnational Publishers, 2001), 26-7.
[204] Andrej Marian Świątkowski, *Charter of Social Rights of the Council of Europe* (Alphen aan den Rijn, Kluwer Law International, 2007), 50, 56.
[205] Świątkowski, *Charter of Social Rights of the Council of Europe*, 58.
[206] Council of Europe, “Digest of the Case Law of the European Committee of Social Rights,” September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

immediate results but a gradual development and improvement in the field of employment policies.[207]

However, the constant increase in unemployment globally in the 1970s and 1980s and the realization that the assessment of conformity with the adoption of full employment as a goal became an increasingly difficult challenge had a negative influence in the supervision of article 1(1). The ECSR's conclusions on the conformity with article 1(1) came to a halt following the 1978-1979 cycle, which lasted until the 1999-2000 cycle. After 1999, the ECSR started to reach conclusions on the conformity with the requirements of article 1(1) again.

As established, the ECSR's interpretation of the provision obliges states to develop and maintain certain measures that serve the purpose of attaining full employment. Such measures are: "1) labour intensive economic policy or 2) active employment policy measures to create jobs or 3) at least effective job mediation services, 4) other employment services and 5) provision of income security for the unemployed."[208] It is obvious from these undertakings that there is no single measurement in assessing the compliance of the member states with the provision. Hence, the ECSR utilizes various indicators of a state before reaching a conclusion concerning conformity. The data the ECSR requires for the assessment of conformity with article 1(1) involve a variety of legal, economic and social indicators of the national economic situation and the measures of employment. These indicators include GDP, measures of

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207 This approach of the ECSR demonstrates a similar position to that of the CESCR, where the CESCR provides for progressive achievement. The adoption of such a position indicates that states are not under the obligation to provide results of immediate effect but to put into action means that are targeted towards full employment.

208 Matti Mikkola, *Social Human Rights of Europe* (Porvoo: Karelactio, 2010), 139.

economic growth, unemployment rate, job creation rates, etc.[209] The ECSR examines the actions taken concerning employment policies and requires states to include a clear undertaking of full employment in their national legislations. It then requests figures indicating the actual efforts of the state in the field of employment such as the total amount of expenditure and resources provided and used for this purpose. Furthermore, the ECSR puts special emphasis on the employment opportunities and the employment rate of vulnerable groups in the field of employment, including young persons, persons with disabilities, ethnic minorities and the long-term unemployed.

This demonstrates that unless a general assessment of all of the figures indicates otherwise, neither the unemployment rate nor the level of increase or decrease in the unemployment rate in a given state is the sole decisive factor in deeming a state in conformity with or in violation of article 1(1). The ECSR observes the whole picture and reaches its conclusions after having regard to each related factor.

2.4.2.2. Freedom to Work

The second aspect of the right to work governed by the ESC in article 1(2) is "the right of a worker to earn his living in an occupation freely entered upon". It is rather striking that the drafter of the ESC chose to regulate freedom to work as a second

[209] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

undertaking of the right to work, after full employment, where the provision clearly states that “the achievement and maintenance of as high and stable a level of employment as possible” shall be accepted as one of the “primary aims and responsibilities”. Yet, such regulation also matches the ESC’s general systematic in the sense that unlike most of the other equivalent general international and regional instruments on human rights and particularly on economic, social and cultural rights, the ESC goes a lot further than merely listing and requiring states to recognize the rights it provides. The ESC has a detailed context and not only sets the principles but also the minimum standards in a concrete manner. Therefore, by considering the aim of full employment as the primary undertaking, the ESC signifies the importance of employment policies in realizing the right to work.

Naturally, this does not mean that effective protection of freedom to work, which is governed under article 1(2), is regarded any less significant by the ESC. In fact, when the conclusions of the ECSR on article 1 are observed, the most detailed assessment of conformity with article 1 of the ESC appear to be gathered around article 1(2). Due to the fact that article 1(1) on full employment is an obligation as to the means rather than as to the result and therefore requires certain economic policies directed towards the purpose of full employment, the ECSR seems to avoid immediately concluding non-conformity of article 1(1). Therefore, the ECSR's conclusions are more abundant and explicit in assessing conformity with article 1(2).

The freedom to work provision of the ESC is more or less similar to its equivalents in the previously discussed international instruments. The right to an occupation freely entered upon is not interpreted as obligating states to provide jobs for all those who seek one, but rather to ensure protection against slavery, forced and compulsory labor, and any other similar practices, subject to clearly defined exceptions. It seeks to ensure that individuals work at freely accepted or chosen work under equal opportunities, that they are provided with a level of protection against dismissals and that they have the freedom to terminate work whenever they desire.

Making a broad explanation of the right to earn one's living in an occupation freely entered upon, the ECSR observes three issues in assessing conformity with article 1(2) of the ESC. These consist of firstly, prohibition of discrimination in employment, prohibition of forced or compulsory labor, and a general prohibition of practices that may interfere with the workers' right to earn their living in an occupation freely entered upon.[210]

Firstly, article 1(2) of the Charter is interpreted as prohibiting any kind of discrimination in creating and providing employment, whether on the grounds of race, color, sex, religion, language, political or other opinion, national or social origin, birth, disability or other grounds. The list is non-exhaustive and covers all forms of direct and indirect discrimination during access to employment, working conditions and dismissals. It covers not only the traditional grounds for discrimination but also *de facto* discrimination cases, where the problem arises out of a violation of the principle of equality.[211] Prohibition of discrimination constitutes

[210] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

[211] ECSR, *Syndicat national des Professions du tourisme v. France*, Collective Complaint No. 6/1999, October 10, 2000; ECSR, *Confederazione Generale Italiana del Lavoro v. Italy,* Collective Complaint No. 91/2013, October 12, 2015.

the “effective protection” part of article 1(2).[212] In other words, effective protection of the right concerned is realized through prohibition of all forms of discrimination in the field of employment.

The ECSR defines discrimination in terms of the ESC as “a difference in treatment between people in comparable situations where it does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate to the aim pursued.”[213] Among the grounds for discrimination, the ESC puts special emphasis on discrimination on the grounds of disability and sex by ensuring the employment rights of these groups in separate articles.

Prohibition of discrimination on the ground of disability is specifically regulated in article 15, which governs the rights of persons with disabilities to independence, social integration and participation in the life of the community. The rights of persons with disabilities in employment is regulated in paragraph 2 of the article which stipulates that in relation to persons with disabilities, the states parties are under the obligation to undertake “to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level

[212] Tekin Akıllıoğlu, *Gözden Geçirilmiş Avrupa Sosyal Şartı ve Türkiye* (Ankara: İmaj, 2015), 20.
[213] Council of Europe, “Digest of the Case Law of the European Committee of Social Rights,” September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

of disability. In certain cases, such measures may require recourse to specialised placement and support services".

The promotion of equal access to employment of persons with disabilities initially requires states parties to pass legislations on the matter prohibiting discrimination both in access to employment and in cases of dismissals. Furthermore, the national legislations shall create obligations on the part of the employers to make reasonable accommodations with a view to increase accessibility for persons with disabilities.[214]

In relation to discrimination on the grounds of sex, Article 20 stipulates "the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex", identifying the obligation of the state parties "to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

> a) access to employment, protection against dismissal and occupational reintegration;
>
> b) vocational guidance, training, retraining and rehabilitation;
>
> c) terms of employment and working conditions, including remuneration;
>
> d) career development, including promotion."

This article provides protection against discrimination on the grounds of sex in all stages of employment, including access to employment, working conditions and dismissals. The states parties are under the obligation to enact detailed legislations protecting against gender discrimination in employment. Mere reference to equality

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[214] Ibid.

in the Constitution is not found adequate by the ECSR in complying with the article. The legislations shall be supported by effective implementation and remedies for individuals who encounter discriminatory acts.[215]

It should be noted that in the case where a state party has accepted one or both of the special articles concerning prohibition on the grounds of disability (article 15(2)) and gender (article 20), the supervision of prohibition of discrimination within the framework of the right to work is conducted as part of the accepted specific article. Only in the case where a state party has not accepted article 15(2) and/or article 20 does the ECSR assess conformity with prohibition of discrimination on the grounds of disability and/or sex under article 1(2), along with the other grounds for discrimination.

The second aspect of article 1(2) of the ESC is prohibition of all forms of forced or compulsory labor, which establishes the "occupation freely entered upon" part of the provision, underscoring the consent factor of the employment.[216] The objective of this aspect is to guarantee freedom to work in respect of accessing employment and termination of employment. In other words, the individual can neither be forced into entering into an employment relationship nor can he/she be forced to remain in employment which he/she had freely taken up, but no longer want to prolong. The forced labor definition adopted by the ECSR is that of the ILO' Forced Labour Convention No. 29 of 1930, which is also the definition accepted by the ECtHR. Accordingly, forced labor is defined in article 2 of the ILO Convention No. 29 as "all

[215] Ibid.
[216] Akıllıoğlu, *Gözden Geçirilmiş Avrupa Sosyal Şartı ve Türkiye,* 20.

work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." The specifics of the Convention and forced and compulsory labor will be further analyzed in Chapter 3.[217]

The ESC does not provide for a list of cases that could not be considered as forced or compulsory labor, as in the case of article 4(3) of the ECHR. However, considering the relationship between the ESC and the ECHR and having regard to the case-law of the ECSR [218], it could be concluded that the four situations provided in the ECHR are not deemed to be practices of forced or compulsory labor also in terms of the ESC. Accordingly, (1) work done in the ordinary course of detention[219], (2) compulsory military service or conscientious alternative service, (3) services exacted from persons in case of emergency or calamity, and (4) any work or service as part of normal civic obligations do not constitute forced or compulsory labor.

Having regard to the fact that prison work is a potential for exploitation in terms of forced or compulsory labor, the ECSR requires the states parties to clearly regulate the working conditions of the prisoners in detail and ensure that their employment by

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[217] See 3.2.1 below.

[218] ECSR, *Quaker Council for European Affairs v. Greece,* Collective Complaint No. 8/2000, §22, April 25, 2001.

[219] In terms of work done in the ordinary course of detention, there appears to be a divergence between the ECHR and the ILO Convention No. 29. The ECHR does not make any distinction between detainees concerning prison work. Accordingly, both those who are detained during the legal proceedings and those who are convicted can be subjected to prison work. Whereas the ILO Convention No. 29 sets forth in article 2(2)(c) that prison work may be imposed only on convicts. Therefore, the scope of application of the ECHR is broader than the ILO Convention No. 29.

the private parties are unexceptionally subject to the consent of the worker and in as similar conditions as possible to that of regular workers.[220]

The final aspect of the right to earn one’s living in an occupation freely entered upon provides general grounds for assessment of cases that do not fall under either of the above cases but still involves the right secured under article 1(2). These could involve any issue related to the right to work, including the right to private life of the worker.

A significant point is that Article 1(2) on freedom to work is established around the idea of granting the worker with the right “to earn his[221] living”. Such wording, as was also the case with the CESCR, implies the position of creating a system where individuals are not dependent on the state to survive, fulfil their needs and ensure a certain standard of living for themselves and their families. The right to work is understood not as an *opportunity* to earn one's living but as a *means* of being independent, where the state’s obligation to take care of the people within its jurisdiction is not the principle but an exception. This is also endorsed by the emphasis on *employment,* rather than *work* both in the article and in the conclusions of the ECSR, despite the usage of the wording in the title as “the right to *work*”.

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[220] Council of Europe, “Digest of the Case Law of the European Committee of Social Rights,” September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

[221] It should also be noted that as in the case of the CESCR, the choice of using a masculine language in the drafting of the ESC rather than a neutral one is a clear contradiction with the ESC's position as a social human rights instrument that is based on non-discrimination, which in fact provides an extra emphasis on gender equality.

The fact that the ECSR interprets the scope of application of the provision rather broadly is also in accord with the above interpretation. According to the ECSR, article 1(2) is interpreted as "applying across the spectrum of employment to include self-employment, domestic employment, employment in small firms, part-time employment, and within both public and private sectors."[222]

2.4.2.3. Free Employment Services

The third aspect of the right to work under the ESC is the obligation of the states to establish and maintain free employment services. The objective of the employment services is to unite job-seekers with jobs and employers with workers. Since the main purpose of such services is placement in jobs, there is no requirement for the employment service providers to also offer vocational training services. The state obligations arising out of article 1(3) of ESC is provision of at least effective basic placement services which include "registration of job-seekers and notification of vacancies"[223]. These services shall be provided free of charge.

It should be noted that the state is not under the obligation to provide such services directly as public service. Private employment agencies that charge money for their services are allowed and considered to be in compliance with the provision, provided

[222] Diamond Ashiagbor, "The Right to Work," in *Social Rights in Europe,* ed. Gráinne de Búrca and Bruno de Witte. (New York: Oxford University Press, 2005), 251.
[223] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

that there are free employment services accessible to all job-seekers and employers.[224] The requirement for the employment services to be free-of-charge for both the job-seekers and the employers is "to prevent employers passing any placement costs onto workers."[225] Furthermore, by indicating that the services shall be provided for "all" workers, the article prohibits discrimination and finds that provision of employment services limited to certain sectors is a violation of article 1(3). Due to its nature, the scope of application of article 1(3) is limited to employees and do not cover the self-employed. In other words, the obligation to establish free employment services shall not be interpreted as requiring states to also create self-employment opportunities.[226] Otherwise, the provision of employment services shall be evaluated within the framework of the principle of equality and shall be ensured for all job-seekers without discrimination, including non-nationals.

2.4.2.4. Vocational Guidance, Training and Rehabilitation

Finally, article 1(4) of the ESC requires the provision or promotion of vocational guidance, training and rehabilitation as the final aspect of the right to work. The obligation to provide such programs is intended to serve the purpose of increasing accessibility of the individuals into the labor market and broadening their opportunities through programs that aim at increasing their skills and qualifications and enabling employment opportunities, particularly for persons with disabilities.

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224 Ibid.
225 Ashiagbor, "The Right to Work," 255.
226 Harris and Darcy. *The European Social Charter*, 54.

These programs shall be directed not only to the unemployed persons seeking jobs but also to the employed persons who wish to enhance their skills and qualifications in order to broaden the scope of their eligibility for higher positions.

The significance of article 1(4) lies in the fact that its components, i.e. vocational guidance, training and rehabilitation, are regulated in more detail in the further articles of the ESC. In this regard, article 9 provides for the right to vocational guidance, article 10 for the right to vocational training and article 15(1) for the right of persons with disabilities to guidance, education and vocational training.

Vocational guidance set forth in article 9 of the ESC requires states to provide assistance free of charge "both to young persons, including schoolchildren, and to adults". In complying with their obligations, the ECSR requires states to establish vocational guidance facilities within the labor market, as well as the means to provide information on vocational training and access to vocational training within the schooling system.[227] The objective behind the provision of vocational guidance is to enable information on access to vocation, solving problems arising out of occupational choice, choosing an occupation that meets the personal capabilities and interests of the individuals, etc.

Vocational training has a close correlation to the right to education. It enables individuals with the necessary skills and qualifications, which they would put into use in the labor market. In this respect, the ECSR makes reference to the "lifelong

[227] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

learning"[228] within the framework of article 10 on the right to vocational training and adopts vocational training as covering all stages of education starting from general or vocational secondary education and as including university or other higher education institutions. Furthermore, article 10(2) requires states to establish a system of apprenticeship besides the vocational training facilities for adults. Article 10(4) makes special reference to the long-term unemployed and requires states to enable them with the means of retraining and reintegration. In realizing their obligations arising out of vocational training, the ESC imposes on the states the duty to facilitate the enjoyment of this right free of charge, where possible, and if not, requires states to reduce their fees or grant financial assistance.

Finally, article 15(1) stipulates the right to guidance, education and vocational training of persons with disabilities. The fact that persons with disabilities encounter difficulties and require special measures in the enjoyment of their right to education, the ESC recognizes its significance and regulates it separately from the general provision of the right to vocational guidance (article 9) and the right to vocational training (article 10). In this respect, the objective of article 15 in general is to ensure the proper integration of the persons with disabilities into the regular social life and to facilitate them with the opportunity to fully enjoy their rights arising out of the ESC. Accordingly, the ECSR requires that "in order to guarantee an equal and non-discriminatory treatment of persons with disabilities, mainstream and special schools must ensure adapted teaching."[229]

[228] Ibid.
[229] Ibid.

Where the state party has accepted the latter specific provisions, the supervision of conformity is made under those articles, rather than under article 1(4). In the event where the state party has not accepted the specific provisions, supervision is conducted by the ECSR under article 1(4), provided that it had been accepted by the state concerned.

2.4.3. Assessment

Being the first binding international instrument, the ESC has a detailed and well-monitored regulation of the right to work. Unlike its equivalents, the goal of full employment is not underlined as a *step* in achieving the right to work, but as a clearly recognized obligation of the states, with a view to realizing the right to work. It appears to have set its priorities on ensuring policies that aim at distancing the individual from any state support and making sure that the individual earns their living within their freely chosen or accepted occupation.

Furthermore, it is also worth mentioning that the right to work understanding under the ESC is mainly "focused on securing the *availability* and *accessibility* of work."[230] On the other hand, "acceptability" of work is distributed among the other articles of the ESC and their relation to the right to work is not directly established, contrary to the right to work regulation of the CESCR. Accordingly, the ESC does not deal directly with the working conditions within the framework of the right to work. It

[230] O'Cinneide, "The Right to Work in International Human Rights Law," 120.

restricts the definition of the right to work to access to a freely chosen or accepted employment. However, this is obviously a mere normative distinction and rights at work are secured under the ESC in detail, the violation of which will amount to a violation of the ESC and hence, be declared non-conforming by the ECSR, provided that the given state had ratified the relevant provision.

CHAPTER 3

SEEKING TO DEFINE THE RIGHT TO WORK

> "The [right to work] is not the right to any kind of work, nor is it a duty. The [right to work] should be framed as a means of deciphering work's rewarding aspects from its laborious and exploitative ones."[231]
>
> Guy Mundlak

Following the analysis of the right to work provisions of the relevant international instruments, it is established that despite few distinctions, the international platform appears to have a unified approach on what the right to work includes. On the other hand, the literal language of the international instruments on the right to work does not appear to be coherent with the interpretation established thereof. There appears to be ongoing dilemmas on the right to work, particularly concerning its implementation.

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[231] Guy Mundlak, "Working out the Right to Work in a Global Labour Market," in *The Right to Work: Legal and Philosophical Perspectives,* ed. Virginia Mantouvalou. (Portland: Hart Publishing, 2015), 312.

The objective of this chapter is to provide a different approach to the right to work by seeking to provide solutions to the problems arising out of the theoretical background of the right to work, including the value of work, as well as those arising out of the implementation of the right to work and its enjoyment at the individual level. In this respect, this chapter will firstly provide a *work* definition in terms of the right to work that represents a fair understanding of the value of work. After establishing the aspects of work, the second part of the chapter will seek to generate a right to work definition inspired by those of the international instruments analyzed in the previous chapter.

3.1. DEFINING "WORK"

Establishing a definition of work is a challenge that has been taken up by many scholars of various backgrounds throughout the history of human beings. As explained in the first chapter of this study, the value bestowed on work has a dynamic character and had direct consequences on the perception and definition of work at a given time.

The objective here is to present how *work* should be defined in terms of the right to work, within the framework of the adopted international labor law and the principles of human rights law. In this respect, work in terms of the right to work means *productive, decent* and *suitable* work. Whether work in terms of the right to work merely refers to paid work or whether it also involves unpaid work is an issue to be discussed hereunder.

3.1.1. Productive Work

Work, as we understand it today, occupies the majority of a person's life. Even education is commonly targeted towards attaining better opportunities for better jobs. Since work is an established right at the center of people's lives, it is only humane to expect that the produce of one's work has some value and a level of development may be achieved through work.

The productive characteristic of work is an underlined issue both by the ILO's relevant instruments and by the CESCR. As previously explained,[232] the ILO calls for the promotion of productive employment, which requires work that results in the production of goods or services, which is of economic value. Productivity constitutes an objective criterion. Its mere concern is the kind of activity performed by the worker and not necessarily the subjective motivations of the worker, albeit the productiveness of the work being a significant motivation on its own. However, the productiveness of work is an underlined issue because it complements the states' obligations to create jobs. All the above analyzed international instruments that regulate the obligation to aim at full employment require economic policies that seek to create productive employment with some economic value and which enables the individual to put into action their abilities to produce and contribute to the production system.

It is however difficult to consider an activity that lies within the sphere of employment and business that is of zero economic value. The economic value

[232] See 2.3.2.3 above.

criterion of work is what distinguishes work from any other activity. However, the productive aspect of work is not distinguishable in establishing the definition of work in terms of the right to work because whether done for the benefit of others or of oneself, all work is productive by definition.

In order to assess the constituents of work, the definition introduced by James W. Nickel will be taken as a reference point and each aspect will be evaluated separately. Nickel states that there are two definitions of work, one being the broad concept of "productive activity requiring effort"[233] and the other, "work in the narrow sense". Work that is of relevance to the right to work is the latter, which is defined by Nickel as "work that is in some organized form of production (…) and oriented towards generating income and making a living."[234] Nickel explains "organized" to mean that "the activities and methods of work are regular and institutionalized – and often occurring in a special workplace."[235] The results that can be reached from Nickel's two definitions of work is that firstly all work, whether paid or unpaid, is productive; in other words the aspect of *productivity* is what makes the activity "work". Secondly, the right to work deals exclusively with employment, namely paid work. The latter result, namely the claim that the definition of work in terms of the right to work is limited to paid work, is challenged in this study. The following part will discuss why unpaid work should also be involved in the work definition of the right to work.

233 James W. Nickel, "Giving Up on the Human Right to Work," in *The Right to Work: Legal and Philosophical Perspectives,* ed. Virginia Mantouvalou. (Portland: Hart Publishing, 2015), 138.
234 Ibid.
235 Ibid.

3.1.2. Paid and Unpaid Work

Although productivity apparently can be measured by the financial benefits *by* the performer, financial benefits *on the part of* the performer should not be considered as a condition for the right to work. The right to work is mostly established as merely dealing with paid work, whether as a result of employment or self-employment – an approach which is also established in Nickel's definition of work and adopted by the international instruments. The advocates of paid work underscore work's significance in providing income, which enables accession of individuals to the resources they need in order to *inter alia* secure their and their family's survival and then to further advance it.[236] However, this view has various weak points and excludes rather some significant performers of productive work, who are granted with no financial benefits in return.

It is in fact true that paid work is a significant part of the right to work because work is likely to be seen as the most important means of generating income. Regular income of an individual is a necessary tool for ensuring economic independence. Whereas economic independence presents individuals with the opportunity to enjoy their freedom from the state, as well as from other individuals – most likely their family to whom they had lived dependent on until they have declared their economic emancipation. Those without the necessary wealth to secure their and their families' subsistence are bound to depend either on the state or on others. Therefore, the majority of social and economic rights, particularly the right to adequate standards of

[236] Nickel, *Making Sense of Human Rights: Philosophical Reflections of the Universal Declaration of Human Rights*, 156-58.

living, the right to fair wage and the right to social security, are designed as human rights to ensure the *de facto* enjoyment of the right to life. However, this does not justify the exclusion of unpaid work from the scope of *work*, when establishing a definition of the right to work. As Griffin argues, "[t]here is certainly a right to the resources needed to live as an agent, but those resources do not have to come from work."[237] A balance shall be established between the right to work and other economic and social rights that seek to ensure the individual with the right to the necessary resources for subsistence.

Exclusion of unpaid work from the scope of the right to work is likely to cause various unjust consequences. An approach as such results in the disregard of some significant work, as well as in the rejection of any other means of valuing work aside from money. Considering paid work as the sole scope of the right to work means that the only accepted consideration of work is payment in terms of money; whereas work is actually a good in an individual's life that contributes to more than their economic situation. Work has at least an equal value as a contributor to a person's self-development and self-realization.

As will be further analyzed below under "Suitable Work",[238] work has contributing effects on a person's social and vocational development. Through work, individuals are given the opportunity to activate their productivity and to utilize and enhance their physical and/or intellectual capabilities, depending on the type of work. Furthermore, work is generally performed in a workplace in the presence of co-

[237] James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), 207.
[238] See 3.1.3 below.

workers, creating a social environment for individuals, where they have the chance to socialize and be part of a team, therefore contributing to their social skills.

Restricting work to paid work undermines the non-economic importance of work and depreciates various unpaid work that require at least equal amount of skills and qualifications as some paid work. Valuing work merely in terms of money also implies that it can be commensurable and thus, leads to the notion of commodification of labor. Work should be considered as *an end in itself* and *not as a means to an end*. The way to establish this is to reject the commodification of labor and to acknowledge that work creates other values, among which lies the means to approach the ultimate personal goal of self-realization.

The most obvious examples of productive and contributive (either to the self or to the society or both) work are voluntary work and traineeships/internships. Individuals are not affiliated in paid employment relationships in cases of voluntary work or traineeship, but the work they perform is not only productive, but also generally requires the presence and usage of specific skills and qualifications. Furthermore, recognizing the right to work as the right to employment, i.e. paid work, situates "money" as a constituent element of work, rather than adopting "activity" as the qualifying aspect for identifying work. This can be exemplified with the case of two painters, where one sells his/her paintings and the other merely keeps them to him/herself or distributes them for free. In both cases, the activities generate a piece of art, hence they are both productive. If *work* in terms of the right to work is restricted to paid work, only the activity of the painter who sells their paintings is defined as work and the other painter's remains a mere activity that is not eligible to qualify as *work* in terms of the right to work; only because the latter does not utilize their productive activity as an economic activity.

The work of those who perform productive work which falls outside the scope of paid work should not be taken for granted. The volunteer workers, trainees, or the work of a parent who stays at home and takes care of their children and performs housework, most of which statistically consists of women, are also worth being valued for their work. The mere fact that they do not gain any money in exchange for their work should not be an adequate reason to disqualify them from the scope of *work* in terms of the right to work. An exclusive approach as such is also likely to create *indirect discrimination* against women regarding household work and young workers, whose labors are also left out of the statistics of labor market participation. Unpaid workers' contribution to their household or self-development and to the society shall be granted with recognition and valued at least through the protection of social security systems. Individuals should be given the freedom to perform unpaid work as part of their right to work. That freedom may only be factually realized if states provide adequate living standards for people who provide their labor contribution via unpaid work. Otherwise, one may not talk about freedom to work but an indirect obligation to work in order to earn one's and his/her family's living. Such an indirect obligation to perform paid work cannot be compatible with an idea of the right to work as a human right because if a person is forced into employment against their will, one cannot talk about their right thereof.

Reviewing the right to work as an instrumental right aimed at achieving a better good, namely income which will provide the workers and their families with the adequate standards of living, is a dismissal of the necessity of declaring the right to work as a human right. The reasons thereof consist firstly of the fact that an instrumental approach leaves the individual without any means of enjoying his/her other economic and social rights in the case where he/she is unemployed. This approach results in the fact that those who cannot or do not enjoy their right to work will no longer be entitled to other economic and social rights.[239] This is obviously an unacceptable result since the individual will be left with no means to enjoy his/her human rights. The second reason is based on the fact that work is not the sole means of generating income. If an individual possesses other means that provide him/her with adequate wealth, there would be no point in a human right to work for that person.[240] Therefore, the right to work should be considered as a good in itself rather than as a generator of an alternative good. The right to work makes sense when *work* is valued for its productiveness only, rather than for being an element of employment.

The international human rights instruments that set forth economic and social rights are based on the idea of a social state. The right to work is not established as the sole source of enjoying one's economic and social rights, albeit employment does in fact pave the way for it. A social state is designed to demonstrate a protective profile and to enable its people with the opportunity to enjoy their economic and social rights regardless of their employment status. Indeed, the economic and social rights instruments govern the rights to social security, housing, food, healthcare services,

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239 Umut Omay, *Sosyal Haklar: Kısa ve Eleştirel Bir Bakış* (Istanbul: Beta, 2011), 68.
240 Hugh Collins, "Is There a Human Right to Work?," in *The Right to Work: Legal and Philosophical Perspectives,* ed. Virginia Mantouvalou. (Portland: Hart Publishing, 2015), 20.

education, adequate standards of living and even the right to a fair share of the national income, alongside the right to work.[241]

Understanding the right to work as the right to employment is not compatible with the holistic approach of human rights because it indirectly adopts other economic and social rights as the negative condition of the right to work. States are under the obligation to ensure the subsistence of their people if they lack the means for it. However, the established understanding deriving from the Declaration of the Rights of Man and Citizen of 1793 is that the right to work is a substitute of the right to benefit from public benefits.[242] In other words, individuals are protected by the state in cases where they cannot enjoy their right to work. This is a contradictory approach in many aspects. The adopted policies may and in fact, shall target the creation of employment with a view to ensure self-subsistence rather than being dependent on the state, however if all economic and social rights are accepted to be of equal value, the enjoyment of other economic and social rights shall not be conditional on the failure of the enjoyment of the right to work. The enjoyment of all human rights shall be cumulative and not competitive. There is no point in having a right to work as a positive right if it cannot be secured. Provision of economic and social rights by the state shall not be a compromise for the non-enjoyment of the right to work. The way to avoid this is to acknowledge other interests protected by the right to work, rather than adopting it as a source of income that enables the enjoyment of other economic

[241] These principles are also adopted by the Turkish Constitutional Court to be the constituents of a social state governed by the rule of law. AYM, 18.12.2008 T., 2005/2 E., 2008/181 K., R.G, 07.10.2009, S. 27369.
[242] Şebnem Gökçeoğlu Balcı, "Çalışma Hakkını Yeniden Düşünmek," in *Prof. Dr. Ali Güzel'e Armağan,* ed. Talat Canbolat (Istanbul: Beta, 2010), 1: 286.

and social rights. The income generating characteristic of work should not be directly relevant in establishing the normative content of the right to work.

It should be noted that the traditional approach to work as paid work that was majorly adopted in the international platform appears to show signs of a shift in favor of unpaid work. The increased voices of concern by a group of scholars as a result of the exclusion of unpaid workers from the protection provided to paid workers is generating positive results. Among these, the most significant and explicit development appear to be introduced by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 23 of 2016. For the first time, the Committee recognized unpaid work expressively within the framework of the protection set forth in the CESCR and included a special sub-title exclusively for unpaid workers.[243]

As a result, unpaid productive work is not of any less value than paid work. The right to work in this regard shall not be understood necessarily as the right to paid work but the right to *any* productive work. The right to work should not be confused with the right to an adequate standard of living and the right to an adequate standard of living should not be dependent on one's paid work. These are separate rights that shall be ensured by the states. The contributive aspect of any work shall be recognized and the individual shall have adequate guarantees to make the free choice

[243] Under the sub-title of "unpaid workers", the Committee provided the following: "Women work in activities that are significant for their households and the national economy, and they spend twice as much time as men in unpaid work. Unpaid workers, such as workers in the home or in family enterprises, volunteer workers and unpaid interns, have remained beyond the coverage of ILO conventions and national legislation. They have a right to just and favourable conditions of work and should be protected by laws and policies on occupational safety and health, rest and leisure, and reasonable limitations on working hours, as well as social security." UN Committee on Economic, Social and Cultural Rights, "General Comment No. 23," para. 47(j).

of performing either unpaid or paid work. In order to accomplish free choice of the type of work and thus to promote freedom to work, states shall at least award unpaid productive work, either through financial or other in-kind benefits.

3.1.3. Suitable Work

Gerhard Stuby defines the right to work as the right of each citizen, who is willing and capable, to find a suitable work that is in accordance with their qualifications.[244] In other words, the right to work should be read as the right to suitable work. Suitable work has two sides, one being *subjective* and the other *objective*. The subjectivity of suitable work deals with the motivations of the worker and takes into account their subjective stimulators while performing a specific work. The objective side of suitable work is also established within the sphere of the worker but deals with the skills and qualifications of the worker, rather than with their personal feelings and motivations.

The subjective aspect of suitable work asserts that work performed by workers should meet their motivations and workers should have a level of satisfaction in what they do. Since work is likely to dominate a person's life, at least in terms of the hours spent, it is expected that work should not create any psychological burden on the worker and should be able to meet his/her internal expectations. With regard to this

[244] Gerhard Stuby, "Das Recht auf Arbeit als Grundrecht und als internationales Menschenrecht," in *Recht auf Arbeit – eine politische Herausforderung,* ed. Udo Achten (Neuwied: Luchterhand, 1978), 75. (The original German text: "… die Sicherung des Rechtes auf Arbeit, d.h. des Rechtes jedes arbeitsfähigen und arbeitswilligen Bürgers, eine seiner Ausbildung entsprechende zumutbare Arbeit zu finden…")

issue, Gregory Pence introduces a categorization of work according to the level of satisfaction it grants its performer with. Instead of taking the objective criterion of "productivity" as an economic concept, he deals more with the "motivation" aspect of work. He places work into three different categories: labor, workmanship and callings.[245] In his categorization, Pence defines *labor* as an activity that is generally "(1) repetitious, (2) not intrinsically satisfying, (3) done out of necessity; (…) involves (4) few higher human faculties, and (5) little choice about how and when the work is done."[246] *Workmanship* on the other hand requires "(1) use of higher human faculties, (2) some intrinsic satisfaction in the activity itself, (3) some degree of choice about when work is done and how, (4) pride of the worker in the products of his work."[247] Finally, Pence defines *callings* as the type of activities, which fully have intrinsic satisfaction and which are considered by the worker as the products of their unique abilities. As the definitions also imply, callings are the most superior, followed by workmanship and labor, respectively.[248]

While making these distinctions, Pence underscores the issue that this categorization is not based on the activity *per se,* but rather on what the activity means personally to the performer. In other words, the feelings of the performer and the pleasure he/she gains are the determinants of qualifying an activity either as labor, workmanship or a calling. Among these, workmanships and callings are considered to be suitable work and hence constitute the "work" definition in terms of the right to work.

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[245] Gregory Pence, "Towards a Theory of Work," in *Philosophy and the Problems of Work: A Reader,* ed. Kory Schaff. (Oxford: Rowman & Littlefield Publishers, 2001), 93.
[246] Ibid.
[247] Ibid., 94.
[248] Ibid.

The objective aspect of suitable work is the requirement of providing workers with a type of work and a working environment in which they can utilize their existing skills and qualifications and to further enhance them. The workplace for workers should be an environment where they can make achievements contributing to their self-development and self-realization. The means of realizing this goal is through providing the worker with work that in fact requires the utilization of skills and qualifications in accordance with the worker's previous trainings and knowledge. Work should also provide workers with the means to develop their professional knowledge and skills through the promotion of vocational trainings and other personal development programs.

It should be noted that the function of work as a contributor to self-development and eventually to self-realization is not limited to the worker's skills and capabilities concerning the work performed, but also includes socialization. The traditional working environment provides workers with a social environment, in which they have the chance to enhance their social skills. The significance of work in this sense is such an established notion that the ECtHR introduces the working lives of the individuals within the definition of private life, and accordingly includes the right to work within the scope of application of article 8 of the ECHR.[249] In this respect the Court confirms that "in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with

[249] ECtHR, *Niemietz v. Germany*, no. 13710/88, 16.12.1992, § 29; ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 27.05.2013, § 165; ECtHR, *C. v. Belgium*, no. 21794/93, 07.08.1996, § 25; ECtHR, *Schüth v. Germany,* no. 1620/09, 23.09.2010, § 53; ECtHR, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 27.10.2004, § 43; ECtHR, *Pretty v. the United Kingdom,* no. 2346/02, 29.07.2002, § 61.

the outside world."[250] Therefore, certain aspects of the right to work[251] are directly secured through the right to respect for private life and are considered by the ECtHR to be protected by the ECHR.

As a result, work should not be conceived as a mere activity of the worker. Workplaces should also be recognized as learning environments for workers and both the work performed and the workplace should be organized with the acknowledgment of their effect on self-development. If the work performed by workers requires the utilization of their skills and qualifications by providing the means to enable their self-development, the subjective aspect of suitable work, i.e. motivation, is likely to be satisfied alongside the objective aspect.

3.1.4. Decent Work

Finally, the right to work should be understood within the context of decent work. This means that the beneficiary of the right to work should be entitled to decent work. It should be noted that decent work is a broad concept with different levels of application. According to the ILO, the right to a freely chosen or accepted work is a significant dimension of decent work.

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[250] ECtHR, *Niemietz v. Germany*, § 29.

[251] ECtHR considers the right to access work and various cases of unfair dismissals to have direct consequences on the private life of the individual and therefore, decides on such cases within the framework of the right to respect for private life set forth in article 8 of the ECHR.

In defining work within the meaning of decent work, the ILO also refers to the work definition adopted in this study as "encompassing all forms of economic activity, including self-employment, economic unpaid family work and wage employment in both the informal and formal sectors."[252] Although it covers all types of work (wage-earning work, self-employment and unpaid work) within the framework of the right to work, some aspects of it by their nature are not directly applicable to unpaid work and even self-employment. These aspects are generally those that deal with the conditions of employment and the rights of workers arising out of their contracts for employment, such as fair wage. It is a concept that puts special emphasis on human dignity at work and seeks to eliminate any level of exploitation and degrading instances arising out of the employment relationship.

As in the case of the UDHR, some scholarly definitions of the right to work also include decent work as an aspect of the right to work.[253] They indicate that the realization of the right to work goes through, among others, the realization of decent work. Although the assertion is true, the systematization is subject to criticism. Decent work and the right to work certainly have pivotal intersecting points, however decent work possesses some unique discrete areas. It is a broad concept and indeed encapsulates the right to a freely accepted wage-earning work. One may not talk about decent work in the absence of a freely chosen or accepted work. Nonetheless, a

[252] Richard Anker et al., "Measuring Decent Work with Statistical Indicators" (Working Paper No. 2, Policy Integration Department, Statistical Development and Analysis Group, International Labour Office, Geneva, 2002), 2.

[253] Philip Harvey, "Benchmarking the Right to Work," in *Economic Rights: Conceptual, Measurement, and Policy Issues,* ed. Shareen Hertel, and Lanse Minkler (New York: Cambridge University Press, 2007), 123; Seçkin Nazlı, *Anayasanın Çalışma Hak ve Özgürlüğüne İlişkin Düzenlemelerinin İş Hukukuna Etkileri* (Ankara: Seçkin, 2015), 40; Murat Şen, "İnsan Hakları Bağlamında Çalışma Hakkı," *MÜHFD* 2 no. 2 (2013): 19.

significant amount of rights dealt with within the framework of decent work are rights at work, i.e. conditions of work, which are not directly secured by the right to work, but through the right to just and favorable conditions of work. If anything, the right to work may be an aspect of decent work, but not the other way around. In this respect, the right to decent work as an aspect of realizing the right to work is illogical.

Furthermore, as will be further analyzed below,[254] decent work is one end of a large spectrum with forced labor on the opposite end. Minor violations of the right to decent work that have remedies merely within labor law and do not require the intervention of criminal law are also on this spectrum and are also deemed violations of the right to decent work. When the right to decent work is taken as an element of the right to work, even such minor violations which are easily remediable will amount to declaring a violation of the right to work. This would obviously be an exaggeration because one cannot claim a violation of their human right to a freely chosen or accepted work merely because one of their rights-at-work had been infringed. As Griffin explains, "human rights have to do with a certain minimum – the minimum proximately necessary for normative agency."[255] Those below such minimum are not deemed *human* rights, albeit bearing the characteristic of still being *rights*.

It is argued in this study that decent work is assumed in the definition of work rather than in that of the right to work. The right to work should be read as to mean the

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[254] See 3.2.1.6 below.
[255] Griffin, *On Human Rights*, 187.

right to decent work. If work is not decent, then one cannot talk about the right to work because there could not be a right to an exploitative work. Obviously, the right to work has to be the right to decent work. The significance of decent work lies with its intertwined relationship with human dignity because decent work in the most basic sense refers to *dignified work.* Work is such a personal and a dominating aspect of a person's life and it is so vulnerable against possible exploitative acts that any negative interference thereto amounts to an interference to personal rights. Individuals have a personal right over their work and their *dynamic personality,* which refers to their place within the society earned as a result of utilizing their abilities.[256] The emphasis on personal rights within the framework of a person's work derives from the notion of human dignity.[257] It is this characteristic of work that influences the judgments of the ECtHR and leads it to observe cases involving the right to work within the framework the right to private life.[258]

The objective of the notion of decent work is to promote the performance of work without prejudice to human dignity. As a result of the expansiveness of work related issues that may have direct or indirect effect on human dignity, the aspects that make a given work decent cannot be determined in an exhaustive manner. They are more likely to be identified *ipso facto.* Nonetheless, as a commonly highlighted and gradually developing aspect of decent work that also has traces in suitable work, the right to development earns special reference.

[256] Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku Cilt II Kişiler Hukuku* (Istanbul: Filiz, 2016), 142
[257] Şükran Ertürk, *İş İlişkisinde Temel Haklar* (Ankara: Seçkin, 2002), 51.
[258] See 3.1.3 above.

Work's significance as a prominent contributor to development is an established notion. Therefore, one of the requirements of decent work is to promote work that can facilitate the individual with the opportunity to realize self-development. The right to development cannot be liberalized from decent work. This intertwined relationship between work and the right to development is recognized in the UN Declaration on the Right to Development of December 4, 1986.[259] Accordingly, access to employment as a means of income and in which the individual may utilize and enhance his/her skills and qualifications lies among the primary means of realizing the right to development.

3.2. DEFINING THE RIGHT TO WORK

The significance of the right to work and the necessity to regulate this right as a social human right instrument lies with the objective of eliminating labor that is involuntary and against human dignity. Since labor is one of the most likely exploited characteristic of human beings, it requires a protection system that is well-structured and that establishes balance between freedom of contract and state intervention.

Although there were arguments, particularly during the Cold War period, concerning the obligatory character of work, such approach appears to have been deserted in

[259] Article 8 of this Declaration sets forth the following: "States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income." United Nations General Assembly, A/RES/41/128, "Declaration on the Right to Development," December 4, 1986.

favor of the voluntariness of work. With the emergence of economic and social rights as human rights, states are now under the obligation to look after their people and provide for their survival, at minimum. The individual economic and social rights of social security and to an adequate standard of living – among others – guaranteed under the established economic and social human rights instruments, declare the state as the primary obligator and the source of people's fundamental needs. This means that the commonly accepted and voiced assertion that "work provides the sole income of workers in order to ensure their and their family's survival" is *in theory* a *false* statement, although it may be true in the majority of cases *in practice*.

Nonetheless, the right to work is guaranteed in the international instruments that also ensure other economic and social rights and promote the founding of a *social state*. The objective of a social state is to ensure the subsistence of its people through the provision of basic services with a view to secure their economic and social rights. Within this framework, it would be illogical to assume that work is intended to be the sole source of subsistence. The fact that the right to work is regulated as an economic and social right implies that the purpose of work should be more than providing the means of survival. Otherwise, work would be an obligation (not necessarily a legal obligation but a *de facto* obligation) and there would be no point in naming it a *right* and granting it a status of a human right. What is intended to be underlined with the right to work is that work should be performed *voluntarily*. Furthermore, the elements of work indicated above (productive, paid or unpaid, suitable and decent)[260]

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[260] See 3.1 above.

endorse the voluntariness of work, because it would be unlikely to talk about consented work which is not suitable and/or not decent.

Consequently, the right to work is not the right to any kind of work but the right to a consented work, in other words the right to a *freely chosen or accepted* work. The right to a freely chosen or accepted work[261] shall be understood as a broad concept, which includes prohibition of slavery, forced and compulsory labor, the right to engage in work of one's own choosing, the right to remain in work, i.e. the right to protection of employment and the right to terminate work.

3.2.1. Prohibition of Slavery, Forced and Compulsory Labor

Prohibition of slavery, forced and compulsory labor constitutes the negative element of the right to work. In this sense, it requires states to refrain from practices that amount to coercion into labor and also to preclude third parties from engaging in such actions. Freedom from slavery, forced or compulsory labor categorically falls under civil and political rights and therefore, it is secured and referred to in almost all human rights instruments, including article 4 of the ECHR. It seeks to protect individuals from being coerced into labor and being kept in labor with the purpose of exploitation of them or of their labor. In addition to the international institutions that

[261] It should be noted that the right to freely chosen or accepted work by definition regulates two situations of chosen work and accepted work. "Chosen work" refers to the self-employed, in other words their freedom of establishment as an aspect of the right to work; whereas "accepted work" covers those who are employed by third parties as part of an employment contract.

explicitly prohibit any practices that coercively retrieve labor, the modern democratic states also recognize this prohibition in their constitutions.

An issue that needs to be addressed is that the states' obligations arising from prohibition of slavery and forced labor are not limited to the negative obligation to refrain from enforcing practices that may amount to slavery, practices similar to slavery or forced labor. States' obligations also cover positive obligation to pass legislations that would penalize such actions by the third parties and ensure their enforcement.[262] In this respect, with a view to eliminate all forms of slavery and forced labor, the penalties and remedies introduced by states shall be effective and serve the ultimate purpose fully.

There appears to be an argument concerning the legal basis of prohibition of slavery, forced or compulsory labor. An opinion on the issue claims that prohibition of coercion into labor can be explained through freedom of contract and that freedom of work does not need to be referred to. In this context, Shim argues that "free choice of occupation as the absence of physical coercion can be secured with reference to freedom of contract alone and accordingly there is little scope for the freedom of work independent of freedom of contract."[263] Accordingly, it is stated that since a coerced employment relationship is by definition concluded in the absence of free-will, it is a violation of freedom of contract. Therefore, it falls under the protection of freedom of contract.

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[262] ECtHR, *Siliadin v. France,* no. 7331/01, 26.10.2005, §27.
[263] Jaejin Shim, "Equality of the Right to Work? Explanation and Justification of Anti-Discrimination Rights in Employment" (PhD diss., LSE, 2008), 111, http://etheses.lse.ac.uk/2176/1/U613408.pdf.

Even though this assertion appears to be valid in theory, the past experience on *freedom of contract* based employment relationships indicates otherwise. The whole purpose of state intervention in the employment relationships, and hence the creation of labor law and thus the protection of workers, arose from the injustices which derived from a freedom of contract approach. Whether one argues that the purpose of labor law is actually to establish freedom of contract by providing the worker with the minimum and a sphere of negotiating conditions of work or that it is simply to protect the worker from being exploited by the employer, freedom of contract falls short of explaining freedom from slavery and forced labor.

Freedom of contract is associated with private law relations and is a principle of contract law which asserts that what makes a contract valid is the presence of coinciding wills. Accordingly, its remedies are in principle found within the sphere of private law. On the other hand, the main interest intended to be protected by prohibiting slavery and forced labor is not the *will* of the worker but *human dignity* that will be infringed as a result of exploitation. Freedom from slavery and forced labor is not directly concerned about the *validity* of the contract between the worker and the employer. It is more concerned with the existence of such a relationship despite its unrecognition by the state. Rendering an action of slavery or forced labor invalid can be explained through freedom of contract but it is not the protection that is sought by freedom from slavery and forced labor. A person being subjected to slavery or forced labor cannot be protected by mere *invalidity*. These practices create a situation where the victim is no longer a subject of rights and freedoms and can no longer enjoy their human rights.[264] Furthermore, the fact that there are continuing practices of slavery-like or forced labor practices in the world require special attention, which would likely have a weak influence if they were to be protected within the context of freedom of contract. Therefore, there are legitimate reasons to distinguish work related rights from the sphere of freedom of contract.

The right to work, on the other hand, combines the *consent* aspect of a contractual relationship with *human dignity* that is intended to be protected through national and international norms and principles. It is why the right to work is an internationally recognized human right and why prohibition of slavery and forced labor – the worst forms of violations of the right to work – are independently ensured in civil and political human rights instruments.

3.2.1.1. Slavery

Slavery is defined in the League of Nations Slavery Convention of September 25, 1926 as "the status or the condition of a person over whom any or all of the powers attaching to the right of ownership is exercised." Being among the earliest human rights conventions, the slavery definition provided in this convention has been maintained to date and even confirmed with an additional reference to human trafficking in the 1998 Rome Statute establishing the International Criminal Court. The material substance of the 1926 Slavery Convention has been subjected to

[264] Michael Krennerich, *Soziale Menschenrechte: Zwischen Recht und Politik* (Schwalbach: Wochenschau Verlag, 2013), 160.

expansion with a supplementary convention thereto. Accordingly, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery establishes four “practices similar to slavery” and hence, broadens the scope of the Slavery Convention of 1926. These are listed as debt bondage, serfdom, servile marriage and child exploitation

It can be derived from the slavery definition that there are two main constituents that require explanation: “the status or the condition of a person” and “powers attaching to the right of ownership”.

3.2.1.1.1. Status or Condition

The slavery definition involves either a “status” or a “condition” of a person, over whom any or all of the powers attaching to the right of ownership are exercised. The fact that the 1926 Convention specifically uses these phrases indicates that it distinguishes the status from that of the condition of slavery.

The purpose of such distinction is to point out the fact that both *de jure* slavery and *de facto* slavery are included in the definition of slavery and therefore, fall within the scope and application of the 1926 Convention. This means that the 1926 Convention aims at the abolition of slavery in two ways. Firstly, in the legal sense, which means that states shall provide no legal recognition of slavery and ensure this through legislative initiatives. Secondly, the 1926 Convention aims at the abolition of slavery in practice, which may arise either as a result of customs or practices of private persons.

Such formulation of the definition of slavery guarantees the applicability of the Convention to practices that although do not legally attribute the slavery status to the victim, bear aspects that may otherwise be defined as slavery. Therefore, the scope of application of the Convention extends to more concrete problems.[265]

3.2.1.1.2. Powers Attaching to the Right of Ownership

This aspect of slavery has been a subject matter of many controversies. The fact that the "powers attaching to the right of ownership" remains on one hand a legal phenomenon but on the other a general abstract description, leads to the absence of clarification of which acts constitute slavery and which acts do not. In the slavery definition of the 1926 Convention "… no real criteria are provided by 'the exercise of powers attaching to ownership' so that any application of the definition of slavery

[265] This argument is explicitly formulated in the The Queen v. Tang judgment of the High Court of Australia: "Status is a legal concept. Since the legal status of slavery did not exist in many parts of the world, and since it was intended that it would cease to exist everywhere, the evident purpose of the reference to 'condition' was to cover slavery *de facto* as well as *de jure*. This is hardly surprising. The declared aim of the parties to the Convention was to secure the complete suppression of slavery in all its forms, and to prevent forced labour from developing into conditions analogous to slavery. They undertook to bring about 'the complete abolition of slavery in all its form'. It would have been a pitiful effort towards the achievement of those ends to construct a Convention that dealt only with questions of legal status. The slave trade was not, and is not, something that could be suppressed merely by withdrawal of legal recognition of the incidents of slavery. It is one thing to withdraw legal recognition of slavery; it is another thing to suppress it. The Convention aimed to do both." The Queen v. Tang, [2008] H.C.A. 39.

descends into a sort of 'I know it when I see it'…"[266] Therefore, many scholars and practitioners have sought to establish an explanation of this aspect with a view to confer it some substance.[267]

The main reference point in explaining the meaning of "powers attaching to the right of ownership" lies with the notion of *de jure* slavery. As previously expressed, *de jure* slavery is no longer recognized in the modern legal systems. Whatever the circumstances, no legal system will grant a person a right of ownership or any powers attaching thereto over another person. However, this does not hinder the possibility of *de facto* slavery, where the exercise of any power that is analogous to the right of ownership is found adequate to constitute slavery. Therefore, the slavery definition does not directly require the right of ownership but "the powers attached" thereto.

According to Allain and Hickey, the meaning attributed to the "powers attaching to the right of ownership" is built around the concept of *control*. Regardless of whether the control has a legal basis or is merely a *de facto* situation, the control of one

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[266] J.E. Penner, "The Concept of Property and the Concept of Slavery1," in *The Legal Understanding of Slavery: From the Historical to the Contemporary,* ed. Jean Allain. (Oxford: Oxford University Press, 2012), 248.

[267] In order to clarify the meaning of the "powers attached to the right of ownership", the 1953 Report of the UN Secretary-General provides for the characteristics of such powers in a six points list, which sets forth the following:
"1. the individual of servile status may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than which might be expressly provided by law;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted ipso facto to descendants of the individual having such status."
UN Economic and Social Council, E/2357, "Slavery, the Slave Trade, and Other Forms of Servitude," 27 January 1953, 28.

person over another and the restriction of the other person's liberty amounts to an act of slavery. "In objecting to slavery, we object principally to the subjection of one person to another, to the inroads on the freedom of that person that come when she is controlled or used in ways inconsistent with her choosing and inimical to her plans for life. It follows that any enquiry to the existence of slavery should be concerned first with the real, factual existence of such constraints."[268] Restricting a person by making him/her subject to another against his/her will shall be adequate to raise the question of slavery.

A similar view is supported by the Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, which is adopted with the purpose of clarifying the legal measures as to what constitutes "powers attaching to the right of ownership". As Allain and Hickey, the Bellagio-Harvard Guidelines place the "control of another" as the foundation of ownership but also emphasize that such control shall be "tantamount to possession".[269]

Penner develops this interpretation and asserts that the criterion is not the *de facto* control analogous to possession *per se*, but rather "a *de facto right* to immediate, exclusive possession of a person."[270] He articulates that *de facto* right refers to a *de facto* norm and the way that such a *de facto* norm can be possible "is to show that that person is subject to the exercise of powers of ownership. This is so because the

[268] Jean Allain and Robin Hickey, "Property and the Definition of Slavery," *International and Comparative Law Quarteryly* 61 (2012): 929.
[269] Guideline 2 stipulates the following: "In cases of slavery, the exercise of 'the powers attaching to the right of ownership' should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually this exercise will be supported by and obtained through means such as violent force, deception and/or coercion."
[270] Penner, "The Concept of Property and the Concept of Slavery1," 250.

exercise of *powers* is inherently normative in the way that taking advantage of rights is not."[271] Accordingly, *de facto* slavery exists only where there is a *de facto* norm that generates a *de facto* right, no matter how exploitative an act is. In order for a person to have a *de facto* right over another, Penner requires the existence of at least another party who recognizes such a right and powers arising thereof.

3.2.1.2. Contemporary Forms of Slavery

The absence of practices of *de jure* slavery but the emergence of new practices that bear similarities with *de facto* slavery but are not as exploitative had left the 1926 Slavery Convention lacking in responding to problems arising out of different practices. This situation led the international community to adopt the Supplementary Convention of 1956 to the 1926 Convention, where abolition of practices similar to slavery has been targeted. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was adopted in Geneva on 7th of September 1956 and came into force on 30th of April 1957. Article 1 of the Supplementary Convention defines four practices similar to slavery, namely debt bondage, serfdom, servile marriage and child exploitation.

Debt bondage or bonded labor is a form of forced labor, where a person is forced into providing their labor without a fair remuneration as a consideration. It is defined in the Supplementary Convention as "the status or condition arising from a pledge by a

[271] Ibid.

debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined". This definition regulates two forms of debt bondage: one where "the value of those services is not applied towards the liquidation of the debt" and another where "the length and nature of those services are not respectively limited and defined".

The first form of debt bondage identifies the situation where the debtor provides his/her labor or that of the person under his/her control as a security to the claimant for his/her debt, but where his/her labor is not meant to account for the payment for the debt or becomes practically impossible to be. There are many variations of this practice. One case may involve a situation where the interest rate for the debt (which may arise out of an advance wage payment in the first place) is so high and/or the wage earned is so low that the debtor becomes bound to work indefinitely for the claimant. Another example involves the case where the debtor's labor power as a security is considered to be the property of the claimant, hence making it impossible for the debtor to work at another job in order to earn the money needed to pay his/her debt.

The second form of debt bondage refers to the situation where the labor performed by the debtor for the claimant is agreed to serve the purpose of paying the debtor's debt, but the absence of a clearly established duration and the amount of work to be performed leads to the debtor being unable to pay his/her debt in full and becoming bound to work for an unreasonable amount of time and even for the rest of his/her life and that of his/her heirs. The article on debt bondage does not prohibit working to pay off one's debt *per se* but requires such work to be definite in terms of time and the amount of work to be performed.

With a view to eliminate the practices of debt bondage, states are under the obligation to ensure that workers are paid remuneration in cash and in the amount that will secure them from the possibility of being subjected to bonded labor. Protection of wages from any possible exploitation by the employers secures workers from being trapped in employment. The objective behind the states' intervention in employment relationships, namely the purpose of labor law is to establish rules and principles that protect the worker from the power holding employer.

Serfdom is the second contemporary form of slavery. It is defined as "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate services to such other person, whether for reward or not, and is not free to change his status". The practices of serfdom are encountered mainly in agricultural areas and just like debt bondage, it is also a form of forced labor. What specifies serfdom is the inability of serfs to abandon and change their status, which results in them being tied to the land and to the landowner. The labor of the serf may change depending on the relationship with the landowner and may include sharing of crops, doing domestic work or other work requested by the landowner.[272]

[272] Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, "Abolishing Slavery and its Contemporary Forms," New York and Geneva: 2002, 11.

With regard to servile marriage, the Supplementary Convention lists three institutions and practices that amount to this practice. The first of those institutions and practices prohibits the case where “(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group”. The main point here that leads to the prohibition of the institution or practice is the absence of the woman’s consent in marriage. The fact that the woman is forced into marriage in exchange for payment to “her parents, guardian, family or any other person or group”, makes the woman an object of purchase and thus, commodifies her. The second prohibition in relation to servile marriage is the institution or practice whereby, “(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise”. Similar to the previous case, such practice also commodifies the woman and is therefore, considered to be a practice similar to slavery. In the final form of prohibition, “(iii) A woman on the death of her husband is liable to be inherited by another person”. This final institution or practice of servile marriage is called *levirate* and makes the woman the wife of the person who inherited her. This is also a form of forced marriage, meaning that it is realized in the absence of the woman’s consent and again, considers the woman a commodity by making her an object of inheritance.

Finally, child exploitation is defined as “Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.” This definition of child exploitation establishes the essence of trafficking in persons. In this case, the Supplementary Convention covers merely child trafficking, without specifically naming it as such, and refrains from regulating trafficking in general, leaving it to be covered by the subsequent international instruments.

3.2.1.3. Trafficking in Persons

The internationally accepted definition of trafficking in persons is provided in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime of November 15, 2000, otherwise known as the 2000 Palermo Protocol. According to article 3, trafficking in persons "shall mean the recruitment, transportation, transfer, harbouring or receipt of 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." It could be derived from the definition that trafficking in persons consists of three aspects: the acts of "recruitment, transportation, transfer, harbouring or receipt" of a person, the means of such acts, and the purpose of exploitation.

The first aspect defines the types of actions that lead to trafficking. Committing one of these acts of movement of persons, i.e. either recruitment, transportation, transfer, harboring or receipt of a person, is adequate in qualifying for an act of trafficking. However, paragraph (c) of the article indicates that when a child is the subject of trafficking, the means of "recruitment, transportation, transfer, harbouring or receipt" mentioned in the definition are not required for the act to constitute child trafficking. Therefore, one does not seek the existence of this element in naming an act child trafficking.[273]

The second aspect provides the means of achieving the above listed acts. Such means involve using methods that impair the consent of the person in engaging in trafficking as a victim. In other words, the victim shall be forced into the listed acts and the forcing shall be a result 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". The existence of any of these forms of coercion obliterates the presence of consent of the victim. One cannot talk about consent under coercion. Yet, with a view to underline the issue, paragraph (b) of the given article of the Protocol indicates that the consent of the victim shall be irrelevant where the listed means of coercion are present in an act of trafficking. The same conclusion would have been reached anyway had that provision not be present.[274]

[273] It should be noted that those to whom the Protocol refers to as children are persons under the age of 18.

[274] "Labour trafficking should not, in theory, take place if the jobseeker has freedom of geographical movement and freedom of access to employment. It occurs because: the worker is below the legal minimum age of employment; the employment is itself illegal; the conditions of work are worse than those prescribed by law; or the worker seeks to reach a country where there are barriers to legal migration. And finally, of course, it exists because someone can make a profit from the exploitation of these imbalances." ILC, 89th Session, Report I(B), "Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work," Geneva: 2001, para. 168.

The final aspect of trafficking in persons refers to the purpose of the action, i.e. the purpose of exploitation. The Protocol lists a few examples of what constitute exploitation in the second sentence of article 3(a). Accordingly, “[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. Given that the language of the article uses “at a minimum”, the list shall not be considered as exhaustive. Motives of similar characteristics would also suffice to satisfy the “objective” aspect of trafficking in persons.

Human trafficking is one of the most common and diverse practices of human exploitation. The most typical practice involves trafficking in women for prostitution, trafficking in children for labor, prostitution and child pornography. It derives from taking advantage of a person in a vulnerable situation, whether economically, socially or personally.

3.2.1.4. Forced and Compulsory Labor

Forced labor is a general concept which, depending on the specificities of a case, may encapsulate some of the above mentioned forms of enslavement or practices similar to slavery.[275] Yet, although forced labor is not mutually exclusive with slavery and similar practices, it covers a wide range of cases and practices that do not

[275] See 3.2.1.1, 3.2.1.2 and 3.2.1.3 above.

necessarily fall within the scope of slavery or practices similar to slavery. In this respect, forced labor is a broader concept than slavery and slavery-like practices. Forced Labor is defined in the ILO's Forced Labour Convention (No. 29) of 1930 as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Three elements can be derived from the definition that require separate explanation and assessment: "all work or service", "menace of any penalty" and "involuntary offer". The intention behind the usage of the phrase "all work or service" is to cover all activities performed by the laborer. The type of the activity is irrelevant to deem it forced labor as long as it is some form of labor. It can be in the form of manual or intellectual labor or service.[276]

The second element of forced labor is "menace of any penalty". This element, together with the third element, namely "involuntary offer", constitute the part of the forced labor which deems it "forced". These two elements refer to the fact that labor is exacted in the absence of the performer's consent. The menace of a penalty refers to a threat that victims are likely to encounter if they refuse to perform the work asked of them. It is the aspect of forced labor which results in the coercion of the laborer to remain in work. Apart from physical or psychological violence and penal sanctions, such penalty may also be of the nature of "loss of rights or privileges."[277]

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[276] According to the Committee of Experts of the ILO, "all work or service" shall not be interpreted as to include compulsory education, as this is accepted as the means to realize the right to education, and that "a compulsory scheme of vocational training, by analogy with and considered as an extension to compulsory general education, does not constitute compulsory work or service within the meaning of Convention No. 29" ILC, 96th Session, Report III (Part 1B), "General Survey concerning the Forced Labour Convention, 1930 (No.29), and the Abolition of Forced Labour Convention, 1957 (No. 105)," Geneva: 2007, para. 36.

[277] Ibid., para. 37.

The menace of penalty in question may or may not have a legal basis. The mere fact that the victim is made to believe in the existence of a penalty is adequate in qualifying the work or service as forced labor. Accordingly, in the case of *Siliadin v. France* the ECtHR finds that the penalty condition will be satisfied if the victim is "in an equivalent situation in terms of the perceived seriousness of the threat."[278] In other words, the menace of a penalty is deemed to exist even where it is the subjective perception of the victim, rather than a real, solid threat.[279]

The third and the final element of forced labor is the victim's "involuntary offer" of his/her work or service. Although it has a similar connotation with "menace of any penalty" in the sense that they both injure consent, the difference arises in their timing. While menace of penalty aims at maintaining the victim in forced labor, "involuntary offer" exists at the beginning of the relationship. In other words, the victim does not enter into the forced labor at their own will but by force.[280]

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[278] ECtHR, *Siliadin v. France,* §118.

[279] The ILO has developed a list of circumstances that lead to the identification of the "menace of a penalty". In case of "actual presence or credible threat of" the following, this element of forced labor may be considered to be satisfied: "Physical violence against worker or family or close associates, sexual violence, (threat of) supernatural retaliation, imprisonment or other physical confinement, financial penalties, denunciation to authorities (police, immigration, etc.) and deportation, dismissal from current employment, exclusion from future employment, exclusion from community and social life, removal of rights or privileges, deprivation of food, shelter or other necessities, shift to even worse working conditions, loss of social status". ILC, 93rd Session, Report I(B), "A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005," Geneva: 2005, para. 15.

[280] Again, the ILO has a list of circumstances that are commonly encountered and which constitute absence of consent: "Birth/descent into 'slave' or bonded status, physical abduction or kidnapping, sale of person into the ownership of another, physical confinement in the work location – in prison or in private detention, psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance, induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.), deception or false promises about types and terms of work, withholding and non-payment of wages, retention of identity documents or other valuable personal possessions" Ibid.

A controversial issue regarding consent emerges where laborers are fully informed about the exploitative nature of the work they are expected to take up. It is argued by some that in cases where the laborer is fully informed about the exploitative nature of the work, that person cannot be regarded as a victim of forced labor; whereas others claim that no one intentionally agrees into such work unless there are other conditions which in fact force them into doing such work and thus, would satisfy "the absence of consent" element of forced labor.[281] In the light of the definition of forced labor, the spectrum from a total disregard of the presence of forced labor to the absolute characterization of all exploitative labor as forced labor shall be approximated towards the middle by inserting certain conditions to the latter point of view.

It should be firstly noted that the significance of forced labor appears in the relationship between the victim and the employer. The exploitative nature of the work lies not with the specificities of the work *per se* but with the abusive power of the employer over the victim. This also means that whether the work performed is legal or illegal under the national law or whether it is of economic value or not is irrelevant in determining forced labor.[282] It is only the nature of the *relationship* between the victim and the employer that is of relevance in determining forced labor. Therefore, the above argument shall be read to question whether a person would willingly enter into an employment relationship where he/she is aware of the fact that he/she will be exploited by their employers. To illustrate, the example most

[281] Kevin Bales and Peter T. Robbins, "No One Shall be Held in Slavery or Servitude: A critical analysis of international slavery conventions," *Human Rights Review* 2, no. 2 (2001): 29.
[282] ILC, "A Global Alliance Against Forced Labour," para. 16.

frequently referred to on this issue is the case of prostitutes. The problem of consent in question is not whether someone would willingly become a prostitute *per se,* but whether someone would willingly enter into prostitution where he/she will be forced to remain in labor under the menace of any kind of threat or penalty. It would seem reasonable to assume that a person would not give consent to such ill-treatment and that in the exceptional case where he/she might, the law shall be interpreted as to interfere and protect such persons from such decisions. However, the necessity of the protection by the law does not necessarily mean that all exploitative employment relationships have to be defined as forced labor. In this respect, in determining the "involuntary offer" aspect, particularly in cases where victims enter into the relationship at their own free will, two issues require analysis: whether the victims was deceived into the relationship and whether they have the possibility of freely terminating the relationship.

Deception of the victim into willingly accepting work shall be interpreted as the absence of consent and in the case where other elements of forced labor are present, shall deem the act forced labor. One cannot talk about consent if consent was taken by deceiving the person in question. Therefore, in case where the apparent consent of the victim is a result of a misleading, the "involuntary offer of oneself" criterion of forced labor shall be interpreted as to be present.

The same is also valid for the inability to retrieve consent. In order for the work to be deemed voluntary, consent given at the conclusion of the employment contract shall be revocable. If laborers are bound to the work and cannot by their own will terminate the employment, in other words, if they are forced to remain in the employment relationship, such work would amount to the absence of a voluntary offer and deem the work forced labor. However, it should be noted that economic necessities of the workers to remain in work and their reservation to take the risk of finding a new job shall not be considered as an inability to withdraw consent. The restrictions that amount to forced labor shall arise from the employer and constitute a physical or psychological threat.

With regard to approximating a forced labor determination, a second issue is that an employment relationship where the laborer is subject to ill-treatment shall be deemed a criminal offence, regardless of whether consent exists – just for the mere fact that it is built around the notion of exploiting a person's body and labor. Existence of the consent of a person to be exploited shall not create hesitation concerning the *criminal offence* nature of the act of exploitation. The same point of view is adopted in the Human Rights Standards for Treatment of Trafficked Persons (HRS) of 1999, which recognizes "the right of adults to make decisions about their lives, including the decision that working under abusive or exploitative conditions is preferable to other available options."[283] The mere fact that all exploitative work is not characterized as forced labor cannot be interpreted as to legitimize the act. Although all acts of forced labor are criminal offences, the same is obviously not true vice versa. Instead of forcing an idea of an *assumption* of the absence of a consent, it would be more

[283] Accordingly, the HRS states that "[i]n situations where labour conditions are no worse than those expected by the worker and the worker is not deprived of her or his freedom of movement or choice, the abuser or exploiter remains criminally liable for other crimes, such as assault, unlawful detention, and labour abuses and for appropriate administrative and civil offenses. The existence of consent to work under such conditions does not excuse the abuser or exploiter from being subjected to the full force of domestic laws that prohibit such practices." GAATW, STV and IHRLG, "Human Rights Standards for the Treatment of Trafficked Persons," GAATW: 1999, 5.

meaningful to stick to the adopted definition of forced labor and criminalize other exploitative acts independently.[284]

An issue that is worth pointing out is the problem of determining the locus of a specific case on the large spectrum of treatment from decent work to forced labor. Although exploitative in nature, some relationships remain at the level of indecent work and are penalized with minimum criminal penalties, if not none, and mostly with civil penalties; whereas others reach the severity of forced labor and constitute criminal offences. This problem may not arise out of the interpretation of the presence of consent *per se* but out of the characteristics of the relationship as a whole and particularly out of the reason that there is not an adopted clear definition of exploitation that has been agreed upon.

With a view to provide a solution to this problem, Skrivankova introduces the notion of "continuum of exploitation"[285]. The continuum is established from the positive extreme of decent work to the negative extreme of forced labor, which may or may not be a consequence of trafficking. Here, Skrivankova identifies an act of violation

[284] Offering oneself voluntarily for work is of particular significance concerning children. Forced labor is regarded as one of the worst forms of child labor not merely due to health and ethical grounds, but also due to the absence of the legal capacity of the child which is founded on free-will and thus consent. Therefore, in the case of child labor, there is an assumption of an absence of consent. Due to the vulnerability of children to exploitation, international standards have been established to regulate and limit child labor. In particular, the work of the ILO on child labor is significantly extensive and precise. Accordingly, the Minimum Age Convention of 1973 (No. 138) provides that states are under the obligation to establish minimum age for work, which under article 2(3), "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.". The Convention provides an exception in paragraph 4 for states "whose economy and educational facilities are insufficiently developed" to establish the minimum age as 14. Furthermore, employment of children between ages of 13 and 15 may be allowed provided that the work is not harmful to their health or development and would not hinder their attendance in school. However, in any case, children and young people under the age of 18 shall not be employed in hazardous work or work that may impede their health and growth.

[285] Klara Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (York: Joseph Rowntree Foundation, 2010).

according to their remedies either in labor law or in criminal law or in both. Accordingly, violations that are considered to be minor violations and thus, are closer to the "decent work end" of the continuum are those that have remedies only within the context of labor law. Where a violation falls within the sphere of intervention of not only labor law but also criminal law, it would be somewhere towards the forced labor end of the continuum.

Apparently, Skrivankova's method of identifying a violation on the continuum is through observing and identifying its consequences in the law. Although this method may really be of relevance in the process of lawmaking, considering its positivist approach of taking the existing legislation as a reference point, it still provides for the possibility to define an action as forced labor in a given situation under the national law. The main point of Skrivankova in this study is that "[w]ithin the complex environment of causes and contributing factors, forced labour should be addressed both as an issue of labour (human) rights as well as through the criminal justice system, looking at the situation of exploitation as the determining factor, when identifying the appropriate interventions"[286]. In other words, forced labor shall not merely be considered to fall within the sphere of criminal law but shall also be considered as an issue of labor and human rights law.

[286] Ibid., 21.

3.2.2. The Right to Engage in Work of One's Own Choosing

The second element of the right to a freely chosen or accepted work is the right to engage in work of one's own choosing, whether as an employed, self-employed or as an unpaid productive worker, the work of which is valued by the financial or substantive benefits with the objective of providing the workers and their families with adequate standards of living. The meaning and content of the right to engage in work of one's own choosing is a highly disputed issue and there are different arguments thereto which require reference hereunder.

The first one of these arguments argues that this right does not generate a claim right for individuals and that it only serves the purpose of ensuring the passivity of the state concerning the distribution of work and the prohibition of forced labor by cherishing the principle of freedom of contract. It is also the adopted meaning of the right to work under the Universal Declaration of Human Rights.[287] It should be observed that this view was adopted during the clash of the communist and liberal ideas and appears to side with the liberals by freeing the state from any positive obligation under the right to work. Although the freedom of contract approach asserts what the right to work indeed dictates, it falls short of explaining the full content of the right. In other words, it is true that the right to work prohibits compulsion of an individual into any work by the state, but it also provides more rights and opportunities for the individual.

[287] Regarding the position of the UDHR, see 2.1.3 above.

The second approach identifies the right to engage in work as the right to the opportunity to gain one's living by work. This understanding of the right to work, which is specifically stipulated both in the CESCR and the ESC, restricts the scope of work to paid work. As repeatedly indicated[288], the coverage of work in terms of the right to work should also include unpaid productive workers and their work should be recognized by the state and valued in terms of social security and the obligation of states to ensure an adequate standard of living. It is understandable and logical for states to have as their primary preference individuals who are not directly dependent on the state and therefore, encourage paid work as an economic policy. However, this should not mean disregarding other unpaid productive work by excluding them from the scope of the right to work.

The significance of the approach adopting the right to the opportunity to gain one's living by work lies with the underlined progressiveness. By indicating that people have the right to the *opportunity* to gain one's living by work, the supporters of this view seek to relieve the state of any claims of work placements. In other words, states are under the obligation to merely aim for and provide equal employment opportunities and a job market for the individuals. Ideally, the individual should have the absolute choice of the work he/she performs. However, this would not be a realistic approach and would hinder the realization of the right to work and diminish its significance. Therefore, states' obligations concerning the right to engage in work should be limited to creating equal opportunities for individuals to access suitable

[288] For detailed discussion on paid and unpaid work, see 3.1.2 above.

and decent work and should not lay the burden of placing the individual in the work of their choice on states.

The right to engage in work cannot be understood as being absolute in a way that it creates an obligation for the employers to actually hire. This would be a disproportional interference to the employer's freedom of contract. Apart from the exceptional cases of obligation to conclude a contract[289], employers are free to hire whoever they desire, provided that their actions do not constitute discrimination. Therefore, the right to engage in work of one's own choosing cannot be read to mean that the individual has an absolute freedom to be placed at any job he/she desires. The primary obligator of the right to engage in work is as a rule the state, and the obligation arising out of the right to engage in work of one's own choosing refers to creating equal opportunities to work.

The right to engage in work of one's own choosing also generates a negative right to *reject* undesired job offers. This negative right to reject is absolute concerning offers of work that are not decent. With regard to unsuitable employment, the only exceptions of the right to reject are the cases of legal obligations to work arising from citizenship duties, which will be further analyzed below.[290] Concerning work that is both decent and suitable, the individual is, in principle, free to reject any job offer. However, this right may be subject to some legal restrictions such as those arising from welfare-to-work programs or an indirect restriction of making the granting of some rights and benefits conditional on work of a given period of time.

[289] See 3.2.2.2.3 below.
[290] See 3.3 below.

In summary, the right to engage in work is neither limited to ensuring passivity of the state nor to the right to the opportunity to gain one's living. It not only involves both aspects but also seeks to ensure the individual the freedom to contribute to their skills and qualifications and to the society, whether through paid or unpaid work. Financial burden should not create an indirect obligation on individuals to do paid work. They should have the freedom to choose among paid and unpaid productive work. In terms of the rights and obligations it ensures, the right to engage in work of one's own choosing has two sides, one being negative and the other positive.

3.2.2.1. Negative Obligations of States

The negative obligation of the state serves in general the freedom to work and obliges states to refrain from intervening in the individuals' choice of whether or not to work and when affirmative, the type of work they do. The right to work is intertwined with the individual's personality and as a fundamental personal right, it cannot be renounced and all agreements that impose restrictions on the enjoyment of this right shall be deemed invalid.[291] Apart from the above assessed[292] obligation of the states to ensure prohibition of slavery, forced and compulsory labor, states are under the obligation to also refrain from intervening in the right to engage in work of the individuals and in this respect, ensure that they do not encounter discriminatory actions either by the state or by third parties.

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[291] Turhan Esener, *İş Hukuku* (Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1978), 12.
[292] See 3.2.1 above.

3.2.2.1.1. Freedom to Work and Freedom of Contract

The states' negative obligations concerning the right to work is based on the idea that workers are free to engage in any work they desire. In this respect, freedom to engage in work is parallel to freedom of contract if a third party is involved. Freedom to work bans the state's intervention in the choosing of the work. The reasons why freedom to work is accepted as a separate freedom from freedom of contract are firstly, because not all work is a result of a contract and secondly, in cases where an employment contract is present, special attention and regulations are required in order to realize social justice, that would not be satisfied with a mere freedom of contract approach.

As repeatedly emphasized in this study, work in terms of the right to work should not be restricted to the right to employment. Although engaging in paid work, whether as an employee or self-employed, constitutes a prevailing portion of the right to work, unpaid work is also proven to be worthy of the protection provided by the enjoyment of the right to work. Unpaid work may be contractual, such as internships or voluntary work as part of an organization, but the majority of unpaid work is non-contractual and self-performed, such as the work of an artist or a mother performing house-chores and taking care of her children. In the assumption that there is an absence of a difference between freedom of contract and freedom to work or that freedom to work is a special regulation of freedom of contract, the work of the unpaid non-contractual workers become disvalued. Freedom to engage in work for those who perform *unpaid and non-contractual work* cannot be explained in terms of freedom of contract without attributing a negative connotation. In other words, those who perform non-contractual work (and thereby unpaid work) enjoy their freedom of contract by not engaging in a contractual relationship, i.e. they enjoy their freedom *not* to conclude a contract. When freedom to work is explained by freedom of contract, the same negative connotation becomes applicable to the freedom to work. This means that those who do not enjoy their freedom of contract would also not be enjoying their freedom to work. They would be enjoying their freedom *not* to work. Freedom to work undoubtedly includes the right to refrain from working. One obviously cannot be forced into work. However, characterizing the most encountered practices of unpaid work as the enjoyment of one's freedom *not* to conclude a contract or freedom *not* to work, means naming unpaid work as *not work.* Therefore, despite the fact that freedom of contract and freedom to work have common denominators, freedom to work shall not be explained as a subsidiary of freedom of contract.

Nonetheless, even in cases where freedom of contract and freedom to work meet under a common denominator, there exists legitimate reasons for naming the two separately. Although the state is not entitled to intervene in the choosing or accepting of work, as in the case of freedom of contract, it is under the obligation to intervene in regulating the employment relationship that will arise out of the free choice. To put it in other words, the state's involvement surfaces when a third party, namely the employer, comes into the picture. The state shall not interfere in the type of work the worker's will is directed towards but should interfere if this choice results in an employment relationship (or a contractual unpaid work) in order to protect the worker from the more powerful employer.

It should be noted that the state's negative obligation to refrain from intervening in the individuals' freedom to engage in work is not absolute. In fact, states are obliged to impose *prohibitions* to work with a view to protect certain disadvantaged groups where work or various types of work can lead to severe exploitations, such as slavery, slavery-like practices or forced labor. These groups which are vulnerable against exploitative acts include among others children, the elderly, persons with disabilities concerning various work, and pregnant women.

Although states are under the obligation to refrain from interfering to the individual's right to engage in work, this does not prevent them from making accession to certain professions conditional on other requirements. Relevant professional education, particularly for various professional groups such as lawyers, medical doctors, veterinarians, engineers, etc., would be a reasonable and legitimate condition for access to those professions, considering the safety and benefit of the public. The same is also true for making employment for a specific sector or a job conditional on the health of the worker, provided that they are legitimate and do not constitute discrimination. Furthermore, conditions such as citizenship requirements for civil servants and the military personnel shall be considered within the framework of national safety and public interest and shall not be deemed discriminatory and as violating the right to work. The same grounding is also valid for those who are disqualified from their occupation as a result of their unlawful actions, provided that the penalty of disqualification is prescribed by law and proportional to the unlawful action and does not infringe the individual's right to find alternative employment opportunities. The state's intervention in such circumstances is legitimate since prevailing interests are at stake against the interest protected by the right to work.

3.2.2.1.2. Prohibition of Discrimination

Prohibition of discrimination, although categorically a civil negative obligation, may require states to take positive measures. It includes not only the state's duty to refrain from discriminatory acts, but also their positive obligation to pass legislations ensuring protection against discrimination by third parties and implement these protections through effective remedies. Prohibition of discrimination within the framework of the right to work inserts a civil and political right aspect to the right to work and covers all stages of work.

This is also confirmed by the ECtHR judgments on the right to work, despite the absence of an explicit recognition of the right. As previously referred[293], the ECtHR situates work within the sphere of private life and accepts cases concerning the right to work within the scope of article 8, i.e. the right to respect for private and family life. Accordingly, the ECtHR finds violations of article 8 in cases where the state imposes limitations on the right of the individual to engage in work.[294] One of the cornerstone cases that was found to be in violation of prohibition of discrimination (article 14) in conjunction with the right to respect for private and family life (article 8) is the *Sidabras and Džiautas v. Lithuania* judgment. The case was brought by two former KGB agents who were prohibited from working in public and some private sector jobs for a period of ten years. The ECtHR found that although the objective of such a law prohibiting access to jobs in public sector was legitimate, it was

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[293] See 3.1.3 above.

[294] ECtHR, *Naidin v. Romania,* no. 38162/07, 21.10.2014; ECtHR, *Campagnano v. Italy,* no. 15869/02, 23.03.2010 § 54. For further information see Zeynep Kılıçkaya, "Avrupa İnsan Hakları Mahkemesi Kararları Işığında Anayasa Mahkemesi'nin Bireysel Başvuru İncelemelerinde Çalışma Hakkı," *DEÜ Hukuk Fakültesi Dergisi* 18 no. 2 (2016): 135-9.

disproportional to apply the ban to private sector jobs and hence, violated article 14 in conjunction with article 8.[295]

The protection ensured by prohibition of discrimination shall cover not only the right to engage in work, but also the right to remain in work. Equality of opportunities shall be ensured to all of the disadvantaged population of a state. In order to ensure this, states shall lay obligations on the employers as third parties to refrain from discriminatory acts. Discrimination based on race, sex, age, religion, political thought, and union membership are some of the conventional forms of discrimination. However, new grounds for discrimination such as sexual orientation, HIV, or "people's appearance, such as being ugly or being overweight"[296] are also commonly encountered. As Shim emphasizes, instead of an exhaustive list of cases of discrimination, a non-exhaustive formulation of grounds for discrimination would have a more effective and extensive protection against the new grounds of discrimination without requiring a legislative revision.[297]

Among the most common group that encounters discrimination in the field of employment are women. This is a worldwide unresolved problem based on variety justifications ranging from the belief that women are less capable in terms of physical strength, the fact that cultural traces that impose women to be housewives or the possible inconsistent participation of women in the labor market due to pregnancy and motherhood. There are numerous national and international initiatives

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[295] ECtHR, *Sidabras and Džiautas v. Lithuania*, § 48-5, 60.
[296] Shim, "Equality or the Right to Work? Explanation and Justification of Anti-Discrimination Rights in Employment," 135.
[297] Ibid.

targeting the promotion of women's participation in the labor market. Along with the international human rights instruments, modern constitutions recognize equality between men and women distinctively. This is a highly underscored issue by the whole international community, such that even the economically oriented international organizations use women's participation in the labor market as a parameter of a state's development rate.

A Convention that is of special reference in this context, which exclusively deals with prohibition of discrimination against women is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which has been adopted by the UN General Assembly in 1979. CEDAW governs a variety of areas in which women encounter discrimination and provides detailed provisions on each issue. Among the areas of coverage of CEDAW also lies prohibition of discrimination in the field of employment, which is governed in article 11. It is a long article covering issues from the right to work to the right to a fair wage, working conditions and social security. Paragraph 2 of the article specifically refers to cases of discrimination on the grounds of marriage and maternity. The sub paragraphs (a), (b) and (c) of the first paragraph reveal the aspects of the right to work in detail. In this respect, CEDAW calls for the elimination of discrimination against women in the field of employment, concerning among others:

> "(a) The right to work as an inalienable right of all human beings;
>
> (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training".

The extensiveness and the detailing of these provisions display the significance attributed to the issue and to the elimination of discrimination against women concerning the enjoyment of their right to work.

Persons with disabilities constitute another significant group concerning provision of equal opportunities in access to employment. Protection concerning persons with disabilities include a variety of obligations that emerge on the part of both the state and the employer. The states' obligations concerning accessibility of persons with disabilities to the social life include foremost, accessibility to employment. In this respect the states' obligations are mostly positive obligations aimed at overcoming the disadvantages persons with disabilities encounter and create obligations for employers to provide reasonable adjustments that are aimed at removing the barriers for persons with disabilities in performing their duties arising out of the employment contract.

The universal convention which governs the rights of persons with disabilities, which Turkey has also ratified, is the UN Convention of the Rights of Persons with Disabilities (CRPD).[298] Article 27 of CRPD governs the rights of persons with

[298] Article 2 of CRPD defines discrimination on the grounds of disability as: "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human

disabilities in the field of employment in detail, with special focus on the right to work. Apart from recognizing the right to work of persons with disabilities in all its aspects, the article highlights the requirement of a "work environment that is open, inclusive and accessible to persons with disabilities." This confirms that the obligations arising out of eliminating discrimination on the grounds of disability is not limited to mere prohibition of discrimination and effective remedies and penalties thereof, but also imposes positive obligations on the part of both the state and the employer to ensure accessibility, which requires ensuring reasonable accommodation[299] among others.

Another distinct issue concerning equal opportunities in access to employment is the case of alien workers. It is a commonly established fact that states impose restrictions on non-nationals concerning access to the national labor market. Such restrictions are likely to cause claims of inconformity with the universality of the right to work as a human right. There needs to be clearly established borders that set forth the legitimate restrictions imposed on non-nationals. Accordingly, the criterion utilized to declare such restrictions illegitimate is *arbitrariness*. Ungrounded, arbitrary restrictions on the right of the non-nationals to engage in work shall be regarded as illegitimate and a violation of their right to work. Only when there are higher legitimate interests at stake can states impose such restrictions for accession to the labor market of non-nationals. In the words of Mantouvalou, "The reason for placing

rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation".

[299] Reasonable accommodation is defined in article 2 of CRPD as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

restrictions on migrants' right to work is viewed as part of the exercise of state power to control immigration and to protect the national labour market. The protection of the national labour market could also be presented as protection of the right to work of the country's nationals."[300] In other words, restrictions imposed on non-nationals' right to work gain their legitimacy from the fact such restrictions fall within the states' competence in the enjoyment of their sovereign power and have the legitimate aim of protecting the labor market – a requirement for the states to perform their positive obligations arising out of the right to work.[301] Therefore, states may impose certain restrictions on non-nationals' accession to their labor markets, such as visas. Applications within this framework shall not be interpreted as constituting discrimination.[302]

Age is another common ground for discrimination in the enjoyment of the right to work. There are two sides to age in terms of the right to work, one concerning children and the other, the elderly. Children is a group that is in need of special protection in terms of the right to work and thus, lead to the creation of an obligation

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[300] Virginia Mantouvalou, "The Right to Non-Exploitative Work," in *The Right to Work: Legal and Philosophical Perspectives,* ed. Virginia Mantouvalou. (Portland: Hart Publishing, 2015), 43.

[301] See 3.2.2.2 below.

[302] Nonetheless, the legal reservation concerning the right to work of aliens does not absolve the states from protecting non-nationals from exploitation and does not mean that those satisfying the requirements of accessing the labor market (for instance, being entitled to work permits or being granted the status of a refugee) may be subject to different treatment, on the grounds of being non-nationals. Unless there are other discrete particularities of an individual case that legitimizes the different treatment, such disadvantage of the migrant worker will amount to he violation of their right to work as well as to prohibition of discrimination. In this regard, a recent development in enhancing the protection provided to non-nationals is provided with the Protocol of 2014 to the Forced Labour Convention, 1930, which came into force on November 9, 2016. Article 4 of the Protocol obliges the states parties to ensure "all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation." As of February 2017, this Protocol has been ratified by the following 10 countries: Argentina, Czech Republic, Estonia, France, Mali, Mauritania, Niger, Norway, Panama and United Kingdom. So far, it came into force only in Niger, Norway and the United Kingdom.

on the part of states to prevent child labor, which is identified as a severe form of exploitation.

Concerning the elderly, the problem of discrimination arises out of the fact that most national labor and social security law systems stipulate mandatory retirement ages, after which the individual is forced *out* of the labor market. The right to work of the elderly competes with the states' obligation to regulate the labor market in order to allow circulation with a view to ensure the right to work of the younger population and to promote production. Yet, in most cases, the previous work of the elderly is valued through the pension system which is designed to grant them and their families the right to an adequate standard of living, despite forcing them to terminate their work. What legitimizes such practices is the necessity of maintaining the labor market dynamic and productive by ensuring the enjoyment of the right to work of the newcomer. Furthermore, national pension systems can also be considered as the means of celebrating the former work of the elderly and granting them the possibility of taking leisure time after having worked for many years.

The states' obligation concerning elimination of discrimination is not limited to refraining from discriminating. It also requires the states to preclude third parties from engaging in such acts. In terms of the right to work, states shall take all necessary measures to ensure that workers are not subjected to discrimination and unequal treatment by the employers. In this respect, states have a positive obligation to pass legislations that ban such treatment and ensure effective remedies to those who are the victims of discrimination.

Consequently, prohibition of discrimination in the field of employment cannot be restricted to guaranteeing equal opportunities in accession to employment. Provision of equal opportunities in accession to employment is indeed an important aspect of the right to work, for which the state is the primary obligator. In order to realize the individuals' right to equal employment opportunities, states are under the positive obligation to adopt economic and social policies that particularly seek to increase the labor participation rate of the disadvantaged groups. This may be achieved through relevant economic and social policies as well as through the involvement of the employers and imposing additional duties on them. In this respect, the employers' obligation to contract[303] constitutes a substantive instrument. Nevertheless, the states' obligation concerning elimination of discrimination in the field of employment is not limited to ensuring equal opportunities in accessing employment. States are also under the positive obligation to pass legislations that impose obligations on the employers to adhere to non-discriminatory acts within the employment relationship and to ensure their implementation through effective remedies to the victims and penalties to the employers engaging in such discriminatory acts.

3.2.2.2. Positive Obligations of States

The affirmative obligations of states concerning the right to engage in work of one's own choosing firstly, require states to adopt economic policies that aim at achieving full employment and secondly, to ensure individuals with the right to employment

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[303] See 3.2.2.2.3 below.

services and vocational training as the means to increase their opportunities in the labor market. Among these, the former obligation is directed exclusively to paid work. Even in states where individuals are granted social assistance or income that seek to ensure their subsistence in case of unemployment, these social security measures seek only to provide what is the minimum for one's and their family's survival. Therefore, in most cases of enjoyment of the right to work, people will likely lean towards paid employment rather than unpaid work. In this regard, the obligation of states to aim at having enough jobs is an essential aspect of the right to work.

3.2.2.2.1. Full Employment

Perhaps one of most repeated state obligations arising out of the right to work is progressive achievement of as high a level of employment as possible with full employment as the targeted economic policy. The term "full employment" has been a subject matter of debates among the economists since the 1920s. The most popular definition of full employment as understood in the 1940s was introduced by Beveridge as "having always more vacant jobs than unemployed men, not slightly fewer jobs. It means that the jobs are at fair wages, of such a kind, and so located that the unemployed men can reasonably be expected to take them; it means, by consequence, that the normal lag between losing one job and finding another will be very short."[304] The belief that full employment can be accomplished served the

[304] William Beveridge, *Full Employment in a Free Society* (London: G. Allen and Unwin, 1944), 18.

understanding that the right to work can be fully realized by having sufficient amount of jobs for the entire labor force of a population. However, when the Keynesian economics replaced the previous belief that full employment was achievable with the claim that such goal is not possible, it undermined the meaning attributed to the right to work (which was simply understood as the right to a job). This intervention resulted in the avoidance of research and clarification of the right to work and left it to remain unenlightened.

The states' obligations concerning full employment is to adopt policies that aim at creating new employment opportunities and establishing the means to match vacant positions with workers most suitable for the positions. However, the adoption of full employment as a goal shall not be interpreted merely in terms of quantities. In this respect, Branco lists four requirements that shall be met while passing active employment policies.[305] Accordingly, an employment policy aimed at full employment shall be efficient in filling the existing vacant positions. In order to fulfill this requirement, states should take into consideration the demands of the labor market and organize their vocational training policies accordingly. Furthermore, the matching of the jobs with workers should not be considered merely in terms of numbers and should be in accordance with the skills and qualifications of the workers. This also means that employment policies and the functioning of the employment services shall be directed towards avoiding the matching of workers

[305] Manuel Couret Branco, "The Right to Work and the Political Economy of Human Rights," (Documento de Trabalho No. 2006/8, Departamento de Economia, Universidade de Évora, Évora, 2006), 19.

with jobs for which they will be overqualified.[306] Branco's second requirement draws attention to decent work and indicates that states shall refrain from making compromises from decent work while forming and pursuing employment policies. These should be realized simultaneously. The third requirement puts emphasis on the types of jobs that need to be created. Accordingly, creation of unproductive and merely occupational jobs that have no contributive effects on either the skills of the workers or on the national economy in terms of production of goods and services is not adequate in fulfilling the states' obligation to aim at achieving full employment. Finally, the economic policies shall be participatory and involve other groups of the society, particularly the employers and impose duties on them in securing the right to work.[307]

Nonetheless, it should be noted that the right to work should not be interpreted as creating individual claims towards being secured with employment. The obligation of the states to aim at achieving full employment is a program norm and does not involve a direct claim right for the unemployed to be placed in jobs. Otherwise, it would be too much of an economic burden, since achieving full employment is simply an economic fantasy, and a near impossible task – considering that it would be too impractical to ensure that the provided work is not only one that the employer has consented to, but at the same time one that is suitable for the worker, as well as a work of their own choosing. This is also established by Michael Rath in his work *Die Garantie des Rechts auf Arbeit.* Rath defines work in a rather restricted manner as

[306] Karl-Jürgen Bieback, "Sozialer Hintergrund der Diskussion über das Recht auf Arbeit," in *Recht auf Arbeit – eine politische Herausforderung,* ed. Udo Achten (Neuwied: Luchterhand, 1978), 106, 144-5.
[307] Branco, "The Right to Work and the Political Economy of Human Rights," 19.

the claim right of the unemployed, who are willing and capable, to be placed in jobs as employees.[308] He argues that since the right to work is a fundamental right, it shall be considered as a subjective right that grants its holder with a claim right against the state.[309] Having established the right as such, Rath analyzes the means of actually ensuring the right and concludes that achieving full employment in a market economy system is impossible due to economic, financial and technical difficulties.[310]

In this context, the right to work is not an individual right to be placed in employment. Instead, it is a collective right that requires a just distribution of work within the society and the state's obligation to fulfill this task.[311] Since full employment is not an achievable task, the means to realize the right to work within the framework of targeting full employment is through ensuring that a significant majority of the population is employed and work is equally distributed among the members of the society through the provision of equal opportunities.

As a result, states' obligations in this regard shall be limited to adopting and implementing economic policies that promote employment and overcome unemployment, but shall not entitle individuals with individual claim-rights to be placed in jobs. Moreover, states' fulfillment of their obligations arising out of the right to engage in work shall not be considered as an immediate task. Adopting and

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[308] Michael Rath, *Die Garantie des Rechts auf Arbeit* (Göttingen: Verlag Otto Schwartz & CO, 1974), 9. (The original German text: Das Recht auf Arbeit als Anspruch auf Verschaffung eines Arbeitsplatzes hat nur für Arbeitswillige und Arbeitsfähige Bedeutung, die als Arbeitnehmer eine (neue) Stellung suchen."
[309] Ibid., 89-106.
[310] Ibid., 109-10, 139.
[311] Gökçeoğlu Balcı, "Çalışma Hakkını Yeniden Düşünmek," 293.

pursuing the necessary employment policies *and* accomplishing positive results rapidly are highly dependent on the level of development and the economic situation of the state concerned.[312]

Nonetheless, having established that the positive obligation of states to adopt active employment policies that aim at full employment does not generate an individual right, the fact that it enables a *collective* right shall not be overseen. This collective right is called by Bentele as "the right to an employment policy".[313] Although this program norm interpretation is the most accepted view, there are authors who claim otherwise. Among these, Nickel claims that the approach which rejects the presence of an individual claim right vis-à-vis the states' obligation to aim at achieving full employment contradicts with the theory of rights. He claims that one can either emphasize the significance of full employment and not make it a matter of a claim, or call it a right. It does not go both ways. A right, rightfully, generates a claim thereto and if the possibility of claiming the enjoyment of a right is bereaved, one can no longer assert the existence of a right. In this respect, Nickel claims that the position that needs to be taken by the states with a view to fully realize the right to employment[314] should be either one of the following: to be the primary source of employment or to be an employer of last resort.[315] In spite of the fact that these

[312] This relativity of the right to work is criticized by Rath as being against the rule of law and legal clarity. Rath, *Die Garantie des Rechts auf Arbeit,* 126-32.

[313] Max Bentele, *Das Recht auf Arbeit: in rechtdogmatischer und ideengeschicktlicher Betrachtung* (Zurich: NZN, 1949), 74. (The original German text: "Man würde dieses Gemeinschaftsgrundrecht vielleicht am besten das 'Recht auf Beschäftigungspolitik' nennen.")

[314] Nickel uses the concept "the right to employment" rather than "the right to work" because his definition of the right to work is limited to paid work, namely employment, and excludes unpaid work from the definition of work in terms of the right to work.

[315] James W. Nickel, "Is There a Human Right to Employment?," *The Philosophical Forum* 10 No. 2-4 (1978):155-156.

propositions are likely to indeed ensure the realization of the right to employment, their applicability in practice is questionable.

The first proposition which asserts that the state should be the primary supplier of employment opportunities may in fact be in favor of the full realization of the right to employment, although its applicability remains within the context of centralized economies with full control over the employment system and which have established coordination between their education and employment systems.[316] Apart from only a small number of countries in the world, the current systems are established on the notions of liberal economies, where privatization is at a glorified position. The position of the state as the primary supplier of employment is likely to vitiate the discourse of the right to work as a human right, since it would be ridiculous to expect states to nationalize their economies for the sake of realizing the right to work. Simply because they would not do it.

Nickel's second alternative, on the other hand, proposes obligating the state to be the employer of last resort, i.e. to provide the individual with work in the public sector, in cases where individuals cannot find any by their own means. However, employing all unemployed persons in public sector has the potential of creating enormous economic burden on the state and would result in the creation of jobs that are not necessary in practice and hiring of individuals with qualifications that may not be of use in a given position in the public sector. It also requires the presence of constant vacancies in the public sector, which is too much of a risk to be expected from the

[316] Wolfgang Däubler, "Recht auf Arbeit verfassungswirdrig?," in *Recht auf Arbeit – eine politische Herausforderung,* ed. Udo Achten (Neuwied: Luchterhand, 1978), 169.

state, since it may hinder the functioning of the public sector and the state's duly performance of its other duties. A burden as such on the state has the risk of situating persons in unproductive and particularly, in unsuitable employment.

As a result, the problem arising out of the realization of the right to work in terms of providing employment to everyone who is willing is not legal *per se*. The codification of the right to work and generating relevant rights is not the main source of the concerns regarding the implementation of the right to work. Establishing a fair and optimum distribution of jobs and workers with the objective to ensure the realization of the right to work is in fact an *economic* problem, rather than a *legal* one.[317] Maximizing the opportunities of people to be placed in paying jobs is unquestionably one of the means of realizing the right to work but the right to work should be addressed with a bigger perspective.[318] The right to work should indeed be interpreted as to grant the individual a claim right in terms of finding employment but such individual claims should address more substantial ends than "full employment". Obligations concerning the individual alone can be presented as the aspects of the states' obligation to pass economic policies to promote as high a level of employment rate as possible. In this respect, the states' obligations that trigger the raising of individual claims consist of other instruments that are directly formed within the domain of the individual, which aim at integrating the individual into the

[317] Rolf Wank, *Das Recht auf Arbeit im Verfassungsrecht und im Arbeitsrecht* (Königstein: Athenäum, 1980), 144.

[318] It should be underscored that the above assertions are based on the idea that the right to work is actually a right to employment. The right to work as a human right should not be limited to its capabilities of providing the person with the income that he/she would earn in exchange of his/her performance.

labor market. The most prominent and substantial instrument for individual claims is the provision of free employment services and vocational guidance and training.

3.2.2.2.2. The Right to Employment Services, Vocational Guidance and Vocational Training

The right to employment services and vocational guidance and training serve the purpose of fully realizing the right to work and ensuring the individuals with productive and suitable work. The former is exclusively oriented towards placing workers in jobs, whereas the latter provides the individual with the possibility of learning or extending their skills and qualifications. In this sense, the right to vocational training constitutes a common denominator between the right to work and the right to education.

The right to employment services as an instrument for realizing the right to work shall be free of charge. The beneficiaries of such services consist of unemployed persons and employed persons seeking alternative employment opportunities on one hand and employers on the other. Charging unemployed persons, who have no regular income due to their unemployment, for placement in employment will be meaningless and discourage the individual from benefitting from such services. Moreover, the absence of free employment services will violate the states' obligation to ensure employment services as a public service. On the other hand, charging the employer for the employment services also has consequences that prejudice the right to work of the job-seeker. Without question, the essential purpose of the employment services is to serve the job-seekers and provide them with assistance in finding employment. It is not a service that is required or found necessary by the employers. As long as there are unemployed persons in the market, employers will not have great difficulties in finding workers. Therefore, any discouragement that could preclude employers from utilizing the services provided by the employment services is to the disadvantage of the job-seekers. Following this approach, the imposition of any administrative fee on the employer, regardless of its amount, is found by the European Committee of Social Rights to be incompatible with the requirement of free employment services.[319] As a result, any fee on either part is not in consistence with the objective of ensuring the realization of the right to access employment. However, the conclusion of the ECSR which sustains private employment service providers, provided that there is a free alternative, shall not be considered as an infringement of the right to employment services.[320]

The obligation of states to provide vocational guidance and training programs aim at constructing a labor market with skilled and qualified workers who will be eligible to perform productive work. As in the case of the employment services, the main purpose of such programs is to create employment opportunities for the individuals. The basis of such programs is not necessarily oriented towards ensuring the right to education, despite references to lifelong learning in this context. They rather seek to increase the chances of the individual in finding employment.

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[319] Council of Europe, European Committee of Social Rights, "Conclusions XIV-1 – Turkey - Article 1-3," 1998, http://hudoc.esc.coe.int/eng?i=XIV-1/def/TUR/1/3/EN.

[320] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

3.2.2.2.3. Obligation to Conclude a Contract

As a human right that requires the taking of positive actions, full realization of the right to work imposes certain obligations on the part of the third parties, namely the employers. A social state ensures social justice through the protection of the weaker groups against the stronger ones. In order to fulfill this obligation, states may impose certain restrictions on the freedom of contract to avoid unjust practices that may result in the exploitation of the weaker groups.[321] Accordingly, states are under the obligation to impose certain responsibilities on the employers, with a view to protect workers and secure their right to work.[322] This way, states share the responsibilities arising out of the right and at the same time protect the essence of the right against employers.[323]

In this respect, a pivotal instrument for the protection of the right to engage in work is the employers' obligation to conclude specific employment contracts. As previously indicated, the right to work cannot be interpreted as giving full discretion to the worker and dismissing the freedom of contract of the employer. In principle, employers are free to conclude an employment contract with whomever they desire.[324] However, in the exceptional cases where a prevailing interest deriving from the individual's disadvantage in the enjoyment of his/her right to work is in question,

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[321] Refik Tiryaki, *Ekonomik Özgürlükler ve Anayasa* (Ankara: Yetkin, 2008), 135.
[322] Bülent Tanör, *Anayasa Hukukunda Sosyal Haklar* (Istanbul: May, 1978), 259.
[323] Ibid., 282.
[324] Ertürk, *İş İlişkisinde Temel Haklar*, 56.

the employer's freedom of contract may be restricted. In other words, the right to work of the individual constitutes the limit to the employer's freedom of contract.[325]

For the purpose of diminishing the difficulties various disadvantaged groups encounter in finding employment, it is a common interventional policy used by states to restrict the employers' freedom of contract in favor of realizing the right to work. This is accomplished though obliging employers to conclude employment contracts with certain workers or groups of workers, such as persons with disabilities, ex-convicts and other groups which require (re)integration into the society who otherwise lack the means to.

3.2.3. The Right to Remain in Employment

The third element of the right to work is the right to remain in employment, i.e. the right not to be deprived of work unfairly. It is an internationally protected right which is based on the idea that work is generally the only source of income, and hence living, for the worker and their family. This right protects the worker from arbitrary terminations by the employer, which may result in the worker being deprived of the income he/she needs in order to pursue his/her living.[326] The right to

[325] Devrim Ulucan, "Çalışma Hakkı ve İş Güvencesi," in *Prof. Dr. Ümit Yaşar Doğanay'ın Ansına Armağan,* (Istanbul: İ.Ü. Siyasal Bilimler Fakültesi, 1982), 2: 195.

[326] The right to remain in employment, by its nature, is designed to serve paid employees and excludes unpaid workers and the self-employed. The purpose of protection of employment is to avoid the worker and their family from suffering as a result of an unexpected loss of income and to lift the constant threat of being dismissed by taking away from the employer the absolute right to terminate the employment contract. Therefore, it would be meaningless and unnecessary to provide such guarantee to the unpaid workers, as long as they have the opportunity to engage in work elsewhere under the labor market's circumstances.

remain in employment is known in the labor law terminology as the right to protection against unfair dismissals, namely job security.[327] Job security refers to the restriction on the employer's right to terminate employment by either providing the worker with the right to be reinstated in work or to be granted pecuniary compensation. The objective of such protection to the worker is to diminish the economic consequences that are likely to appear on the part of the worker as a result of the loss of source of income. As the definition implies, the right to protection against unfair dismissals exclusively concerns employed workers, i.e. wage-earning workers who are employed under an employment contract.

The differential aspect of the right to protection against unfair dismissal is that it generates a new duty-bearer in addition to the state, namely the employers. States' obligation with respect to job security is to pass legislations guaranteeing this right and to ensure their implementation. Whereas the duty of the employers, which are established through the national legislations, arises in realizing the rights through avoiding unfair dismissals of those who are protected through job security. In this sense, the right to protection against unfair dismissals clashes with the employer's freedom of contract. Job security relieves the employee from bearing the risk of being dismissed and accordingly lose their income for their and their families' subsistence. Relieving the worker from such a risk is recognized as a prevailing interest over the employer's interest in enjoying an unlimited freedom of contract. It should however be noted that the restriction of the employer's freedom of contract is

[327] Although an important aspect, job security is not the single instrument of the right to remain in employment. Apart from job security, there are also other instruments for restricting termination rights of the employer. These include, among others, restrictions concerning collective redundancies and the suspension periods that need to be expired before employers can use their rights to terminate without notice.

limited to the *already hired* employees. Apart from some exceptional cases, the employer cannot be forced into *concluding* an employment contract.

In this regard, the most prominent international instruments are introduced by the ILO. These instruments seek to ensure the right to work through protection of employment. The most essential ILO Convention is the Termination of Employment Convention of 1982 (Convention No. 158).[328] This Convention of the ILO regulates jobs security and restricts the grounds for termination by the employer to "valid reasons". The Convention regulates these in article 4 as reasons "connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." In other words, employers' right to terminate the employment contract, in this sense their freedom of contract, is limited to reasons arising out of either the worker or the undertaking, establishment or service. The sanctions that shall be applicable in cases of dismissals not complying with the above reasons are governed in article 10. Accordingly, such terminations shall either be declared invalid and/or the worker should be reinstated or the worker shall be entitled to an adequate compensation. The significance of protection against unfair dismissal is so highly underscored and voiced by international law that even the ECtHR observes various unfair dismissal cases despite the fact that it is not a right protected under the ECHR.[329] However, the scope of the majority of cases observed by the ECtHR concerning unfair dismissals is limited to those in which the dismissal was caused as a result of the exercise of any of the rights protected under the ECHR.[330]

[328] This Convention has been ratified by Turkey on January 4, 1995.
[329] Kılıçkaya, "Avrupa İnsan Hakları Mahkemesi Kararları Işığında Anayasa Mahkemesi'nin Bireysel Başvuru İncelemelerinde Çalışma Hakkı," 140-3.
[330] ECtHR, *Smith and Grady v. The United Kingdom*, nos. 33985/96 and 33986/96, 25.10.2000; ECtHR, *Lustig-Prean and Beckett v. The United Kingdom*, nos. 31417/96 and 32377/96,

However, in case of a severe violation, the ECtHR tends to directly observe a case of dismissal in the absence of a violation of another right protected under the ECHR.[331]

Nevertheless, as a result of changing patterns in labor relations in the globalizing world, opposing voices against job security started to rise among the labor law scholars and practitioners. These voices submit that lifelong jobs are the highlights of the past and articulate that they are no longer aspired since the current labor relations are built around the ideas of flexibility and labor movement. Stone proposes in this regard "a social safety net that does not draw a sharp line between employment and unemployment, but that recognises that individuals should have the ability to move between labour market statuses without risking financial ruin."[332] Through a social safety net, workers may have the necessary protection to have the flexibility to be mobile and shift between different employment opportunities.

Although the grounding of the job security oppositions present factual claims, new forms of flexible work and the constant transition shall not render the principle of job security extinct and insignificant. The majority of the active population in the world still work in conventional forms of employment and are dependent on the protection provided to them with job security. Flexible employment and constant transition between jobs should not create unfavorable conditions for the workers compared to what they would be entitled to if they were protected through job security.

27.12.1999; ECtHR, *Obst v. Germany,* no. 425/03, 23.09.2010; ECtHR, *Özpınar v. Turkey*, no. 20999/04, 19.10.2010; ECtHR, *Redfearn v. The United Kingdom*, no. 47335/06, 06.02.2013; ECtHR, *I.B. v. Greece*, no. 552/10, 03.01.2014.

331 ECtHR, *Schüth v. Germany,* § 73; ECtHR, *Kyriakides v. Cyprus,* no. 39058/05, 16.1.2009, § 52; ECtHR, *İhsan Ay v. Turkey,* no. 34288/04, 21.04.2014, § 31.

332 Katherine V.W. Stone, "A Right to Work in the United States: Historical Antecedents and Contemporary Possibilities," in *The Right to Work: Legal and Philosophical Perspectives,* ed. Virginia Mantouvalou. (Portland: Hart Publishing, 2015), 289.

Movement within the labor market should be the result of the will of worker and not an imposition by the employer. In other words, workers should move within the labor market by their own choice and not because they are forced into it as a result of the constant layoffs of the employers. Job security should still protect those in conventional jobs and should become flexible only for the exceptional contemporary forms of employment relationships that exclude, by their nature, the protection provided by jobs security. Otherwise, it may result in the violation of the right to work of the individuals.

On the other hand, it is true that job security intends only to protect the workers of the conventional employment relationships; whereas workers in flexible employment relationships who constantly move within the labor market are not provided with sufficient protection. Workers who are not dismissed but terminate their employment contracts by their own will are not granted the internationally regulated protection of income security. This also has the risk of violating the right to work because it indirectly forces individuals to remain in a job, unless they are unfairly dismissed. The states' legislations should adjust to the flexibility of the labor market. Otherwise, it will create injustices and different treatment of persons employed in different types of employment relationships.

Philip Harvey rejects the idea that the right to work involves restrictions on the employer's right to terminate the employment contract. He claims that the right to work's "touchstone is not tenure in a particular job but the availability of enough jobs to eliminate involuntary unemployment."[333] This may have been a substantial argument in the ideal economic regime where full employment was achievable as there would be no interest for individuals to remain in their existing job and they would be exempt from the risk of being continuously unwillingly unemployed. However, the reality demonstrates otherwise. Full employment is unachievable and this means that there will always be more unwillingly unemployed than the number of employment vacancies. As a result, job security is necessary to ensure that the individual has a job and does not unfairly encounter the risk of being dismissed. If the right to work involves having a job, securing the existing job is certainly a means to achieve this objective.

3.2.4. The Right to Terminate Employment

While the right to remain in employment secures the worker's position at an existing job, the final element of the right to work, namely the right of the worker to terminate employment, guarantees the worker the opportunity to quit their work, without encountering a serious threat to their lives or that of their families. The right to work is an individual right and the enjoyment of the right is subject to the will of the individual. It is not possible to talk about a right, but rather a compulsion if the individual is not granted the right not to enjoy it. Therefore, the right of the individual to terminate the performance of the work is a natural aspect of the right to

[333] Philip Harvey, "Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously," *Columbia Human Rights Law Review* 33(2001-2002): 381.

work.[334] It is also referred to within the framework of forced labor as an indicator of voluntariness of the work performed.[335]

Although economic necessities that compel workers to remain in jobs which they would otherwise not sustain are not deemed forced labor, they may under various circumstances result in the violation of the right to work. As part of their obligations arising out of the right of the individuals to social security and adequate standards of living, states are under the obligation to provide their people with at least the minimum means for their survival. The same is true also for those who become unemployed. The right of the worker to terminate employment is realized if the worker in fact has adequate security to ensure their and their family's livelihood in the absence of a regular income based on employment. Only this way can one truly talk about a freely chosen or accepted work.[336]

Unemployment benefits serve the right to work by endorsing freedom of choice. Their objective is to insure the worker against the risk of being unemployed and losing their regular income necessary for their and their family's subsistence.[337] Since the purpose of unemployment benefits is to reduce the suffering of the unemployed as a result of the loss of a source of income, its scope of application is in most legal systems limited to those who were previously participating in paid employment and excludes unpaid work. Yet, it still values work (although only paid

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[334] Fevzi Demir, "Çalışma Hakkı Kavramı ve Hukuki Niteliği," in *Sosyal İnsan Hakları Sempozyumu VI Bildiriler* (Istanbul: Petrol-İş Yayınları, 2014), 148.

[335] See 3.2.1.4 above.

[336] An issue that requires underlining is that the right to terminate employment shall be applicable to all categories of workers, whether paid, unpaid or self-employed. All workers are entitled to terminating their work and to either benefit from the opportunity to access another work or to declare their retirement, although may be subject to additional conditions under the national law.

[337] Süleyman Başterzi, *İşsizlik Sigortası* (AÜHF: Ankara, 1996), 53.

work) because it is generally conditional on previous employment – just like the entitlement to old-age pensions. These benefits mostly celebrate the former employment of the worker and attribute rights that emerge after the employment relationship terminates. In other words, paid work is valued not only by the payment of wages and rights at work, but also by the granting of rights which are exclusive to the period after the employment relationship is over.

Unemployment benefits are more commonly provided to employees whose employment contracts had been terminated by the employer. In this respect, it indeed provides a second stage of guarantee for the employee, following job security – although unemployment benefits may still be granted in cases of termination by the employee in exceptional situations. The significance of unemployment benefits in the protection of the right to work manifests itself regarding the entitlement of employees to unemployment benefits in cases where employees themselves terminate the employment contract without notice. Where remaining in the employment relationship is no longer bearable for the employee, the employee is granted the right to terminate the employment contract effective immediately and be entitled to unemployment benefits. The reason behind this rule is that the employees' termination without notice cannot be considered as the misconduct of the employee. In the absence of the income security guaranteed through unemployment benefits, there will be an indirect coercion on the employee to remain in the unbearable employment relationship, although the employee could no longer be reasonably expected to proceed with it. Provision of unemployment benefits in cases of termination by the employee creates an opportunity to provide the worker with a level of discretion in terminating the employment relationship. The financial concerns of employees that force them into remaining in a job that they would otherwise not continue – and objectively would not be expected to continue – is being reduced, granting the employees the opportunity to at least consider taking the risk of terminating their employment relationship. This way, unemployment insurance emerges as an instrument for the realization of the right to work, as opposed to a "compromise"[338] for the failure of realizing the right to work as Cahit Talas identifies.

The same can also be voiced concerning severance allowances. Severance allowances are also directed towards minimizing the employees' risk of suffering economic burden as a result of termination of their employment contracts by the employers, and in exceptional cases by the employees themselves.[339] This is affirmed in article 12(1) of the ILO Convention No. 158 which stipulates the following:

"A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

> (a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
> (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

[338] Talas, "Çalışma Hakkı ve Türkiye'deki Durum," 412.
[339] Ünal Narmanlıoğlu, *İş Hukuku Ferdi İş İlişkileri I* (Istanbul: Beta, 2014), 536.

(c) a combination of such allowance and benefits."

As the article indicates, both unemployment benefits and severance allowances are, as a rule, targeted towards overcoming the risks that the employees are likely to encounter as a result of termination of their employment contract *by the employer.* Neither is designed towards providing workers with the freedom to terminate their employment contract without either having found another job and hence, another source of income, or suffering economic burdens.

3.3. OBLIGATION TO WORK

Obligation to work is a highly debated issue and in fact has occupied the scope of a variety of subjects, including philosophy, theology, sociology, economics and law. There are many theories articulating that there is in fact an obligation of the individuals to work, although they are likely to differ in their justifications. It is still a familiar notion which not only had recognition in the constitutions of the former communist states, but is also present in the constitutions of some of the current liberal states. Furthermore, among the international instruments, it is governed in article 29(6) of the African Charter of Human and People's Rights.[340]

Obligation to work is based on the idea that the state and the society are in need of an active and productive population in order to function. In this respect, obligation to

[340] Article 29(6) of the African Charter of Human and People's Rights provides the following: "The individual shall also have the duty (…) to work to the best of his abilities and competence…"

work has a social function and derives from social necessities.[341] Two significant justifications concerning obligation to work are commonly encountered, both of which still have a substantial number of supporters. The first one of these justifications is based on the social obligation of the individual to work and the second one directly establishes it as a legal duty, which the individual is required to perform as part of their citizenship.

3.3.1. Social Obligation to Work

The social obligation of the individual to work is based on the articulation that work ensures social inclusion. It is based on the idea that an unemployed person is likely to be excluded from the society either due to being accused of being "idle"or for being in a state of poverty, creating the perception of being a financial burden on others as well as a "potential criminal" or any other biased generalizations that are laid on the persons living in poverty by the elitists. The social exclusion justification of obligation to work is based on the assumption that the society does not value idleness and considers the idle as the inactive beneficiary of the working population's labor, particularly concerning those who live off welfare, namely the taxes and social security contributions of the workers. This common opinion also creates social pressure on the individual to find employment.

[341] Ayferi Göze, *Sosyal Devlet Sistemi* (Istanbul: İ.Ü. Hukuk Fakültesi, 1976), 143.

Although there are some strong points in the social obligation to work argument, the advocates of this view disregard the fact that the risk of social exclusion commonly affects those living in poverty and does not directly deal with those who are wealthy but do not work by choice. Persons who live off welfare and simultaneously encounter condemnation by others consist only of the unemployed who live in poverty. This means that social exclusion is not necessarily a risk borne by the unemployed, rather by the poor. The fact that the working poor are among the risk groups of social exclusion also upholds this reasoning. Obligation to work is not the social phenomenon in question; instead the capability to maintain one's economic independence is the main issue here. Social exclusion will be inevitable as long as there is poverty and enormous economic diversities between people in a society. Unemployment or idleness are not the main underlying problems in this regard.

3.3.2. Legal Obligation to Work

The second justification of the obligation to work hinges upon a legal basis and is explicitly recognized to be among the duties of citizens. Work as a duty arising out of citizenship has its foundations in the socialist ideas and is present in the constitutions of the former communist countries. The socialist understanding of work as an absolute obligation of the state on one hand, and as a duty of the citizens on the other, is based on the economic and ideological interests of the state. In this respect, utilizing the existing labor power represents the economic interest; whilst making work the key to a meaningful lifestyle represents the ideological interest.[342]

Among the communist constitutions, article 12 of the 1936 U.S.S.R. Constitution stipulates the following: "In the U.S.S.R. work is duty and a matter of honor for every able-bodied citizen, in accordance with the principle: 'He who does not work, neither shall he eat.' The principle applied in the U.S.S.R. is that of socialism: 'From each according to his ability, to each according to his work.'"[343] The socialist idea of the right to work is directly correlated with the duty to work because the only way for the citizens to perform their duty is for the state to ensure that there are enough jobs for everyone. Therefore, out of the duty to work emerges the right to work.

Nonetheless, the right to work is understood in terms of duty to work neither in the modern international human rights discourse nor in the present study. Duty to work in the liberal economies, as will be further analyzed hereunder, appear concerning entitlement to various benefits, the granting of which are conditional on previous or present employment. However, as Bob Hepple clarifies, duty to work in these cases "corresponds only to a right to social security, and not to a right to work."[344] Duty to work in the socialist sense forces individuals to work regardless of their intentions to work or not and therefore violates freedom to work. Accordingly, and for the reasons presented above,[345] the right to work cannot be interpreted as creating an obligation for the state to ensure employment for everyone. Apart from the fact that full

[342] Klaus Westen, "Das Recht auf Arbeit in den Prämissem sozialistischer Verfassungen," in *Das Recht des Menschen auf Arbeit,* ed. Hans Ryffel and Johannes Schwartländer (Strassburg: N.P. Engel, 1983), 143.
[343] http://www.departments.bucknell.edu/russian/const/36cons01.html
[344] Bob Hepple, "A Right to Work?," *Industrial Law Journal* 10 No.1 (1981): 70.
[345] See 3.2.2.2.1 above.

employment is not economically achievable and therefore, individuals cannot be expected to comply with their duty to work in the absence of sufficient number of jobs,[346] work as a duty is not compatible with the freedom to work because it lifts the voluntary nature of work and establishes work as a compulsory activity. Yet, there is considerable amount of constitutions in force that explicitly govern a duty to work. Apart from a number of Latin American and the still remaining communist constitutions, constitutions of Hungary (article XII,1), Italy (article 4), Japan (article 27), Spain (section 35,1), and Turkey (article 49) are also among those states which mention duty to work in their constitutions. Furthermore, the Preamble of the 1958 Constitution of France makes reference to the Preamble of the 1946 Constitution, which explicitly recognizes in paragraph 5 the duty and the right of everyone to work.

The two questions arising here are firstly, why is there a duty to work governed by the constitutions in the first place and secondly, how can these obligations be implemented? The answer to the former lies within the states' perception of work as either an individual activity or a socially contributing one. Becker explains this with the principle of reciprocity, asserting that people are dependent on the work of each other and the way to reciprocate the goods we have attained from the work of others is to do socially useful work.[347] Social development depends on a productive and economically active society. In this sense, there is a bilateral relationship between the state and the members of the society. While the state is the primary obligator of

[346] Gökçeoğlu Balcı, "Çalışma Hakkını Yeniden Düşünmek," 294.
[347] Lawrence C. Becker, "The Obligation to Work," *Ethics* 91, no. 1 (1980): 41-43.

achieving social progress, it cannot fulfill its duties arising thereof without the involvement of the members of the society.[348]

The problem with this is identifying the socially useful work. As Becker also elaborates, traces of indirect social usefulness may be found in almost any kind of work.[349] Therefore, it is an issue of interpretation to establish what kind of work could constitute socially useful work. It could however be assumed, as does Becker[350], that socially useful work is not limited to paid work and also covers unpaid work. Assuming otherwise would generate the burden on the state to have enough jobs for the entire population since it would be a contradiction for a state to impose a duty to work on its people while there are not enough jobs for the people to perform their duties at. Furthermore, a strict application of a duty to perform paid work will be a severe interference with the individuals' right to work. In this respect, duty to work should be understood not as a legal obligation but as a statement of the moral duty[351] of the citizens to be productive and contributive. It should not be understood as requiring them to be active participants of the labor market.

The second issue that requires attention is the problem of *implementing* duty to work. Apart from the justified state imposed compulsory labor, such as compulsory public service or military service, there are no means of supervising the work of individuals,

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348 This position is endorsed by article 6 of the UN Declaration on Social Progress and Development which states the following: "(1) Social development requires the assurance to everyone of the right to work and the free choice of employment. (2) Social progress and development require the participation of all members of society in productive and socially useful labour (…)" United Nations General Assembly, Resolution 2542 (XXIV), "Declaration on Social Progress and Development," December 11, 1969.

349 Becker, "The Obligation to Work," 44.

350 Ibid., 45.

351 Bernd Nenninger, *Das Recht auf Arbeit in Japan und Deutschland: Eine rechts- und kulturvergleichende Untersuchung* (Berlin: Duncker&Humblot GmbH, 1994), 99.

particularly if they are involved in unpaid work. When socially useful work is taken in the broad sense, activities that are not clearly identifiable may still have direct or indirect contributive aspects. Whether through bringing up a child or pursuing a healthy life by doing daily workouts and hence, reducing the risk of occupying the state's healthcare system, every activity can be assessed within the context of "socially useful work". Not only is it difficult to identify such work, it is also an impossible task to establish objective criteria thereof.

State imposed compulsory labor aside, there may also be no execution of criminal penalties against those who refrain from doing socially useful work, in the assumption that they have been identified. Imposition of any form of sanctions against those who do not comply with their duty to work is foremost against prohibition of forced labor.[352] Making various benefits conditional on work, although legitimate, is not adequate in explaining duty to work because as a rule, such benefits are dependent on paid work and apart from some rather increasing number of exceptions, they commonly disregard unpaid work. Explaining duty to work through benefits dependent on employment will establish duty to work as duty to perform paid work, which will lead to the problems assessed above.

As a result, duty to work remains merely a principle and an indicator of the states' perceptions of work and society. Its sole function is to express the idea that a society operates through the work of its people and underlines the contributive effect of

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[352] Gökçeoğlu Balcı, "Çalışma Hakkını Yeniden Düşünmek," 290.

productive work. It cannot be interpreted as creating duties on the individuals to *actually* perform work.

That being said, there are various duties to work bestowed on the individuals as a result of their citizenship or as a condition of accession to a profession. These duties to work either require the services of the individual for a specific period of time (such as military service or mandatory public service) or aim at providing the individual with a certain level of experience before practicing certain professions (such as mandatory internship or service period for medical doctors or lawyers). This is also endorsed by the relevant international human rights conventions. Accordingly, article 5(1) of the 1926 Slavery Convention stipulates that forced or compulsory labor may be extracted for "public purposes" only, and when this is the case, the High Contracting Parties are under the obligation to "endeavor progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence." Article 4 of the ECHR on the other hand, specifies what "public purposes" constitute rather than establishing a general statement as in the case of the Slavery Convention. Unlike the methodology of the Slavery Convention, the ECHR, along with the ILO, takes the position of excluding such purposes from the *definition* of forced labor rather than identifying them as *exceptions*. It refrains from qualifying the listed practices as forced labor and thus, shrinks the legal definition of forced labor. A formulation of a restricted definition approach is possibly taken with a view to adopt prohibition of forced labor as an absolute principle rather than one with exceptions. It is also why a conceptual distinction is established between forced labor and compulsory labor. Yet, they are qualified and regardless of their legitimacy, the list of practices that are omitted from the definition of forced labor are still extracted from the individual in the absence of their consent. In this regard, the second paragraph of article 4 of the ECHR lists four cases which are not considered as forced or compulsory labor:

- prison work
- military service or alternative service exacted from conscientious objectors
- service exacted in cases of emergency or calamity
- work or services as part of normal civic obligations.

Despite some minor divergence in the language and the extent, this list is parallel to the exceptions provided under article 2(2) of the ILO Convention No. 29. The list of exceptions set forth in the ILO Convention No. 29 is more restrictive than that of the ECHR. Furthermore, the ILO Convention No. 105 expands this list to avoid the sanctioning of various acts under the pretense of forced labor exceptions. Pursuant to article 1 of the ILO Convention No. 105, forced and compulsory labor shall not be used for the following:

“(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

(b) as a method of mobilising and using labour for purposes of economic development;

(c) as a means of labour discipline;

(d) as a punishment for having participated in strikes;

(e) as a means of racial, social, national and religious discrimination."

The states' compliance with the forced labor conventions are assessed within the framework of the above criteria. Accordingly, in the presence of a legislation or a practice which is recognized among the exceptions of forced labor, they still need to be implemented in a way that does not create the means or methods that are listed in article 1 of the ILO Convention No. 105. Otherwise, the state in question is deemed in violation of prohibition of forced and compulsory labor.

Both the ILO and the ECHR, along with the ECSR, have parallel interpretations concerning obligations to work. However, the list of exceptions requires questioning, particularly in terms of prison work. In order to determine the framework of these exceptions, they require separate analyses.

3.3.2.1. Prison Work

Although all other exceptions may be legitimized through both discourses on obligation to work, namely the social obligation to work and the legal obligation to work arising out of citizenship, work extracted from detainees in the absence of their consent can be explained by neither. Prison work is claimed to be serving the purpose of rehabilitating the prisoners and offering them an opportunity to re-integrate into the society by ensuring them with the means to gain and put into use their productive skills.

This legitimization is absurd in many aspects. Firstly, the so-called objective of "re-integrating into the society" is not so much different than designating work as a means of punishment. The modern criminal law approach adopts punishment basically as a means of re-socializing the unsocial. It is rather salient that *work* is utilized as a method for disciplining (or "re-integrating") the unsocial to be a proper member of the society. "Re-integration" is nothing more than a fancier and a more moderate way of saying disciplining. Secondly, it is an extreme form of interference to the personal right of the prisoner for a comparatively subordinate interest of socializing an individual, assuming that is in fact the genuine reason. Prohibition of forced and compulsory labor lies among the most basic rights of persons. The forsaking of this right cannot be legitimized by the reason of "re-integrating a criminal into the society", an issue which is a concern for states' penal policies. Re-integration is neither a human right nor an actual individual interest. It is not even the sole necessary instrument for avoiding further crimes and work is certainly not the only means of achieving re-integration. Work may indeed be contributive to the further life of the prisoner, but it should be left to the will of the individual. The claimed objective behind prison work is not a good enough reason to legitimize work extracted from the prisoners in the absence of their consent.

It is not a great challenge to comprehend that there are other underlying reasons for legitimizing compulsory prison work. The global reforms in the area of penal policies that incorporate the private sector into the process are criticized by some scholars to be of economic nature rather than being pursued within a human rights discourse. Yasemin Özdek, who is among these writers, presents two economic factors which she argues to have influenced the new penal policies. The first factor is the increase in the exploitation of the prisoners' labor. The way prison work is utilized today places it among the cheapest and the most disciplined usage of the labor power. The second factor is the fact that penalization became an independent industry as a result of the increase of investments in prisons by private sector.[353]

Most developments in the area of penal policies are supportive of Özdek's claims. Making way private enterprises to employ prisoners, the rise of private prisons in an increasing number of countries, and the creation of the perception within societies that the idle and uneducated poor have a higher tendency to commit crimes are among many facts that concretize the accuracy of the criticism concerning the influence of the economic factors on the new penal policies. Accordingly, Özdek's study concludes that the imprisonment policies in the USA target the non-white persons, migrants, the unemployed, the uneducated, the homeless and those who are excluded from social protection resources.[354]

Work performed by prisoners is not qualified as a contractual employment relationship. A prisoner does not have the right to choose the work or the other party, namely the employer. It is not possible to talk about the presence of a contractual relationship in the absence of a right to choose. Hence, prisoners cannot be

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[353] Yasemin Özdek, "Küreselleşme Sürecinde Ceza Politikalarındaki Dönüşümler," *Amme İdaresi Dergisi* 33 no.4 (December 2000): 24.
[354] Ibid., 35.

characterized as employees.[355] This makes prison work vulnerable against abuses and it bears traces of the modern form of labor exploitation. It is preferred for its advantages to the private enterprises, namely cheap labor which is conducted under full supervision and discipline where workers are deprived of their certain fundamental rights including freedom of contract, the right to strike, and the right to rest. This exploitative character of prison work is recognized by the international platform and it is for this reason that prison work is strictly regulated by the international conventions and requires detailed legislative actions by states.

The same reasoning is also applicable for community service requirements in the form of punishment. Although work is not adopted in theory as a means of punishment, requiring convicts to perform work, for whatever grounds, under the disguise of compensating for their actions is nothing more than a state imposed forced labor, particularly since the convicts perform such work without any payment in return. This way, public services that should be offered by the (social) state through paid public servants are executed by convicts without any financial burden. Community service exacted from convicts is utilized as a means of relieving the state from paying individuals for the services it is obligated to provide its people with.[356] The sole commonly adopted protection of community service performers is that compulsory community work shall be exacted exclusively by the state and for the benefit of the state, where third party involvement, particularly as a beneficiary, is strictly prohibited.

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[355] Fatih Uşan, "İş ve Sosyal Güvenlik Hukuku Açısından Tutuklu ve Hükümlü Çalışması," in *Prof. Dr. Nuri Çelik'e Armağan,* ed. H. Fehim Üçışık (İstanbul: Seçkin, 2001), 2: 1443-4.

[356] Özdek, "Küreselleşme Sürecinde Ceza Politikalarındaki Dönüşümler," 45.

The scope of legitimate prison labor adopted by the ILO is limited to convicts. This indicates that only convicts of a crime among the prisoners can be subject to compulsory work and those who are in detention in the absence of a final court judgment cannot be the subjects of such labor. On the other hand, neither the ECtHR in its judgments nor the ECSR in its conclusions make any distinction between the detainees. In this sense, the ECtHR does not appear to have strict rules concerning prison work and commonly refrains from declaring violation in its judgments. It bases its decisions on the standards adopted in the member states instead of establishing its own discrete standards.[357] Possibly due to the ECtHR's moderate position, the ECSR frequently makes reference to the ILO's principles and observations on the issue in its conclusions. Accordingly, the ECSR holds the ILO's position and adopts the principle that the exceptions of forced and compulsory labor shall not be utilized as a means of penalizing persons for holding or expressing political opinions or participating in strikes or as a means of labor discipline.

In terms of working for private enterprises, article 2(2)(c) of the ILO Convention No. 29 states that the work of convicts shall be "carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations". Although this provision appears to prohibit the employment of convicts by private enterprises, it should not be disregarded that this rule is the exception to the exception of forced and compulsory labor. In other words, prohibition of employment of convicts by private enterprises shall be read as the prohibition of *compulsory* prison work for private

[357] ECtHR, *Stummer v. Austria,* no. 37452/02, 07.07.2011, §128.

enterprises. Therefore, this rule shall not preclude the convict to engage in *consensual* employment relationship in the private sector. Indeed, the ECSR allows the employment of prisoners by private enterprises only in the presence of their consent and requires states to ensure these prisoners the rights and conditions that are as similar to the ordinary employment relationships with private enterprises as possible.[358]

3.3.2.2. Services of Military Character or Alternative Service

The second form of compulsory work that is excluded from the definition of forced labor and has legitimacy in the relevant international instruments is military service. It is a commonly recognized form of obligation arising out of citizenship and bestows on the individuals the obligation to offer their services in matters of national security. In this sense, compulsory military service lies among the exceptions of forced labor due to the states' choice in prioritizing national security over prohibition of forced labor.

The ECHR recognizes an alternative service to military service exacted from conscientious objectors. However, as the wording of the article explicitly states and as adopted in the judgments of the ECtHR, the recognition of an alternative service

[358] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

for conscientious objectors shall not be read to require states to ensure their citizens with such alternative.[359] The purpose of this recognition is to legitimize the extraction of alternative compulsory services and not deem them forced labor merely because they do not constitute military service. In the case where a state has chosen to offer alternative compulsory services, the ECSR requires the length of such alternative service to be proportional to and reasonable compared to the duration of the compulsory military service.[360]

It should be noted that the context of the present exception is not limited to compulsory military service for citizens and involves all services that are of military character. Therefore, it also concerns the military professionals and legitimize the unique rules of the military that amount to compulsory labor.

3.3.2.3. Service Exacted in Cases of Emergency or Calamity

The third practice that is excluded from the scope of forced labor is the services exacted from individuals in cases of emergency or calamity that create a threat over the community. The objective of this exception is to unite the necessary workforce of the population and overcome the threat as quickly as possible with minimum damage. It is of particular concern when the lives of individuals are at stake and the

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[359] ECtHR, *Bayatyan v. Armenia,* no. 23459/03, 07.07.2011, § 99.

[360] Council of Europe, "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

right to health of the public becomes prioritized over the right to work of medical doctors and other personnel.

3.3.2.4. Work or Services as Part of Normal Civic Obligations

Work or services as part of normal civic obligations is the final group of practices that are excluded from the scope of forced labor. The regulation of the ILO and the ECHR concerning this practice differ in terms of content. While the ECHR does not distinguish normal civic obligations, the ILO Convention No. 29 makes an additional reference to a special form of civic obligations, also deeming it a forced labor exception. According to article 2(2)(e), "minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community" shall be considered as being part of normal civic obligations, provided that the members of the community or their representatives are consulted on the need for such services.

With regard to work or services performed as part of normal civic obligations, the ECtHR has established certain criteria that shall be satisfied in order render the work normal civil obligation rather than as forced labor. Firstly, the service required from the individual should not fall outside of the ambit of normal activities performed as part of their profession. Secondly, reasonable compensation should be provided in exchange of their services. This, however, does not have to be financial and the accession into the profession afterwards and being able to perform it independently is considered as reasonable compensation. Furthermore, the ECtHR notes that the contribution of the professional training to the individual's career and the experience gained could also satisfy this condition. Finally, the obligation to work should not create a disproportionate burden on the individual.[361]

3.3.2.4. Other Cases of Obligation to Work

One of the dilemmas concerning the legal obligation to work arises from the state imposed programs that seek to promote the right to work while contradictorily imposing duties on the individuals to work. Mundlak names this problem "institutional coupling"[362]. One of the cases in which institutional coupling is among the most apparent is the welfare-to-work programs. These programs aim at integrating individuals who are living off welfare into the labor market by making them active participants, while at the same time lifting the burden on the state to provide the means of subsistence for such individuals and their families.

There are different forms and practices of welfare-to-work programs. As Mundlak underlines, there are welfare programs ranging from those that are mandatory for every welfare claimant and to those that are completely on voluntary-basis. Some function with the purpose of placing people in suitable jobs by increasing their

[361] In a case, the ECtHR found that the applicant had adequate amount of time left from his working hours to perform other paid work and rendered the obligation proportional. See: ECtHR, *Van der Mussele v. Belgium,* no. 8919/80, 23.11.1983, §39.
[362] Mundlak, "The Right to Work – The Value of Work," 358-361.

opportunities through vocational training programs, whereas others do not necessarily take into consideration the skills and capabilities of the job-seekers.[363]

Although welfare-to-work programs do not directly infringe the right to work, they have the risk of creating such infringement if implemented in the wrong way. In order to satisfy the requirements of fully realizing the right to work, welfare-to-work programs should have a level of voluntariness. They shall not be regarded as the means of relieving the states from their obligation to provide social security to their people and to take care of those who lack the financial means of doing it on their own. In other words, an individual's entitlement to social security and an adequate standard of living should not be conditional upon the individual's participation into a welfare-to-work program. Such programs should not create an obligation on the individual to be an active participant of the labor market. However, they may provide an additional incentive for the individual to participate in them, either financially or by other means.

Furthermore, placement into a job under a welfare-to-work program should also be undertaken with a view to avoiding violating the right to work. In other words, jobs that individuals are placed in shall be both decent and suitable, and individuals should not be obligated to accept any job offer that they are presented with in a way that would interfere with their right to engage in work of one's own choosing.

[363] Ibid., 359.

3.4. ASSESSMENT

It is an established fact that work is a dynamic notion evolving with the global trends and ideas. The international instruments that regulate work (and the right to work in this respect) are likely to fall behind in realizing an updated version of work considering the lack of harmony in the development level of states. Yet, establishing work as a right requires consistency within the rights discourse and has to be in harmony with other human rights. With a view to define a right to work that satisfies such requirements, this chapter presented work as a productive activity that is decent and suitable and is not, by definition, necessarily valued for being performed in exchange for a consideration in the form of money. Other forms of work that fall outside the scope of an employment relationship have been established here as constituting work in terms of the right to work.

Furthermore, it is observed from the international instruments on the right to work that clear borders of this right are not strictly identified. Either due to a vague language or the confusion of concepts related to work, a clear global definition of the right to work does not seem to have established. The right to work is presented in this study as the right to a freely chosen or accepted work and is distinguished from the right to just and favorable conditions of work – although the relationship between the two is acknowledged. The right to work accordingly consists of the following aspects: prohibition of slavery, forced and compulsory labor, the right to engage in work of one's own choosing, the right to remain in employment and the right to terminate employment. States' obligations arising out of the right to work are diverse, where some are categorized as positive obligations, whereas others require the state to refrain from interfering. Furthermore, the right to work is not adopted as an absolute right and involves various limitations and exceptions where a higher interest is at stake.

With a view to fully realize the right to work where unpaid work is also valued within the scope of this right, a rather commonly repeated proposition for a social security mechanism is basic income. The theory of basic income argues that individuals should be entitled to a without means-tested, unconditional income, regardless of their previous, existing or future work. It is based on the idea of a social state, which has the obligation to provide for its people by offering them at least their monetary needs for survival. The advocates of basic income security argue that since the achievement of full employment is established to be a fiction, the only other means of fully achieving the realization of the right to work is through the basic income guarantee. Although it is not argued to be the solution to all problems of work, it is designed to provide the individual with the basic security to pursue their subsistence and therefore, have freedom of choice concerning work. In the words of Guy Standing, "[i]t would be one part of a strategy to provide real freedom in which individuals could make rational choices about how to work and, from time to time, how not to work."[364]

The definition of the right to work of basic income advocates also endorses the view adopted in this study, namely that the right to work should not be limited to the right to employment but should be understood as to include all paid and unpaid work. In

[364] Guy Standing, "Why Basic Income is Needed for a Right to Work," *Rutgers Journal of Law & Urban Policy* 2 no. 1 (2005): 95.

this regard, a social security system which provides an unconditional income guarantee is likely to create the environment in which individuals will be given the possibility to make willful choices concerning the work they would like to perform.[365] This way "people will pursue work for precisely the reasons why it should be considered such – because they seek self-fulfilment, socialisation and externalisation of talents associated with work."[366]

However, basic income guarantee is only one of the proposals that states may implement within their social security systems. It is in no way the sole means of responding to problems arising out of the right to work and nor could it be sufficient. In order for states to fully realize their obligations arising out of economic and social rights, and in particular the right to work, they are required to have a strong social security system where individuals are provided with the freedom to work and in this respect, freedom to not work and freedom to work in an unpaid work.

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[365] Ibid., 99-100.
[366] Mundlak, "The Right to Work- The Value of Work," 362.

CHAPTER 4

THE RIGHT TO WORK IN TURKISH LAW

Up until this chapter of the study, the main focus had been the theoretical conceptualization of the right to work through an assessment of the human rights discourse and the adopted values in conjunction with the emerging trends. In this chapter, the right to work as defined in the previous chapter will be concretized through the Turkish positive law and the conformity of the Turkish law with the requirement of the right to work will be assessed.

Accordingly, as an issue of human rights, the right to work is recognized as a fundamental right within the Turkish legal system. The protection attributed to this right has two dimensions in terms of its implementation. The first dimension protects the right to work within the system of constitutional law as a public law issue and adopts the right to work as constitutional right; whereas the second dimension integrates this right into the individual employment relationships, where it is protected within the private law system through the relevant institutions. These two systems will be analyzed in separate headings and assessed accordingly hereunder.

4.1. THE RIGHT TO WORK IN THE TURKISH CONSTITUTIONAL LAW

The Turkish Constitution is characteristically recognized for its broad coverage of human rights. Articles 12 through 74 are saved exclusively for fundamental rights and freedoms and are regulated in four chapters. The first chapter sets forth the general principles concerning such rights whereas the following three chapters categorize the rights as “The Rights and Duties of the Individual”, “Social and Economic Rights and Duties” and “Political Rights and Duties”. Articles 41 through 65 regulate economic and social rights and include a detailed list of fundamental rights and freedoms that fall in this category[367], including labor rights. Different aspects of the right to work are also recognized in the Turkish Constitution directly in three of its articles. Article 18 of the Constitution governs prohibition of forced and compulsory labor within the scope of the fundamental rights and freedoms of the individual; whereas article 48 recognizes freedom to work and article 49 sets forth the right to work, both within the scope of economic and social rights.

[367] These rights consist of the following: protection of family and children’s rights (article 41), right and duty of education (article 42), utilization of coasts (article 43), land ownership (article 44), protection of agriculture, animal husbandry, and persons engaged in these activities (article 45), expropriation (article 46), nationalization and privatization (article 47), freedom of work and contract (article 48), right and duty to work (article 49), working conditions and the right to rest (article 50), right to organize unions (article 51), right to collective agreement (article 53), right to strike and lockout (article 54), provision of fair wage (article 55), health services and protection of the environment (article 56), right to housing (article 57), protection of the youth (article 58), development of sports and arbitration (article 59), right to social security (article 60), persons requiring special protection in the field of social security (article 61), Turkish citizens working abroad (article 62), protection of historical, cultural and natural assets (article 63), protection of arts and artists (article 64), the extent of social and economic duties of the State (article 65).

4.1.1. Prohibition of Forced and Compulsory Labor

Prohibition of forced and compulsory labor is foremost an aspect of freedom to work.[368] However, due to its significance within the human rights catalogue and the severity of the practices that are in violation of this principle, it is governed separately under the Turkish Constitution. Accordingly, prohibition of forced and compulsory labor is explicitly governed under the Turkish Constitution. Article 18(1) of the Turkish Constitution provides with a rather simple wording the following: “No one shall be forced to work. Forced labour is prohibited.”[369] This article, along with the others that protect fundamental rights and freedoms of persons shall be interpreted as the legal basis for prohibition of slavery, forced and compulsory labor.[370]

The fact that there is no direct reference to slavery in the Turkish Constitution shall not be considered as a deficiency, but rather as implied through reference to human rights in the Preamble, human dignity in article 17 and the inviolability and inalienability of the inherent fundamental rights and freedoms in article 12, aside from the above referred provision of prohibition of forced labor. The absence of a direct declaration of slavery shall be interpreted as nothing more than the absence of a historical recognition and thus, sensitivity thereof.

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[368] Tiryaki, *Ekonomik Özgürlükler ve Anayasa,* 158.

[369] English translation available at: https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[370] It should be noted, however, that the meaning of the latter sentence of the above provision appears to have gotten lost in translation. The Turkish word used in place of forced labor, i.e. *angarya*, does not have a direct English translation and is not a concept that is found in international documents. *Angarya* is defined in the rationale of the article as forcing someone to work without offering any consideration in return. By this definition, *angarya* is a form of forced labor where the individual is deprived of any form of payment in return for their labor. AYM, 06.03.1964 T., 1963/358 E., 1964/17 K., R.G, 02.06.1964, S. 11717.

Furthermore, Turkey’s international liabilities arising from the ratifications of a significant number of human rights documents have a reflection in the Constitution. Firstly, article 90(5) states that international agreements shall not be challenged before the Constitutional Court with claims of unconstitutionality. Secondly, international human rights documents which Turkey has ratified prevails national laws, in case of conflict between the two. Therefore, even if the national laws are in violation of an international human rights instrument, they do not have applicability before the national courts. Turkish courts are charged with the duty to apply the prevailing international human rights documents in cases of contradiction with the national legislation.

In addition to the constitutional protection of prohibition of forced labor, article 117(1) of the Turkish Criminal Code (No. 5237) of 2004 also penalizes any act that is in violation of freedom to work or freedom of employment and which is performed as a threat or menace or any illegal activity. Those who engage in such acts are penalized with six months to two years of imprisonment or administrative fine. The second paragraph of article 117 of the Turkish Criminal Code, on the other hand, penalizes persons who employ workers with no pay or with a disproportionately low pay or makes them work in conditions that do not comply with human dignity by exploiting that person’s desperateness, destitution and dependency. The penalty for engaging in such acts is six months to three years of imprisonment or administrative fine that is not less than 100 days. The same penalties are also applied to those who recruit, transfer or transport persons in order to place them in such situations.

Concerning trafficking, the Turkish legislation on anti-trafficking is formalized in a way that is parallel to the international norms. It is primarily regulated under articles 79, 80 and 227(3) of the Turkish Criminal Code and is supported by other relevant legislations. However, as a transit country, Turkey encounters many cases of human trafficking and this is considered as a point of concern both by the UN Human Rights Committee[371] and the ILO[372]. On the other hand, the efforts taken in fighting against human trafficking is also recognized and encouraged by the respective international bodies.

The Turkish legislation on minimum age for employment is also parallel to the ILO Convention No. 138, although it cannot be considered as a direct implementation. Article 71 of the Labor Act establishes the minimum age for employment as 15. However, children aged 14 may also be employed in light work which would not compromise their physical, mental, social or moral development, provided that they have completed their compulsory education and the work that will be performed would not be in the way of their attendance in school. Those under the age of 14 may only be employed for artistic, cultural and commercial activities, provided that it will not compromise their development or attendance in school. As regulated in the ILO Convention No. 138, workers under the age of 18 shall not be employed in hazardous work, including underground or underwater work, or in industrial work.

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[371] United Nations Human Rights Committee, CCPR/C/TUR/CO/1, "Concluding Observations on the Initial Report of Turkey Adopted by the Committee at its 106th Session (15 October – 2 November 2012)," November 13, 2012, para. 15.

[372] ILO CEACR, 104th ILC Session, "Observation on the Application of Forced Labour Convention, 1930 (No. 29) – Turkey," 2015.

With regard to forced labor, a specific case of violation found both by the ECSR and the ILO concerns the extensive power given to the captains of a ship pursuant to article 1467(2) of the former Commercial Code No. 6762 of 1956. According to this provision, captains were empowered with the authority to use force on the seamen and other persons on the ship, which included forcing them to return back to the ship. The fact that this disciplinary power of the captains was based on the objectives of proper functioning of the vessel or securing safety and *order* on board was found to be in violation of the right to work article of the ESC and the ILO Convention No. 105 for creating disproportionate compulsory labor. The ECSR stated in its conclusion that "any sanction involving compulsory labour should be limited to acts endangering the safety of the ship or the life or health of persons on board, and needed to be strictly defined."[373] As a positive step, this clause has been left out of the scope of the new 6102 numbered Turkish Commercial Code of 2011 and is no longer in force.

4.1.2. Freedom to Work

A second article in the Turkish Constitution dealing with the right to work is article 48 which regulates freedom to work and freedom of contract together in the same article: "Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free."[374] Here, the Turkish

[373] Council of Europe, European Committee of Social Rights, "Conclusions XIII-3 – Turkey – Article 1-2," 1995, http://hudoc.esc.coe.int/eng?i=XIII-3/def/TUR/1/2/EN.
[374] English translation retrieved from the official website of the Turkish Grand National Assembly, https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution recognizes three freedoms, namely freedom to work, freedom of contract and freedom of establishment, systematically under the same context but by referring to them separately. The fact that freedom of establishment is stipulated not as a separate freedom, as in the case of freedom of contract and freedom to work, but merely as a statement leads to the interpretation that the legislator's will was directed towards not excluding freedom of establishment from the scope of freedom of contract and/or freedom to work.

It is established and confirmed with the Turkish Constitution that freedom of contract and freedom to work are linked but separate freedoms. Freedom to work derives from freedom of contract and at the same time contributes to the person's freedom of contract.[375] It presents the individual with the freedom to whether or not to work, to work in an occupation and for an employer as well as at a workplace of their own choosing and to terminate the employment relationship.[376] As for the freedom of establishment, its distinction from either freedom of contract or freedom to work cannot be easily distinguished. In fact, freedom of establishment is a special regulation of both freedom of contract and freedom to work. Freedom of contract provides the individual with the right to establish and conduct businesses; whereas in terms of freedom to work, freedom of establishment means freedom to work as a self-employed.[377] The fact that freedom of establishment is distinctively referred to is explained through the requirement and presence of regulations and state interventions unique to the freedom of establishment. This is justified in the second

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[375] Baki Erken, "Anayasal Çerçevede Türkiye'de Çalışma Hakkı," *ÇSGB Çalışma Dünyası Dergisi* 1 no. 2 (October-December 2013): 72.
[376] Z. Gönül Balkır, *Türk Anayasa Yargısında Sosyal Hakların Korunması* (Kocaeli: Kocaeli Üniversitesi Yayınları, 2009), 148.
[377] Tanör, *Anayasa Hukukunda Sosyal Haklar*, 99-100.

paragraph of article 48, which states that, "[t]he State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability."[378]

Freedom to work is one of the reflections of the autonomy of the will within the legal system.[379] It provides the individual with freedom of choice. Consequently, freedom to work grants individuals with the protection of the actions that they can decide to take on their own behalf. Therefore, a negative obligation of the state to refrain from interfering in the individual's enjoyment of this right is generated.[380] In this respect, prohibition of forced and compulsory labor constitutes an aspect of freedom to work.

On the other hand, freedom to work and freedom of contract and establishment are likely to clash in various practices of the right to work. The freedom of the individual to engage in the work of his/her choice and also to benefit from a system of employment protection is inconsistent with the employers' freedom to conclude contracts with whomever they desire.[381] The way to resolve this issue is through the implementation of a compromise for both freedoms for the sake of ensuring both. Accordingly, freedom to work does not grant individuals with the freedom to work in any work they desire (and therefore create a claim right on the part of the individuals to be hired by the employer) despite the will of the employer. Nor can it be interpreted as abolishing the right of the employer to terminate the employment relationship. However, the employer's freedom of contract has to be balanced with

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[378] https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[379] Tiryaki, *Ekonomik Özgürlükler ve Anayasa,* 157; Ertürk, *İş İlişkisinde Temel*, 48.

[380] Ibid.; Yüksel Ersoy, *Çalışma Hürriyetine Karşı Suçlar* (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1973), 76.

[381] Devrim Ulucan et al., *İşçinin Feshe Karşı Korunması (İş Güvencesi) ve Türkiye İçin Bir Model Önerisi* (Istanbul: TÜSES, 1989), 102.

the right and freedom of the individual to work. Therefore, various limitations on the employers' freedom of contract may be imposed in favor of the workers. Accordingly, employers may on one hand, be obligated to conclude various contracts for employment and on the other, their right to terminate may be restricted through the institutions for employment protection.[382]

A violation of Turkey concerning freedom to work and the state's obligation to refrain from interfering in the choice of work of an individual was repeatedly expressed by the ECSR since 2003. Article 2(8) of the Turkish Martial Act No. 1402 of 1971 enables the transfer and suspension of civil servants and local government employees during martial law on the grounds that their work poses a threat to general security, public safety and law and order, as well as on the grounds that the services are not necessary. The ECSR notes that suspension or transfer of services of civil servants and local government employees on the grounds that their services are not necessary is in violation of article G of the ESC, which provides that the rights and principles set forth in the ESC may be restricted exclusively "for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals." Despite the non-application of the act, the ECSR finds it not in conformity with the requirements of the right to work because of simply being in force.[383] Nonetheless, Turkey does not appear to take any positive steps thereof.

[382] Ibid., 103. Tanör, *Anayasa Hukukunda Sosyal Haklar*, 278.
[383] Council of Europe, European Committee of Social Rights, "Conclusions XVI-1 – Turkey – Article 1-2," 2003, http://hudoc.esc.coe.int/eng?i=XVI-1/def/TUR/1/2/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-2," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/2/EN.

4.1.3. The Right to Work

The right to work is also distinctively recognized in the Turkish Constitution, alongside freedom to work. Work is adopted in article 49 of the Constitution both as a right and as a duty. The language of the current 1982 Constitution on the right and duty to work is almost the same as that of the previous Turkish Constitution of 1961. However, when the rationale of both provisions are compared, differences concerning the nature of the right to work come into surface.

Accordingly, rationale of article 42 of the 1961 Constitution adopted the right to work as a program norm rather than as generating a subjective individual right. [384] In other words, the 1961 Constitution took the position that the right to work merely generates an obligation on the part of the state to undertake the duty to provide employment, rather than being suitable for individual claims. On the other hand, the rationale of article 49 of the current Constitution of 1982 explicitly states that work shall be accepted as both a right and a duty at the *individual* level, in addition to the fact that it creates a positive obligation for the state to take measures to provide employment.[385] Therefore, the current constitutional regulation of the right to work is feasible for individual claims.[386]

As a constitutionally protected economic and social right, the sole addressee of claims arising out of the right to work is established as the state.[387] With respect to

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[384] Ulucan et al., *İşçinin Feshe Karşı Korunması (İş Güvencesi),* 100.
[385] https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf.
[386] Ulucan et al., *İşçinin Feshe Karşı Korunması (İş Güvencesi),* 100; Ertürk, *İş İlişkisinde Temel Haklar,* 58.
[387] Balkır, *Türk Anayasa Yargısında Sosyal Hakların Korunması,* 153.

the recognition of the state's affirmative obligation concerning the right to engage in work, article 49 of the Turkish Constitution clarifies the state's obligation thereof. The second paragraph provides that, "[t]he State shall take the necessary measures to raise the standard of living of workers, and to protect workers and the unemployed in order to improve the general conditions of labour, to promote labour, to create suitable economic conditions for prevention of unemployment and to secure labour peace."[388] Apparently, there is no direct reference to full employment in the Turkish Constitution concerning the right to work. However, a similar idea can be derived from the recognition of "taking necessary measures to promote labor and prevent unemployment" and creating conditions for employment as obligations of the state.[389] In addition to these, the state undertakes to protect both the workers *and* the unemployed and to adopt policies that target promotion of employment, as well as to raise the standards of all workers. The fact that "protection of the unemployed" was introduced into the Constitution at a later time in 2001[390], points to an intentional additional and an explicit recognition of the state's obligation to protect the unemployed within the framework of the right to work. This amendment is also a recognition of unemployment as a social problem and a confirmation that the state cannot grant the right to work in terms of providing sufficient jobs for everyone. This constitutional confirmation has led to the broadening of the coverage of the protection ensured by the right to work to the unemployed.[391] It can be understood

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[388] https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[389] Mustafa Kılıçoğlu, "Çalışma Hakkı Kapsamında İş Güvencesi," in *Prof. Dr. Sarper Süzek'e Armağan,* ed. Süleyman Başterzi (Istanbul: Beta, 2011), 2: 1209; Mesut Gülmez, "Çalışma Özgürlüğü ve Hakkı Açısından Emeğin Evrimi: Ulusal ve Ulusalüstü Hukuksal Boyutlar Üzerine Düşünceler," in *Sosyal İnsan Hakları Ulusal Sempozyumu VI Bildiriler* (Istanbul: Petrol-İş Yayını, 2014), 83; Ertürk, *İş İlişkisinde Temel Haklar,* 56-7.

[390] "Taking necessary measures for the protection of the unemployed" as a duty of the state was introduced into the Constituion on October 3, 2001 with article 19 of the 4709 numbered Law.

[391] Gökçeoğlu Balcı, "Çalışma Hakkını Yeniden Düşünmek," 295.

from this provision that the prescribed economic policies to be adopted shall be active employment policies that aim at constant development in all areas of employment. Furthermore, the 2014-2023 National Employment Strategy (NES) endorses this interpretation and provides expressively the goal of pursuing an active employment policy. In this respect, in the Action Plans for the period between 2014 and 2016, NES identifies decreasing the unemployment rate to its natural figures as the primary measure and highlights three main issues thereof: "maintaining stable and high growth", "increasing growth effect on employment", and "reducing unregistered employment".[392]

However, realization of the right to work in terms of targeting full employment remains within the domain of the state only and is not exposed to direct individual claims thereof.[393] The same conclusion can be reached by the Turkish Constitution. Article 65 stipulates the limits of the state's obligations in the economic and social areas as the "capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties."[394] This article is understood by the Turkish scholars as hindering any subjective claims that may arise concerning economic and social rights secured under the Constitution and as providing the state with a constitutionally legitimized response against such claims. Concordantly, the Constitutional Court has found that article 49 of the Constitution does not grant the individual with the power to compel the state to realize the right to work. The state is not under the obligation to provide work for everyone or to place them in one. Its

[392] Ministry of Labour and Social Security General Directorate of Labour, *National Employment Strategy (2014-2023): Action Plans (2014-2016),* accessed October 21, 2016, http://www.uis.gov.tr/Media/Books/UIS-en.pdf.
[393] Ertürk, *İş İlişkisinde Temel Haklar,* 59.
[394] https://global.tbmm.gov.tr/docs/constitution_en.pdf.

obligation arising out of the right to work is limited to taking necessary measures and creating the necessary institutions to promote finding employment, within its capabilities.[395]

Nonetheless, article 65 of the Constitutional shall not be interpreted as to deem the right to work a mere program norm. The right to work is still recognized as an individual right and the state is still the primary obligator of this right. A social state cannot refuse to take responsibility in performing its positive obligations. Therefore, the state has to take all measures within its power to promote and ensure work for all who are willing and grant sufficient safety for those who do not or cannot enjoy their right to paid work.[396] Furthermore, the right to work also imposes certain obligations on the employers and establishes certain principles to be applied within the employment relationships through limiting the freedom of contract of employers.[397]

The ECSR found Turkey to be in conformity with article 1(1) of the ESC regarding the adoption of a policy of full employment for the first time in its 2016 Conclusions ever since it has started reaching conclusions on the provision in 2000. Before the 2016 Cycle, the conclusions on the issue used to be either “deferral” due to the absence of adequate information[398] or “not in conformity”. In the 2012 Conclusions, the ECSR indicates that Turkey has a labor market situation with contradicting

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[395] AYM, 19.12.1989 T., 1989/14 E., 1989/49 K., R.G, 02.03.1990, S. 20449. Similarly see: Ertürk, *İş İlişkisinde Temel Haklar,* 57.

[396] Seyithan Güneş, *Teori ve Uygulamada Kişi Özgürlüğü ve Güvencesi* (Istanbul: Kazancı, 1998), 165.

[397] Ulucan, “Çalışma Hakkı ve İş Güvencesi,” 194.

[398] Turkey appears to disregard many of the repeated requests of information by the ECSR. This is a general problem that is not unique to article 1 of the ESC. Turkey does not abide by its obligation to provide the required information for the reporting system by either remaining passive or in some cases by providing the wrong information.

figures. On one hand, it has a sustainable economic growth and on the other, it cannot achieve a prominent improvement in the employment rate.[399] The ECSR found Turkey to be not in conformity with article 1(1) of the ESC on the grounds that Turkey has not provided sufficient indicators[400] concerning the active labor market measures, despite the constant request by the ECSR.[401] However, the 2016 Conclusions indicate that although various figures such as growth rate and unemployment rate have gone in the negative direction and the active policy funds are significantly low, other data indicate that there is still a certain level of progress in the application of active employment policies with a view to achieve full employment. Therefore, the ECSR concluded for the first time that Turkey is in conformity with its obligations arising out of article 1(1) of the ESC.[402]

4.1.4. Restrictions on the Enjoyment of the Right to Work

The fact that the right to work is not an absolute right is also recognized by the Turkish Constitution and specific restriction on the enjoyment of this right are adopted. Accordingly, article 50 of the Turkish Constitution adopts age, sex and capacity as the parameters of prohibition to work: "(1) No one shall be required to perform work unsuited to his/her age, sex and capacity. (2) Minors, women, and

[399] Council of Europe, European Committee of Social Rights, "Conclusions 2012 – Turkey - Article 1-1," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/1/EN.
[400] Also a problem of Turkey's failure to present the ECSR with the required information.
[401] Council of Europe, European Committee of Social Rights, "Conclusions 2012 – Turkey - Article 1-1," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/1/EN.
[402] Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-1," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/1/EN.

physically and mentally disabled persons, shall enjoy special protection with regard to working conditions."[403] This provision establishes the justified restriction[404] to both freedom to work, as guaranteed under article 48, and the right to work, as secured under article 49. The restrictions imposed on the freedom to engage in work of such groups creates a ban on the *employers* to hire workers who are protected by these restrictions. This means that in cases where these restrictions are not complied with, it will be the employers who have violated the ban and who will encounter criminal and civil sanctions – and not the workers who are the subjects of the protection.

In addition to prohibition of forced labor and child labor, which have been discussed under the relevant title,[405] women and persons with disabilities are also considered to be among the groups which require special protection. In this respect, employers are prohibited to employ women, whether adult or not, under article 72 of the Turkish Labor Act No. 4857 of 2003 and persons with disabilities under article 30(4) of the same Act in underground or underwater work. Furthermore, article 73 makes women's employment in nightshifts subject to special regulations.

The prohibition concerning persons with disabilities protects legitimate interests because the interest protected through the health and safety regulations at work is a higher interest than the freedom of persons with disabilities to engage in

[403] https://global.tbmm.gov.tr/docs/constitution_en.pdf

[404] Article 13 of the Turkish Constitution states: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their existence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

[405] See 3.2.1 above.

underground or underwater work. This prohibition seeks to protect the health and safety of not only persons with disabilities themselves but also other persons who are in physical contact with the workplace in question. This is also justified in article 10(3) of the Turkish Constitution which states that taking special measures concerning persons with disabilities, among others, shall not constitute discrimination or violation of the principle of equality.

The prohibition concerning women on the other hand, is an unacceptable approach on the women's freedom to work and a violation of Turkey's obligations arising from international law. The restriction on women's right to work is a violation of the principle of equality and generates a contradiction within the Constitution. Accordingly, article 10(2) of the Turkish Constitution explicitly and separately underscores equality between men and women and provides that the state is under the obligation to ensure gender equality in practice. Measures taken by the state with a view to fulfill its obligation thereof shall not be deemed as being against the principle of equality. It is confirmed by the rationale of this provision that these measures refer to the advantages provided to women.[406] The same rationale makes reference to article 23 of the European Union Charter of Fundamental Rights which stipulates the following: "Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex." Consequently, the objective of article 10(2) of the Constitution is to ensure gender equality in all fields. The following paragraph

[406] https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf. Also see: Gaye Burcu Yıldız, *İşverenin Eşit İşlem Yapma Borcu* (Ankara: Yetkin, 2008), 55.

of article 10 (article 10(3)) on the other hand, governs groups which require special protection by the state (as confirmed by the rationale of the provision)[407], the members of which may be subjected to different treatment without the measure being deemed to be against the principle of equality. These groups that require special protection are listed as children, the elderly, persons with disabilities, widows and orphans of martyrs, veterans and persons disabled on duty. *It does not list women among the persons that require special protection.* In contradiction, article 50 of the Constitution includes women among the list of groups that require special protection in the field of work and enables prohibition of requiring women to work in areas that are not suitable for their gender. In the second paragraph of article 50, women are listed alongside minors and physically and mentally disabled persons to be entitled to "special protection" concerning working conditions.[408]

It is observed here that article 10(2 and 3) and article 50(1 and 2) are not in harmony with each other. Regarding women to be among the groups that require special protection, as adopted in article 50(1 and 2), is against the principles provided in article 10(2 and 3). The rationale of article 10 explicitly refers to the above provided article 23 of the European Union Charter of Fundamental Rights which adopts gender equality in all fields and particularly in the field of employment and work. As a result, article 50 is not compatible with the general principle of equality provided in article 10 and requires revision.

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[407] https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf.

[408] Kadriye Bakırcı, *Uluslararası Hukuk, AB ve ABD Hukuku ile Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı Cinsiyet Ayrımcılığı Yasağı ve Türkiye* (Ankara: Seçkin, 2012), 86.

Women may indeed require special protection, particularly in cases of pregnancy and birth; however their right to a freely *chosen or accepted* work shall not be restricted through the law.[409] Unlike children, whose special protection is based on the idea that their right to education precedes their right to work and that they are considered to be vulnerable against exploitation due to the absence of an established free-will amounting to legal capacity, adult women shall not be recognized as a vulnerable group under the law. This is confirmed in article 11(1)(b) of the CEDAW, which has been ratified by Turkey[410], which recognizes women's "right to the same employment opportunities, including the application of the same criteria for selection in matters of employment". Consequently, article 50 of the Turkish Constitution is *not* in conformity with the international standards of gender equality in the field of employment.

The Turkish Labor Code adopts the position of article 50 of the Constitution and restricts the fields of employment which women can be employed in. The approach adopted concerning women in the Turkish Labor Code which prohibits the employment of women in underground or underwater work constitutes discrimination against women by considering them as being weak-willed, lacking capacity or power and violates their right to work.[411] The same conclusion has been reached by the ECSR which found that restrictions on women's access to certain professions is a discrimination based on sex and a violation of article 20 of the ESC which governs prohibition of discrimination on the grounds of sex and the right to

[409] Yıldız, *İşverenin Eşit İşlem Yapma Borcu,* 290.
[410] Turkey ratified CEDAW in 1985 and it came into force in Turkey in 1986.
[411] Bakırcı, *Cinsiyet Ayrımcılığı Yasağı ve Türkiye,* 378.

equal opportunities and treatment in matters of employment and occupation.[412] As long as protection against forced labor remains as covering both men *and* women, the type of work a woman can or cannot perform shall not be a subject matter of the law. The woman herself and the employer who is considering to hire her shall be the determinants of whether the woman in question is capable of performing a given work, not the legislator. The legislator, a heavy majority of which consists of men, shall not be entitled to determine what kind of work women can or cannot do in terms of their capacity. An argument that adopts the view that "women are protected from themselves through such restrictions"[413] is a sexist approach that adopts women as being deprived of the capacity to take decisions on their behalf. These legislations which claim to *protect* women only endorse the idea that women are less capable and weaker than men. On the other hand, this is certainly not a decision for the legislator. A woman is likely to be familiar with her own capacity and if she or the employer have doubts on whether she can fully perform the requirements of the job, it should be her decision not to work in such a job or the employer's decision to not hire her.[414]

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[412] Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 20," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/20/EN.

[413] Ertuğrul Yuvalı, *İşçimin Kişisel Özellikleri Bakımından İşverenin Eşit Davranma Borcu* (Ankara: Turhan, 2012), 120.

[414] The same position is also taken by the ECtHR. In its judgment *Emel Boyraz v. Turkey,* ECtHR stated that "[w]here a difference of treatment is based on sex, the margin of appreciation afforded to the State is narrow" and such measures shall be proportional with the aim pursued and necessary under the circumstances. ECtHR, *Emel Boyraz v. Turkey,* no. 61960/08, 02.03.2015, §51. Accordingly the alleged inability of women to perform certain responsibilities shall have a solid basis.

4.1.5. Duty to Work

Turkey is among the countries which regulate duty to work in their constitutions. Article 49 of the Turkish Constitution adopts work both as a right *and* as a duty. The rationale of the article establishes work foremost as the moral duty of the individual to the society.[415] This is endorsed by article 12(2) of the Turkish Constitution which recognizes fundamental rights as also generating duties and responsibilities for the individuals towards the society, their family and other individuals.

Moreover, the duty to be productive and contribute to the functioning of the society through work is also laid on the individuals as a legal obligation based on citizenship.[416] In fact, various types of work, albeit compulsory, are exempted from the scope of forced labor pursuant to article 18(2) of the Constitution. Accordingly, prison work, services of military character[417], services exacted in cases of emergency or calamity and work or services as part of civic obligations are deemed legitimate and are not identified as practices of forced labor. These will be assessed separately hereunder.

It should be noted that work as a legal duty emerges in exceptional cases and shall not in any way be interpreted as generating a general obligation of the individuals. Legal obligation to work is a restriction on the individual fundamental freedom to

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415 https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf.

416 Balkır, *Türk Anayasa Yargısında Sosyal Hakların Korunması,* 154; Ersoy, *Çalışma Hürriyetine Karşı Suçlar*, 73.

417 Services of military character is not directly stipulated in article 18(2). However, the rationale of the article (see https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf) states that military service is a part of civic obligations and does not require special reference in the provision. Furthermore, military service is also stipulated in article 72 as a civic service.

work and is therefore, regulated under the Constitution. As article 13 of the Constitution stipulates, fundamental rights may be restricted only on the grounds set forth in the Constitution. Therefore, apart from those listed in article 18, individuals cannot be compelled into work under the pretense of duty to work. Accordingly, duty to work cannot be interpreted as "legitimizing the non-entitlement to certain social benefits of an individual who refuses a duty or a work without any legitimate reason."[418] Apart from the cases listed in article 18, duty to work refers to a moral duty and cannot be utilized as a means of imposing compulsion on the individual to work. Otherwise it will amount to the violation of the right to work.

4.1.5.1. Prison Work

The Turkish law concerning prison work is unfortunately not well-regulated and is lacking in many ways. The law is vague in terms of its language and there is an absence of unified rules of implementation in prisons throughout Turkey. Prison work is regulated in a wide range of legislative instruments that are not always inter-consistent. It is such a controversial issue that despite the clear language of the law that prison work is indeed compulsory for a group of convicts, there are scholars who interpret the law as deeming prison work voluntary.[419] There are also problems that are independent from the legal regulation. The absence of a unified implementation

[418] Translated by the author. İbrahim Ö. Kaboğlu, *Özgürlükler Hukuku* (Ankara: İmge, 2002), 463.
[419] Hande Bahar Aykaç, "Ceza İnfaz Kurumları Dışında Çalıştırılan Hükümlülerin Sosyal Güvenliği," *TİSK Akademi* 10 no. 20 (2015-II): 351.

is also based on factual reasons such as the overcrowded prisons, and the inadequacy or the absence of prison workshops.

Prison work is indeed adopted within the Turkish legal system and is justified with the universal platitudes[420] of re-integrating the unsocial into the society and taking measures to avoid them from committing crimes, again through raising responsible and productive members, as well as to establish discipline and order in prisons.[421] According to article 29 of the Act No. 5275 on the Execution of Penal and Security Measures of December 13, 2004, convicts who are approved by medical doctors in terms of mental and physical health may be required to work. The article makes a distinction between convicts who hold a profession[422] and who do not. Those who do have a profession may be asked to work only if they consent to it. In other words, compulsory prison work is limited to convicts who do not already have a profession.[423] Whereas detainees who are not yet convicted by a court of law shall not be compelled to work. The occupants of the latter group may only be asked to work in the presence of their consent. Nevertheless, this distinction is limited to closed prisons and is not applicable in open prisons. Those who serve their time in open prisons are compelled to work and if the prisoners refuse to perform the work asked of them, they shall be returned to closed prisons. In other words, performing

[420] For a criticism on compulsory prison work, see 3.3.2.1 above.
[421] Nazlı, *Anayasanın Çalışma Hak ve Özgürlüğüne İlişkin Düzenlemelerinin İş Hukukuna Etkileri,* 86-7.
[422] What is meant by “profession” remains vague and the meaning is not clarified by the relevant legislation.
[423] Nazlı, *Anayasanın Çalışma Hak ve Özgürlüğüne İlişkin Düzenlemelerinin İş Hukukuna Etkileri*, 86.

work is a condition for the prisoners to remain in open prisons, provided that they are given work by the authorities.

Under the Turkish law, work extracted from prisoners shall be awarded with a pay, the amount of which shall be determined by the Penal Institutions High Board of Turkey, and the conditions of work shall be as similar to the working conditions of employees working under employment contracts as possible. The working conditions of prisoners requires special attention concerning prisoners who work outside the borders of the prison. The particularities of prisoners working in this manner is recognized by the Turkish legal scholarship and there is a disagreement on how such work shall be qualified. While a group of scholars characterize the performance of this type of work as being derived from an employment contract with a view to offer prisoners with just and equal conditions as regular workers, others refuse the distinction between prison work due to the fact that both are exacted from prisoners in the absence of their consent.[424] The Turkish Court of Cassation adopts the former argument and grants prisoners who work outside the borders of prisons the status of a worker working pursuant to an employment contract.[425]

Turkey was found to be in violation of both the ILO Convention No. 105 and the right to work article of the ESC due to the universal character of compulsory prison work in the previous Turkish legislation. In the view of the ILO, which the ECSR agrees with, despite its legitimacy, compulsory prison work shall not be utilized as the means of penalizing certain categories of detainees. These categories of detainees

[424] Uşan, "İş ve Sosyal Güvenlik Hukuku Açısından Tutuklu ve Hükümlü Çalışması," 1444-8.
[425] Y.10.HD., 20.06.1974 T., E. 1974/3403, K. 1974/4546.

are established in article 1 of the ILO Convention No. 105 as persons who are imprisoned for holding or expressing political opinions, for having committed an act requiring labor discipline or for having participated in strikes.

In finding violations of prohibition of forced and compulsory labor, both the ILO and the ECSR conduct indirect supervision on different grounds. In the case of Turkey's violations, the respective supervisory bodies found violations on two grounds. The first violation concerns the prohibition of using prison labor as a means of punishing participation in strikes. The adopted law and understanding in Turkey concerning the right to strike is commonly criticized by the international platform. Strikes were frequently condemned in Turkey and even the position of the Turkish Constitutional Court placed strikes at the opposite end of the right to work. A rather expired judgment of the Constitutional Court, in terms of the established opinion and the law on strikes, found unlawful strikes to be violations of the right to work of those who have not participated in them and declared imprisonment for the participants of unlawful strikes to be constitutional.[426] A latter, but currently the former, Turkish Act No. 2822 on Collective Agreement, Strike and Lockout of 1983 penalized any form of involvement in unlawful strikes with imprisonment in articles 70 *et al*. Those who were imprisoned for having participated in strikes were required to perform compulsory prison work if asked of them, just like any other prisoner. Both the ILO and the ECSR found that article 1 of the ILO Convention No. 105 was violated since the rule and application of compulsory prison work did not exclude prisoners who

[426] AYM, 14.4.1964 T., 1963/202 E., 1964/32 K., R.G, 18.06.1964, S. 11731.

were detained on the grounds of having participated in strikes.[427] However, with the new Act No. 6356 on Trade Unions and Collective Labor Agreements of 2012, all penalties in the form of imprisonments arising from collective labor law are converted into administrative fines. Individuals are no longer imprisoned for having participated or in any way engaged in unlawful strikes. Therefore, Turkey has fulfilled the required amendments thereof and repealed the relevant legislation that was found to be in violation of prohibition of forced and compulsory labor.

The second ground for violation of the part of Turkey concerns imprisonment for holding or expressing political opinion. The ILO has found violations concerning various Turkish legislation that penalized expressing political opinions with imprisonment. A major one of these legislations is the Turkish Anti-Terrorism Act No. 3713 of 1991. This Act includes a special provision concerning journalists. The former version of article 7(2) provided that those who made propaganda of a terrorist organization were sentenced to one to five years of imprisonment and the penalty was doubled in case it was committed through the media. The fact that a number of journalists were convicted on these grounds were found both by the ILO[428] and the ECSR[429] to be in violation of prohibition of forced and compulsory labor by Turkey, rather indirectly, because compulsory prison work was utilized as a means of punishing expressing political opinion. Upon the rise of criticisms from the

[427] ILO CEACR, 102nd ILC Session, "Observation on the Application of Abolition of Forced Labour Convention, 1957 (No. 105) – Turkey," 2013; Council of Europe, European Committee of Social Rights, "Conclusions XVI-1 – Turkey – Article 1-2," 2003, http://hudoc.esc.coe.int/eng?i=XVI-1/def/TUR/1/2/EN.
[428] ILO CEACR, 102nd ILC Session, "Observation on the Application of Abolition of Forced Labour Convention, 1957 (No. 105) – Turkey," 2013.
[429] Council of Europe, European Committee of Social Rights, "Conclusions XVI-1 – Turkey – Article 1-2," 2003, http://hudoc.esc.coe.int/eng?i=XVI-1/def/TUR/1/2/EN.

international platform, particularly concerning freedom of press, the article was amended in 2013. The current version of the article penalizes not propaganda *per se,* rather propaganda that legitimizes, praises or encourages the application of methods that involve force, violence or threat. However, there is not any change in the amount of penalties or the fact that the penalty is doubled when committed through the media. Considering the record of implementation of this article for journalists even after the respective amendment, Turkey is yet to comply with its obligations on the matter.

It should be noted that both the ILO and the ECSR conduct an indirect supervision of the right to strike, freedom of expression and freedom of press under the disguise of prohibition of forced and compulsory labor. The main criticism of these supervisory bodies lies with the fact that the former Turkish law penalized participation in unlawful strikes with imprisonment and that journalists are imprisoned for having expressed their political opinions, rather than the fact that they were not excluded from the scope of the compulsory prison work. The ILO's observations on the issue also include a number of other Turkish legislations that prohibit holding or expressing various political opinions that are generally opposed to the established system, particularly those concerning political parties.[430]

[430] ILO CEACR, 105th ILC Session, "Observation on the Application of Abolition of Forced Labour Convention, 1957 (No. 105) – Turkey," 2015.

4.1.5.2. Services of Military Character

There are two provisions in the Turkish Constitution that are directly related to services of military character. The first one is the above quoted article 18(2) which governs cases that do not constitute forced labor. Although military service is not listed among these practices, the rationale of the article states that military service shall be considered within the framework of "physical or intellectual work necessitated by the needs of the country as a civic obligation"[431]. In this respect, the Turkish Constitution does not differentiate between services of military character and other civic obligations. The second article that governs military service is article 72 which stipulates national service. According to this article "National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the armed forces or in public service, shall be regulated by law."[432] Turkey has not recognized conscientious objection and hence, does not entitle individuals with alternative service possibilities. Only in exceptional cases, such as for reasons of health, may the male citizens of Turkey be exempted from performing military service. In some cases, such as continuous employment in a foreign country, male citizens of Turkey may be deemed to have completed their compulsory military service, provided that they pay the required compensation.

With regard to the professional military personnel, article 112 of the Turkish Armed Forces Personnel Act No. 926 of 1967 requires special reference. This article

[431] https://global.tbmm.gov.tr/docs/constitution_en.pdf.
[432] https://global.tbmm.gov.tr/docs/constitution_en.pdf.

imposes on the military personnel the obligation to remain in duty for a period of 15 years. [433] It prohibits resignation from the Armed Forces during this period. Apart from exceptional situations (such as the health of the individual hindering their service in the Armed Forces or for service-disabled veterans), only in cases of marriage to a foreigner that is not approved by the Turkish Armed Forces General Staff, loss or deprivation of Turkish citizenship or expulsion from the Armed Forces on disciplinary grounds may the individual be relieved of their mandatory duty period. However, even in the presence of these cases these former personnel are obliged to pay a significant amount of compensation to the Armed Forces. In other words, unless the respective circumstances occur, the Armed Forces military personnel are not allowed to leave the military even if they agree to pay a compensation.[434] Payment of compensation is limited to those who are expelled from the Armed Forces on the grounds of one of the three reasons.

Whether this provision is in violation of article 18 of the Constitution on prohibition of forced and compulsory labor was brought before the Constitutional Court within the scope of an individual application. As a military personnel of the Armed Forced, the applicant was subject to this compulsory duty period and challenged the situation before the Constitutional Court claiming that it was against prohibition of forced and compulsory labor. However, the Constitutional Court rejected the claim on the grounds that the applicant was appointed to the position with his consent and was

[433] The former 15 years of mandatory office period has been reduced to 10 years with the 6318 numbered Act of May 22, 2012 and then increased once again to 15 years with the 681 numbered Statutory Decree of January 1, 2017.

[434] Murat Buğra Tahtalı, "Türk Silahlı Kuvvetleri Personel Kanunu'nda Öngörülen Mecburi Hizmet Süresi – Zorla Çalıştırma Yasağı İlişkisi," *İnönü Üniversitesi Hukuk Fakültesi Dergisi* 5 no. 2 (2014): 437.

aware of the rule he was bound with from the beginning.[435] However, it is not possible to agree with the decision of the Constitutional Court. Taking into account the length of the mandatory work period and the high amount of compensation, this provision shall not be found to be legally justified and deemed forced labor. 15 years is a significantly long period in the working life of individuals and is not a reasonable duration for *any* compulsory work.[436] Neither is it proportional in terms of conflict of interests, namely national security vs. prohibition of forced and compulsory labor. 15 years of involuntary provision of services can no longer be legitimized as falling outside the scope of forced labor for the sole reason of being a service of military character.[437] Therefore, the assessed compulsory period of duty is a violation of the right to work in terms of prohibition of forced and compulsory labor, as well as the worker's right to terminate the employment relationship. The fact that 10 years of compulsory office duration was very recently increased to 15 years shall be considered as a step further back in realizing the right to work.

4.1.5.3. Services Exacted in Cases of Emergency or Calamity

According to the Turkish Constitution, work may be exacted from citizens during the state of emergency. Article 119 of the Constitution provides that state of emergency can be declared in three circumstances: in the event of natural disasters, dangerous

[435] AYM, 21/01/2015 T., İsa Reçber No. 2013/4518, §23.
[436] Tahtalı, "Türk Silahlı Kuvvetleri Personel Kanunu'nda Öngörülen Mecburi Hizmet Süresi – Zorla Çalıştırma Yasağı İlişkisi," 442.
[437] Akıllıoğlu, *Gözden Geçirilmiş Avrupa Sosyal Şartı ve Türkiye,* 23.

epidemic diseases or serious economic crises. In such cases, the state may require its citizens to perform certain work with a view to overcome the situation in an effective and timely manner.

As article 18 of the Constitution explicitly prohibits *angarya*[438], work exacted from citizens during the state of emergency is subject to a consideration and citizens performing work in this context are entitled to a payment. This is confirmed in article 16 of the Act No. 2935 on State of Emergency of 1983. However, this does not alter the fact that work required of citizens is compulsory and incompliance therewith is even punishable with imprisonment of up to three months pursuant to article 25 of the same Act.

The fact that compulsory labor may be exacted from individuals in the event of serious economic crises was found to be a practice of forced labor within the meaning of the ILO Convention No. 29. According to the CEACR, “the notion of ‘serious economic crises’ does not appear to satisfy the criteria for the exception of ‘emergency situations’ in the strict sense of the term”[439] The ILO has found that serious economic crises is not a big enough threat to require citizens to perform compulsory work.

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[438] *Angarya* is a form of forced labor where the individual is deprived of any form payment in return for their labor. See 4.1.1 above.

[439] ILO CEACR, 104th ILC Session, “Direct Request (CEACR) - Forced Labour Convention, 1930 (No. 29) – Turkey,” 2015.

4.1.5.4. Work or Services as Part of Normal Civic Obligations

Article 18 of the Turkish Constitution has not adopted services of military character as a separate case of duty to work, but adopted it as part of civic obligations of the citizens. Since services of military character is assessed in the relevant part of this study,[440] it will not be repeated here.

Concerning civic obligations other than those of military character, the state may require its citizens to perform certain compulsory work with a view to serve the needs of the country. Both the ECtHR and the Turkish Constitutional Court adopt the view that those who choose a profession that requires certain civic obligations are deemed to have prior consent to such requirements.[441] In this respect, compulsory public duty imposed on medical doctors, which is performed in exchange of a pay, was found by the Constitutional Court to be among the normal civic obligations that sought to ensure medical services in all parts of the country.[442]

As a special case, Turkey was found by the ILO to be in violation of the ILO Convention No. 29 as a result of the mandatory work for villagers set forth in articles 12 and 13 of the Village Affairs Act No. 442 of 1924. According to the referred articles, villagers are assigned with mandatory work and the failure to perform such work is penalized. Article 13 provides a list consisting of 37 items that make up the

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[440] See 4.1.5.2 above.

[441] Ulaş Karan, "Kölelik, Kulluk, Zorla Çalıştırma ve Zorunlu Çalışma Yasağı," in *İnsan Hakları Avrupa Sözleşmesi ve Anayasa: Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme,* ed. Sibel İnceoğlu (Istanbul: Beta, 2013), 176.

[442] AYM, 13.3.2006 T., 2006/21 E., 2006/38 K., R.G, 11.12.2007, S. 26727; AYM, 21/04/2016 T., Meltem Sukan No 2013/9659, § 30, 32.

content of the mandatory work of villagers. The ILO has criticized the contents of this article indicating that villagers are required to perform work that exceed the level of "minor communal services", "including building and repairing roads leading from the village to the government centre or neighbouring villages, or building bridges over such roads, etc."[443]

4.2. THE RIGHT TO WORK IN THE TURKISH LABOR LAW

Recognition and protection of the right to work within the Constitution, albeit highly significant, is not adequate in ensuring the full realization of the right to work. As a constitutionally protected fundamental right, the right to work requires implementation within the labor law system to provide effective protection. Despite the fact that it is possible to establish any direct or indirect connection between the right to work and the majority of the labor law rules and principles, those that have direct relevance and have been referred to in the previous chapter will be analyzed under the present heading.

[443] ILO CEACR, 104th ILC Session, "Direct Request (CEACR) - Forced Labour Convention, 1930 (No. 29) – Turkey," 2015.

4.2.1. Prohibition of Discrimination

The general principles on prohibition of discrimination within the Turkish legal system comply with Shim's approach[444] and the non-discrimination provisions are formulized as a list of examples of grounds for which individuals may be discriminated against, followed by an indicator that the examples provided are non-exhaustive. Article 5 of the Labor Act governs prohibition of discrimination within the employment relationships and formulates the employers' obligation to treat workers equally as an obligation arising out of the employment relationship.

However, the lists provided both in article 10 of the Turkish Constitution on the principle of equality and article 5 of the Labor Act consist of the conventional grounds for discrimination. Accordingly, article 5 of the Labor Act No. 4857 prohibits discrimination on the grounds of language, race, color, sex, disability, political opinion, philosophical belief, religion, sect and other similar reasons. The ECSR has remarked the absence of direct references to prohibition on the grounds of age and sexual orientation, despite the non-exhaustive formulation of prohibition of discrimination in the field of employment. It has reached the conclusion that Turkey was not in conformity with the prohibition of discrimination assessed pursuant to article 1(2) of the ESC, as a result of the absence of discrimination cases before the

[444] Shim argues for the enactment of a non-exhaustive list of grounds for discrimination with a view to avoid the exclusion of new grounds that had not been recognized/present during the enactment or in cases of failure to include such grounds in the list of grounds (see 3.2.2.1.2. above).

courts on the grounds of age or sexual orientation.[445] On the other hand, positive steps have been taken for both grounds in the Turkish law and judiciary.

Firstly, the National Human Rights Institution of Turkey has gone through a process of restructuring and became the National Human Rights and Equality Institution of Turkey with the 6701 Act of April 6, 2016. The objective of this Institution is to protect and promote human rights and ensure the right to equality. In realizing this objective, the Institution undertakes the function of observing cases of human rights violations, as well as discrimination cases and gives decisions thereof.

The 6701 numbered Act of 2016 covers a section on anti-discrimination between articles 3 and 7. It makes specific references to employment and prohibits any discriminatory act at any stage of employment, including hiring, during the employment relationship and termination of the contract. In article 4, it lists the types of discrimination in terms of the Act and includes, among others, both direct and indirect discrimination. Furthermore, article 3(2) provides a list of grounds on which discrimination within the framework of this Act is prohibited. This list consists of the following grounds for discrimination: sex, race, color, language, religion, belief, sect, philosophical and political opinion, ethnic roots, wealth, birth, civil status, health situation, disability and age. In this respect, in addition to the conventional grounds for discrimination, some modern grounds are also provided in the list such as wealth, civil status and age. It is rather unfortunate that the list is formulated in an exhaustive

[445] Council of Europe, European Committee of Social Rights, "Conclusions 2012 – Turkey - Article 1-2," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/2/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-2," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/2/EN.

language, rather than leaving room for other grounds of discrimination that are not on the list.

In response to the ECSR's second criticism, a 2013 decision of the Turkish Court of Cassation contains a direct reference to discrimination on the grounds of sexual orientation. Accordingly, the Court states that both article 5 and article 18(3), which governs grounds that do not constitute valid reasons for termination by the employer, provide non-exhaustive lists of grounds, and that sexual orientation that does not create unfavorable situations in the workplace shall be considered in this context.[446]

With regard to discrimination on the grounds of sex, article 5 of the Labor Act provides a detailed regulation. Despite the fact that discrimination on the grounds of sex is voiced in the non-exhaustive list of grounds for discrimination that are prohibited in article 5(1), further paragraphs 3 and 4 also deal with discrimination against women. Article 5(3) of the Labor Act explicitly prohibits discrimination based on sex or pregnancy against the worker during the making of the employment contract, after the conclusion of the employment contract or at the time of the ending of the contract, provided that biological reasons or reasons arising out of the nature of the work require otherwise. The significance of this provision lies with the fact that prohibition of discrimination on the grounds of sex *before* the conclusion of the contract is emphasized unlike the rest of the provisions of the same article. However, it should be noted that neither this additional emphasis on discrimination before the conclusion of the contract nor the remaining coverage of the provision provide any

[446] Y.9.HD., 01.04.2013 T., E. 2011/276, K. 2013/10657.

additional protection for women compared to workers who are the victims of discrimination on the grounds other than sex.[447]

By prohibiting lower wage for work of same or similar value on the grounds of sex, article 5(4) creates merely an additional emphasis on gender discrimination. In the light of the internationally regulated protections concerning the right to equal pay for work of equal or similar value, this provision highlights and repeats the issue within the framework of the employers' prohibition of discrimination and their obligation to treat workers equally. Again, this provision does not provide the worker with any additional claim, apart from the general remedies arising out of discrimination and the claim for the difference in the pay, to which the worker would anyway have been entitled to had the provision not existed.

With a view to realize the obligations arising out of CRPD, Turkey has enacted the 5378 numbered Act on Persons with Disabilities. The provisions of this Act are generally parallel to the issues governed under the CRPD. With respect to employment, article 14 of the Act highlights sustainable employment and requires measures to be taken to establish guidance and counselling services to promote self-employment for persons with disabilities. Furthermore, paragraphs 2 and 3 of the same article prohibit discrimination at all stages of employment, including before the conclusion of the contract. The legislation also recognizes the right of persons with disabilities to accessibility and obliges employers and other relevant institutions to ensure reasonable accommodation. Furthermore, the Labor Act seeks to decrease the disadvantages of the persons with disabilities in finding employment by creating an

[447] Yıldız, *İşverenin Eşit İşlem Yapma Borcu,* 198.

obligation on the part of the employers to hire a certain percentage of workers among persons with disabilities.

Aliens constitute another group that requires mentioning concerning prohibition of discrimination. It has been established that certain restrictions imposed on aliens may be found legitimate with a view to protect the higher interests of the state such as national security, public interest and the regulation of the labor market.[448] This is also affirmed by the Turkish Law through article 16 of the Turkish Constitution which states that, "[t]he fundamental rights and freedoms in respect to aliens may be restricted by law compatible with international law."[449] In this context, restrictions on the right to work of aliens have their basis within the Turkish legal system in the Constitution. The conditions and requirements for their eligibility to work permits are regulated in the 4817 numbered Act on Work Permits of Aliens of 2003 and the 6735 numbered International Labor Force Act of 2016.

Apart from work permits or visas, states may impose prohibition of accession to certain occupations for non-nationals for reasons of public safety and health. Restrictions on the right to work shall be legitimate, proportional with the purpose of protecting the prevailing interest and necessary in a democratic society. The Turkish Constitutional Court recognizes the existence of other prevailing interests that may legitimize restrictions on the exercise of the right and freedom to work, despite the absence in the Constitution of any legitimate reasons for such restrictions. In this respect, the legislative has the authority to stipulate restrictions with a view to

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[448] Erken, "Anayasal Çerçevede Türkiye'de Çalışma Hakkı," 81; Mustafa Alp, "Yabancıların Çalışma İzinleri Hakkında Kanun," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 53 no. 2 (2004): 39.

[449] https://global.tbmm.gov.tr/docs/constitution_en.pdf.

“realize public interest, regulate the working life, raise the standards of working conditions, introduce restrictions thereof, subject the work of the aliens to permits and to determine the principles concerning the aliens’ work permits”[450], provided that they comply with the article 13 of the Constitution.[451] The same decision of the Constitutional Court finds the prevailing interest of the fulfillment of the state’s obligation to provide its unemployed nationals with employment and the necessity in having various work to be performed exclusively by the nationals as legitimate restrictions on the aliens’ right to work. Therefore, the objective of relieving the bureaucracy from unnecessary workload was not found to be a prevailing interest over the right to work and was deemed unconstitutional.[452]

Turkey has been repeatedly found to be in violation of the right to earn one’s living in an occupation freely entered upon by the ECSR due to the excessive number of occupations prohibited to non-nationals. The ECSR finds that states may ban non-nationals from certain occupations only for reasons provided in article G of the ESC. In this respect, such bans shall be “prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.” Even though Turkey has decreased the number of occupations exclusive to Turkish citizens as a result of the “not in conformity” conclusions of the ECSR, the occupations in the list

[450] AYM, 14.01.2015 T., 2014/108 E., 2015/8 K., R.G, 21.05.2015, S. 29362. (Translated by the author.)

[451] Article 13 of the Constitution states the following: “Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.” https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[452] AYM, 14.01.2015 T., 2014/108 E., 2015/8 K., R.G, 21.05.2015, S. 29362.

are still found by the ECSR to be excessive and not compatible with the reasons provided in article G of the ESC.[453] Currently, in addition to public servants, the following occupations are reserved exclusively for Turkish nationals: dentists, nurses, pharmacists, veterinarians, liable directors in private hospitals, attorneys-at-law, notaries, securities in public and private institutions, exporters of fish, oysters, mussels, sponges, pearls, and corals from territorial waters, divers, underwater seekers, underwater guides, captains, the crew, etc., and customs counsellors. [454]

In the light of the states' obligation to ensure effective remedies and penalties against discriminatory acts, Turkish law provides both civil remedies for the victims of discrimination and criminal penalties for the employers who engage in discriminatory acts. In this context, the above discussed article 5 of the Turkish Labor Act provides a lump sum compensation to the victims of discrimination, the amount of which shall not be higher than the worker's four months' salary, along with the pecuniary and non-pecuniary damages of the worker. However, the entitlement to this compensation is limited to the acts of discrimination after the conclusion of the employment contract, namely during the employment relationship or at the ending of the employment contract.[455] Despite the presence of direct stipulation of prohibition of discrimination at the time of the making of the contract for both women and persons with disabilities, there is no special private law remedy prescribed for cases of discrimination before the conclusion of the contract, with the

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[453] Council of Europe, European Committee of Social Rights, "Conclusions 2012 – Turkey - Article 1-2," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/2/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-2," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/2/EN.

[454] http://www.calismaizni.gov.tr/yabancilar/yabancilara-yasak-meslekler/

[455] Yıldız, *İşverenin Eşit İşlem Yapma Borcu,* 169; Yuvalı, *İşçinin Kişisel Özellikleri Bakımından İşverenin Eşit Davranma Borcu,* 223.

sole exception of discrimination on the grounds of union membership. Those who are discriminated against for reasons other than union membership or non-membership before the conclusion of the employment contract for whatever reason may seek remedies on the grounds of *culpa in contrahendo* under the law of obligations or violation of personality rights accordingly to the civil law.[456] As for those who are discriminated against on the grounds of their membership or non-membership to any or a specific trade union article 25 of the 6356 numbered Act on Trade Unions and Collective Labor Agreements grants a special compensation, the amount of which shall not be less than the amount corresponding to the worker's one year's salary. Furthermore, the victims of discrimination on the grounds of union membership or non-membership are entitled to the enjoyment of the employment protection clauses, regardless of whether they are otherwise eligible to be covered by them.

The upper limit of four months' salary as a remedy for acts of discrimination is found by the ECSR to be a reason for inconformity of Turkey's obligations arising out of article 1(2) of the ESC. It is indicated by the ECSR that a limit as such on one hand hinders discriminatory acts from being dissuasive and on the other, may not be sufficient in remedying the loss suffered by the worker.[457] Although the former criticism is fitting, the latter can be challenged by the fact that the entitlement of this compensation is independent from any loss suffered and that in case of the presence

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[456] Bakırcı, *Cinsiyet Ayrımcılığı Yasağı ve Türkiye,* 509; Sarper Süzek, *İş Hukuku* (Istanbul: Beta, 2016), 508.

[457] Council of Europe, European Committee of Social Rights, "Conclusions XVIII-1 – Turkey - Article 1-2," 2006, http://hudoc.esc.coe.int/eng?i=XVIII-1/def/TUR/1/2/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2012 – Turkey - Article 1-2," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/2/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-2," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/2/EN.

of any pecuniary and/or non-pecuniary damage, the worker may claim them alongside the compensation for discrimination. In other words, damages suffered by the worker shall not be appropriated from the compensation for discrimination provided in article 5 of the Labor Act. However, it is in fact a point of criticism that the law is formulated as establishing the maximum rather than a minimum, as in the case of discrimination on the grounds of union membership or non-membership. Consequently, this law on remedies for acts of discrimination requires amendment in order to effectively protect workers from the discriminatory acts of the employers.[458]

The burden of proof in discrimination cases lies in principle with the worker. However, the workers' burden of proof pursuant to article 5(7) of the Labor Act is a moderate one and does not seek the existence of an absolute proof. Taking into account the difficulty in providing the presence of discrimination in various substantial cases, the Labor Act finds adequate the submission by the worker of a situation that strongly implies the presence of a violation. In this case, the burden of proof shifts to the employer and at this point, it is the employer who is required to prove that a violation does not exist. Nonetheless, there are two exceptions to this clause. The first one concerns workers who are covered by the employment protection clauses. In case the employment contracts of these workers are terminated by the employer on discriminatory grounds, the burden of proof lies with the employer rather than with the worker. This is because article 20(2) of the Labor Act sets forth that the burden of proof for the presence of valid reasons for termination lies with the employer in cases of employer's termination of the employment

[458] Yıldız, *İşverenin Eşit İşlem Yapma Borcu,* 330; Yuvalı, *İşçisinin Kişisel Özellikleri Bakımından İşverenin Eşit Davranma Borcu,* 224.

contract of a worker who is protected by the employment protection clauses. The second exception to the worker's burden of proof in discrimination cases is the discriminatory termination of the worker's contract on the grounds of membership or non-membership to any or a specific trade union. Article 25(6) of the Act No. 6356 provides that in cases where the employment contract is claimed to have been terminated due to membership or non-membership to any or a specific trade union, the employer bears the burden of proving the grounds for the termination.

An important point of criticism here is that the scope of application of article 5 of the Labor Act is limited to those who are subject to the Labor Act. Those who are not protected by the Labor Act[459] are not entitled to the above indicated compensation against discriminatory acts and the administrative fine cannot be imposed on the employers of such groups.[460] This is an obvious lacking of the legislation which requires an immediate amending. Protection of workers from discrimination is certainly not an issue of distinction between groups of workers.

As for the public law penalties imposed on the employers who engage in discriminatory acts against workers, the Turkish legal system prescribes both an administrative fine (article 99 of the Labor Act) and imprisonment (article 122(1)(c,

[459] The types of work or employment relationships that are excluded from the scope of application of the Labor Act are listed as follows: (1) sea air transport businesses (2) workplaces or enterprises carrying out agricultural and forestry works and employing less than 50 (including 50) workers (3) all construction works related with agriculture that are within the limits of family economy (4) work performed by the members of a family and their relatives up to 3rd grade (including 3rd grade) at home or in handcrafting workplaces, without the participation of third parties (5) domestic services (6) sportsmen (7) persons in rehabilitation (8) workplaces of three employees that are covered by article 2 of the Act No. 507 on Tradesmen and Craftsmen. Furthermore, journalists are subject to their unique Act and are also not protected by the Labor Act.

[460] Bakırcı, *Cinsiyet Ayrımcılığı Yasağı ve Türkiye,* 235; Yıldız, *İşverenin Eşit İşlem Yapma Borcu,* 292.

d)). The administrative fine is applicable to all employers who engage in discriminatory acts during the employment relationship or while ending the contract. However, whether this fine is also applicable to cases of gender discrimination before the conclusion of the contract is a controversial issue. Bakırcı holds the position that since the language of article 99 explicitly refers to "employees", the administrative fine shall not be applicable in cases of discrimination against those with whom an employment contract has not been concluded and hence, are not given the title of an "employee". Otherwise, it will be against the principle of *nullum crimen sine lege.*[461] On the contrary, Süzek does not make any distinction between the coverage of article 5 of the Labor Act and states that employer's discrimination on the grounds of sex before the conclusion of the contract will result in the imposition of the administrative fine against the employer.[462] The administrative fine shall be applicable for discriminatory acts for both *before and after* the conclusion of the employment contract. However, the amount of the administrative fine, which is determined as 150 Turkish Liras for each worker who encounters an act of discrimination, is far from being dissuasive and cannot be deemed to be serving the goal of anti-discrimination. The penal penalties for acts of discrimination during both the hiring of the workers and the conducting of a normal economic activity is provided as one to three years of imprisonment. Those who deprive others from being hired for jobs or hinder them from performing normal economic activities for discriminatory reasons are the subjects of the criminal offence. Furthermore, acts of discrimination may amount to the violation of freedom to work or freedom of

[461] Ibid., 199.
[462] Süzek, *İş Hukuku*, 499.

employment[463] and be penalized with six months to two years of imprisonment or administrative fine.

Finally, the Act No. 6701 on National Human Rights and Equality Institution of Turkey (2016) provides a second legal remedy for the victims of discrimination in the field of employment. Article 17(5) of the Act, which prohibits discrimination at all stages of employment (including during hiring), indicates that complaints concerning article 5 of the Labor Act may be submitted before the National Human Rights and Equality Institution of Turkey after the remedies provided in the Labor Act and the relevant legislation have been exhausted and no sanction has been imposed on the employer. The administrative fine provided in this Act for acts of discrimination appear to be more effective, albeit still insufficient than the one set forth in the Labor Act. Depending on the severity of the act of discrimination, the National Human Rights and Equality Institution of Turkey shall determine the administrative fine to be minimum 1000 Turkish Liras and maximum 15000 Turkish Liras.

4.2.2. Protection of Wage

The interest behind the protection of wage in terms of realizing the right to work arises out of the objective to preclude any practices of slavery or practices resembling slavery, particularly debt bondage. Protection of wage can be realized

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[463] Bakırcı, *Cinsiyet Ayrımcılığı Yasağı ve Türkiye,* 521.

through a variety of diverse labor law instruments. The Turkish Labor Law uses different means to protect the main source of income of the workers, namely their wages, by restricting the legal transactions or other actions targeted towards disposing the wage. Accordingly, under article 35 of the 4857 numbered Labor Act, no more than one fourth of a worker's wage can be subjected to seizure or be transferred or pledged by the worker to others. Furthermore, article 407(2) of the 6098 numbered Turkish Code of Obligations restricts bartering of the worker's wage by the employer in exchange for the worker's debt to the employer to only exceptional cases and article 407(3) deems invalid all agreements between the worker and the employer which oblige the worker to spend the wage for the benefit of the employer. These are among the many protections provided to the worker's wage.[464]

4.2.3. The Right to Employment Services, Vocational Guidance and Vocational Training

Within the Turkish legal system, the public institution charged with the duty to provide free employment services and vocational guidance and training is the Turkish Institution for Employment (İŞKUR), alongside the national educational institutions for vocational training. Furthermore, private employment agencies, the establishment of which are dependent on the licenses provided by İŞKUR, also conduct the respective services. Accordingly in Turkey, private employment

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[464] For other protections see: Süzek, *İş Hukuku*, 424-36; Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (Ankara: Turhan Kitabevi, 2014), 695-704.

agencies have the right to operate besides İŞKUR's free employment services, provided that they have attained license from İŞKUR. Furthermore, with the 2016 amendment to article 7 of the Labor Act No. 4857, the private employment agencies are authorized to work as temporary work agencies if they are licensed by İŞKUR thereof.

In terms of Turkey's obligation to provide free employment services, the ECSR had found a violation by Turkey because of the administrative fees that were laid on the employers upon the usage of services provided by İŞKUR.[465] According to the ECSR, although the amount of the fee that was charged to the employers was considerably small, it still led to inconformity because it was a violation of Turkey's obligation to provide *free* employment services.[466] This fee is no longer applied and therefore, Turkey currently complies with its obligation to provide free employment services.

Private employment agencies work alongside İŞKUR. However, unlike İŞKUR, private employment agencies do not provide their services free of charge. This cannot be considered as a violation of the provision of free employment services because as previously explained,[467] fee charging private employment agencies are legal as long as there is a free alternative, in this case İŞKUR. Article 19(1) of the Turkish Institution for Employment Act (No. 4904) of 2003 allows private employment agencies to charge employers a fee in return for their services either as

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[465] Council of Europe, European Committee of Social Rights, "Conclusions XIV-1 – Turkey - Article 1-3," 1998, http://hudoc.esc.coe.int/eng?i=XIV-1/def/TUR/1/3/EN.
[466] Council of Europe, European Committee of Social Rights, "Conclusions XVI-1 – Turkey - Article 1-3," 2003, http://hudoc.esc.coe.int/eng?i=XVI-1/def/TUR/1/3/EN.
[467] See 3.2.2.2.2 above.

an employment service provider or a temporary work agency. The same provision prohibits the charging of the workers by private employment agencies on any grounds and expresses that the private employment agencies shall not gain any form of benefit from the workers, provided that they are not among list of exceptions provided in article 22 of the Private Employment Agencies Regulation of 2016. The groups of workers listed in the respective article may be charged by the private employment agencies in exchange for some of their services. Accordingly, private employment agencies that work within the framework of the Act No. 5580 on Private Education Institutions may charge workers for the training they provide, provided that they are not given as part of the provision of employment services. Moreover, private employment agencies may charge for all activities they provide the following groups: professional athletes, technical directors, trainers, models, other groups of artists, general directors or those who will be placed in equal or higher executive positions.

Concerning the second obligation to provide vocational guidance and training, the ECSR has found Turkey to be mostly in conformity with the obligation to provide vocational training; whereas it has been declared to be in violation of the obligation to provide vocational guidance several times. Accordingly, the ECSR has found Turkey to be repeatedly not in conformity with article 1(4) and article 9 of the ESC. The main reasons for violation are focused on the geographically restricted access to vocational guidance and the low state expenditure on such services.[468] The same is

[468] Council of Europe, European Committee of Social Rights, "Conclusions XIV-1 – Turkey - Article 1-4," 1998, http://hudoc.esc.coe.int/eng?i=XIV-2/def/TUR/1/4/EN; Council of Europe, European Committee of Social Rights, "Conclusions XIII-1 – Turkey - Article 9," 1993, http://hudoc.esc.coe.int/eng?i=XIII-1/def/TUR/9//EN.

specifically underscored concerning persons with disabilities. Although the legislative basis has been established for the vocational rehabilitation and guidance for persons with disabilities in article 13 of the Act No. 5378 on Persons with Disabilities of 2005, the implementation of the legislation is lacking and requires taking more effective actions. Accordingly, the ECSR finds the level of participation and the number of training courses and facilities for persons with disabilities in vocational guidance and training programs too low and requires more effort on the part of Turkey thereof.[469] In addition, as previously explained, the ECSR requires vocational guidance programs to be integrated within the national education system. The absence of an established vocational guidance programs within the education system was found to be a violation of the right to vocational guidance.[470] In both 2012 and 2016 Conclusions, however, the ECSR recognized the efforts and improvements in the scope of the vocational guidance programs, both in terms of the labor market and in schools, and finally, found Turkey to be in conformity with the right to vocational guidance.[471]

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[469] Council of Europe, European Committee of Social Rights, "Conclusions XIII-3 – Turkey - Article 1-4," 1995, http://hudoc.esc.coe.int/eng?i=XIII-3/def/TUR/1/4/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-4," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/4/EN.

[470] Council of Europe, European Committee of Social Rights, "Conclusions XIII-3 – Turkey - Article 1-4," 2008, http://hudoc.esc.coe.int/eng?i=XIX-1/def/TUR/1/4/EN.

[471] Council of Europe, European Committee of Social Rights, "Conclusions 2012 – Turkey - Article 9-4," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/9/EN; Council of Europe, European Committee of Social Rights, "Conclusions 2016 – Turkey - Article 1-4," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/4/EN.

4.2.4. Obligation to Conclude a Contract

As a means of ensuring individuals with the right to engage in work of one's own choosing, positive obligations on the part of the employers to conclude employment contracts has been recognized in a number of cases under the Turkish law. Accordingly, the obligation of the employers to conclude an employment contract presents itself either as an obligation to rehire certain workers or to satisfy a quota of employing workers, who are among the disadvantaged groups in finding employment.

The former appears as a special form of employment protection and seeks to protect the individuals' right to remain in employment. Obligation of the employer to rehire consists of firstly, workers who were dismissed as part of a collective redundancy. If the employer, who had conducted the redundancies, wishes to hire workers for the work of the same nature within six months following the execution of the redundancy, he/she is under the obligation to rehire the suitable former workers. Secondly, the employer's obligation to rehire emerges in case where a worker, who had to terminate the employment relationship due to his/her disability, returns following their treatment and recovery. Under article 30(5) of the Labor Act, the employer is obliged to rehire the worker in question under the updated working conditions to his/her previous position or a similar one immediately, if such positions are available, or as the primary preference in the next possible opening, if they are not available at the time of the worker's application to the employer. If the employer refrains from rehiring the worker, despite the presence of positions that are available immediately or at a later time, he/she has to pay the worker a compensation worth his/her six months' salary. The same obligation exists under article 31(4) of the Labor Act for those who apply to their previous employer within two months following the finalization of their compulsory military service or any other duty arising from the law, for which the worker had to terminate the employment relationship. If the worker is not reinstated into his/her work under the updated working conditions despite the presence of an immediate or a later position of the same or similar nature, the worker is entitled to a compensation in the amount of his/her three months' salary. Finally, a special protection is provided to journalists whose employment contracts are terminated following the mandatory suspension period of six months in the event of sickness. Article 12(2) of the Media Labor Act states that if upon recovery the journalist in question reapplies for their previous position within one year following termination, they shall be preferable rehired.

The second category for which the employers' obligation to conclude employment contracts arises consists of certain groups that are in a disadvantaged position in finding employment. The objective of these regulations is to present the disadvantaged groups with the opportunity to effectively enjoy their right to engage in work and thus, become productive members of the society. It is through employment and their opportunity to gain their living that they can be independent beings and loosen their dependency on the society.[472] Persons in this second group are regulated in article 30 of the Labor Act as persons with disabilities, ex-convicts and persons who were injured but not disabled while fighting against anti-terrorism. Accordingly, private sector employers who have fifty or more workers working for

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[472] Nazlı, *Anayasanın Çalışma Hak ve Özgürlüğüne İlişkin Düzenlemelerinin İş Hukukuna Etkileri,* 117.

them are under the obligation to employ three percent of their total number of workers from persons with disabilities.[473] This percentage is four percent for the public sector employers who also have fifty or more workers working for them. The obligation to hire ex-convicts or the injured persons due to anti-terrorism who are not disabled lies exclusively with the public sector employers and these groups should constitute two percent of the total number of their employees. However, since the language of the provision explicitly uses the conjunction "or", the public sector employer is obliged to employ *either* ex-convicts *or* the abled victims of anti-terrorism. For both the private and public sector employers, the workers in question shall be employed in suitable work that will meet their professions and their physical and mental capabilities. Furthermore, the provision of such workers shall be realized through İŞKUR. According to article 101 of the Labor Act, employers who do not comply with their obligation to hire persons with disabilities and/or ex-convicts or abled victims of anti-terrorism are subject to an administrative fine of 1700 Turkish Liras for every month they fail to comply with this obligation. However, since the person who suffers damage from the employer's incompliance cannot be determined, the employer in question does not encounter any civil sanction, apart from those arising out of prohibition of discrimination, if applicable.

[473] Ünal criticizes this quota system and claims that it results in the labelling of persons with disabilities as incapable and leads to their exclusion. Instead of placing the idea that employers are doing these persons a favor, effective actions to eliminate discrimination shall be taken with the support of measures that seek to establish the employment of persons with disabilities a favorable choice. Canan Ünal, *Özürlülerin Sosyal Güvenlik Hakları: Dünyadaki Yeni Yaklaşımlar Işığında Öneriler* (Istanbul: Beta, 2012), 187.

4.2.5. Employment Protection and Restriction on the Employer's Right to Terminate

Employment protection is an essential aspect of the right to work in terms of providing the worker with the right to remain in employment.[474] Protection of the worker from arbitrary terminations by the employer through various institutions derives from some of the fundamental principles adopted by the Constitution. These constitutional principles that establish the foundations of the notion of employment protection are the principle of a social state, the right to life and to protect and develop one's physical and moral existence, and finally the right to work.[475]

Employment protection is foremost a requirement arising out of the principle of a social state, as secured in article 2 of the Turkish Constitution. A social state has the duty to provide social justice. One of the essential means of realizing this objective is through interfering in the employment relationships and protecting the worker from the abuses of the economically superior employer. Since workers and their families are highly dependent on the income that comes from the workers' jobs, they remain vulnerable against the possibilities of no longer earning the income. With a view to lift the workers' and their families' vulnerabilities and to ensure that they live in dignity, the social state has to protect workers from arbitrary dismissals.[476] Secondly, the interest of the worker in maintaining their work is protected by article 17 of the Constitution which recognizes the right to life and the right to protect and develop one's physical and moral existence. Work is directly related to the personality of the

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[474] See 3.2.3 above.
[475] Ulucan et al., *İşçinin Feshe Karşı Korunması (İş Güvencesi)*, 96.
[476] Ibid., 97-8.

worker by contributing to their self-development. The loss of a job may have negative consequences to the individual's right to development and may even result in the loss of the social environment which the workers has identified themselves to be a part of.[477] Therefore, alongside the interest of the worker in maintaining their income, there is an additional interest of development that is protected through the employment protection system. Finally, as a pivotal aspect of the right to work, employment protection is a requirement directly deriving from the right to work as secured in article 49 of the Turkish Constitution.[478]

The first form of employment protection is the notification periods and the right of the worker to seek employment. These two institutions are constructive measures that seek to minimize the damage workers and their families encounter by imposing an additional responsibility on the employers.[479] Article 17 of the Labor Act requires the party terminating the employment relationship to abide by the periods set forth in the article according to the seniority of the worker. If one party fails to comply with these periods, he/she shall pay payment in lieu of notice in the amount that corresponds to the worker's pay for those periods. In case of termination by the employer, this requirement provides the worker with the opportunity to prepare themselves for the termination and search for new employment opportunities or other alternatives.[480] Secondly, article 27 of the Labor Act grants the worker with the right

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[477] Ibid., 96-7.
[478] Tankut Centel, *İş Güvencesi* (Istanbul: Legal, 2012), 22.
[479] Fevzi Demir, *Mukayeseli Hukukta ve Türk Hukukunda Çalışma Hakkının Korunması (İş Güvencesi)* (Istanbul: Belediye-İş Sendikası Eğitim Yayınları, 1986), 124.
[480] Münir Ekonomi, "İşsizliğin Önlenmesi ve Telafisinde İş Hukuku Kurumları," in *Arbeits-und Sozialrechtliche Probleme der Arbeitslosigkeit (İşsizliğin İş Hukuku ve Sosyal Güvenlik Açsından Sorunları),* ed. İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi (Ankara: KAMU-İŞ, 2003), 251; Ulucan, "Çalışma Hakkı ve İş Güvencesi," 186.

to search for a new job during the notification periods. Accordingly, the employer is under the obligation to provide the worker with the opportunity to search for a new job during the working hours for a minimum of two hours per day, without any deduction in the pay. If the employer fails to grant this right to the worker, he/she shall pay a compensation in the amount that corresponds to those hours, in addition to the one that the worker would anyhow had earned had he/she been allowed to use such periods.[481]

The most prominent aspect of employment protection that is granted to certain groups of workers is job security. Job security was introduced into the Turkish Labor Law for the first time in 2002 and then recognized as an underlying principle in the current 4857 numbered Labor Act of 2003. It is regulated in articles 18 through 21 and formulated in a parallel manner to the ILO Convention No. 158. In fact, some articles of the Labor Act are direct translations of the ILO Convention. As per article 18 of the Labor Act, job security is applicable for workplaces with thirty or more workers and for workers with at least six months of seniority and who are working under an employment contract of indefinite duration.

The thirty workers rule has been challenged before the Turkish Constitutional Court with the claim that it was a violation of the ILO Convention No. 158 and the Constitutionally protected right to work. In this respect, apart from the alleged violation of article 49 (the right to work), article 13 for unconstitutional restriction of the right to work, article 2 and 5 for being against the principle of social state and the state's duty to remove barriers that would interfere with the principle of social state

[481] Ekonomi, "İşsizliğin Önlenmesi ve Telafisinde İş Hukuku Kurumları,", 251.

were also claimed to have been violated.[482] However, the Constitutional Court did not find any violation of the Constitution and asserted that every country has to take into account their own data and conditions of the working life when determining the parameters for job security, by also observing the balance between the worker and the employer. The Constitutional Court based its decision on the possibility of an increase in unregistered employment due to the increase in the costs that the employers had to bear for complying with the requirements of implementing job security. The Constitutional Court found the legitimacy in excluding small-size enterprises from severe financial burden in to article 2(5) of the ILO Convention No. 158 which stipulates that "categories of employed persons in respect of which special problems of a substantial nature arise in the light of (…) the size or nature of the undertaking that employs them" may be excluded from the scope of application of the Convention. Accordingly, the Constitutional Court found that the balance established between the economic interest of the small-size enterprises and the interest of the workers in having job security was not disproportionate.[483]

This decision of the Constitutional Court is criticized by the majority of the Turkish scholars. One criticism highlights the contradiction in the decision by remarking that although the Constitutional Court's points concerning the small-size enterprises are

[482] AYM, 19.10.2005 T., 2003/66 E., 2005/72 K., R.G, 24.11.2007, S. 26710.

[483] Ibid. The original text is as follows: "İş güvencesi ölçütleri belirlenirken, her ülke kendi verilerini ve iş hayatı koşullarını göz önüne almaktadır. İş hayatına ilişkin kuralların belirlenmesinde kamu yararı esastır, ayrıca işçi ve işveren arasındaki denge de gözetilmektedir. 18. maddeyle getirilen 30 veya daha fazla işçi çalıştırma koşulunun işveren aleyhine değiştirilmesi durumunda işveren bakımından oluşacak ek mali külfetlerin kayıt dışı uygulamalara neden olabileceği, ayrıca iş güvencesi ile oluşabilecek ağır mali yükten küçük işletmelerin uzak tutulması amaçları gözetildiğinde, dava konusu kuralla getirilen şartlarla işçi ve işveren arasında kurulan dengede bir ölçüsüzlük bulunmamaktadır. Nitekim, Uluslararası Çalışma Örgütünün 158 sayılı Sözleşmesinde de, işçilerin özel istihdam şartları bakımından veya istihdam eden işletmenin büyüklüğü veya niteliği açısından esaslı sorunlar bulunan durumlarda, işçilerden bir kategorinin, iş güvencesinin tamamı veya bir kısım hükümlerinin kapsamı dışında tutulabileceği öngörülmektedir."

valid, workplaces with ten to thirty workers fall within the sphere of medium-size enterprises.[484] Therefore, maintaining the thirty-worker threshold for job protection cannot be legitimized. Whereas another criticism is voiced concerning the limitation on the scope of application of job security in a way that workers in more than 90% of the workplaces are excluded from the protection provided thereby.[485] This criticism is endorsed by the fact the coverage of the job security provisions is limited to workers for whom either the 4857 numbered Labor Act or the 5953 numbered Media Labor Act is applicable. The workers listed in article 4 of the Labor Act who are excluded from the scope of application of the Labor Act[486] and the workers who are subject to the 854 numbered Maritime Labor Act are not covered by the protection offered by the job security provisions. Furthermore, article 18 of the Labor Act expands this exclusion to employers' representatives and their assistants who manage the enterprise in its entirety and to employers' representatives who manage the workplace in its entirety who assume the authority to recruit or dismiss workers.

This distinction between workers cannot be legitimized by any reasonable explanation and is a clear violation of the ILO Convention No. 158, which although permits the exclusion of various groups of workers in article 2, requires objective

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[484] Süzek, *İş Hukuku*, 597; Nuri Çelik, Nurşen Caniklioğlu and Talat Canbolat, *İş Hukuku Dersleri* (Istanbul: Beta, 2016), 379-80; Toker Dereli, "Labour Law and Industrial Relations in Turkey," in *International Encyclopaedia for Labour Law and Industrial Relations,* ed. Roger Blanpain (Alphen aan den Rijn: Kluwer Law International, 2011), para. 385.

[485] Mollamahmutoğlu, Astarlı and Baysal, *İş Hukuku,* 28.

[486] The types of work or employment relationships that are excluded from the scope of application of the Labor Act are listed as follows: (1) sea air transport businesses (2) workplaces or enterprises carrying out agricultural and forestry works and employing less than 50 (including 50) workers (3) all construction works related with agriculture that are within the limits of family economy (4) work performed by the members of a family and their relatives up to 3rd grade (including 3rd grade) at home or in handcrafting workplaces, without the participation of third parties (5) domestic services (6) sportsmen (7) persons in rehabilitation (8) workplaces of three employees that are covered by article 2 of the Act No. 507 on Tradesmen and Craftsmen.

reasons thereof. The excessiveness of the number of groups that are not protected by the employment protection clauses is also adverted in the relevant ILO Observations, with special emphasis on the non-compliance concerning the non-coverage of the seafarers.[487] Exclusion of various groups from the scope of protection of job security provisions without legitimate reasons that prevail the interest protected by the right to work constitutes a violation of their right to work.

Apart from the scope of application of the job security provisions, the remaining aspects appear to be in conformity with the ILO Convention No. 158. In this respect, the valid reasons for termination by the employer are limited to those that are either "connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service", as provided in article 4 of the ILO Convention No. 158. Furthermore, the list of cases that do not constitute valid reasons provided in articles 5 and 6 of the Convention[488] have been directly implemented into the Labor Act.[489]

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[487] ILO CEACR, 102nd ILC Session, "Observation on the Application of Termination of Employment Convention, 1982 (No. 158) – Turkey," 2013.

[488] These reasons are stipulated in the Convention as follows: According to article 5, the following shall not constitute valid reasons.
"(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
(e) absence from work during maternity leave."
In addition to these, article 6 provides that "[t]emporary absence from work because of illness or injury" also does not constitute a valid reason for termination.
It should be further noted that item (d) in article 5 on prohibition of discrimination has been implemented in a non-exhaustive language in the Labor Act, with the addition of "or similar reasons" following the exemplary list.

[489] Levent Akın, "Termination of Labor Contracts and Unfair Dismissal Under Turkish Labor Law," *Comparative Labor Law & Policy Journal* 25 (2003-4): 568; Dereli, "Labour Law and Industrial Relations in Turkey," para. 394.

Other requirements of the ILO Convention No. 158 concerning employment protection are satisfied by the Turkish Labor Act. Workers are provided with the opportunity to present their defense when faced with the accusation that their capacity or conduct does not meet the standards required by the employment relationship. Furthermore, the burden of proving that valid reasons are present in a given case rests on the employer. In addition, article 10 of the Convention which stipulates the remedies in case of wrongful termination are directly implemented into article 21 of the Labor Act. Accordingly, if a court finds that the employer's termination is not justified by a valid reason or is not duly executed, it has the authority to declare the termination invalid. In this case, the employer is provided with a right to choose from two possibilities. The employer has the choice of either reinstating the worker and paying up to four months' wage of inactive work between the date of termination and the date of the court order or refraining from reinstatement and paying compensation calculated as the worker's four to eight months' wage, in addition to the maximum of four months' wage of inactive work period, as well as other payments (such as severance allowance and payment in lieu of notice, if applicable) arising out of the employer's termination. In the latter case, the date of termination is accepted to be the date when the employer refuses to reinstate the worker despite the court order deeming the termination invalid.

In addition to the above requirements of job security provided in the legislation, an important principle that is applied in order to fully realize and endorse job security is the *ultima ratio* principle.[490] According to this principle, termination by the employer

[490] Nazlı, *Anayasanın Çalışma Hak ve Özgürlüğüne İlişkin Düzenlemelerinin İş Hukukuna Etkileri,* 168.

shall be a final resort and the employer shall seek other means of sustaining the employment relationship before applying to the option of termination. Although this principle is not explicitly stated in the legislation, it is referred to in the rationale of article 18 and is an adopted principle among the Turkish Labor Law scholars[491] and the judiciary.

It should be noted that the ILO still requires the existence of some form of legal remedy for workers who are not covered by the employment protection clauses. Pursuant to article 10 of the ILO Convention No. 158, in cases where national courts are not competent in declaring an unjustified termination invalid and/or rule for the reinstatement of the worker, effective legal remedies shall be available for the worker in the form of "adequate compensation or such other relief as may be deemed appropriate." Accordingly, article 434 of the Turkish Code of Obligations and article 17(6) of the Labor Act entitle workers with an employment contract of indefinite duration who are not covered by the employment protection clauses and whose employment contracts have been terminated by the employer in bad faith a compensation of three times the notice pay, along with payment in lieu of notice, severance pay, other pecuniary and non-pecuniary damages, if applicable. For those working under a fixed term employment contract, the wrongful termination by the employer grants the employee with a compensation, the amount of which corresponds to the total amount of wage that the employee would have earned had

[491] Mollamahmutoğlu, Astarlı and Baysal, *İş Hukuku*, 1001-5; Süzek, *İş Hukuku*, 637-42; Centel, *İş Güvencesi,* 113; Çelik, Caniklioğlu, Canbolat, *İş Hukuku Dersleri,* 396; Akın, "Termination of Labor Contracts and Unfair Dismissal Under Turkish Labor Law,"569-70; Dereli, "Labour Law and Industrial Relations in Turkey," para. 390.

the contract not been terminated.[492] Furthermore, the same employee may be granted an unfair dismissal compensation up to six months' wage by the court.

When the remedies provided for those who are covered by the employment protection clauses is compared to those provided for those who are excluded, the latter is entitled to a far less than the former. According to the CEACR, given the fact that some of the reasons that constitute valid reasons are so fundamental that "termination on some of these grounds constitutes an infringement of the fundamental Conventions such as those regarding discrimination and freedom of association, a penalty of three times the notice pay is substantially less than the remedies afforded other workers under the Labour Act and might be considered inadequate compensation for the purposes of *Article 10* of the Convention."[493] It should be however noted that as a result of the Constitutional Court's judgment of November 22, 2014, those who encounter discrimination on the grounds of their membership or non-membership to any or a specific trade union are now entitled to the protection provided by the job security clauses, regardless of whether they satisfy the requirements thereof. The original version of article 25 of the 6356 numbered Act which granted job security only to those who were covered by the system was found unconstitutional and has been revoked, allowing the provisions of job security to also cover those whose employment contracts are terminated on the grounds of

[492] The amount the worker saves as a result of termination or the amount the worker earns or refrains from earning by working at another job shall be deducted from this compensation (article 438 of the Code of Obligations).
[493] ILO CEACR, 100th ILC Session, "Observation on the Application of Termination of Employment Convention, 1982 (No. 158) – Turkey," 2011.

discrimination for union membership or non-membership and who are otherwise not covered by the job security provisions.[494]

As another means of protection, restrictions concerning collective redundancies within the Turkish Labor Act are also based on the ILO Convention No. 158. The objective of these restrictions is to ban the employer from conducting arbitrary dismissals and more importantly, considering the high number of workers suffering from loss of employment in cases of collective redundancies, to ensure that all parties (the workers and the state) are involved in the process and that all possible alternatives before executing such a decision of collective redundancy have been exhausted. In cases of collective redundancies for economic, technological, structural or similar reasons, the employer is required under article 29(1) of the Labor Act to notify the workers' representative, the relevant regional directorates and the Turkish Institution for Employment Services. In the light of the *ultima ratio* principle, the workers' representatives and the employer shall deliberate about minimizing the number of dismissals and their negative effects for the workers and consider other possibilities. If the redundancy takes place and the employer intends to hire workers for positions of the same nature within six months following the collective redundancy, the employer's freedom of contract is restricted under article 29(6), which governs the employer's obligation to conclude a contract for employment with the dismissed workers.

Another instrument for employment protection is the restriction on the employer's right to terminate the employment contract without notice for specified durations.

[494] AYM, 22.11.2014 T., 2013/1 E., 2014/161 K., R.G, 11.11.2015 S. 29529.

These are regulated in article 25, which govern the reasons for which the employer is entitled to terminate the employment contract immediately. These reasons are regarded to be so severe that in the existence of such reasons, it is no longer objectively and reasonably expected from the employer to continue with the employment relationship. However, in the existence of various reasons, the employer's right to terminate without notice begins following the expiration of the relevant duration. These include, among others, force majeure and worker's absence due to sickness, arrest, pregnancy and birth or without an excuse, the durations of which are all regulated separately. In the presence of such circumstances, the employer shall not terminate the employment relationship before the expiration of the periods determined in the article for each case. If the employer terminates the employment contract without complying with the periods set forth, workers who are secured by the job protection may benefit from the provisions thereof; whereas those who are not covered by the job security provisions are entitled to payment in lieu of notice and under article 438(3) of the 6098 numbered Code of Obligations to a compensation up to six months' salary to be determined by the court. However, both the entitlement and the amount of the latter compensation is within the discretion power of the judge.

The above institutions are some of the most significant instruments of employment protection. The examples can be multiplied.[495] What is common in all of these examples is that their objective is to avoid arbitrary terminations by the employer that could cost the workers not only their job, but also their source of income. As

[495] For more information see: Demir, *Mukayeseli Hukukta ve Türk Hukukunda Çalışma Hakkının Korunması (İş Güvencesi*.

opposed to the positive duty of the states to aim at full employment, which is merely a commitment for adopting and pursuing an economic policy that is directed towards lowering unemployment and creating new employment opportunities and not actually realizing these goals, employment protection is presented as a substantive principle. As long as unemployment remains a risk and finding employment becomes a challenge, employment protection serves the protection of the right to work by ensuring that workers at least do not lose their jobs without substantial reasons.

4.2.6. The Right of the Worker to Terminate the Employment Relationship

Turkey, which has ratified the ILO Convention No. 158[496], has chosen option (c) among choices provided in article 12(1)[497] of the respective Convention and hence, grants workers whose employment contracts have been terminated by the employer – and in exceptional cases by the workers themselves – both severance allowance and unemployment benefits, both of which are subjected to distinct conditions.

The Turkish legislation on unemployment benefits is regulated under the 4447 numbered Unemployment Insurance Act of 1999, which defines unemployment

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[496] Turkey has ratified the ILO Convention No. 158 on January 4, 1995.

[497] "A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits."

insurance in article 47(1)(c) as a "compulsory insurance which operates with the insurance technique and compensates for a specific period, part of the loss of income of the insured as a result of being unemployed, who have lost their jobs without their own malice and fault despite having the will, competence, health and proficiency to work."[498] According to this legislation, those who are within the scope of application of the unemployment insurance scheme and thus, eligible for being entitled to unemployment benefits are those who work as an employee under an employment contract and have paid their contributions to the unemployment insurance scheme. In other words, self-employed, civil servants or other groups who do not work under an employment contract despite being secured under the social security scheme may not benefit from the unemployment insurance scheme.[499]

In order to be granted unemployment benefits, four conditions have to be satisfied. The first condition is the payment of contributions for unemployment insurance for a specified period of time. According to article 50(2) of the referred Act, contributions shall have been paid in the last 120 days before the termination of the employment contract and for a minimum of 600 days in the last three years. In other words, the person applying for unemployment benefits should have been employed in the last 120 days before the termination of their employment contract and should have worked for at least 600 days in the last three years. The number of days of receiving

[498] Translated by the author. The original text is as follows: "Bir işyerinde çalışırken, çalışma istek, yetenek, sağlık ve yeterliliğinde olmasına rağmen, herhangi bir kasıt ve kusuru olmaksızın işini kaybeden sigortalılara işsiz kalmaları nedeniyle uğradıkları gelir kaybını belli süre ve ölçüde karşılayan, sigortacılık tekniği ile faaliyet gösteren zorunlu sigortayı (…) ifade eder."

[499] It should be noted that payment of unemployment insurance contributions is mandatory. Therefore, employees may not waive their right to employment benefits by abstaining from paying contributions. As per article 49 of the 4447 numbered Act, the division of payment of contributions are as follows: 1% by the employee, 2% by the employer and 1% by the state. The 1% state contribution is not required for part-time workers who are insured under the voluntary insurance scheme for their inactive remaining hours.

employment benefits depends on the number of days of contributions that were paid on behalf of the insured in the last three years.[500] The second condition that is required to be satisfied in order to be entitled to unemployment benefits is the termination of the employment contract due to the specified reasons stipulated in article 51 which are not the result of malice or the fault of the insured person.[501] Thirdly, the person applying for the unemployment benefits should not be receiving any old-age pension from the Turkish Social Security Institution. In other words, those who receive old-age pensions are not eligible for unemployment benefits. Finally, in order to receive payment of unemployment benefits, the insured person has to apply to İŞKUR, which is the competent authority for unemployment insurance.

Those who satisfy all of the above requirements are entitled to unemployment insurance under the Turkish law. It is also seen that in the exception that the employment contract is terminated by the employee without notice, the employee is considered to be eligible for receiving unemployment benefits. The cases where the employee is entitled to terminate the employment contract immediately, i.e. without giving prior notice, are regulated under article 24 of the Labor Act. However, this is an exceptional form of termination, which is granted in situations where the reasons

[500] In this respect, 600 days of contribution payment provides 180 days, 900 days of contribution payment provides 240 days and 1080 days of contribution payment provides 300 days of unemployment benefits.

[501] These reasons are listed as follows:

- Termination of the employment contract by the employer with notice.
- Termination of the employment contract by the employee without notice.
- Termination of the employment contract by the employer without notice for reasons stipulated in article 25(I), which governs health reasons, and article 25(III), which governs force majeure.
- Unemployment as a result of expiration of the term of the fixed term employment contract.
- Termination of the employment contract as a result of the transfer or permanent close down of the workplace or the change in the nature of the work or the workplace.

for termination are so severe that it is no longer reasonably expected from the employee to proceed with the employment relationship. In this respect, it serves the protection of the right to work by providing the employee with an income security in situations where the employment relationship is no longer bearable and therefore, not forcing the employee to remain in the employment relationship.

According to article 48 of the 4447 numbered Act, in addition to unemployment benefits (and payment of contributions for the universal health insurance), the insured unemployed person is also provided with supportive services that seek to place them in suitable employment. Accordingly, the insured person is entitled to the employment services as well as to the vocational guidance and training programs provided by İŞKUR. The objective of the unemployment insurance to place the unemployed in jobs that meet their skills and qualifications also serves the objectives of promotion of full employment, as well as to place the unemployed in suitable employment.[502]

With regard to severance pay, the applicable Turkish legislation is article 14 of the former 1475 numbered Labor Act of 1971.[503] Accordingly, workers who have worked for the same employer for at least one year are entitled to 30 days' salary to be calculated according to the their final wage for every year they have worked for that employer. Employees are entitled to severance allowances in cases of termination by the employer, with the exception of termination without notice on the

[502] Başterzi, *İşsizlik Sigortası,* 53-4. Ekonomi, "İşsizliğin Önlenmesi ve Telafisinde İş Hukuku Kurumları," 245.

[503] Since the severance pay provisions of the Labor Act in force, namely the 4857 numbered Act, have yet to come into force after the establishment of a severance pay fund, the provisions of the former Labor Act on severance pay still remain in force.

grounds stipulated in article 25/II of the Labor Act, i.e. employee's actions against moral rules and good faith, and in cases of termination by the employees on the grounds that entitle them to terminate without notice. As in the case of unemployment benefits, workers for whom continuance with the employment relationship would be a burden and who could no longer be reasonably expected to bear the burden are given the opportunity to terminate the employment contract effective immediately and still receive their severance allowances if other conditions are met. The legislation also provides the payment of severance pay in four exceptional cases of employee termination with notice. These cases are termination with a view to perform compulsory military service for men, termination with a view to receive old-age pensions or disability allowances, termination by the women employee within one year following her marriage, and termination by the trade union officers in order to perform their duties within the trade union. Additionally, severance allowance is granted to the heirs upon the death of the employee.

Among the above conditions of entitlement to severance allowance, the fact that entitlement to severance allowance in case of the employee's termination within one year following marriage is limited to women is a violation of the state's obligations arising out of the right to work.[504] It is established that one of the positive obligations

[504] This provision had been challenged before the Turkish Constitutional Court for being in violation of the principle of equality. The Constitutional Court dismissed the claim and found the provision constitutional on the grounds that rules in favor of women may be adopted as a result of the woman's responsibilities within the society and the family. AYM, 19.06.2008 T., 2006/156 E., 2008/125 K., R.G. 26.1.2008, S. 27066. In contrast, article 5 of CEDAW (which Turkey is a party to) on one hand promotes the "elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women" and on the other hand, requires states to ensure "the recognition of the common responsibility of men and women" within family. The fact that the Constitutional Court based its judgment on gender-based prejudices and on the assumption that women have a greater responsibility within the family is a violation of article 5 of the CEDAW. Bakırcı, *Cinsiyet Ayrımcılığı Yasağı ve Türkiye,* 158.

of the state is to aim at full employment and to adopt and implement active employment policies that promote employment. As an under-represented gender in the labor market, women's employment shall be encouraged and be a primary concern in the adoption of such policies. However, it is observed here that instead of promoting women's employment, the law creates an incentive solely for women to quit work upon marriage and be a housewife. This provision could have been a means of supporting the right to work had it not been gender-biased. Presenting the employee with an option to terminate their employment relationship upon a life changing event such as marriage can indeed support the right of the individual to terminate employment. However, the fact that it is limited to women restricts the options of the spouses and in case where one of them has to or want to terminate their employment contract, the more advantageous option is for the woman to take up this task. This consequence cannot be disregarded and therefore, is subject to criticism. The law in this respect requires amendment by at least granting this right to men as well as to women.[505]

There is not a consensus among the Turkish scholars concerning the legal nature of severance allowance.[506] However, the most commonly accepted legal explanation asserts that it is a payment in exchange for the loyalty and commitment of the

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[505] As a counter argument, Bakırcı claims that as long as long as the state continues with its failure to adopt regulations that promote the sharing of family responsibilities between men and women and as long as the local administrations do not comply with their duties concerning child care services, this provision is fitted. Women, who are loaded with an additional family responsibilities may find the burden too heavy and choose to terminate their employment relationship. The provision of severance pay in this context to some extent protects the woman from poverty and economic dependency. Bakırcı, *Cinsiyet Ayrımcılğı Yasağı ve Türkiye,* 160-1.

[506] One view asserts that severance pay is part of the broad meaning of "pay". Another qualifies it as a compensation in the technical sense of the term. The worker is entitled to just compensation in exchange for their wearing and for being unemployed. Esener, *İş Hukuku*, 244-6. Finally, another view adopts severance pay as a *sui generis* institution arising out of the law. Başterzi, *İşsizlik Sigortası,* 208.

worker[507] - a view also adopted by the Court of Cassation.[508] In this respect, severance allowance is an additional means of valuing the work of the employee and a source of income guarantee in case of termination of their employment contract for reasons that do not arise out of the misconduct of the worker or their arbitrary termination. Another view that could also be explained through the right to work is introduced by Esener, who attributes severance pay the qualification of a just compensation that seeks to cover the damages which the employee is likely to encounter as a result of termination, whether pecuniary or non-pecuniary.[509] This approach to severance pay does not require damages to incur in the technical sense of the term. It merely asserts that workers who have devoted their labor to a specific employer and a specific job shall be compensated for their devotion and the possible loss of income before finding new employment.[510]

A point of criticism is the limited scope of application of the severance allowance provisions. Eligibility of severance pay is limited to those who are working pursuant to the Labor Act, Maritime Labor Act or the Media Labor Act. The private employment relationships which are excluded from the scope of application of these acts and hence, are covered by the Turkish Code of Obligations are not entitled to receiving severance allowances. This is an unexplainable distinction between employees. The protection covered by severance allowance should be expanded to

[507] Münir Ekonomi, *İş Hukuku* (İstanbul: İstanbul Teknik Üniversitesi, 1984), 230; Mollamahmutoğlu, Astarlı and Baysal, *İş Hukuku*, 1103.
[508] YİBGK, 15.5.1957 T., E. 1956/13, K. 1957/10.
[509] Esener, *İş Hukuku*, 246.
[510] A further indirect function of severance allowance can be argued to be employment protection. Since termination by the employer, in principle, grants the employee with severance pay, employers may be less inclined to terminate the employment contract. Narmanlıoğlu, *İş Hukuku: Ferdi İş İlişkileri I,* 536.

all workers employed by the employment contract. As an instrument for ensuring the realization of the right to work, it is against equality and a violation of the right to work of those who are not eligible to benefit from the protection ensured by severance allowance.

4.3. RECOGNITION OF UNPAID WORK WITHIN THE TURKISH LEGAL SYSTEM

The right to work within the Turkish legal system is generally understood in terms of the conventional meaning of the right to *employment*. The rationale of article 49 of the Constitution on the right to work makes reference to paid employment and explicitly states that the sole source of income for the workers is work. The same is also true for the right to social security as secured under article 60 of the Constitution. The rationale of this article states that the right to social security is the right of the “workers”.[511] However, this interpretation in the rationale of article 60 does not satisfy either the language of the article or the meaning of the right to social security as a human rights.

Article 60 of the Turkish Constitution explicitly states that the right to social security is a right of *everyone* and not just workers. It is a universal right that is granted to everyone without distinction as to their nationality, wealth, employment or age.[512] The state is under the obligation to ensure individuals with the right to social security

[511] https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf.
[512] A. Can Tuncay and Ömer Ekmekçi, *Sosyal Güvenlik Hukuku Dersleri* (Beta: Istanbul, 2016), 96.

and has to satisfy a minimum in performing its obligations arising thereof. Accordingly, the social security floor that the state has to comply with is the minimum standard of a *dignified* life.[513] The provision of this minimum is in fact one of the essentials of a social state.[514] In this respect, this obligation of the state foremost derives from article 2 of the Constitution that recognizes social state as one of the characteristics of the Republic. Therefore, despite the rationale of article 60 of the Constitution, the scope of the right to social security cannot be limited to the working population. A contrary interpretation will infringe the nature of the right to social security and will be a violation of Turkey's obligations arising out of the international instruments on economic and social rights.

Upon establishing the right to social security as a right of *everyone,* the problems arising out of adopting work as paid work[515] also become valid within the Turkish constitutional system. The duty of the state to secure the right to social security shall not be a negative condition for the failure of the enjoyment of the right to work. *Both* rights are guaranteed under the Constitution and the individual is entitled to both rights *equally*. Unless the state can secure full employment, the right to work as a right to employment is a meaningless right to be regulated by the Constitution. Stating that "the enjoyment of the right to work is dependent on the existence of employment opportunities"[516] means declaring an internationally recognized *human right* conditional on external factors. However, the enjoyment of the right to work shall not be conditional on *finding a job.* Therefore, interests other than the income

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513 Ibid., 97.
514 A. Tarık Gümüş, *Sosyal Devlet Anlayışının Gelişimi ve Dönüşümü* (XII Levha: Istanbul, 2010), 188.
515 See 3.1.2 above.
516 Şen, "İnsan Hakları Bağlamında Çalışma Hakkı," 24.

generating characteristic of work shall be acknowledged in adopting work as a constitutionally protected right. In doing so, the right to work can be read as the right to either paid or unpaid work, rather than as a right to employment. Only this way can it be enjoyed by everyone regardless of the economic situation of the state. When the state can achieve a well-functioning social security system, the right to social security will be intertwined with the right to work, particularly concerning those performing unpaid work. Those who are protected by the social security system will be presented with the option of enjoying their right to work through unpaid work.

Despite the fact that the majority of the Turkish law involving the right to work is based on paid employment, there are an increasing number of institutions that value work that is not performed as part of an employment relationship and/or in exchange for a pay. These institutions are diverse and may be found in different areas of law, particularly within family law and social security law.

The first regulation that values work outside the employment relationship is the *social pay* provided to the apprentices. An apprentice is defined in article 2 of the Act No. 3308 on Vocational Training of 1986 as someone who develops vocational knowledge, skills and work habits within work. The general objective of apprenticeship is to raise qualified workers.[517] Therefore, the main obligation arising out of the contract for apprenticeship is to teach the apprentice a profession or an art.[518] In return, the apprentice performs the work that is required of them. Accordingly, a contract for apprenticeship is not an employment contract and the

[517] Süzek, *İş Hukuku,* 147.
[518] Fatih Uşan, *Çıraklık Sözleşmesi* (Konya: Mimoza, 1994), 8.

apprentice is not qualified as an employee.[519] However, article 25 of the Act No. 3308 grants apprentices a pay that is no less than 30% of the minimum income determined according to the age of the apprentice. This pay is named by the Turkish scholarship as a "social pay".[520] It is not recognized as being in return for the work of the apprentice. It is rather qualified as arising out of the principle of social justice, with a view to provide the apprentice with a means to cover their expenses as well as to promote the institution of apprenticeship.[521] Consequently, the payment of a social pay to the apprentices points to the state's obligation to provide adequate standards of living to those who engage in productive unpaid work.

Traces of valued unpaid work is apparent secondly within the Turkish family law system. The Turkish family law intends to celebrate the value of work done by the spouse performing household work – almost exclusively women – through the introduction of two institutions. One of these derives from the spouses' obligation to contribute to the expenses made within marriage and the other one is based on the notion of "joint property".

According to article 186/III of the 4721 numbered Turkish Civil Code of 2002, spouses within marriage shall contribute to the expenses incurred during marriage within their power in the form of work and assets. Here, the legislator recognizes the work of the spouses as a form of participation and does not necessarily limit it to material contribution. The scope of "work" as a contribution is solidified in article 196 of the Civil Code. Accordingly, performing housework, taking care of the

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519 Ibid., 46; Süzek, *İş Hukuku,* 147; Mollamahmutoğlu, Astarlı, Baysal, *İş Hukuku,* 188.
520 Uşan, *Çıraklık Sözleşmesi,* 83; Süzek, *İş Hukuku,* 147.
521 Uşan, *Çıraklık Sözleşmesi,* 82-3.

children, and work performed as part of an unpaid work are recognized as contribution to the financial situation of the household and in case where the court has to determine the amount of contribution each spouse has to make, the judge is charged with the duty to take these elements into account.[522] This is a clear recognition of unpaid work within the Turkish legal system where the work of the spouse within the household is valued for the activity only and regarded as a contribution in determining the *financial* contribution shares of the spouses.

As a second recognition of unpaid work with the Turkish Family Law, the 4721 numbered Turkish Civil Code of 2002 adopted the joint property regime[523] as the legal property regime, as a rule. This regime requires the assets acquired within marriage following the date when the legislation came into force, i.e. 01.01.2002, to be divided equally between the spouses upon liquidation, provided that they had not previously chosen a different property regime recognized under the legislation.[524] The objective of introducing joint property as the legal property regime and abandoning the pre-2002 legal property regime of "separation of property" is indicated in the rationale of article 218 of the Turkish Civil Code. The rationale explicitly indicates the injustices the former property regime caused, particularly concerning women who performed housework and assisted the husband in carrying out his occupation.[525] This objective is endorsed by the judgments of the Turkish Court of Cassation, which highlight that the mere fact that women do not work in

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[522] Mustafa Dural, Tufan Öğüz and Mustafa Alper Gümüş, *Türk Özel Hukuku Cilt III Aile Hukuku* (Istanbul: Filiz, 2016), 161.

[523] or "participation to the acquired property", according to the direct English translation from Turkish. (Translated by the author.)

[524] Dural, Öğüz and Gümüz, *Aile Hukuku,* 206.

[525] Cevdet Yavuz, *Türk Medeni Hukuku ve Türk Borçlar Hukuku Mevzuatı* (Istanbul: Beta, 2014), TMK 218.

paid jobs and do not have regular incomes should not amount to the disregarding of the work they perform at home. The household work performed by women is acknowledged by the judgments of the Court of Cassation as facilitating the husband with the time and means to duly proceed with his occupation outside. Therefore, women's work at home is to be recognized and women are entitled to the half of what is acquired within marriage.[526]

Thirdly, the Turkish Social Security Law also has various institutions that are established with a view to recognize unpaid work. These include, among others, the payment of contributions of specified services and the system of voluntary insurance. The former facilitates the addition of various work to the period of insurance that is taken into account in the entitlement to disability, old-age and death insurances of periods. These types of work are regulated in an exhaustive list of activities, for which social security contributions were not paid.[527] The relevance of this institution is that it recognizes various unpaid work as services and grants the duration spent doing such activities the possibility of being included in the calculation of the long-term insurance schemes, as if they were spent in paid employment, provided that their contributions are paid at a later time by the insured. The periods which may be indebted are stipulated in articles 41 and 46 and the provisional article 4 of the 5510 numbered Social Security and Universal Health Insurance Act of 2006.

The first period to be included in the service period for the long-term social security schemes upon payment of the necessary contributions is the periods spent by women

[526] Y.14.HD., 31.10.2006 T., E. 2006/11169, K. 2006/12117.
[527] Ali Güzel, Ali Rıza Okur and Nurşen Caniklioğlu, *Sosyal Güvenlik Hukuku* (Istanbul: Beta, 2016), 510.

during their legal unpaid maternity leave and up to two years after the birth of the child during which the mother does not actively work. The legal unpaid maternity leave is regulated under article 74 of the 4857 numbered Turkish Labor Act as eight weeks before (or ten weeks in case of multiple pregnancy) and eight weeks after birth. Accordingly, the total of sixteen weeks (or eighteen weeks in case of multiple pregnancy) can be indebted as service durations.[528] The mother can request the merging of her inactive period up to two years after giving birth with her active employment period on the condition that the child lives. This is because the indebted period is intended to provide the mother with the opportunity to take care of her child during the first two years, in which the child is the most dependent on the mother. It indirectly recognizes the mother's work of looking after her child and hence, loses its objective in the event where the child does not live. It should also be noted that this indebted service period which may be counted for women's active employment period is limited to three births.

Other periods that may be indebted are the periods spent in recruitment in the army as a private or in the reserve officer schools; unpaid leaves of civil servants; the periods of doctoral education or specialization in medicine, provided that the individual is not otherwise insured under the social security system; the legal internship as a precondition for becoming licensed attorneys; the period spent in detention or arrest, provided that the individual is acquitted from all accusations;

[528] On the other hand, for those who are subjected to the 657 numbered Act on Civil Servants, the unpaid leave begins after this sixteen (or eighteen) weeks and civil servants are granted up to twenty-four months of unpaid maternity leave. During the above sixteen (or eighteen) weeks, women working under the Act on Civil Servants are entitled to their salaries and therefore, this period is not eligible for being indebted since it already counts as an active service duration. Tuncay and Ekmekçi, *Sosyal Güvenlik Hukuku Dersleri*, 675.

strikes and lock-outs; voluntary assistantship of medical doctors; the inactive period of civil servants who resigned from their posts in order to run for elections; the remaining hours of part-time workers to be deemed full-time workers; the period spent as an official student abroad over the age of 18, provided that they are sent under the 1416 numbered Act and have successfully completed their education and their compulsory service upon returning; the successful education period in the higher education institutions of those who were later appointed to specified positions either in the Turkish Armed Forces or the Turkish National Police, provided that the education was received at their own expenses; and finally the periods stipulated in provisional article 4 of the 5510 numbered Act. All these periods are valued as work by being considered in the total number of days of contributions paid for being entitled to long-term social security schemes. These long-term social security schemes grant the individual with disability allowances, old-age pensions or death allowances and are conditional on previous work. Yet, the activities in the above list are taken into consideration as "previous work", despite the fact that the insured person in question is not participating in an active paid employment.

It is rather unfortunate that the insured person is required to pay contributions for those periods that may be indebted. The legislation does not grant individuals with any deduction while requiring them to pay contributions for a period that they had performed a specific activity but did not receive any payment in return. The sole activity of the insured person should have been found sufficient to be taken into account for the long-term insurance schemes. Here, we see the financial concerns of the state supersede the right to work of the individuals.

A second institution of the Turkish Social Security Law which values unpaid work is the voluntary insurance scheme, which is governed in articles between 50 and 52 of the 5510 numbered Social Security and Universal Health Insurance Act. According to this scheme, persons who are not employed either by third parties or who are not self-employed are granted the opportunity to be self-insured by paying contributions for the long-term social security schemes and the universal healthcare system. This way, individuals may include their unemployed periods in the number of days of paid contributions required for disability allowances, old-age pensions and death allowances, all of which are social security benefits conditional on prior employment.

Persons who satisfy the required conditions[529] are eligible to join the voluntary insurance scheme and include their unemployed days in the total number of days of contribution payment required in order to benefit from the long-term social security schemes, which are conditional on previous employment. This scheme entitles the individual to social benefits, which are normally conditional on the previous employment, without being employed, provided that he/she pays the contributions

[529] According to the 5510 numbered Act, conditions for joining the voluntary insurance scheme are provided as follows:

- The insured has to be either a resident in Turkey or to be a Turkish citizen who, while residing in Turkey, is sent to a country with which Turkey has not signed a social security agreement.
- The voluntarily insured shall not be benefitting from any mandatory insurance as a result of their employment. Exceptionally, those who are not employed full time may join the voluntary insurance scheme for their remaining hours (see Güzel, Okur and Caniklioğlu, *Sosyal Güvenlik Hukuku,* 178).
- The voluntarily insured persons shall not be receiving allowances or pension from the Turkish Social Security Institution as a result of their own previous employment. In other words, they should not be receiving disability allowances or old-age pensions. Since death allowances are not the result of the person's own employment, receipt of death allowances shall not preclude joining voluntary insurance (see Tuncay and Ekmekçi, *Sosyal Güvenlik Hukuku Dersleri,* 350).
- The voluntary insurance can be granted only to those who are 18 years of age or above.
- The person willing to join the voluntary insurance scheme has to apply to the Turkish Social Security Institution.

thereof. It is an opportunity for the unemployed workers such as women doing housework and taking care of the children to receive old-age pensions just like a retiree. The voluntary insurance scheme not only facilitates the valuing of unpaid work, but also weakens the understanding that the only way an individual can serve the society and thus, be entitled to the state benefits is by having a job.

4.4. ASSESSMENT

The Turkish constitutional system is based on the principle of a social state that simultaneously has a free market economy. In order for the state to realize its duties arising out of its identity as a social state and at the same time ensure the functioning of a free market economy, the right to work has to be realized on one hand, but at the same time restricted in terms of the claim rights it provides to the individuals on the other. Accordingly, both freedom to work and the right to work are explicitly recognized in the Turkish Constitution among the fundamental economic and social rights of the individuals.

However, the recognition of the right to work within the Turkish legal system does not offer individuals the right to be employed in any work they desire.[530] Individuals are not granted with the right to make such demands. On the other hand, this does not mean that the right to work is merely a statement with no function. It has a more significant function than merely being a program norm. It is still considered as an

[530] Ulucan et al., *İşçinin Feshe Karşı Korunması (İş Güvencesi),* 101.

individual right and grants the individual with the right to a freely chosen or accepted work. This is realized through presenting the individual with the freedom to choose the field of work and the workplace and through prohibition of forced and compulsory labor.[531]

The Turkish law on the right to work, in particular labor law, appears to be inconsistent in terms of its compliance with the right to work. The positive law that governs the aspects of the right is gradually developing and the number of decisions of inconformity against Turkey due to the inadequacy of the legislation is evidently decreasing. Yet, there still appears to be various problems concerning the implementation of the right at the individual level. The Turkish law and practice fails to ensure elimination of all forms of discrimination and there are still specific forms of forced labor practices that are based on law. In terms of its obligation to aim at full employment, while active employment policies are adopted and the goals are set, they are not well translated into practice, leading to inconsistency. Furthermore, as a significant tool for implementing the right to work, employment protection, although recognized, is restricted in terms of coverage. A significant number of workers are left out of the protections provided through the employment protection institution.

In terms of adaptation to the current global trends on work, the Turkish law has traces of instruments that bestow on work value that dignifies unpaid productive work in addition to paid work based on employment. Particularly in Family Law issues and through certain institutions of Social Security Law, the value of certain unpaid work is recognized and performers of such work are granted a certain level of

[531] Ibid.

security. Yet, the existing value given to unpaid work, albeit gradually increasing, is not sufficient to claim that Turkish law has recognized unpaid work within the framework of the right to work.

CONCLUSION

> "The right to work should serve as a fixed reminder that the economic was designed to serve the person, and not vice versa."[532]
>
> Guy Mundlak

The evolution of work has a long history of different ideas that evolve around the value given to work. Today's understanding that work is an inseparable aspect of human dignity and the acknowledgement that work has a central position in the life of individuals as an enabler for a wide-range of interests have led to work being valued for its representative character as the value given to human dignity. However, being highly dependent on the adopted ideas and notions of a given point of time, it presents a dynamic nature. Therefore, it would be an unrealistic approach to claim that work has completed its evolution. In fact, work still remains to be a topic of high coverage in a variety of disciplines, each contributing to the evolution of work from different aspects.

[532] Guy Mundlak, "The Right to Work: Linking Human Rights and Employment Policy," *International Labour Review* 146 no. 3-4 (2007): 211.

In this respect, the perception of work and the value attributed thereto still bears traces of the historic contributions. The absolute requirement of labor for survival had been recognized even by the Ancient Greek philosophers who despised work and by the early Christian theologians who named work as a curse from God. Today, in reference to its income generating character, work is considered to be a significant source of subsistence. The ideas introduced by Locke had a turning over impact on the value of work because it was he who formed the relationship between human beings and their labor, indicating that human beings had a natural right over their own labor. This forms the foundations of the human dignity theory that is based on the notion that labor cannot be detached from self. Finally, Marx's critique of capitalism revealed the injustices resulting from the commodification of labor and contributed to the formation of the new approach to work as an economic and social human right.

Today, work is identified together with its different dimensions serving a wide range of interests. The most commonly repeated dimensions may be listed in a non-exhaustive manner as follows: Work is primarily, a source of income for the majority and secures the subsistence of the workers and their families, presenting them with the means of enjoying their other economic and social rights. Secondly, it introduces the individual with a sphere of self-development and self-realization, both in terms of their social skills and in terms of their professional skills and qualifications. Thirdly, the work of the individual has a contributive effect on the whole society and on the functioning of the national economy. Having recognized these interests deriving out of it, work became an integral part of the development in the human rights discourse in the twentieth century. It is recognized in the most fundamental and universal economic and social human rights documents. On top of that, the right to work is commonly stipulated at the peak point of the list of economic, social and cultural rights, as in the case of UDHR, CESCR and the ESC.

The particularities of the right to work had led to heated discussions during the drafting of the right. The differences in the interpretation of the right to work based on the adopted ideologies and economic systems of countries had its reflections in the language used in the International Bill of Rights, which includes the UDHR, the CESCR and the CCPR, as well as in the instruments of the ILO. Nonetheless, the position to be taken in the international platform concerning the right to work was resolved in favor the liberal states. Accordingly, the right to work is not interpreted as to create an obligation on the part of the state to ensure employment to everyone who seeks one and is willing. It is universally established that the right to work requires states to adopt and implement active employment policies that aim at full employment and to prove progress thereof. The measures to be taken in that regard are diverse and are within the discretion power of states. In this context, the indicators utilized by the international supervisory bodies in assessing progress on the matter consist of a variety of objective measures and are analyzed cumulatively, rather than through reaching conclusions on specific data. Instead of establishing objective criteria, the supervisory bodies take into account the national specificities of each state separately and assess within the framework of their level of economic development.

The normative content of the right to work is established coherently by the assessed international documents, with minor diversities. The common aspects that constitute the right to work are recognized to include essentially the right to the opportunity to gain one's living by work. This right firstly requires prohibition of forced and compulsory labor and for the states to adopt active employment policies that aim at full employment. The states' employment policies on creating employment should not be limited to increasing the quantity of available employment opportunities. The quality of the created employment opportunities is a pivotal criterion in assessing conformity of the states with their obligations thereof. Accordingly, the employment available should be productive and the job-seekers should be provided with suitable employment. In other words, they should respond to the skills and qualifications of the workers.

With a view to realizing the right to work, the CESCR, the ILO and the ESC introduce the significance of vocational training and promote it as a step that is ought to be taken by the states. In addition, the ILO and ESC underscore the relevance of free employment services in matching job-seekers with employment and impose the obligation on the states to facilitate such services, alongside vocational training.

There does not seem to be a consensus on whether decent work is an aspect of the right to work or a close correlative. The UDHR takes the position of establishing decent work as an aspect of the right to work, whereas the Committee on Economic, Social and Cultural Rights appears to be hesitant in adopting a clear point of view in the interpretation of the right to work provision of the CESCR. On the other hand, the ILO instruments as well as the ESC recognize the correlation between the right to work and decent work but does not necessarily establish decent work as a normative content of the right to work.

Recognizing the problems in the right to work formulations of the above international human rights instruments, the objective of this study was to create a more solid and inclusive right to work definition that acknowledges the value of work. It is established that the classical right to work definitions adopted by the international platform restrict the boundaries of work to paid work. In this respect, the right to work is commonly conceptualized as the right to employment. That being the case, the dominant standpoint which adopts the right to work as the right to employment is increasingly encountering a shift towards the recognition of unpaid work. The unresolved injustices as a consequence of the exclusion of unpaid workers from the scope of the right to work has raised the voices of various liberal writers and promoted the accession of unpaid work into the agenda of various international bodies that deal with the right to work. This inclination of valuing unpaid work through instruments alternative to money is recognized in this study in formulating the normative content of the right to work.

Accordingly, work definition within the framework of the right to work is established as including unpaid work alongside paid work. Work in terms of the right to work involves productive, suitable and decent work. The income generating aspect of paid work is found to be irrelevant in formulating the work definition of the right to work. Nevertheless, since the right to work is commonly enjoyed in the form of paid work, employment should be taken into account while formulating the normative content of the right to work.

The right to work is taken in this study as referring to the right to a freely chosen or accepted work. The main reference point in the definition of the right to work is consented work. Obviously, work is not necessarily something everyone desires and not all types of work is desirable for everyone. People may not want to work in certain types of work but feel obligated to do so in order to ensure their and their families' subsistence. Or they may not even want to work at all. Whether due to economic requirements or social pressure, any reason that creates an obligation on the part of the individual to engage in paid work is not compatible with right to work. The normative content of the right to work, therefore, includes aspects that aim at protecting the will of the individual in choosing and performing work. In this respect, the normative content of the right to work includes prohibition of slavery, forced and compulsory labor, the right to engage in work of one's own choosing, the right to protection of employment and the right to terminate work. The respective obligations of the states arising out of these rights that establish the right to work shall be understood cumulatively and not as alternatives to each other. A full realization of the right to work requires states to ensure *all* of the means referred to.

Unlike the positions of Rath[533] and Saner[534], who limit the beneficiaries of the right to work to the capable and willing unemployed persons, the right to work is a universal right that may be enjoyed in principle by everyone. None of these three conditions, namely being unemployed, being capable and being willing, are true for the right to work. In this respect, the subjects of the right to work may be persons who are *employed* as well as the unemployed. Those unwilling to work enjoy their right to work by not being forced into work and the capability shall not be a limit in the enjoyment of the right to work. In fact, one of the requirements of the right to work is to create equal employment opportunities for all persons in the community, including and especially for persons with disabilities.

A significance of the right to work is claimed to lie with the fact that it has an instrumental value in the enjoyment of other economic and social rights. It provides the individual with the independence of securing their other rights without being dependent on the state. However, this assertion is true only for paid work where individuals earn enough money to satisfy their other needs and enjoy their other economic and social rights. This instrumentalist view estranges the right to work from being recognized as a human right and approaches it as a tool for realizing other

[533] Rath, *Die Garantie des Rechts auf Arbeit,* 9.
[534] Luc Saner, *Recht auf Arbeit und Wirtschaftssystem: Eine Abhandlung de lege ferenda aus schweizerischer Sicht* (Bern: Verlag Peter Lang AG, 1985), 37-8.

human rights by disregarding the other goods that work provides an individual, such as the feeling of satisfaction, dignity and self-development. Work should not be seen as a source of income and should not be commodified by making it commensurable with money. It is the state's duty to provide the individual with their basic needs and the opportunity to advance one's quality of life through paid work. Work should be the choice of the individual. Work should be a freedom and not a necessity to stay alive.

However, the adopted country systems on the right to work are mostly based on the right to employment. Countries are hesitant in inserting unpaid work within the definition of work in terms of the right to work. The same can also be voiced concerning the Turkish law. As a social state pursuing liberal economic policies, Turkey has recognized both freedom to work and the right to work in its Constitution. Accordingly, everyone is entitled to free choice of occupation and forced labor in all its forms is prohibited and these principles are translated into the labor law system.

The Turkish legislation concerning the right to work is mostly parallel to the international regulations, at least in terms of language. However, clear violations are observed both in positive law and in practice. The legislative violations are in particular, concerning prohibition of discrimination on the grounds of sex and prohibition of forced labor for certain groups such as the military personnel and convicts of certain political opinions.

The Turkish labor law recognizes the aspects of the right to work in terms of the individual's right to engage in work, remain in work and terminate the employment relationship. It has implemented the principles of prohibition of discrimination, provides measures for the protection of the wage, and has established employment services, as well as vocational guidance and vocational training facilities. Furthermore, with a view to fulfill its duties arising out of the right to work, employers' freedom of contract is limited in favor of the right to work and a system of employment protection in this respect is adopted. Accordingly, the foundation is established. Yet, there are many problems with the adopted laws and their implementation.

Firstly, the obligation to aim at full employment, albeit supported through active employment action plans, fails to provide consistent results. The provision of employment services, vocational guidance and training is showing daily improvement, although their rate of coverage remains too low. Secondly, the Turkish labor law system on prohibition of discrimination fails to provide effective protection and remedies against those who encounter discriminatory acts. Thirdly, employment protection is limited to only a certain number of workers and excludes the majority of the labor market. Finally, despite the fact that certain institutions such as unemployment insurance and severance allowance are adopted, the security provided to workers who desire to enjoy their right to terminate the employment contract is not sufficient.

Evidently, Turkey still has to take many steps and make a number of adjustments in its legal system in order to comply with its obligations arising out of its international responsibilities on the right to work. In the current situation, Turkey is not capable of ensuring the right to work in all its aspects. As regards recognition of unpaid work, there appears to be certain laws and practices within the family law and social security law system that value such work and grant certain rights and benefits to the performer. However, these cases are not sufficient in terms of quantity and the benefits provided to the performer to assert that unpaid work is adopted within the work definition in terms of the right to work.

One of the most significant requirements of full realization of the right to work is having a solid social security system which provides the individual with at least a minimum basic security, adequate to uphold their living. In addition to violating the states' obligation to ensure the right to social security and the right to an adequate standard of living (which are secured as social human rights), the absence of such a system is likely to depreciate the work of those who do not perform work in exchange for a consideration in the form of money. Furthermore, the absence of a well-functioning social security system could also compel individuals to enter into the labor market, ending up in jobs that they may otherwise not accept, in which they attain no satisfaction or a possibility of self-development.

REFERENCES

Akıllıoğlu, Tekin. *Gözden Geçirilmiş Avrupa Sosyal Şartı ve Türkiye.* Ankara: İmaj, 2015.

Levent Akın, "Termination of Labor Contracts and Unfair Dismissal Under Turkish Labor Law." *Comparative Labor Law & Policy Journal* 25 (2003-4): 561-92.

Allain, Jean, and Robin Hickey. "Property and the Definition of Slavery." *International and Comparative Law Quarteryly* 61 (2012): 915-38.

Alp, Mustafa. "Yabancıların Çalışma İzinleri Hakkında Kanun." *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 53 no. 2 (2004): 33-59.

Alston, Philip. "The Committee on Economic, Social and Cultural Rights." In *The United Nations and Human Rights: A Critical Appraisal,* edited by Philip Alston, 473-508. Oxford: Clarendon Press, 1992.

Alston, Philip, and Gerard Quinn. "The Nature of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly* 9, no. 2 (May 1987): 156-229.

Andreassen, Bård-Anders. "Article 22." In *The Universal Declaration of Human Rights: A Common Standard of Achievement,* edited by Gudmundur Alfredsson and Asbjørn Eide, 453-88. The Hague: Kluwer Law International, 1999.

Anker, Richard, Igor Chernyshev, Philippe Egger, Farhad Mehran, and Joseph Ritter. "Measuring Decent Work with Statistical Indicators." Working Paper No. 2, Policy Integration Department, Statistical Development and Analysis Group, International Labour Office, Geneva, 2002.

Anthony, P.D. *The Ideology of Work.* Bristol: Tavistock, 1977.

Arendt, Hannah. *The Human Condition.* Chicago: University of Chicago Press, 1998.

Aristotle. *Politics.* Translated by Bejamin Jowett. Kitchener: Batoche Books, 1999.

Ashiagbor, Diamond. "The Right to Work." In *Social Rights in Europe,* edited by Gráinne de Búrca and Bruno de Witte, 241-59. New York: Oxford University Press, 2005.

Aykaç, Hande Bahar. "Ceza İnfaz Kurumları Dışında Çalıştırılan Hükümlülerin Sosyal Güvenliği" *TİSK Akademi* 10 no. 20 (2015-II): 348-69.

Bakırcı, Kadriye. *Uluslararası Hukuk, AB ve ABD Hukuku ile Karşılaştırmalı Çalışma Yaşamında Kadın Erkek Eşitliği Arayışı Cinsiyet Ayrımcılığı Yasağı ve Türkiye* Ankara: Seçkin, 2012.

Bales, Kevin. “Slavery in its Contemporary Forms.” In *The Legal Understanding of Slavery: From the Historical to the Contemporary,* edited by Jean Allain, 281-303. Oxford: Oxford University Press, 2012.

Bales, Kevin and Peter T. Robbins, “No One Shall be Held in Slavery or Servitude: A critical analysis of international slavery conventions.” *Human Rights Review* 2, no. 2 (2001): 18-45.

Balkır, Z. Gönül. *Türk Anayasa Yargısında Sosyal Hakların Korunması.* Kocaeli: Kocaeli Üniversitesi Yayınları, 2009.

Balme, Maurice. “Attitudes to Work and Leisure in Ancient Greece.” *Greece & Rome* 31-2 (1984): 140-52.

Başterzi, Süleyman. *İşsizlik Sigortası.* AÜHF: Ankara, 1996.

Baxi, Upendra. “Failed Decolonisation and the Future of Social Rights.” In *Exploring Social Rights: Between Theory and Practice,* edited by Daphne Barak-Erez and Aeyal M. Gross, 41-55. Portland: Hart Publishing, 2011.

Becker, Lawrence C. “The Obligation to Work.” *Ethics* 91, no. 1 (1980): 35-49.

Bentele, Max. *Das Recht auf Arbeit: in rechtdogmatischer und ideengeschicktlicher Betrachtung.* Zurich: NZN, 1949.

Beveridge, William. *Full Employment in a Free Society.* London: G. Allen and Unwin, 1944.

Bieback, Karl-Jürgen. “Sozialer Hintergrund der Diskussion über das Recht auf Arbeit.” In *Recht auf Arbeit – eine politische Herausforderung,* edited by Udo Achten, 105-58. Neuwied: Luchterhand, 1978.

Branco, Manuel Couret. “The Right to Work and the Political Economy of Human Rights.” Documento de Trabalho No. 2006/8, Departamento de Economia, Universidade de Évora, Évora, 2006.

Brocker, Manfred. *Arbeit und Eigentum: Der Paradigmenwechsel in der neuzeitlichen Eigentumstheorie.* Darmstadt: Wissenschaftliche Buchgesellschaft, 1992.

Brugger, Winfried. “Freiheit des Berufs und Recht auf Arbeit im Verfassungsrecht.” In *Das Recht des Menschen auf Arbeit,* edited by Hans Ryffel and Johannes Schwartländer, 111-34. Strassburg: N.P. Engel, 1983.

Buckle, Stephen. *Natural Law and the Theory of Property: Grotius to Hume.* Oxford: Clarendon, 1991.

Budd, John W. *The Thought of Work.* New York: Cornell University Press, 2011.

Centel, Tankut. *İş Güvencesi.* Istanbul: Legal, 2012.

Ciulla, Joanne B. *The Working Life: The Promise and Betrayal of Modern Work.* New York: Times Books, 2000.

Collins, Hugh. "Is There a Human Right to Work?." In *The Right to Work: Legal and Philosophical Perspectives,* edited by Virginia Mantouvalou, 17-38. Portland: Hart Publishing, 2015.

Council of Europe. "Digest of the Case Law of the European Committee of Social Rights," September 1, 2008,

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

Council of Europe, Committee of Ministers. "Form for the Reports to be Submitted in Pursuance of the 1961 European Social Charter and the 1988 Additional Protocol," March 26, 2008,

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804922f6.

Council of Europe, European Committee of Social Rights. "Conclusions I – Statement of Interpretation – Article 1," 1969, http://hudoc.esc.coe.int/eng/?i=I_Ob_-1/Ob/EN.

_______. "Conclusions 2012 – Turkey - Article 1-1," 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/1/EN.

_______. "Conclusions 2016 – Turkey - Article 1-1," 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/1/EN.

_______. “Conclusions XIII-3 – Turkey – Article 1-2,” 1995, http://hudoc.esc.coe.int/eng?i=XIII-3/def/TUR/1/2/EN.

_______. “Conclusions XVI-1 – Turkey – Article 1-2,” 2003, http://hudoc.esc.coe.int/eng?i=XVI-1/def/TUR/1/2/EN.

_______. “Conclusions XVIII-1 – Turkey - Article 1-2,” 2006, http://hudoc.esc.coe.int/eng?i=XVIII-1/def/TUR/1/2/EN.

_______. “Conclusions 2012 – Turkey - Article 1-2,” 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/1/2/EN.

_______. “Conclusions 2016 – Turkey - Article 1-2,” 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/2/EN.

_______. “Conclusions XIV-1 – Turkey - Article 1-3,” 1998, http://hudoc.esc.coe.int/eng?i=XIV-1/def/TUR/1/3/EN.

_______. “Conclusions XVI-1 – Turkey - Article 1-3,” 2003, http://hudoc.esc.coe.int/eng?i=XVI-1/def/TUR/1/3/EN.

_______. “Conclusions XIII-3 – Turkey - Article 1-4,” 1995, http://hudoc.esc.coe.int/eng?i=XIII-3/def/TUR/1/4/EN.

_______. “Conclusions XIV-1 – Turkey - Article 1-4,” 1998, http://hudoc.esc.coe.int/eng?i=XIV-2/def/TUR/1/4/EN.

_______. “Conclusions XIII-3 – Turkey - Article 1-4,” 2008, http://hudoc.esc.coe.int/eng?i=XIX-1/def/TUR/1/4/EN.

_______. “Conclusions 2016 – Turkey - Article 1-4,” 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/1/4/EN.

_______. “Conclusions XIII-1 – Turkey - Article 9,” 1993, http://hudoc.esc.coe.int/eng?i=XIII-1/def/TUR/9//EN.

_______. “Conclusions 2012 – Turkey - Article 9-4,” 2012, http://hudoc.esc.coe.int/eng?i=2012/def/TUR/9/EN.

_______. “Conclusions 2016 – Turkey - Article 20,” 2016, http://hudoc.esc.coe.int/eng?i=2016/def/TUR/20/EN.

Craven, Matthew C. R. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development.* Oxford: Clarendon Press, 1995.

Çelik, Nuri, Nurşen Caniklioğlu and Talat Canbolat. *İş Hukuku Dersleri.* Istanbul: Beta, 2016.

Däubler, Wolfgang. “Recht auf Arbeit verfassungswirdrig?.” In *Recht auf Arbeit – eine politische Herausforderung,* edited by Udo Achten, 159-80. Neuwied: Luchterhand, 1978.

Demir, Fevzi. "Çalışma Hakkı Kavramı ve Hukuki Niteliği." In *Sosyal İnsan Hakları Sempozyumu VI Bildiriler, 131-56.* Istanbul: Petrol-İş Yayınları, 2014.

_______. *Mukayeseli Hukukta ve Türk Hukukunda Çalışma Hakkının Korunması (İş Güvencesi).* İstanbul: Belediye İş Sendikası Eğitim Yayınları, 1986.

Dereli, Toker. "Labour Law and Industrial Relations in Turkey." In *International Encyclopaedia for Labour Law and Industrial Relations,* edited by Roger Blanpain. Alphen aan den Rijn: Kluwer Law International, 2011.

Dural Mustafa, and Tufan Öğüz. *Türk Özel Hukuku Cilt II Kişiler Hukuku.* Istanbul: Filiz, 2016.

Dural, Mustafa, Tufan Öğüz and Mustafa Alper Gümüş. *Türk Özel Hukuku Cilt III Aile Hukuku.* Istanbul: Filiz, 2016.

Eide, Asbjørn. "Article 28." In *The Universal Declaration of Human Rights: A Common Standard of Achievement,* edited by Gudmundur Alfredsson and Asbjørn Eide, 597-632. The Hague: Kluwer Law International, 1999.

_______. "Economic, Social and Cultural Rights as Human Rights." In *Economic, Social and Cultural Rights: A Textbook,* edited by Asbjørn Eide, Catarina Krause, and Allan Rosas, 21-40. Dordrecht: Martinus Nijhoff, 1995.

Eide, Asbjørn and Wenche Barth Eide. "Article 25." In *The Universal Declaration of Human Rights: A Common Standard of Achievement,* edited by

Gudmundur Alfredsson and Asbjørn Eide, 523-550. The Hague: Kluwer Law International, 1999.

Ekonomi, Münir. *İş Hukuku.* Istanbul: İstanbul Teknik Üniversitesi, 1984.

_______. "İşsizliğin Önlenmesi ve Telafisinde İş Hukuku Kurumları." In *Arbeits- und Sozialrechtliche Probleme der Arbeitslosigkeit (İşsizliğin İş Hukuku ve Sosyal Güvenlik Açsından Sorunları),* edited by İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi, 235-53. Ankara: KAMU-İŞ, 2003.

Engels, Friedrich. *Anti-Dühring Dialektik der Natur.* Vol. 20 of *Karl Marx Friedrich Engels Werke,* edited by Institut für Marxismus-Leninismus beim ZK der SED. Berlin: Dietz Verlag, 1969.

Erken, Baki. "Anayasal Çerçevede Türkiye'de Çalışma Hakkı." *ÇSGB Çalışma Dünyası Dergisi* 1 no. 2 (October-December 2013): 66-84.

Ersoy, Yüksel. *Çalışma Hürriyetine Karşı Suçlar.* Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1973.

Şükran Ertürk, *İş İlişkisinde Temel Haklar.* Ankara: Seçkin, 2002.

Esener, Turhan. *İş Hukuku.* Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1978.

Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and International Human Rights Law Group, "Human Rights Standards for the Treatment of Trafficked Persons." Global Alliance Against Traffic in Women: 1999.

Glotz, Gustave. *Ancient Greece at Work: An Economic History from the Homeric Period to the Roman Conquest.* Translated by M.R. Dobie. London: Routledge, 1996.

Governmental Committee of the European Social Charter, CM(2006)53, "New System for the Presentation of Reports on the Application of the European Social Charter," May 3, 2006.

Gökçeoğlu Balcı, Şebnem. "Çalışma Hakkını Yeniden Düşünmek." In *Prof. Dr. Ali Güzel'e Armağan,* edited by Talat Canbolat, 285-302. Istanbul: Beta, 2010.

Göze, Ayferi. *Sosyal Devlet Sistemi.* Istanbul: İ.Ü. Hukuk Fakültesi, 1976.

Griffin, James. *On Human Rights.* New York: Oxford University Press, 2008.

Gülmez, Mesut. "Çalışma Özgürlüğü ve Hakkı Açısından Emeğin Evrimi: Ulusal ve Ulusalüstü Hukuksal Boyutlar Üzerine Düşünceler." In *Sosyal İnsan Hakları Ulusal Sempozyumu VI Bildiriler,* 63-128. Istanbul: Petrol-İş Yayını, 2014.

Gümüş, A. Tarık. *Sosyal Devlet Anlayışının Gelişimi ve Dönüşümü.* XII Levha: Istanbul, 2010.

Güneş, Seyithan. *Teori ve Uygulamada Kişi Özgürlüğü ve Güvencesi.* Istanbul: Kazancı, 1998.

Güzel, Ali, Ali Rıza Okur and Nurşen Caniklioğlu, *Sosyal Güvenlik Hukuku.* Istanbul: Beta, 2016.

Harris, David and John Darcy. *The European Social Charter.* New York: Transnational Publishers, 2001.

Harvey, Philip. "Benchmarking the Right to Work." In *Economic Rights: Conceptual, Measurement, and Policy Issues,* edited by Shareen Hertel, and Lanse Minkler, 115-41. New York: Cambridge University Press, 2007.

_______. "Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously." *Columbia Human Rights Law Review* 33(2001-2002): 363-471.

Hepple, Bob. "A Right to Work?." *Industrial Law Journal* 10 No.1 (1981): 65-83.

Humphrey, John P. "The Universal Declaration of Human Rights." *International Journal* 4 (1949): 351-61.

International Labour Conference. 67th Session, Report III (Part 4A), "Report of the Committee of Experts on the Application of Conventions and Recommendations," Geneva: 1981.

_______. 86th Session, "ILO Declaration on Fundamental Principles and Rights at Work," Geneva: June, 1998.

_______. 87th Session, "Report of the Director-General: Decent Work," Geneva: June, 1999.

_______. 89th Session, Report I(B), "Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work," Geneva: 2001.

_______. 93rd Session, Report I(B), "A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005," Geneva: 2005.

_______. 96th Session, Report III (Part 1B), "General Survey concerning the Forced Labour Convention, 1930 (No.29), and the Abolition of Forced Labour Convention, 1957 (No. 105)," Geneva: 2007.

_______. 97th Session, "ILO Declaration on Social Justice for a Fair Globalization," Geneva: 10 June 2008.

International Labour Organisation. *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO.* 5th (revised) ed. Geneva: ILO, 2006.

_______. "ILO supervisory system/mechanism." Accessed October 26, 2015. http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm.

________. "Committee of Experts on the Application of Conventions and Recommendations." Accessed October 26, 2015. http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

________. "Committee on Freedom of Association." Accessed January 12, 2016. http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm#P10_4015.

________. "Complaints." Accessed January 12, 2016, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm.

________. "Conference Committee on the Application of Standards." Accessed October 26, 2015. http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm.

International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations. 100th ILC Session, "Observation on the Application of Termination of Employment Convention, 1982 (No. 158) – Turkey," 2011.

_______. 102nd ILC Session, "Observation on the Application of Abolition of Forced Labour Convention, 1957 (No. 105) – Turkey," 2013.

_______. 102nd ILC Session, "Observation on the Application of Termination of Employment Convention, 1982 (No. 158) – Turkey," 2013.

_______. 104th ILC Session, "Direct Request (CEACR) - Forced Labour Convention, 1930 (No. 29) – Turkey," 2015.

_______. 104th ILC Session, "Observation on the Application of Forced Labour Convention, 1930 (No. 29) – Turkey," 2015.

_______. 105th ILC Session, "Observation on the Application of Abolition of Forced Labour Convention, 1957 (No. 105) – Turkey," 2015.

International Labour Organisation Governing Body. "Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organisation." April 8, 1932 (57th Session), modified at 291st Session (November 18, 2004). http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcm_041899.pdf.

Isacsson, Bert. "Article 24," In *The Universal Declaration of Human Rights: A Common Standard of Achievement,* edited by Gudmundur Alfredsson and Asbjørn Eide, 511-21. The Hague: Kluwer Law International, 1999.

Kaboğlu, İbrahim Ö. *Özgürlükler Hukuku.* Ankara: İmge, 2002.

Kanger, Helle. *Human Rights in the U.N. Declaration.* Uppsala: Acta Universitatis Upsaliensis, 1984.

Kapani, Münci. *Kamu Hürriyetleri.* Ankara: Yetkin, 1993.

Karan, Ulaş. "Kölelik, Kulluk, Zorla Çalıştırma ve Zorunlu Çalışma Yasağı." In *İnsan Hakları Avrupa Sözleşmesi ve Anayasa: Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme,* edited by Sibel İnceoğlu, 159-78. Istanbul: Beta, 2013.

Källström, Kent, and Asbjørn Eide. "Article 23." In *The Universal Declaration of Human Rights: A Common Standard of Achievement,* edited by Gudmundur Alfredsson and Asbjørn Eide, 489-510. The Hague: Kluwer Law International, 1999.

Kılıçkaya, Zeynep. "Avrupa İnsan Hakları Mahkemesi Kararları Işığında Anayasa Mahkemesi'nin Bireysel Başvuru İncelemelerinde Çalışma Hakkı." *DEÜ Hukuk Fakültesi Dergisi* 18 no. 2 (2016): 127-65.

Kılıçoğlu, Mustafa. "Çalışma Hakkı Kapsamında İş Güvencesi." In *Prof. Dr. Sarper Süzek'e Armağan,* Vol. 2, edited by Süleyman Başterzi, 1207-29. Istanbul: Beta, 2011.

Körner, Marita. *Das internationale Menschenrecht auf Arbeit: Völkerrechtliche Anforderungen an Deutschland.* Berlin: Deutsches Institut für Menschenrechte, 2004.

Krennerich, Michael. *Soziale Menschenrechte: Zwischen Recht und Politik.* Schwalbach: Wochenschau Verlag, 2013.

Lis Catharina, and Hugo Soly. *Worthy Efforts: Attitudes to Work and Workers in Pre-Industrial Europe.* Boston: Brill, 2012.

Locke, John. "Two Treatises of Government." In *Locke: Two Treatises of Government,* edited by Peter Laslett, 135-428. Cambridge: Cambridge University Press, 2000.

Mantouvalou, Virginia. "The Right to Non-Exploitative Work." In *The Right to Work: Legal and Philosophical Perspectives,* edited by Virginia Mantouvalou, 39-60. Portland: Hart Publishing, 2015.

Marx, Karl, *Das Kapital: Kritik Der Politischen Ökonomie Erster Band Hamburg 1872,* vol. II/6 of *Karl Marx Friedrich Engels Gesamtausgabe (MEGA),* ed. Institut für Marximus-Leninismus beim ZK der KPdSU and Institut für Marxismus-Leninismus beim ZK der SED. Berlin: Dietz Verlag, 1987.

Marx, Karl, and Friedrich Engels, *Die deutsche Ideologie.* Vol. 3 of *Karl Marx Friedrich Engels Werke,* edited by Institut für Marxismus-Leninismus beim ZK der SED. Berlin: Dietz Verlag, 1969.

Mayer, Jean. "The Concept of the Right to Work in International Standards and the Legislation of ILO Member States." *International Labour Review* 124, no. 2 (1985): 225-42.

_______. “The Employment Policy Convention: Scope, assessment and prospects.” *International Labour Review* 130, no. 3 (1991): 339-58.

Mikkola, Matti. *Social Human Rights of Europe.* Porvoo: Karelactio, 2010.

Ministry of Labour and Social Security General Directorate of Labour, *National Employment Strategy (2014-2023): Action Plans (2014-2016),* accessed October 21, 2016, http://www.uis.gov.tr/Media/Books/UIS-en.pdf.

Mollamahmutoğlu, Hamdi, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku.* Ankara: Turhan Kitabevi, 2014.

Morsink, Johannes. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent.* Philadelphia: University of Pennsylvania, 1999.

Mundlak, Guy. “The Right to Work: Linking Human Rights and Employment Policy.” *International Labour Review* 146 no. 3-4 (2007): 189-215.

_______. “The Right to Work – The Value of Work.” In *Exploring Social Rights: Between Theory and Practice,* edited by Daphne Barak-Erez and Aeyal M. Gross, 341-66. Portland: Hart Publishing, 2011

_______. “Working out the Right to Work in a Global Labour Market.” In *The Right to Work: Legal and Philosophical Perspectives,* edited by Virginia Mantouvalou, 291-313. Portland: Hart Publishing, 2015.

Narmanlıoğlu, Ünal. *İş Hukuku Ferdi İş İlişkileri I.* Istanbul: Beta, 2014.

Nazlı, Seçkin. *Anayasanın Çalışma Hak ve Özgürlüğüne İlişkin Düzenlemelerinin İş Hukukuna Etkileri.* Ankara: Seçkin, 2015.

Nenninger, Bernd. *Das Recht auf Arbeit in Japan und Deutschland: Eine rechts- und kulturvergleichende Untersuchung.* Berlin: Duncker&Humblot GmbH, 1994.

Nickel, James W. "Giving Up on the Human Right to Work." In *The Right to Work: Legal and Philosophical Perspectives,* edited by Virginia Mantouvalou, 137-48. Portland: Hart Publishing, 2015.

_______. "Is There a Human Right to Employment?." *The Philosophical Forum* 10 No. 2-4 (1978): 149-70.

_______. *Making Sense of Human Rights: Philosophical Reflections of the Universal Declaration of Human Rights.* California: University of California Press, 1987.

Ochs, Martin. *Indikatoren und Benchmarks in UN-Menschenrechtsverfahren – eine rechtliche Analyse.* Stuttgart: Boorberg, 2011.

O'Cinneide, Colm. "The Right to Work in International Human Rights Law." In *The Right to Work: Legal and Philosophical Perspectives,* edited by Virginia Mantouvalou, 99-122. Portland: Hart Publishing, 2015.

Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, "Abolishing Slavery and its Contemporary Forms," New York and Geneva: 2002.

Omay, Umut. *Sosyal Haklar: Kısa ve Eleştirel Bir Bakış.* Istanbul: Beta, 2011.

Osiatyński, Wiktor. "Needs-Based Approach to Social and Economic Rights." In *Economic Rights: Conceptual, Measurement, and Policy Issues,* edited by Shareen Hertel and Lanse Minkler, 56-75. New York: Cambridge University Press, 2007.

Özdek, Yasemin. "Küreselleşme Sürecinde Ceza Politikalarındaki Dönüşümler." *Amme İdaresi Dergisi* 33 no.4 (December 2000): 21-48.

Pence, Gregory. "Towards a Theory of Work." in *Philosophy and the Problems of Work: A Reade,* edited by Kory Schaff, 93-105. Oxford: Rowman & Littlefield Publishers, 2001.

Penner, J.E. "The Concept of Property and the Concept of Slavery1." In *The Legal Understanding of Slavery: From the Historical to the Contemporary,* edited by Jean Allain, 242-52. Oxford: Oxford University Press, 2012.

Plato. *Republic.* Translated by G.M.A. Grube, Revised by C.D.C. Reeve. USA: Hackett Publishing Company, 1992.

Prast, Franz. "Leben ohne Arbeit? Arbeitslosigkeit als sozialpolitische Herausforderung." In *Menschenrecht auf Arbeit? Sozialethische Perspektiven,* edited by Johannes Rehm and Hans G. Ulrich, 39-49. Stuttgart: Kohlhammer, 2009.

Rath, Michael. *Die Garantie des Rechts auf Arbeit.* Göttingen: Verlag Otto Schwartz & CO, 1974.

Robertson, Robert E. "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights." *Human Rights Quarterly* 16 no. 4 (Nov. 1994): 693-714.

Saner, Luc. *Recht auf Arbeit und Wirtschaftssystem: Eine Abhandlung de lege ferenda aus schweizerischer Sicht.* Bern: Verlag Peter Lang AG, 1985.

Schaff, Kory. "Introduction." In *Philosophy and the Problems of Work: A Reader* edited by Kory Schaff, 1-18. Oxford: Rowman & Littlefield Publishers, 2001.

Sepúlveda, Magdalena. *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights.* Utrecht: Intersentia, 2003.

Shim, Jaejin. "Equality of the Right to Work? Explanation and Justification of Anti-Discrimination Rights in Employment." PhD diss., London School of Economics and Political Science, 2008.
http://etheses.lse.ac.uk/2176/1/U613408.pdf

Sieghart, Paul. *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights.* Oxford: Oxford University, 1985.

Skrivankova, Klara. *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation.* York: Joseph Rowntree Foundation, 2010.

Smith, Adam. *Wealth of Nations.* New York: Prometheus Books, 1991.

Standing, Guy. “Why Basic Income is Needed for a Right to Work.” *Rutgers Journal of Law & Urban Policy* 2 no. 1 (2005): 91-102.

Stone, Katherine V.W. “A Right to Work in the United States: Historical Antecedents and Contemporary Possibilities.” In *The Right to Work: Legal and Philosophical Perspectives,* edited by Virginia Mantouvalou, 275-90. Portland: Hart Publishing, 2015.

Stuby, Gerhard. “Das Recht auf Arbeit als Grundrecht und als internationales Menschenrecht.” In *Recht auf Arbeit – eine politische Herausforderung,* edited by Udo Achten, 75-103. Neuwied: Luchterhand, 1978.

Süzek, Sarper. *İş Hukuku.* Istanbul: Beta, 2016.

Swepston, Lee. “International Labour Law.” In *Comparative Labour Law and Industrial Relations in Industrialized Market Economies,* edited by Roger Blanpain, 155-82. Alphen aan den Rijn: Kluwer Law International, 2014.

Świątkowski, Andrzej Marian. *Charter of Social Rights of the Council of Europe.* Alphen aan den Rijn: Kluwer Law International, 2007.

Şen, Murat. “İnsan Hakları Bağlamında Çalışma Hakkı.” *MÜHFD* 2 no. 2 (2013): 13-37.

Tahtalı, Murat Buğra. “Türk Silahlı Kuvvetleri Personel Kanunu’nda Öngörülen Mecburi Hizmet Süresi – Zorla Çalıştırma Yasağı İlişkisi.” *İnönü Üniversitesi Hukuk Fakültesi Dergisi* 5 no. 2 (2014): 407-58.

Talas, Cahit. “Çalışma Hakkı ve Türkiye’deki Durum.” *Ankara Üniversitesi SBF Dergisi* 46 (1991): 407-21.

Tanör, Bülent *Anayasa Hukukunda Sosyal Haklar* Istanbul: May, 1978.

Tiryaki, Refik. *Ekonomik Özgürlükler ve Anayasa.* Ankara: Yetkin, 2008

Trubek, David M. “Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs.” In *Human Rights in International Law: Legal and Policy Issues,* edited by Theodor Meron, 205-71. Oxford: Clarendon Press, 1985.

Tuncay, A. Can and Ömer Ekmekçi, *Sosyal Güvenlik Hukuku Dersleri.* Istanbul: Beta, 2016.

Ulucan, Devrim. “Çalışma Hakkı ve İş Güvencesi.” n *Prof. Dr. Ümit Yaşar Doğanay’ın Ansına Armağan,* Vol. 2*,* 183-95. Istanbul: İ.Ü. Siyasal Bilimler Fakültesi, 1982.

Ulucan, Devrim, Öner Eyrenci, Savaş Taşken and Fazıl Sağlam. *İşçinin Feshe Karşı Korunması (İş Güvencesi) ve Türkiye İçin Bir Model Önerisi.* Istanbul: TÜSES, 1989.

United Nations. A/CONF.32/41, "Final Act of the International Conference on Human Rights," 22 April to 13 May 1968, http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf.

United Nations Commission on Human Rights. 43rd Session, E/CN.4/1987/17, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," January 8, 1987.

United Nations Committee on Economic, Social and Cultural Rights. E/1989/22, "General Comment No. 1: Reporting by States parties," January 1, 1989.

_______. E/1991/23, "General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)," January 1, 1991.

_______. E/C.12/GC/18, "General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights," November 24, 2005.

_______. E/C.12/GC/23, "General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (article 7 of the International Covenant on Economic, Social and Cultural Rights)," April 27, 2016.

United Nations Economic and Social Council. E/2357, "Slavery, the Slave Trade, and Other Forms of Servitude," 27 January 1953.

United Nations General Assembly. A/RES/41/128, "Declaration on the Right to Development," December 4, 1986.

_______. Resolution 2542 (XXIV), "Declaration on Social Progress and Development," December 11, 1969.

United Nations Human Rights Committee. CCPR/C/TUR/CO/1, "Concluding Observations on the Initial Report of Turkey Adopted by the Committee at its 106th Session (15 October – 2 November 2012)," November 13, 2012.

United Nations Office of Public Information. *The United Nations and Human Rights.* New York: United Nations, 1978.

Uşan, Fatih. *Çıraklık Sözleşmesi.* Konya: Mimoza, 1994.

_______. "İş ve Sosyal Güvenlik Hukuku Açısından Tutuklu ve Hükümlü Çalışması." In *Prof. Dr. Nuri Çelik'e Armağan,* Vol. 2, edited by H. Fehim Üçışık, 1436-73. Istanbul: Seçkin, 2001.

Ünal, Canan. *Özürlülerin Sosyal Güvenlik Hakları: Dünyadaki Yeni Yaklaşımlar Işığında Öneriler.* Istanbul: Beta, 2012.

Veneziani, Bruno. "The Evolution of the Contract for Employment." In *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945,* edited by Bob Hepple, 31-72. Portland: Hart Publishing, 2010.

Vlassopoulos, Kostas. "Greek Slavery: From Domination to Property and Back Again." *Journal of Hellenic Studies* 131 (2001): 115-30.

Wank, Rolf. *Das Recht auf Arbeit im Verfassungsrecht und im Arbeitsrecht.* Königstein: Athenäum, 1980.

Weber, Max. *The Protestant Ethic and the Spirit of Capitalism.* New York: Routledge, 2005.

Westen, Klaus. "Das Recht auf Arbeit in den Prämissem sozialistischer Verfassungen." In *Das Recht des Menschen auf Arbeit,* edited by Hans Ryffel and Johannes Schwartländer, 135-51. Strassburg: N.P. Engel, 1983.

Yavuz, Cevdet. *Türk Medeni Hukuku ve Türk Borçlar Hukuku Mevzuatı.* Istanbul: Beta, 2014.

Yıldız, Gaye Burcu. *İşverenin Eşit İşlem Yapma Borcu.* Ankara: Yetkin, 2008.

Young, Katharine G. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content." *The Yale Journal of International Law* 33 no. 1 (2008): 113-75.

Yuvalı, Ertuğrul. *İşçimin Kişisel Özellikleri Bakımından İşverenin Eşit Davranma Borcu.* Ankara: Turhan, 2012.

LIST OF CITED CASE-LAW

AYM, 06.03.1964 T., 1963/358 E., 1964/17 K., R.G, 02.06.1964, S. 11717.

AYM, 14.4.1964 T., 1963/202 E., 1964/32 K., R.G, 18.06.1964, S. 11731.

AYM, 19.12.1989 T., 1989/14 E., 1989/49 K., R.G, 02.03.1990, S. 20449.

AYM, 19.10.2005 T., 2003/66 E., 2005/72 K., R.G, 24.11.2007, S. 26710.

AYM, 13.3.2006 T., 2006/21 E., 2006/38 K., R.G, 11.12.2007, S. 26727.

AYM, 19.06.2008 T., 2006/156 E., 2008/125 K., R.G. 26.1.2008, S. 27066.

AYM, 18.12.2008 T., 2005/2 E., 2008/181 K., R.G, 07.10.2009, S. 27369.

AYM, 22.11.2014 T., 2013/1 E., 2014/161 K., R.G, 11.11.2015 S. 29529.

AYM, 14.01.2015 T., 2014/108 E., 2015/8 K., R.G, 21.05.2015, S. 29362.

AYM, 21/01/2015 T., İsa Reçber No. 2013/4518.

AYM, 21/04/2016 T., Meltem Sukan No 2013/9659.

ECSR, *Confederazione Generale Italiana del Lavoro v. Italy,* Collective Complaint No. 91/2013, October 12, 2015.

ECSR, *Quaker Council for European Affairs v. Greece,* Collective Complaint No. 8/2000, April 25, 2001.

ECSR, *Syndicat national des Professions du tourisme v. France*, Collective Complaint No. 6/1999, October 10, 2000.

ECtHR, *Bayatyan v. Armenia,* no. 23459/03, 07.07.2011.

ECtHR, *C. v. Belgium*, no. 21794/93, 07.08.1996.

ECtHR, *Campagnano v. Italy,* no. 15869/02, 23.03.2010.

ECtHR, *Emel Boyraz v. Turkey,* no. 61960/08, 02.03.2015.

ECtHR, *I.B. v. Greece*, no. 552/10, 03.01.2014.

ECtHR, *İhsan Ay v. Turkey,* no. 34288/04, 21.04.2014.

ECtHR, *Kyriakides v. Cyprus,* no. 39058/05, 16.1.2009.

ECtHR, *Lustig-Prean and Beckett v. The United Kingdom*, nos. 31417/96 and 32377/96, 27.12.1999.

ECtHR, *Naidin v. Romania,* no. 38162/07, 21.10.2014.

ECtHR, *Niemietz v. Germany*, no. 13710/88, 16.12.1992.

ECtHR, *Obst v. Germany,* no. 425/03, 23.09.2010.

ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 27.05.2013.

ECtHR, *Özpınar v. Turkey*, no. 20999/04, 19.10.2010.

ECtHR, *Pretty v. the United Kingdom,* no. 2346/02, 29.07.2002.

ECtHR, *Redfearn v. The United Kingdom*, no. 47335/06, 06.02.2013.

ECtHR, *Schüth v. Germany,* no. 1620/09, 23.09.2010.

ECtHR, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 27.10.2004.

ECtHR, *Smith and Grady v. The United Kingdom*, nos. 33985/96 and 33986/96, 25.10.2000.

ECtHR, *Siliadin v. France,* no. 7331/01, 26.10.2005.

ECtHR, *Stummer v. Austria,* no. 37452/02, 07.07.2011.

ECtHR, *Van der Mussele v. Belgium,* no. 8919/80, 23.11.1983.

The Queen v. Tang, [2008] H.C.A. 39.

Y.9.HD., 01.04.2013 T., E. 2011/276, K. 2013/10657.

Y.10.HD., 20.06.1974 T., E. 1974/3403, K. 1974/4546.

Y.14.HD., 31.10.2006 T., E. 2006/11169, K. 2006/12117.

YİBGK, 15.5.1957 T., E. 1956/13, K. 1957/10.