

Human Rights, Labour Rights, and Criminal Wrongs

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When does human rights law impose obligations to criminalise breaches of labour rights? This is the question that this chapter considers with a focus on the European Convention on Human Rights (ECHR or Convention). The European Court of Human Rights (ECtHR) has often ruled that the Convention imposes positive obligations to criminalise conduct, as the first part of the chapter explains. The requirement to criminalise certain violations of human and labour rights is grounded on an understanding that criminalisation is an effective form of regulation, primarily because of its deterrent effect. As the Court has frequently emphasised that Convention rights have to be practical and effective, a duty to enact criminal laws aims to achieve exactly that by deterring people from engaging in the conduct in question.¹ Another crucial factor to which the Court pays attention when considering whether certain conduct needs to be criminalized involves the nature of the wrongdoing. Some kinds of wrongdoing are such that the condemnation of criminal law is needed so as to influence behavior, a purpose that civil law may not meet to the same extent.

Arguments that conduct should be criminalised should not be made too quickly. They have to meet criteria of serious wrongfulness and harm. The imposition of obligations on states to criminalise violations of labour rights is a relatively new development in the case law of the ECtHR. The Convention has two provisions that explicitly protect labour rights: first, an individual labour right in Article 4 that prohibits slavery, servitude, forced and compulsory labour; second, a right to form and join trade unions in Article 11. The Court has ruled that Article 4 imposes an obligation to criminalise severe labour exploitation, which I examine in the first subsection of the second part of the chapter. Therein I discuss the case law of the Court, the type of wrong and harm experienced by the workers, and the kind of positive obligations revolving around criminalisation, which the Convention imposes. I argue that criminalisation is justified in these circumstances, though it is important to appreciate that criminal law has to be accompanied by effective enforcement, as well as other labour protective rules, without which criminal legislation is of limited value. The UK Modern Slavery Act, which I briefly discuss, exemplifies this point.

Article 11 of the Convention has not been found to impose positive obligations to criminalise thus far. Nevertheless, some violations of labour rights under this provision, together with Article 8 (the right to private life), and Article 14 (the prohibition of discrimination) are sufficiently serious and wrongful that they justify and require criminalisation, as the second subsection of the second part of the chapter argues. Sometimes a duty to criminalise may be the only way to guarantee the rights in question. Civil law may not be sufficient to communicate the gravity of the wrong and deter it. To illustrate this point, I use the example of ‘blacklisting’. Blacklisting is a widespread practice in the UK construction industry, whereby workers who are members of a trade union, and who may therefore be perceived as ‘troublemakers’, are included in a secret list that employers consult. These workers lose their jobs and are unable to

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¹ On occasion, ensuring compliance with international obligations, including the ECHR, also requires the authorities to amend existing criminal law legislation.

find work for years or decades, with grave implications for their well-being, affecting their income, health and personal life.² Both the practice and the effects of blacklisting on workers' lives are devastating. I suggest that Articles 8 and 11, standing alone or together with Article 14 of the ECHR, should form the basis of a positive obligation to criminalise blacklisting. The cumulative convergence of these rights provides in this case a strong normative argument for criminalisation.

The third part discusses two objections to introducing new criminal offences: first, the concern of overcriminalisation; second, the concern of a possible exclusive focus on criminalisation (rather than employing other forms of regulation). On the former objection, even though I suggest that blacklisting meets the requirements of an especially serious wrong that causes especially serious harm that it ought to be criminalised, I do not of course suggest that all violations of collective labour rights should constitute criminal offences. On the latter objection, I do not suggest that other approaches to regulation, such as through the provision of civil remedies, are not important tools, which can co-exist with criminalisation. However, blacklisting is such a wrong that has caused such harm that the machinery of criminal law is appropriate in order to communicate the wrongfulness of the practice, to punish the perpetrators of this particular wrong, and to deter such systemic violations of trade union rights in the future.

1. Human Rights and Positive Duties

When the Convention was initially conceived, its aim was to place limitations on state action. Over the years, the Court developed a range of positive obligations on states with a view to ensuring the protection of rights in relations between private individuals.³ The Court has repeatedly ruled that human rights have horizontal effect in the employment relation. The extension of human rights in the workplace through the imposition of duties to protect workers against employer intrusions is justified. Human rights violations are moral wrongs that can be committed not only by state actors, but also by private individuals. Employers can exercise power on employees at times greater than state power, and impose restrictions on their freedom that are incompatible with liberal values:⁴ the protection of human rights at work can serve to address that. Many ECHR rights have been ruled to give rise to positive obligations applicable in the employment relation, such as the right to private life and freedom of religion,⁵ but the central Convention provisions that are relevant to labour law are Articles 4 and 11.

The obligation to criminalise conduct that violates human rights has been developed in the context of the application of human rights law in relations between private individuals. The legal basis of positive obligations under the ECHR is Article 1, which provides that '[t]he High

² This has been documented extensively in publications of the Institute of Employment Rights. The first publication was by Keith Ewing: KD Ewing, *Ruined Lives – Blacklisting in the UK Construction Industry*, (IER 2009).

³ See Dean Spielmann, 'The European Convention on Human Rights – The European Court of Human Rights', in Dawn Oliver and Jorg Fedtke (eds), *Human Rights and the Private Sphere* (Routledge 2007) 427. On this, see also the landmark *Marckx v Belgium* (1979) 2 EHRR 330.

⁴ Hugh Collins, 'Is the Contract of Employment Illiberal?', in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018); Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)*, (Princeton University Press 2017).

⁵ On Article 8, see *Barbulescu v Romania*, App No 61496/08, Grand Chamber judgment of 5 September 2017; *IB v Greece*, App No 552/10, Judgment of 3 October 2013; on Article 9 see *Eweida and Others v UK*, App Nos 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.

Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. It is well-established that articles 2 (the right to life) and 3 (prohibition of torture, inhuman and degrading treatment), two non-derogable provisions in times of war and other public emergencies under article 15 of the ECHR,⁶ impose extensive positive obligations to deploy the criminal law.⁷

However, it is important to appreciate that a leading judgment of the Court on positive obligations to criminalise was *X and Y v Netherlands*,⁸ which involved the right to respect for private life under Article 8, a derogable and qualified provision. By saying that a right is qualified we mean that it can be restricted if the limitation pursues a legitimate aim, and is proportionate to the aim pursued. In this case, the complaint was that no criminal proceedings could be initiated against a person who raped a young girl with learning disabilities, because the 16-year old lacked legal capacity to appeal against the decision of the prosecutor not to bring criminal charges against the alleged rapist. In examining the claim that criminal law was essential in order to address the wrong that the girl suffered, the Court noted that states have a margin of appreciation as to the means by which they will secure protection of Article 8, and that the type of state obligations that the Convention imposes depends on the aspect of private life that has been affected. 'Recourse to the criminal law is not necessarily the only answer'.⁹ But it continued:

[T]he protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.¹⁰

The fact that article 8 has been ruled to impose positive obligations to criminalise suggests that it is not the absolute or non-derogable nature of a Convention provision that is crucial when considering the type of positive obligation that exists. What seems to have been crucial in *X and Y* was the nature of the wrongdoing that the applicant suffered, namely the violation of her sexual integrity that constitutes a central aspect of the right to private life, and the practical and effective protection of which requires criminalisation of the relevant conduct.¹¹

The positive obligations to criminalise under the ECHR were categorised by Ashworth as follows:¹² first, an obligation to secure a right by enacting effective criminal laws, supported by law enforcement mechanisms to prevent, suppress and sanction; second, a duty to adopt preventive operational measures to protect someone who is at risk of a crime by another person; and third, an obligation to have an effective mechanism for the investigation of allegations of violations of Convention rights, as well as an obligation to have an effective investigation that can lead to the identification and punishment of the perpetrators. Discussing this same issue, Tulkens divided positive obligations to criminalise into two categories: substantive and procedural. The substantive obligation involves a duty to enact effective criminal laws to deter

⁶ Article 15 provides that derogation from article 2 is permitted only for deaths resulting from lawful acts of war.

⁷ See further Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart 2015) 200-206.

⁸ *X and Y v Netherlands*, App No 8978/80, Judgment of 26 March 1985, hereafter cited as *X and Y*.

⁹ *Ibid* [24].

¹⁰ *Ibid* [27].

¹¹ *Ibid* [30].

¹² Ashworth, as above n 7, 198.

the commission of an offence.¹³ The procedural obligation contains an obligation to investigate effectively, including a duty to have an effective judicial system that may not only award damages, but which should also lead to the identification and punishment of the perpetrators.¹⁴ The investigation has to be prompt in order to maintain public confidence in the state response to a crime.¹⁵ Finally, these procedural obligations contain a line of requirements, such as criminalisation in primary legislation, interpretation of the criminal legislation, prosecution policy and form, sentencing and execution of sentence.¹⁶ These obligations seek to ensure that rights of ‘fundamental importance’,¹⁷ as the Court puts it, are practical and effective rather than theoretical and illusory.¹⁸ By characterising articles 2 and 3 as rights of fundamental importance, the Court suggests that it is their nature as non-derogable provisions under article 15 that gives them a status possibly higher than other rights that are derogable. However, the fact that article 8 was the first provision that gave rise to a positive duty to criminalise shows that the crucial factor is the nature of the wrongdoing and the harm that it generates, rather than the nature of the Convention provision at stake. Against this background, it is possible to imagine positive duties to criminalise stemming from any provision of the Convention, if the wrongdoing and the harm are sufficiently serious.

2. Criminalisation of Breaches of Labour Rights

What are the concrete positive obligations to criminalise violations of labour rights? The section that follows examines individual labour rights, and then turns to collective labour rights.

a) *Severe Labour Exploitation*

The first time that the Court ruled that the Convention imposes positive obligations to criminalise in the labour law context was under Article 4, a non-derogable provision under Article 15 of the ECHR, in the landmark case *Siliadin v France*.¹⁹ The facts of the case illustrate the severity of the moral wrong of exploitation with which the Court was faced, which led to the imposition of a positive duty to criminalise. *Siliadin* involved the ill-treatment and abuse experienced by a migrant domestic worker, who was a minor at the time. The applicant arrived to France from Togo, with someone who had agreed with her father that she would be sent to school, that her status would be regularized, and that she would work until her plane ticket was paid off. In reality she worked for him for a period of time, and then was lent to a family for whom she worked as a domestic worker, sleeping in the children’s room, and working for 15 hours a day, with no day off, without being paid or being sent to school, with no ID documents, and with undocumented immigration status. Before the Strasbourg Court, *Siliadin* claimed that the failure of France to have in place criminal legislation to penalize the exploitation that she suffered amounted to a breach of Article 4, because there was no effective way to prevent the

¹³ *Mahmut Kaya v Turkey*, App No 22535/93, Judgment of 28 March 2000, on Article 2; *A v UK*, App No 25599/94, Judgment of 23 September 1998, on Article 3.

¹⁴ *McKerr v UK*, App No 28835/95, Judgment of 4 May 2001 [121].

¹⁵ *Isayeva v Russia*, App No 57959/00, Judgment of 24 February 2005, [213], on Article 2; *Khashiyev and Akayeva v Russia*, App Nos 57942/00 and 57945/00, Judgment of 24 February 2005, [177], on Article 3.

¹⁶ Françoise Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’ (2011) 9 *Journal of International Criminal Justice* 577, 586-587.

¹⁷ *Khashiyev*, above n 15, [183].

¹⁸ On the principle that rights have to be practical and effective, see *Airey v Ireland*, App No 6289/73, Judgment of 9 October 1979.

¹⁹ *Siliadin v France*, App No 73316/01, Judgment of 26 July 2005.

crime and punish the perpetrators of the ill-treatment. In addition, she argued that the existence of civil proceedings and remedies were inadequate for they could not afford the necessary protection to her integrity. France claimed that existing legislation, including some criminal offences, met the requirements of the Convention.

The ECtHR referred to its case law on Articles 8, 2 and 3 that emphasized that protection against rape requires criminal legislation, and that children and other vulnerable people require particularly effective protection against breaches of their integrity. It explained that ‘together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe’.²⁰ Having discussed a list of international documents involving forced labour and exploitation of children, the Court said that ‘limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice.’²¹ The Court emphasised that Article 4 contains one of the most fundamental provisions in the Convention, in the sense that it is an absolute prohibition which does not permit derogations in times of emergency, and imposes an obligation to both criminalise and prosecute effectively.²²

The *Siliadin* judgment also considered the definition of the prohibited conduct. It said that slavery should be defined in light of the Slavery Convention of 1927 as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. Servitude, on the other hand, involves an obligation to provide services under coercion, and includes an obligation to live in another person’s property and the impossibility of changing the person’s condition. On forced and compulsory labour, the Court relied on the ILO Forced Labour Convention No 29, which defines forced labour 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’. *Siliadin* raised awareness on the vulnerability and ill-treatment of migrant domestic workers,²³ and has been influential at national and international level.²⁴ The severe exploitation of migrant domestic workers was rightly presented as a systemic wrong in France and elsewhere,²⁵ which criminal law could deter.²⁶ The serious violation of physical and mental integrity suffered by migrant domestic workers was ruled to meet the conditions for a crime to be enacted.

²⁰ Ibid [82].

²¹ Ibid [89].

²² Ibid [112].

²³ Virginia Mantouvalou, ‘Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers’, (2006) 35 *Industrial Law Journal* 395. See also the discussion by Holly Cullen, ‘*Siliadin v France*: Positive Obligations Under Article 4 of the European Convention on Human Rights’ (2006) 6 *Human Rights Law Review* 585.

²⁴ For detailed discussion of the case in documents of international organisations, see *Forced Labour and Human Trafficking: Casebook of Court Decisions*, International Labour Organisation, 2009. See also Maria Fernanda Perrez Solla, ‘Slavery and Human Trafficking: International Law and the Role of the World Bank’, *Social Protection and Labour Paper No. 0904 of 2009*, 52. For discussion of the judgment by NGOs, see Human Rights Watch Report ‘As If I Am Not Human’, 7 July 2008, Chapter V. For references to the case in parliamentary documents and debates, see UK HL Debs, 5 November 2009, Col 400.

²⁵ *Siliadin*, paras 49 ff.

²⁶ *Siliadin*, paras 143-144.

The positive obligation to criminalise Article 4 violations was reiterated in subsequent case law,²⁷ and the Court developed further extensive positive obligations in relation to criminalisation, which mirror the case law on Articles 2 and 3.²⁸ Special mention should be made of *Rantsev v Cyprus and Russia*,²⁹ the first case that examined trafficking for sexual exploitation under the ECHR. This involved a young woman from Russia who went to Cyprus to work in a cabaret under an ‘artiste visa’, but soon left her job and tried to return to her country of origin. Her employer found her and led her to the police station, but the police returned her to the custody of the cabaret owner. The young woman was taken to a flat and was found dead a few hours later, in an apparent suicide. The case was taken to Strasbourg by the father of the victim.

Trafficking for sexual exploitation is not explicitly covered in Article 4. However, in line with its case law on the interpretation of the Convention as a living instrument, the Court ruled that human trafficking ‘by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership’,³⁰ treating people as commodities, often for little or no pay, involving close surveillance, violence, life and work in poor conditions. It went on to say that trafficking is contrary to human dignity and other fundamental values. As a result, there is no need to identify whether it should be classified as slavery, servitude, forced and compulsory labour, but it is sufficient to say that it is contrary to Article 4.³¹ This move was criticised for not examining in depth the particularities of human trafficking under the Palermo Protocol, and its relationship to labour exploitation.³² What is pertinent for present purposes is that *Rantsev* ruled that the victim suffered a serious moral wrong that violates article 4 and gives rise to positive duties under the Convention.

It is important to emphasise that criminalisation is not sufficient for a state to comply with article 4 obligations. In *Rantsev*, the Court ruled that the state also has to take positive operational measures to protect victims or potential victims from violations.³³ This positive obligation is triggered when the authorities know or ought to have known that someone is a victim or in a real risk to be a victim of treatment contrary to Article 4, and they take no action to protect the individual. This obligation was not met in *Rantsev* where the authorities failed to examine whether the young woman was a victim, but instead returned her to the custody of her exploiter, or more recently in *Chowdury v Greece*,³⁴ where Greek authorities knew of the exploitation of undocumented strawberry pickers, but did not take adequate measures to protect them from violations of article 4.³⁵

In addition, the Convention also imposes an obligation to investigate effectively when there is a suspicion that someone is a victim of treatment contrary to Article 4.³⁶ For an investigation to be effective, it has to be independent and to have potential to lead to the identification and

²⁷ *CN v UK*, App No 4239/08, Judgment of 13 November 2012; *CN and V v France*, App No 4239/08, Judgment of 13 November 2012.

²⁸ For detailed discussion, see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered* (CUP 2017) chapter 8.

²⁹ *Rantsev v Cyprus and Russia* App No 25965/04, Judgment of 7 January 2010, hereafter cited as *Rantsev*.

³⁰ *Ibid* [281].

³¹ *Ibid* [282].

³² Ashworth, as above n 7, 208; Jean Allain, ‘*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10 *Human Rights Law Review* 546.

³³ *Rantsev*, as above n 29, [286].

³⁴ *Chowdury and Others v Greece*, App No 21884/15, Judgment of 30 March 2017.

³⁵ *Chowdury*, paras 111-115.

³⁶ *Rantsev*, as above n 29 [288].

punishment of those who are responsible for the crime. Investigation has to be prompt, and the victim or next-of-kin have to be involved in the investigation to better safeguard their interests.³⁷ When there is a case of human trafficking, the authorities have to co-operate with the relevant authorities abroad if there is a cross-border element.³⁸

That Article 4, along with Articles 2 and 3 of the ECHR, has given rise to positive obligations to criminalise should not come as a surprise. It is worth noting that criminalisation of severe labour exploitation, and particularly human trafficking, is not a novel regulatory response to this social problem. It was partly inspired by the international law of human trafficking, which is extensively discussed in *Siliadin*, *Rantsev* and other subsequent case law.³⁹ The European Social Charter, which is the counterpart of the Convention in the area of social and labour rights, also imposes an obligation to criminalise all acts of sexual exploitation against children under Article 7 paragraph 10, which involves the protection of children and young persons from labour exploitation.⁴⁰

Severe labour exploitation is a grave wrong consisting in taking advantage of workers' vulnerability, which is often due to her or his immigration status, and imposing on them appalling working and living conditions.⁴¹ The harm suffered by workers involves their mental, physical or sexual integrity. Such violations of personal integrity have in the past given rise to obligations to criminalise under the Convention, and article 4 case law re-iterates the principle that the state response to such wrongs may require the machinery of criminal law. To the extent that criminal law is viewed as the best way to protect fundamental values that human rights embody, criminalisation demonstrates societal disapproval, while criminal penalties can also have a preventive or deterrent function.⁴²

*The Modern Slavery Act 2015*⁴³

Against the background of the landmark developments in the field and in order to respond to article 4 case law, the UK enacted the Modern Slavery Act 2015 (MSA), which codified criminal legislation on slavery, servitude, forced and compulsory labour, and human trafficking.⁴⁴ It can be said that the MSA meets ECHR obligations to criminalise under article 4, but it is very questionable whether it meets procedural obligations to enforce the law effectively.

The stated purpose of the MSA consisted in facilitating the work of prosecutors and the police with regard to modern slavery,⁴⁵ and increasing the rates of prosecutions, which were viewed

³⁷ *LE v Greece*, App No 71545/12, Judgment of 21 January 2016 [68].

³⁸ *Rantsev*, as above n 29 [89].

³⁹ On a discussion of a criminal law approach to human trafficking, see Bridget Anderson and Rutvica Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 40 *Soundings* 135; Hila Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76.

⁴⁰ See for instance Conclusions 2011, Bosnia Herzegovina.

⁴¹ In *Rantsev* it resulted in her death.

⁴² See analysis of these in Tulkens, above n 16, 590-591. More generally on the criminalisation of exploitation, see Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' (2017) *Criminal Law Review* 169.

⁴³ I discuss the MSA in much more detail in Virginia Mantouvalou, 'The Modern Slavery Act Three Years On' (2018) 81 *Modern Law Review* 1017.

⁴⁴ Sexual Offences Act 2003 ss 57-59; Asylum and Immigration (Treatment of Claimants) Act 2004 s 4, as amended by Protection of Freedoms Act 2012 ss 109 and 110, and Coroners and Justice Act 2009 s 71.

⁴⁵ Hansard, HC 8 July 2014, vol 584, col 171.

as low.⁴⁶ However, the Act has not led to a significant increase in the number of identifications of victims and prosecutions, which led to criticisms in a National Audit Office Report.⁴⁷ Existing data suggests that even though there has been a small increase in prosecutions, the numbers are still strikingly low if assessed against National Referral Mechanism (NRM) referrals.⁴⁸ Between 2015-2016, there were 3,146 NRM referrals. In 2016 there were just 80 prosecutions under the MSA, rising from 26 prosecutions in 2015.⁴⁹ In 2017, there were 5,145 referrals, while in 2017-2018, there were just 239 prosecutions.⁵⁰ Even though the number of prosecutions has increased, it is still very low, and there is a striking discrepancy between the number of prosecutions and the number of referrals of victims of human trafficking through the NRM.

The underenforcement of the MSA is partly due to the police response to the crime. In October 2017, a police watchdog, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), produced a report which was highly critical of the police on this matter for a number of reasons, including a lack of understanding of the issue, ineffective investigations, and the frequency with which victims were treated referred to immigration authorities instead of being provided with support.⁵¹ When it comes to both the identification of victims and the prosecution of individual perpetrators of the crime, in other words, the MSA has thus far failed to meet its stated purpose, as well as the positive obligations under the ECHR to investigate and prosecute effectively any violations of Article 4. I will return to positive obligations and the MSA and to how it falls short of article 4 requirements in part 3 of this chapter.

b) *Collective Labour Rights and Blacklisting*

Do violations of collective labour rights justify the imposition on states of positive duties to criminalise? This has not occurred thus far in ECtHR case law, but the remainder of this chapter argues that such duties should be recognised when there is a sufficiently serious breach of the Convention. This analysis inevitably gives rise to the following question: can obligations to criminalise be triggered under qualified and derogable provisions of the ECHR? We saw earlier that article 8 has been found to trigger such an obligation in a case that involved rape. I argue that we should also recognise such duties in response to breaches of collective labour rights, and develop my argument using blacklisting as an example. Blacklisting serves as one instance of a serious breach of collective labour rights that requires criminalisation, but it should not be viewed as the sole example.

Blacklisting is the practice of compiling information on individuals regarding their trade union membership and activities, and sharing this information with employers and employment agencies so as to enable them to discriminate against those blacklisted in obtaining a job or in

⁴⁶ For instance, in 2013 there were only 68 convictions: Hansard, HC 8 July 2014, vol 584, col 175. The MSA also contains a number of preventive measures, backed by criminal sanction upon breach, discussed in Ashworth and Collins, this volume.

⁴⁷ National Audit Office, 'Reducing Modern Slavery', 15 December 2017.

⁴⁸ The NRM is the main administrative mechanism dealing with modern slavery allegations and identifying victims.

⁴⁹ National Audit Office Report, as above n 47, para 4.8.

⁵⁰ Crown Prosecution Service, 'Modern Slavery Report, 2017-18', August 2018.

⁵¹ HMICFRS, 'Stolen Freedom: The Policing Response to Modern Slavery and Human Trafficking', October 2017. On this, see further Candice Morgan, 'Modern Slave or Illegal Worker? The Haze around Modern Slavery and its Implications', LSE Politics and Policy Blog, 17 November 2017.

their treatment at work. The information serves as a reason to systematically deny employment to workers, and in the UK has primarily been used in the construction industry, where it has been revealed to be a widespread practice.⁵² This emerged in 2009, when the Information Commissioner's Office published a report that revealed the extent of blacklisting by an organisation called the Consulting Association. The predecessor of the Consulting Association was the Economic League that was founded in 1919, and included a 'Services Group' that was composed of construction companies that collated data on 'potentially disruptive individuals'.⁵³ The Consulting Association was formed in 1993. In 2009 it was revealed that it put together a secret blacklist on behalf of 44 multinational building contractors. The database contained sensitive personal information on over 3,000 individuals, primarily in relation to trade union membership of workers who had raised health and safety concerns. The information on 'troublemakers' was secretly put together by construction firms (many of which were large multinationals) that paid an annual subscription. Some of the workers were covertly monitored. While initially this appeared to be an activity of private companies, it was later revealed that Scotland Yard provided information to the Consulting Association, which means that there was direct state involvement.⁵⁴ The database was used by employers to check on workers who applied for jobs or were already employed.

Many blacklisted workers were repeatedly dismissed and not hired to work for long periods of time. These workers' description of the practice of blacklisting and its effects serves to illustrate the seriousness of the wrong and harm. A blacklisted bricklayer described it as follows:

The Blacklist is an economic, social and political prison. I have served a life sentence and other workers continue to be imprisoned. In cases like my own, the Blacklist effectively takes the form of house arrest because of its effect on a person's social life. My wife was also deeply affected and badly scarred. More often than not, she was forced to financially support me, and our two children, on her low wage as a care worker. This has had a devastating effect on our standard of living. To her great credit my wife supported me and our family unstintingly. She held us together when things got really tough – which it did quite often. We kept our dignity intact and just managed to keep our heads above water by almost completely sacrificing our social life. My wife had to take out loans, which we could not afford, since my credit rating was zero due to very long spells of unemployment. All of this is the direct result of the building employers deliberately using the Blacklist, time and again, to deny me the right to work and to earn a living.⁵⁵

The wrongfulness of blacklisting consists in, first, abuse of a vulnerability that is due to economic dependence, and second, discriminatory treatment of individuals for the reason that they exercise a right that they have under the Convention (the right to be a trade union member or the right to free speech). The fact that the practice was concealed and coordinated, with dismissals and refusals of employment being inexplicable for years, is a particularly sinister

⁵² For an excellent discussion of the problem of blacklisting, see Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (CUP 2012) 453 ff.

⁵³ See the discussion in the House of Commons Scottish Affairs Committee, 'Blacklisting in Employment – Interim Report', Ninth Report of Session 2012-2013, published in 16 April 2013, p 7. More generally the reports of the Scottish Affairs Committee on blacklisting provide a very valuable and useful account of the facts.

⁵⁴ Rob Evans, 'Officers Likely to Have Passed Personal Files to Blacklisters, Says Met', *The Guardian*, 23 March 2018.

⁵⁵ Collins, Ewing, McColgan, above n 52, 455.

and insidious aspect of the treatment. Blacklisting raises pressing questions under Articles 11 and 8 of the ECHR, alone or together with Article 14 (prohibition of discrimination).⁵⁶ More precisely, being included in a list of trade union members compiled by employers to be used in hiring or retention decisions interferes with Article 11. This is contrary to the Convention for it cannot be seen as having a legitimate aim, as the aim of blacklisting is to discriminate against workers who exercise a Convention right. Because of the discriminatory element, the inability to obtain a job and dismissals on the basis of the blacklists also violates Article 14 together with Article 11.

The harm caused by the wrongful conduct consists in dismissal, inability to obtain a job in their occupational field, poverty and social isolation.⁵⁷ This can also be described as a systemic and arbitrary denial, and hence a violation, of the right to work, with all the severe implications that this has for someone's life.⁵⁸ The right to work is not guaranteed explicitly in the ECHR, but it has been protected in case law on other provisions.⁵⁹ Blacklisting raises questions on the protection of the right to private life under Article 8, a provision that is interpreted broadly by the Court.⁶⁰

The right to private life is implicated not only because the employers held and used workers' personal information, a practice that interferes with privacy with no legitimate aim.⁶¹ There is a broader Article 8 issue. In *Sidabras and Dziautas v Lithuania*,⁶² the Court examined the applicants' dismissal and ban from access to public and various branches of private sector employment for a period of 10 years, for the reason that they were former KGB members. Examining the question whether Article 8 was engaged, it said that the ban 'affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives'.⁶³ The extensive implications of the restriction engaged the right to private life, and led to a violation of Article 14 together with Article 8.⁶⁴

Blacklisted workers face serious restrictions on their ability to obtain a job, with devastating implications for their private life. Article 8 imposes several positive obligations,⁶⁵ and has been found to give rise to a duty to criminalise conduct, as discussed earlier, even though it is a qualified and derogable provision. This is because what carries most weight in the relevant case law of the Court is not the nature of the Convention right as absolute, but the nature of the

⁵⁶ Article 14 is not a free-standing provision. It can only be violated when invoked together with some other Convention right.

⁵⁷ Because of the harm caused by blacklisting, it is also described as having ruined lives. See Keith Ewing, as above n 2.

⁵⁸ On the value and legal protection of the right to work, see Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015).

⁵⁹ Virginia Mantouvalou, 'The Protection of the Right to Work Through the European Convention on Human Rights' (2014) 16 *Cambridge Yearbook of European Legal Studies* 313; Rory O'Connell, 'The Right to Work in the ECHR' (2012) *European Human Rights Law Review* 176.

⁶⁰ See particularly the Grand Chamber judgment *Denisov v Ukraine*, App No 76639/11, Judgment of 25 September 2018.

⁶¹ On this, see *Barbulescu*, above n 5.

⁶² *Sidabras and Dziautas v Lithuania*, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004.

⁶³ *Sidabras* [48].

⁶⁴ See further Virginia Mantouvalou, 'Work and Private Life: *Sidabras and Dziautas v Lithuania*' (2005) *European Law Review* 573.

⁶⁵ See, for instance, *IB v Greece*, above n 5.

wrongdoing and the harm inflicted.⁶⁶ The harm of blacklisting is evident in the following statement by a blacklisted bricklayer:

You start to see the effects almost immediately on your wife and family. You don't have money that you should have to be able to afford everyday things. That sometimes affects the kids, sometimes school holidays, eventually we couldn't afford a social life, we couldn't go out with friends, we couldn't have meals, we couldn't go to the pictures or things that you take for granted. Our social life was immediately cut off.

Probably after three months, you start to really notice the economic and social deprivation. And my wife then had to take on another job and she had one then she had to take two and eventually she had to take three and that put almost impossible demands on her, physically and mentally.⁶⁷

The wife of a blacklisted worker further explained the effects of blacklisting on private life:

At first I resented my husband as he went on strike. I blamed him even though it wasn't his fault. After that he wasn't able to find work. It was really hard for both of us. I was earning for the both of us so I had to do any job I could get. It made me feel quite resentful. As I had to be out working, it meant for a long time we couldn't have a family. I had no choices. Because I had to be working, it put a strain on both of us. We had our daughter in 1986. We had planned to have more children but without my husband being in work we couldn't afford to. After having my daughter, I had to go back to work so we had a source of income, but this was through necessity not choice. We were living on the breadline. We could never afford any holidays and weren't able to go out and do things. There were times we couldn't even afford the train fare to go and see my mother in Edinburgh. It was existence and only that.⁶⁸

When the blacklisting scandal came to light, a fine of £5,000 was imposed on Ian Kerr, a person who held an important role in the Consulting Association (and its predecessor, the Economic League since 1969) for the reason that he processed personal information without having registered as a data controller with the Information Commissioner on the basis of the Data Protection Act 1998. None of the companies that were members of the Consulting Association were prosecuted. Some blacklisted workers applied to employment tribunals, and in 2010 the Employment Relations Act 1999 (Blacklists) Regulations 2010 came into force, which made blacklisting a civil, but not a criminal wrong. The Regulations include provisions that define blacklisting, make it unlawful for organisations to refuse employment, dismiss or cause detriment to individuals who are included in a blacklist, and make it unlawful to agencies to refuse service to blacklisted workers. The regulations make blacklisting unlawful, but not a criminal offence.

⁶⁶ *X and Y*, above n 8, [27], [30].

⁶⁷ Dave Smith, *Blacklisting: The Need for a Public Inquiry* (IER 2017) 10-11.

⁶⁸ *Ibid*, 11.

Despite the human rights implications, the Court declared inadmissible two cases on blacklisting,⁶⁹ though it did accept that there had been interference with Convention rights.⁷⁰ Mr Smith and Mr Brough were blacklisted and suffered significantly because of their inclusion in the lists. Mr Brough claimed that blacklisting violated article 11 of the ECHR, but the Court dismissed his claim for non-exhaustion of domestic remedies, which in this case consisted in not having raised an ECHR argument in employment tribunal proceedings. Mr Smith was an agency worker, who worked in the construction industry. He claimed that the collection of his personal data through blacklisting was in breach of Article 8, that English law did not protect him as an agency worker who was blacklisted because of his union activities, and did not provide him a remedy for that, and that he was not protected from discrimination as a union member and agency worker under Article 14.

The ECtHR accepted that there had been an interference with article 8, and explained that national authorities have a margin of appreciation in securing compliance with the provision.⁷¹ In this regard, it found that the authorities had made the retention of personal data a criminal offence under the Data Protection Act, and that they also allowed for a civil remedy, through which the applicant was awarded compensation. The Court ruled that the application was incompatible with the Convention *ratione personae*,⁷² because the state had met its positive obligations under the Convention by criminalising the unlawful retention of personal data, and by creating a civil remedy, which the applicant pursued and through which he obtained compensation. In reaching the decision, the Court took into account the fact that ‘it was the actions of private companies rather than the national authorities’.⁷³ However, it is important to note that this occurred before the revelations that there was in fact state involvement in blacklisting.⁷⁴ The Court also examined the admissibility of the case on the basis of Article 35(3)(c),⁷⁵ and ruled that the applicant had not suffered ‘significant disadvantage’, because domestic courts recognised the injustice that he suffered, and he received compensation. A number of people received compensation in settlement proceedings in the context of class action before the High Court, the legal basis of which included conspiracy and defamation.⁷⁶ The defendants also offered an apology for the secrecy and consequences of blacklisting. The ECtHR then turned to the question whether respect for human rights requires the examination of the complaint, which it rejected. This was because domestic courts had recognised the injustice of blacklisting, and Parliamentary and other national bodies had scrutinised and condemned the practice.

⁶⁹ *Brough v UK*, App No 52962/11, Admissibility Decision of 30 August 2016; *Smith v UK*, App No 54357/15, Admissibility Decision of 28 March 2017. For discussion of the *Brough* decision, see Keith Ewing and John Hendy, ‘Article 11(3) of the European Convention on Human Rights’, (2017) *European Human Rights Law Review* 356 at 373 ff.

⁷⁰ *Smith* [36].

⁷¹ *Ibid* [36]-[37].

⁷² Article 35(3) of the ECHR.

⁷³ *Smith*, [40].

⁷⁴ See above, n 54.

⁷⁵ Paragraph 3 of Article 35 says that a case will be declared inadmissible if ‘(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal’. On this admissibility criterion, see Dinah Shelton, ‘Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights’ (2016) 16 *Human Rights Law Review* 303.

⁷⁶ Further information on the background of the claims is available here <https://undercoverinfo.files.wordpress.com/2017/09/ragpoc-draft7-typos-mended-final-002.pdf>

In *Smith* and *Brough* the applicants did not argue that blacklisting as a practice should be a criminal offence, despite the fact that its wrongfulness is not limited to the retention of personal data that is a criminal offence under the Data Protection Act.⁷⁷ However, the approach of the Court to the admissibility question whether respect for human rights compels it to examine the case, despite the fact that Smith enjoyed some legal protection and was awarded compensation domestically suggests that the Court did not appreciate fully the moral wrong of blacklisting, its systemic nature, or the harm that it caused to the applicants, their work prospects, their relationships with others at work, as well as their private lives away from work. This was disappointing.

The existence of a separate criminal offence that relates to personal data, as well as civil remedies, cannot be viewed as sufficient for the purposes of articles 11, 8 and 14 of the ECHR, for when there is a serious moral wrong and harm, it is important for the criminal law to identify and condemn it as such. This can be grounded on the guiding principle of ‘fair labelling’, which suggests that a crime needs to be correctly labelled for reasons such as the fair treatment of the offenders⁷⁸ and the public confidence in the law.⁷⁹ The ECtHR has recognised this point using broad terms. It has emphasised that we need to have a criminal offence that captures the wrong, for otherwise the law will not be effective. In *Siliadin* it ruled that the existing criminal offences in French law were insufficient for they did not capture the wrongfulness and the harm suffered by victims of servitude, and forced and compulsory labour. France suggested that even though this conduct was not criminalised at the time, there were two other offences in the French Criminal Code that addressed the relevant wrong (obtaining from someone performance of services without pay, and subjecting someone to working or living conditions incompatible with human dignity by taking advantage of his or her vulnerability). The ECtHR responded that these provisions did not provide effective penalties. It noted that ‘the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’.⁸⁰ Similarly, in *X and Y v Netherlands*, which was discussed earlier in relation to a positive duty to criminalise under article 8, the Court rejected the argument of the Government that existing criminal offences were sufficient for article 8 obligations to be met.⁸¹ It is important to identify correctly the wrongful conduct both for purposes of effectiveness but also for purposes of fair labelling.

The above reasoning on positive obligations to criminalise conduct under articles 4 and 8 applies to the criminalisation of blacklisting. The Data Protection Act 1998 makes the retention of personal data a criminal offence but this is not sufficient. Obtaining or retaining data is a distinct moral wrong that has to do with a person’s privacy, while blacklisting involves the taking advantage of the economic vulnerability of workers, and their discrimination for the reason that they exercise a Convention right. In addition, the harm of blacklisting does not only consist in a violation of privacy, as argued earlier. It consists in a systemic denial of the right to work with grave implications for private life. It should therefore be regulated as a distinct offence, in addition to existing criminal and civil law penalties. The principle of fair labeling supports the position that blacklisting has to constitute a distinct criminal offence, separate to

⁷⁷ I am grateful to John Hendy QC for clarifying this issue, and for providing me with copies of the applications in Strasbourg.

⁷⁸ See, among others, Andrew Ashworth, *Principles of Criminal Law* (5th edition, OUP 2006) 88-89.

⁷⁹ Victor Tadros, ‘Fair Labelling and Social Solidarity’, in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice – Essays in Honour of Andrew Ashworth* (OUP 2012) 67.

⁸⁰ *Siliadin*, [148].

⁸¹ *X and Y*, as above n 8, [28-30].

offences under the data protection legislation. Finally, in relation to making the rights of the Convention practical and effective through deterrence, it is important to appreciate that the penalties under the Data Protection Act offence are low. For this reason, it has been argued that it provides no deterrence, while there is evidence that blacklisting continues to occur.⁸²

The ECtHR has ruled that Article 11 requires ‘real and effective protection against anti-union discrimination’,⁸³ but the legal framework in the UK does not meet this standard. The Blacklist Regulations make it unlawful to develop, provide, use or purchase a ‘prohibited list’, namely one that contains people’s details because of their union membership and activities. However, the Regulations have several weaknesses: they do not have retroactive effect, so those who were blacklisted before the Regulations came into force could not rely on them. Claims have to be brought to a tribunal three months after the offence, but many workers do not know that they are blacklisted for many years after they are included in the list.⁸⁴ The Regulations do not provide for a right to compensation for blacklisting alone: proof of loss or injury to feelings is required. Moreover, an implication of the fact that blacklisting is only dealt with as a civil matter is that the blacklisted worker has to find evidence and take a claim to court. This can be an insurmountable obstacle given the covert nature of the practice.⁸⁵

That blacklisting should be criminalized has been suggested in several fora. In parliamentary debates on blacklisting in 2017, it was argued that there is a strong case to criminalise it, and provide for severe sanctions, including high fines and possible imprisonment for the worst cases,⁸⁶ and ban of companies that have engaged in blacklisting from award of public contracts.⁸⁷ Representatives of trade unions giving evidence to the Scottish Affairs Committee of the House of Commons said that blacklisting would not cease unless legal sanctions against the practice were strengthened: ‘[i]t is happening, and it will continue in the UK until blacklisting is made a criminal offence punishable by imprisonment and unlimited fines. Until that legislation is brought in by whichever Government decides to bring it in, it will continue’.⁸⁸ The Institute of Employment Rights also proposed changes to the law on blacklisting, including criminal sanctions for employers operating blacklists.⁸⁹ Given that there is evidence that blacklisting still happens, criminalisation can serve to condemn employers who engage in the harmful conduct, and to reduce the instances of it.

⁸² IER, 2013, p 17. For instance, it is said that it occurred during the construction works before the Olympic Games. It is also important to note here that Ian Kerr’s fine of £5,000 was paid by McAlpine, a large construction company. Cullum McAlpine, who was Director of several companies in the McAlpine Group, was the first chairman of the Consulting Association.

⁸³ *Danilenkov v Russia*, App No 67336/01, Judgment of 30 July 2009 [124], hereafter cited as *Danilenkov*. See also *Wilson, National Union of Journalists and Others v UK*, App Nos 30668/96, 30671/96 and 30678/96, Judgment of 2 July 2002.

⁸⁴ IER, *The Blacklisting Scandal: A History of Blacklisting, Recent Updates, and How the Law Should be Changed*, 2013, Pp 14-15.

⁸⁵ Dave Smith, *Blacklisting: The Need for a Public Inquiry* (IER 2017) 25.

⁸⁶ House of Commons, Hansard, 5 September 2017, Volume 628, Column 68WH.

⁸⁷ As above, Chuka Umunna MP, Column 69WH.

⁸⁸ House of Commons, Scottish Affairs Committee, ‘Blacklisting in Employment: Addressing the Crimes of the Past; Moving Towards Best Practice’, Sixth Report of Session 2013-2014, [51].

⁸⁹ See Alex Just, ‘A Manifesto Against Blacklisting’, in Dave Smith, *Blacklisting: The Need for a Public Inquiry* (IER 2017) 39. There are also suggestions that EU public procurement rules can be used to exclude from public contracts businesses that have engaged in ‘grave professional misconduct’. See the EU Public Procurement Directive 2014/24/EU of 26 February 2014, article 57(4)(c). See UNITE Legal Services, ‘Blacklisting – The Battle for Justice’, August 2016.

3. Overcriminalisation/Exclusive Focus on Criminalisation

There are two possible objections to the argument that blacklisting should be criminalised. The first one is the question whether we may extend duties to criminalise too far, which is an important concern expressed both in theory⁹⁰ and in the context of the Convention.⁹¹ Tulkens explained in a concurring opinion in *MC v Bulgaria* that ‘criminal proceedings should remain, in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of “restraint”’.⁹² She also suggested that the use of criminalisation has been broad to the extent that ‘it is no longer necessary to justify the use of the criminal option but rather the absence of its use’.⁹³

As mentioned above, the imposition of duties to criminalise in ECtHR case law stems from the interpretive principle employed by the Court according to which Convention rights have to be practical and effective. State coercion through criminalisation is viewed as an effective way to deter the relevant conduct. Sanctions imposed through criminal law aim at influencing behaviour,⁹⁴ and there is indeed evidence that the criminal law has a deterrent effect.⁹⁵ In relation to deterrence, Ashworth suggested that when arguing for a new positive obligation to criminalise we should carefully consider the phraseology for the justification of the duty.⁹⁶ He emphasised that even though criminalisation has a deterrent effect, it is doubtful whether higher penalties lead to lower rates of offending.⁹⁷ He therefore suggested that the ECtHR’s focus should be placed on censuring people for committing particular wrongs, and imposing punishment that is proportionate to the commission of the wrong (separate to or in addition to civil liability).⁹⁸ With either approach to the justification of criminalisation (one focusing on deterrence or one focusing on retribution), the criminalisation of blacklisting is required both in order to reduce the likelihood of future violations and in order to punish those who are culpable for the specific wrongful act.

The argument of this chapter is not of course that all violations of collective labour rights by private individuals should be criminalised. A good example of a case where the Court imposed a positive obligation to secure article 11 rights, but which did not trigger a duty to criminalise, is *Wilson and Palmer v UK*.⁹⁹ *Wilson* involved the practice of treating employees who sign an individual employment contract and cease to be represented by a trade union more favourably than those who refused to do so. UK law did not protect employees, and was found to breach Article 11.¹⁰⁰ What distinguishes *Wilson* from the blacklisting cases is that the wrong of

⁹⁰ See, for instance, Victor Tadros, ‘Criminalisation and Regulation’, in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo and Victor Tadros (eds), *The Boundaries of the Criminal Law* (OUP 2010) 163.

⁹¹ Ashworth, as above n 7; Tulkens, as above n 16; Liora Lazarus, ‘Positive Obligations and Criminal Justice: Duties to Protect or Coerce?’, in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012); Natasa Mavronicola, ‘Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR’ (2017) 80 MLR 1026.

⁹² *MC v Bulgaria*, App No 39272/98, Judgment of 4 December 2003.

⁹³ Tulkens, as above, 585.

⁹⁴ Simester and von Hirsch, 5.

⁹⁵ See eg Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, and P.O. Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart 1999) chapter 2.

⁹⁶ Ashworth, as above n 7, 209.

⁹⁷ Ashworth did question whether higher penalties conduce to deterrence, as above n 7, 210.

⁹⁸ *Ibid.*

⁹⁹ *Wilson*, above n 83.

¹⁰⁰ Ewing examined the implications of *Wilson* and suggested how English law should change in order to provide effective protection to trade union members, but did not suggest that the conduct in question should be criminalised. See Keith Ewing, ‘The Implications of *Wilson and Palmer*’ (2003) 32 *Industrial Law Journal* 1.

blacklisting negates not only union membership but the right to work altogether, with devastating implications for the right to private life. The cumulative convergence of articles 11, 8 and 14 in the case of blacklisting serve as a particularly strong normative basis for criminalisation.

A second objection that needs to be considered is whether the Court is reliant exclusively on criminalisation when faced with serious violations of labour rights, or whether it is sufficiently appreciative of other forms of regulation, such as civil remedies, which may be suitable and effective in addressing the wrong in question.¹⁰¹ The proposition that blacklisting should be criminalized does not imply that there should also not be civil sanctions for the victims. The Strasbourg Court itself recognises the role of different methods of regulation when examining the effective protection of Convention rights. For instance, it explicitly ruled that criminalisation of violations of collective labour rights is not sufficient in *Danilenkov v Russia*.¹⁰² The applicants, members of the Dockers' Union of Russia (DUR), complained that their employer, a private company, subjected them to discriminatory treatment on the basis of their trade union membership, contrary to Article 11 together with Article 14. Following a period of strike action, which was unsuccessful, the applicants were reassigned to special work teams with limited opportunities, transferred to part-time posts, and finally made redundant. Even though they won their case in domestic courts that ordered that they are paid compensation, their discrimination claims were not upheld, because the domestic legal framework made discrimination a criminal offence, which civil courts had no jurisdiction to examine. The prosecutor declined to open a criminal investigation, as an inquiry failed to establish intent to discriminate.

The Court ruled that because discrimination could only be established in criminal proceedings and not through civil action, Russia did not provide effective legal protection to the applicants. Focusing particularly on the question why a criminal remedy is insufficient, the Court explained that criminal proceedings require proof beyond reasonable doubt of intent by the managers to discriminate. On this basis it was decided not to prosecute. For reasons such as this, criminal proceedings alone were viewed as inadequate by the ECtHR. Civil proceedings would have been more suitable for they 'would have made it possible to perform the far more delicate task of examining all elements of the relationship between the applicants and their employer, including the combined effects of the various techniques used by the latter to induce dockers to relinquish DUR membership, and to afford appropriate redress'.

It may be argued at this point that in order to achieve the practical and effective protection of Convention rights, we could simply impose higher penalties under civil law, rather than invoking the 'distinctively moral voice'¹⁰³ and coercive power of criminal law. On this matter, though, it is important to appreciate the different functions of criminal law. As Ashworth rightly pointed, in addition to deterrence, it is also crucial to identify distinctive categories of blameworthy wrongs, and censure those who commit these wrongs. Blacklisting has to be criminalised as such in order to communicate the gravity of the wrong and harm caused to workers.

The imposition of penalties under civil law only for certain wrongful conduct may also be unacceptable under the ECHR. This is because the ECtHR might still classify the relevant sanctions as criminal. In *Ozturk v Germany*, it ruled:

¹⁰¹ See Tadros, as above n 90.

¹⁰² *Danilenkov*, as above n 83.

¹⁰³ AP Simester and Andrew von Hirsch, *Crimes, Harms, and Wrongs* (Hart 2014) 4.

By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual [...] as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards “decriminalisation” which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as “regulatory” instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 [...], the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

In other words the Court approaches the question of what constitutes a criminal offence as an ‘autonomous concept’,¹⁰⁴ in the sense that is not bound by the authorities’ decision to classify a sanction as civil. This is because when state authorities have the power to impose serious sanctions that are typically found in criminal law, these must be viewed as criminal in nature for the ‘defensive role of human rights’¹⁰⁵ under Articles 6 (right to a fair trial) and 7 (no punishment without law) to come into play.

It should be added, before concluding, that the Court is not overly focused on sanctions when considering protection of rights. It also pays some attention to structural factors that create vulnerability to workers’ exploitation. In *Rantsev*, for instance, it explained that ‘the duty to penalise and prosecute trafficking is only one aspect of member States’ general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 must be considered within this broader context’.¹⁰⁶ The Cypriot immigration scheme of artiste visa was ruled to violate Article 4 of the Convention because it did not protect individuals from human trafficking.¹⁰⁷ To return to the example of the MSA, it is very questionable whether it complies with its ECHR obligations, not only because of the limited number of prosecutions as discussed earlier, but also because of the lack of political will to address structural factors, and particularly legal structures, that create vulnerability to exploitation. This point is exemplified by the UK Overseas Domestic Worker visa, which was a central political issue during the passing of the Act.¹⁰⁸

To conclude this section, the objection that there is a tendency to overcriminalise is not pertinent when it comes to labour rights in the ECHR, where the Court has imposed limited obligations to criminalise. At the same time it cannot be said that the Court is not mindful of the role of civil remedies for victims of violations,¹⁰⁹ or of the role of structural factors that create vulnerability to exploitation.¹¹⁰

¹⁰⁴ See George Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (2004) 15 *European Journal of International Law* 279.

¹⁰⁵ Tulkens, as above n 16, 579.

¹⁰⁶ *Rantsev*, as above n 29 [285].

¹⁰⁷ *Ibid* [293].

¹⁰⁸ See Virginia Mantouvalou, ‘The Modern Slavery Act Three Years On’ (2018) 81 *MLR* 1017; Virginia Mantouvalou, ‘“Am I Free Now?” Overseas Domestic Workers in Slavery’ (2015) 42 *Journal of Law and Society* 329.

¹⁰⁹ *Danilenkov*, as above n 83.

¹¹⁰ *Rantsev*, as above n 29.

4. Conclusion

Certain violations of labour rights constitute grave moral wrongs, which can cause serious harm to a person's life, physical or psychological integrity. Taking advantage of workers' vulnerability that is due to economic reasons, or other factors, such as someone's immigration status, and exploiting them by violating their human and other labour rights can give rise to positive obligations under the Convention. In this context, the systemic exploitation of migrant workers has triggered a positive obligation to put in place effective criminal laws that must be backed up by effective procedural protections. The development of such obligations in this context should be viewed as a positive evolution to the extent that it expresses public disapproval for the specific treatment, punishes those who commit the crime, and deters others. The key questions under the ECHR on this issue are whether the relevant criminal law is effectively enforced, on the one hand, and whether the authorities also take steps to remove structural factors that create vulnerability to such exploitation, on the other.

In this chapter, I argued that the violation of collective labour rights may also trigger an obligation to criminalise in certain circumstances. I used the example of blacklisting to illustrate the point that a breach of trade union rights can meet the elements of wrongfulness and harm that are central in the inquiry of criminalisation. This positive obligation arises on the basis of articles 11, 8 and 14 of the Convention. The cumulative convergence of these three rights – the discriminatory treatment of trade union members and the violation of their right to work – provides a strong normative argument for criminalisation. These are not absolute and non-derogable provisions. However, their nature as qualified and derogable rights does not preclude them from triggering obligations to criminalise when the conduct that breaches the Convention is a serious wrong that causes grave harm to the workers. The Court has to recognise positive obligations to enact criminal laws (together with other remedies) to address such violations of collective labour rights, both in order to communicate that treating workers in this manner is a grave moral wrong that our legal system disapproves, and in order to contribute effectively to the protection of workers from the wrongful conduct in question and its disastrous effects.