



City Research Online

City, University of London Institutional Repository

Citation: Drew, S. (2021). Freedom and the Wage: Downward Spirals. Is the NMW adequate to prevent unfree labour? (CLS research paper 2021/13). London, UK: The City Law School.

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/27289/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk



THE CITY
LAW SCHOOL
CITY UNIVERSITY OF LONDON
— EST 1894 —

Academic excellence for business and the professions



City Law School Research Paper 2021/13

Freedom and the Wage: Downward Spirals
Is the NMW adequate to prevent unfree labour?

Sandhya Drew
November 2021

@ Sandhya Drew
The City Law School

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

All rights reserved.

© 2021

The City Law School Working Paper Series are published by The City Law School, City University London, Northampton Square, London, EC1V 0HB.

An index to the working papers in The City Law School Working Paper Series is located at:
www.city.ac.uk/law/research/working-papers

Freedom and the Wage: Downward Spirals

Is the NMW adequate to prevent unfree labour?

Sandhya Drew*

Abstract

The ILO has estimated that in 24% of cases of modern slavery, wages were, or were threatened to be, withheld. This paper considers the role of wages in modern slavery, focusing on cases in Britain and India. The specific question considered is whether the current dominant legal model of the national minimum wage (NMW) is effective to (i) indicate (ii) prevent, compromised freedom. Does current legal thinking (with honourable exceptions) lag behind economic thinking on wages and wage inequality?

Keywords: National Minimum Wage, freedom, unfree labour, supply chains, economic inequality

* Senior Lecturer, The City Law School, City, University of London, Professeure Invitée, Université Paris Nanterre.

1. INTRODUCTION

In the first part of this century, the focus - of the ILO and others – was on modern slavery as a crime, an aberration from mainstream social arrangements and consensus. Criminal law and its enforcement agencies enabled challenge to the dominance of the trade principle and controls on migration which led to the invisibility of trafficked people. Under-identification, for prosecution and beyond, has remained. Supported by the ILO's agenda for Decent Work the focus has shifted but under- identification continues to occur in Modern Slavery Statements. The focus needs to shift further to how, and why, employment conditions descend into modern slavery. *How* employment conditions descend into modern slavery is a question about identification. *Why* employment conditions descend into modern slavery is a question about prevention.

There are at least five reasons to focus on wages. First, wages are central to the employment relationship.¹ Moreover, the worker category created by UK wage legislation extends beyond the narrow employment relationship, as conceived in contract. Second, mechanisms to exploit work through wages are central to much of modern slavery. In 2017, the ILO found that withholding of wages, or the threat that this would be done, was the most common means of coercion, experienced by almost a quarter of people (24 per cent) forced to work. This was followed by threats of violence (17 per cent), acts of physical violence (16 per cent), and threats against family (12 per cent). An obvious point: do we find cases of slavery where the correct payment has been made but hours are excessive or passports are withheld? Pay and conditions are not isolated elements (a point already made in 1901 by the Webbs in *Industrial Democracy*²) and intertwine in a downward spiral. Thus, excessive unmeasured working hours for piece work will affect pay per hour. In this spiral, wages play a crucial part. Third, people know their numbers: one of the writer's first clients, a migrant worker from Sylhet working as a chef in London's east end, spoke little English, but knew of pay slips and his right to them. Fourth, the ability to trace: technology allows tracing of every transaction from identity, location and employment status to the precise amount on pay slips and payment into bank accounts across the world. This aids formalisation, though a recent case commenced in London³ shows that even bank accounts may be manipulated by gangs. Fifth, wages are seen as the very mark of freedom to barter one's labour, and modern employment law is dominated by the principle of freedom of contract. There is no better place to tease out the tension between definitions of freedom and of modern slavery.

In this section I consider ways in which wages are used in coercion. In section 2, I examine some of the economic thinking on compromised freedom and legal responses to that development in economic thinking. In section 3, I

¹ Most labour lawyers would not recognise the premise in Genevieve le Baron 'Wages an overlooked dimension of Business and Human Rights in Global Supply Chains' BHRJ Vol 6 Issue 1 2021 CUP

² Webb S and B (1901) *Industrial Democracy* at 773-784

³ <https://www.leighday.co.uk/latest-updates/news/2021-news/modern-slavery-ring-victims-start-legal-case-against-biffa-smart-solutions-and-fs-commercial/>

consider two national minimum wage frameworks, in Britain and India. I have chosen these two jurisdictions as ones in which I have lived and worked as a labour lawyer. They have connected political histories and connected legal systems. Considering both provides an opportunity to consider unfreedoms across Global North and South. I consider the national minimum wage framework first as an identifier building on the 1982 judgment of the Supreme Court of India in *People's Union for Democratic Rights and others v Union of India and ors* [1982] AIR 1473, 1983 SCR (1) 456. In section 4, I consider reports of extreme wage exploitation from the field, first in Britain and then in India. This has been a paper exercise for now. In section 5, I consider current mechanisms on wages to ensure freedom. In section 6, I conclude that if the NMW is to be kept as the dominant model, the framework must include (i) a living wage; (ii) a move away from precarious hourly or daily wages (iii) responsibility by the ordering company for minimum wage beyond the currently narrowly understood employment relationship, (iv) a stronger transnational role for trade unions.

On one view, wages *are* freedom. They signal life as an economic actor. The worker is not owned in slavery or bound in feudalism. This is one explanation of why interference with them features (Table 1) as a main instrument of coercion. Such a view betrays too shallow a focus.

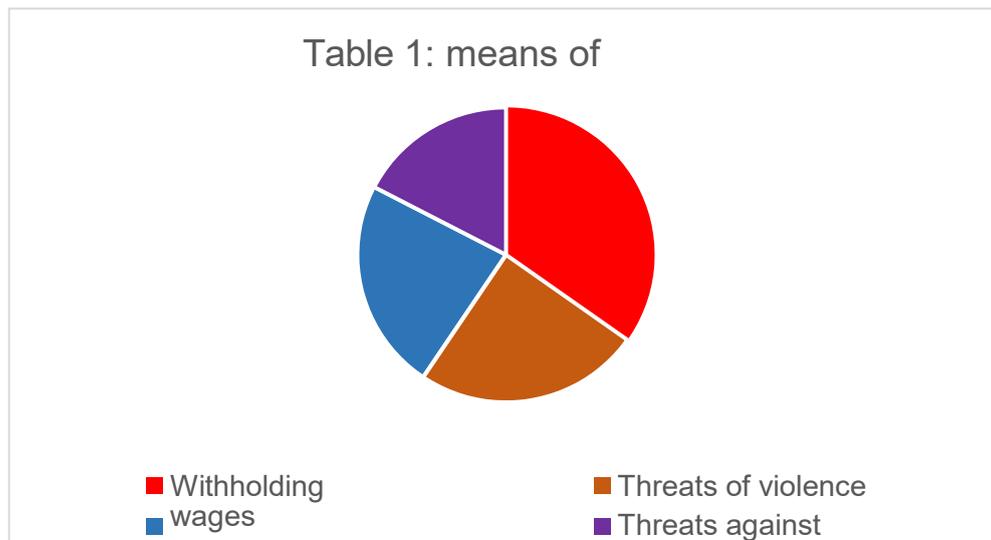


Table 1 is concerned specifically with forced labour: labour is extracted and voluntariness is absent. Its central concern is freedom. It is true to say that its concern is extraction not starvation, but extraction may occur in the context of a situation of starvation.

As can, I hope, be seen from Table 2, wage coercion assumes there is a wage. It goes beyond the classic subordination of the employment relationship.

Table 2: forms of trapping

Method of control used	Wages	Freedom?
Subordination	Value bargained or statutory	Free labour of employees
Debt to giver of work	Not proportionately applied towards the debt	<p><i>Debt Bondage: The status or condition arising from a pledge by a 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.</i></p> <p>Traditional forms of bonded labour, mostly agrarian. Loans taken from landlords by landless labourers to cover family expenses. Quasi-feudal.</p>
Debt to third party	Not proportionately applied towards the debt	Also bonded labour, associated with internal or transnational migration, the involvement of labour contractors and recruiting intermediaries, and work in a range of sectors in the informal economy.
Truck system	Part paid by giver of work in overvalued goods	Labour contrary to the truck legislation. Many similarities to bonded labour.
Exploitation of low bargaining power arising from migration status, either from informality or from cost of migration.	Nominal	Lack of voluntariness?
Exploitation of low bargaining power arising from poverty.	Nominal	Lack of voluntariness?
Casualised labour	No pay	No extraction of labour
Force	No pay	Chattel slavery or servitude

I have referred at the outset to the umbrella term modern slavery. This covers⁴ trafficking, servitude, bonded labour and forced labour, as well of course slavery itself. Annex 1 makes some points about bonded labour in Britain and India, but will not be part of the presentation of the paper. It is clear that in cases of bonded labour, freedom is absent in any sense of that term. In this paper, I will focus on cases of forced labour and lack of voluntariness, generally interpreted in accordance with ILO 29.

Fudge⁵ discusses some of the ways in which different definitions of unfree labour emerge from radically different views of labour markets and economics.

2. THE NEW ECONOMICS AND LEGAL RESPONSES

The capitalist view on wage exploitation is that it is a failure of bargaining on the free market and is anti-competitive. This was eloquently expressed by Winston Churchill in the Parliamentary debates on the Trade Boards Act 1909:⁶

...where you have what we call sweated trades, you have no organisation, no parity of bargaining, the good employer is undercut by the bad, and the bad employer is undercut by the worst...where those conditions prevail you have not a condition of progress, but a condition of progressive degeneration.

On the other hand, drawing on Marxist economics,⁷ a towering contribution has been made by Zoe Adams.⁸ Adams explains the relationship between mainstream work and work spiralling into modern slavery:

[Capitalists engaging in forced or voluntary labour] profit at the expense, in other words, of other capitalists, and the long-run interests of the system. The problem here results from the inherent conflict that exists between the interests of capital as a class (and by definition, workers) in sustainable accumulation, and the interests of individual capitalists, as conceived in the context of competition, in profit-maximisation. It is this same conflict that incentivizes individual firms to depress wages below the socially necessary level (below subsistence level), a strategy that simply shifts those costs onto

⁴ Sandhya Drew 'Human Trafficking: a modern form of slavery?' E.H.R.L.R., 2002 4, 481-492 at 487

⁵ Fudge J (2018) Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization SLS Vol 27(4) 414-434

⁶ Parliament (1909b). Hansard (HC), 5th ser., vol. 4.

⁷ Karl Marx and Frederic Engels, *Wage-Labour and Capital* (1847)

⁸ Zoe Adams *Labour and the Wage* (2020, OUP). The title of this paper is of course parasitic on it.

society.

For Adams, the flaw in a NMW framework is that it is in reality a minimum hourly rate,⁹ based on wages for work done - and undermined by casualisation - and not 'remuneration', a responsibility to provide security.

My own starting point is the work of Amartya Sen on freedom.¹⁰ The possible implications of Sen and Nussbaum's capabilities approach for labour law in general have been recognised, analysed, refuted and discussed,¹¹ including by Profs Collins¹² and Mantouvalou.¹³ My focus is a narrower one. It is not on the overall purpose of labour law. Nor is it the way a capabilities approach can inform our approach of what is a good wage (which leads to the living wage). It is the need to view freedom in the light of economic restrictions. Sen's insight is one which comes from the Global South, in the example cited by him of a daily wage labourer having to come into work during communal riots.¹⁴ It is an insight into restricted freedom replicated in 2013 in the Rana Plaza calamity itself, the building having shown cracks the day before and the bank and shop workers having stayed away, but the garment workers being told that if they did not go in, they would not be paid. In this narrower focus on freedom and the wage, the insight of Langille illuminates: '...the key to the CA is its focus on real freedoms, real capability to choose a life worth living, a life worthy of human dignity. It is not simply on how things turn out for you, but how you get there. There is, as Sen points out a large difference between starving and fasting.'¹⁵

Sen's work has been very influential in the work of the ILO and of the UNDP.¹⁶ Throughout the Covid pandemic apart from lockdowns, the New Economics Centre at Jindal Global University, led by Professor Deepanshu Mohan¹⁷ has carried out studies of the most vulnerable labourers local to the university in Sonapat, Delhi and in Mumbai.

Sen's approach focuses on the true extent of the vulnerability of the person trapped by poverty. As noted above, his work encompasses considerations of inequality. The economics of inequality has been developed more recently by Thomas Piketty, just consideration of whose work is outside the scope of this paper. Piketty himself

⁹ The same point is made by Keith Ewing and Lord Hendy QC in 'Covid-19 and the failure of labour law: Part 1' ILJ 2020 Vol 49, 4 at 515-6

¹⁰ Sen A (1979) Equality of What? The Tanner Lecture on Human Values May 22 1979; (1999) *Development as Freedom*. OUP

¹¹ Brian Langille (ed) *the Capability approach to Labour Law* (2019, OUP)

¹² Hugh Collins 'What can Sen's Capability approach offer to Labour Law?' in Langille

¹³ Virginia Mantouvalou 'Work, Human Rights and Human Capabilities' in Langille

¹⁴ Used in the sense intended by Antonio Gramsci in *La Questione Meridionale* (The Southern Question) Ordine Nuovo (1920) as an extractive relationship between North and South- in that essay, Italy.

¹⁵ Langille 'What is Labour Law? Implications of the Capability Approach' pp123-140 at 138.

¹⁶ <http://hdr.undp.org/en/content/if-we-conceive-development-freedom-inequality-imprisonment>

"Development means in many respects freeing people from poverty, from economic vulnerability, from environmental risks and so on. If we conceive development as freedom, then inequality becomes an imprisonment" (10 April 2019, Accessed 29 November 2021)

¹⁷ <https://jgu.edu.in/jslh/centre-for-new-economics-studies/>

states¹⁸ that ‘the most important limitation of [his] book [Capital in the 21st century] is that it is much too Western-centred.’ Piketty has remedied this in 2019¹⁹ and 2021.²⁰ His 2021 work examines levels of income inequality, and although much of his work focuses on tax, he argues for a fairer share from global production.²¹

3. THE NATIONAL MINIMUM WAGE FRAMEWORK

The current dominant legal model for protection of wages is the NMW. This is a minimum hourly rate, set by the state or agreed through collective bargaining. There are ILO Conventions on protection of pay, though none on the minimum wage. The 2019 Centenary Declaration referred to an adequate minimum wage, statutory or negotiated. 90% of ILO members have NMW systems. In both Britain and India, minimum pay is set by the state rather than collective bargaining. NMW legislation was introduced by incoming national governments on strong mandates, in both India (1947/8) and Britain (1997/8).

The UK NMW varies by age. From 1 April 2021, the hourly wage for workers of 23 and over is £8.91 an hour, for 21 and 22 year olds, it is £8.36 per hour and for 18-20 year olds, it is £6.36 per hour.²² Levels are set annually by the Low Pay Commission and enforced through prosecutions by Her Majesty’s Revenue and Customs and naming and shaming by the HMRC and by individual use of the unauthorised deductions provisions under the Employment Rights Act 1996.

India’s National Minimum Wages Act 1948 will be replaced with the Code on Wages 2019.²³ The Code enacts a single floor, daily wage across India, which can be raised by states. At present, it is the States which set the minimum. The minimum applies, no longer to specific establishments, but to all employees. (Strangely for UK lawyers, for whom the opposite is true, in Clause 2 the term ‘employee’, which includes managerial and administrative work, is wider than the manual ‘worker’ at whom specific protection was previously targeted). At present, the non binding national minimum is 176 rupees for an 8-hour work day. The actual minimum is set by States. The new floor wage is only 2 rupees more, at Rs 178 (£1.78 per day). Minimum wage varies significantly across the 28 states and 8 Union Territories: The minimum basic day wage for an unskilled worker in Delhi is Rs 596. In Rajasthan, it is Rs 225. In Bihar, it is Rs 237. In Jharkhand it is Rs 274.81. In Nagaland it is Rs 176. The new floor wage is set at the very lowest of these rates, rather than raising it. As was seen during the initial days of the pandemic, there are significant flows of inter-state migrant workers looking for work in the richer states.

¹⁸ Thomas Piketty ‘Towards a reconciliation with economics and social sciences’ in Ed Heather Boushey *After Piketty: The Agenda for Economics and Inequality* (2019, Harvard University Press)

¹⁹ *Capital et Idéologie* (Seuil, 2019)

²⁰ *Une brève histoire de l’égalité* (Seuil, 2021) A related online LSE seminar is at <https://www.youtube.com/watch?v=WJUowgzGFck> and includes a fascinating map of share of national income at 22.19, breaking it down from GDP per capita.

²¹ Ibid p309

²² Rising in April 2022 to £9.50; £9.18 and £6.83

²³ Some provisions came into force on 18 December 2020 but the main provisions are not yet in force.

In preparation for Indira and Rajiv Gandhi's flagship 1982 *Asiad Games* in Delhi, construction workers had deduction from wages made by jamadars (middlemen) such that men and women received less than the minimum wage, (then Rs 9.25 per day), in breach of the Minimum Wages Act 1948, with women receiving even less than men. This came to the Supreme Court of India in *People's Union for Democratic Rights and others v Union of India and ors* [1982] AIR 1473, 1983 SCR (1) 456 per Bhagwati J at 487-488. The Supreme Court considered the conditions of the workers in light of the Minimum Wage Act and the prohibition of forced labour under Art 23 of the Indian Constitution. Bhagwati J held:

It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. *It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive.* What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. *It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'.*

The ILO took a more restrictive approach in its 2005 *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*. It stated crisply at 19-22, **'the failure to pay the worker the statutory minimum wage does not constitute forced labour'** and **'the state or 'a particular employer' cannot be held accountable for all external constraints or indirect coercion existing in practice'**.

The judicial reasoning in the *Asiad Games* case is more subtle than is acknowledged in the ILO statement. Being paid below the NMW can give rise to an inference that labour is forced and any practising lawyer would see this as unexceptional. The more significant disagreement here is whether a weakness such as poverty becomes compulsion when exploited by a giver of work. The Supreme Court said yes, the ILO said this was an externality for which employers (and even the state) could not be responsible. This apparently simple difference disguises a fundamental difference over the nature of the work/wage bargain. The ILO position confines the examination of compulsion to the microcosm of the employment relationship, with the bounds defined as all equal before

the employment relationship begins. The Supreme Court has a more radical view in which the duty of the employer extends to the position in which the worker finds themselves. It is in this context that failure to pay the minimum wage is a bright line. This is a difference not just about the nature of compulsion but of the involvement of the employment relationship in that compulsion.

The stark difference of a view on freedom has been softened by an argument of a continuum. An evolution in the ILO position can be seen by 2009, by which time, there is a greater recognition of the spiral from poor employment conditions into slavery:

...there is a continuum including both what can clearly be identified as forced labour and other forms of labour exploitation and abuse. It may be useful to consider a range of possible situations with, at one end, slavery and, at the other end, situations of freely chosen employment. In between the two extremes, there are a variety of employment relationships in which the element of free choice by the worker begins to be mitigated or constrained.

The difference is therefore narrowing. The International Conference of Labour Statisticians has issued Guidelines²⁴ concerning the measurement of forced labour. This adopts the definition under ILO 29 of *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*. Involuntary work is stated to include 'work with very low or no wages'. There is however no discussion of the role inspection of the minimum wage might play. The Centenary Declaration²⁵ calls on members to ensure an adequate minimum wage, statutory or negotiated, as part of Decent Work, but not linked to forced labour.

If payment below the Minimum Wage is accepted as a good indicator of coercion, quantitative and qualitative data examining what is happening to people's wages is essential. Yet this is missing in the national systems of both Britain and in India.

In Britain, the Low Pay Commission has a statutory obligation to make recommendations of the NMW. From 2017, they have issued three stand-alone reports on non-compliance and enforcement of the NMW. At the very start (#1, Executive Summary), they make it clear that the 'data sources we use do not capture the grey economy'. True, there are clear challenges where the grey, informal economy is concerned, but methods to estimate and explore are available. This has not been attempted. In its 2020 report, the LPC does identify access to pay slips as a key factor.²⁶ A 2017 report *Minimum Wage Underpayment in the Informal Economy* from Dept

²⁴ International Labour Office, Women and Men in the Informal Economy, a statistical picture www.ilo.org

²⁵ International Labour Conference ILO Centenary Declaration www.ilo.org

²⁶ Low Pay Commission (UK) Non-compliance and enforcement of the National Minimum Wage (2020)

Business Energy and Industrial Strategy²⁷ is similarly thin on the ground with realistic ‘bottom-up’ ways (as it refers to them) of identifying underpayment of NMW in the informal economy (snowball interviews is one suggestion, trade unions are mentioned, illegality and informality are sharply distinguished).

Although shortly stated, the LPC’s lack of focus on the grey economy has wide implications. In the same report, the LPC identified complaints by workers themselves as ‘the most effective way of identifying underpayment.’ In Britain reports should be made to ACAS or directly to HMRC. At the same time they noted that awareness of the NMW did not translate into confidence in the enforcement system. The LPC are aware of the knowledge gap. As they say: *the data we looked at...gives us a sense of measured underpayment, but tells us nothing about the unmeasured parts of the labour market and the people who work in them.*

The LPC has failed to collect data on the informal sector in Britain despite guidance available from the ILO (2003)²⁸ and ILO Recommendation R204. As defined by the ILO, this is work where the employment relationship is, in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.). As the ILO Recommendation #11 makes clear, two ways this could be done are by an efficient and effective labour inspection and promotion of social dialogue (para 16(a)). The current system of labour inspection in both countries is weak.

In India, informal work is far more widespread, estimated at around 90% (ILO: 2018). Rani and Belser²⁹ make the point that exclusion of informal workers from coverage fails to reach workers ‘at the bottom of the wage distribution’.

Recent reports from Britain and India of those workers at the bottom of the wage distribution are now considered.

4: CASE STUDIES

i: Leicester

On 30th June 2020, Labour Behind the Label published a report³⁰ which alleged that “emerging evidence indicates that conditions in Leicester’s factories, primarily producing for Boohoo, are putting workers at risk of COVID-19 infections and fatalities”. On 5th July 2020 the Sunday Times published an article in which it was said that an undercover journalist had found poor conditions when he got a job in a factory packing clothes destined

²⁷ Department for Business, Energy and Industrial Strategy (2017) *Minimum Wage Underpayment in the Informal Economy* BEIS Research Paper Number 16

²⁸ www.ilo.org

²⁹ Uma Rani and ors (2013) Minimum Wage coverage and compliance in developing countries International Labour Review Vol. 152 , no 3-4 pp382-410

³⁰ <https://labourbehindthelabel.org/report-boohoo-covid-19-the-people-behind-the-profit/>

for Nasty Gal, one of the boohoo Group's brands. It was alleged that other workers had told the journalist that he could expect to be paid as little as £3.50 an hour. The widespread adverse publicity led to Boohoo commissioning a report from Alison Levitt QC, the open version of which was published in September 2020³¹ and which concluded there was no Modern Slavery occurring. Levitt is a criminal practitioner.

Allegations relating to wages

One of the most frequent and persistent allegations relates to workers' wages. It is said that many workers in Leicester's garment factories are paid below (and often well below) the statutory national minimum wage. There have been a number of suggestions as to the mechanisms used to disguise illegally low pay. These include falsified working hours' records, payslips which show fewer hours than have in fact been worked and claims that workers who have officially been paid the minimum wage are then required to repay the 'excess' back to their employer in cash.

Allegations of fraud have also been made, namely that government 'furlough' payments were obtained in respect of workers who in fact continued to work. A related allegation is that in the case of workers who were sent home and told that they should not come to work, 'furlough' payments were obtained from the government by employers but not passed on to the workers concerned.

Levitt's report contains an important insight on the invisibility of the garment makers.

In the middle of the lockdown period, Nasty Gal had placed an order for some jogging bottoms with Revolution, a design house in Manchester which has no manufacturing capability. **Who then did Nasty Gal think was going to make them? I have concluded that the truth is that they did not know and did not really care. Their concern was that the order should be delivered on time, be of acceptable quality and at a price which allowed them the margin they have been told to achieve.** How that was to be achieved was not Nasty Gal's responsibility; after all, they are retailers not manufacturers. They buy and they sell, they do not make.

³¹ <https://www.boohooplc.com/sites/boohoo-corp/files/final-report-open-version-24.9.2020.pdf>

Invisibility is a much commented feature of supply chains, including in business analysis of risks and inefficiencies.³² What is missing from Levitt's report is analysis of *why* they are invisible.

Levitt identified the lack of any supply contracts at all, as 'Boohoo does not currently use formal written contracts with its suppliers. The contract is simply the placing and acceptance of an order, which is evidenced by a paper form.' Levitt 'concluded that many of the problems exposed by this Independent Review can be attributed to the system of sub-contracting. Sub-contracting makes superficial commercial sense in that it means that workforces are fluid and no one is responsible for ensuring that they have jobs throughout the ebb and flow of orders (what was described to me as 'flex'). One has only to articulate it this way to appreciate how this exposes workers to the risk of exploitation. If Boohoo is serious about wanting to eradicate illegal working conditions from its supply chain, it needs to take a different approach to how it places orders. Its primary objective should be to eradicate subcontracting. In future, it should aim to have a direct contractual relationship with those who make its clothes'. It is not clear whether Levitt meant the suppliers or the workers.

Wage conditions in Leicester were not a surprise. In 2015, as the then Modern Slavery Bill was making its way through Parliament, the Ethical Trade Initiative published a report of field research and analysis carried out by Dr Nik Hammer at the Centre for Sustainable Work and Employment Future at the University of Leicester carried out.³³ Chapter 4 of the report focused much more precisely (than does the Levitt report) on the dynamics of wage control and coercion. The key findings in that chapter are set out in the Table.

The starkest findings of the research were severe violations of NMW violations
 Industry norm was £3.00 per hour
 Wages paid cash in hand
 Working hours grossly under-recorded
 No formal contracts and informal methods of payment Only
 about 20% being paid close to NMW
 60% reported variation in working time and wages because of fluctuation in orders
 Often, instead of the NMW, wages from workers' countries of origin are taken as the reference wage.
 For example, one worker interviewed in the research previously worked in a factory in Gujarat earning 3,000 rupees a month. When looking for a job in the UK, this worker was asked: "Would you like to earn 3,000 rupees per week?"
 Any wage slips do not reflect the total hours worked.
 Wages often paid late
 Non-payment of holiday pay

³² ManMohan S. Sodhi, Christopher S. Tang 'Research Opportunities in Supply Chain Transparency' Production and Operations Management Vol 28, N 12, December 2019

³³ New Industry on a Skewed Playing Field: Supply Chain Relations and Working Conditions in UK Garment Manufacturing,

The conclusion in Chapter 4 was that these practices created a level of dependency on the direct employer. The Chapter then turned to consider who benefits from these wage malpractices, which resulted in around £50 million a year in underpaid wages. The researchers concluded that it was not clear which tier of the supply chain benefited from these wage malpractices.

They went on, in Chapter 5, to identify as drivers towards these malpractices: monopsony power, the pressures of the fast fashion business model, working in the hidden economy and a ‘permissive regulatory regime’.

For the financial year 2020/21, notwithstanding the revelations on working conditions in Leicester, Boohoo revenue was £1,745 million (up 41%) and profit was £124.7 million (up 35%).³⁴ Boohoo’s 15 page August 2021 Modern Slavery Statement³⁵ commits to mapping suppliers and indicates that it will open a manufacturing ‘centre of excellence’ facility in Leicester which employs 170 people. It contains no proposals for a contractual requirement on suppliers to pay the national minimum wage.

A research project is being carried out to June 2022 by Nottingham Rights lab to educate workers on their rights.³⁶

Although these working conditions have been reported for over 6 years, the garment makers in Leicester were ‘invisible’³⁷ to the ordering company. They were paid low wages and then also exposed to Covid-19. There are no interviews in either report or in the research project of the direct employers, so we do not know the drivers to the extraction of labour from a person in a position of vulnerability through language or immigration status or disadvantage on the labour market. In all this, the legal framework of a national hourly minimum wage has been ineffective – either bypassed by reference to wages in India, evaded through hours worked or clawed back by the direct employer. It does not address the extreme inequality between the invisible workers and the demanding ordering fast fashion company.

ii: India

The authors of the ETI Report commented that ‘some of the problems discussed tend to be more associated with India, China and South East Asia’. As we have seen, the floor wage and minimum in a poor state such as Nagaland is Rs 178 per 8 hour day or (if only 8 hours are worked) 22.25p per hour. From April 2021, the UK Minimum Wage for someone of 25 and over is £8.91 per hour, almost 40 times as much. This simple, perhaps simplistic, point reveals one income inequality. Other relevant inequalities are income inequalities within countries and inequalities of labour and capital income across supply chains. Two arguments are made for soften this inequality. The first is that purchasing power is different. This is why even the living wage differs across countries and regions.

³⁴ <https://www.businessinsider.com/boohoo-unscathed-covid-19-modern-slavery-allegations-analysts-2021-5?r=US&IR=T>

³⁵ <https://www.boohooplc.com/sustainability/downloads/modern-slavery>

³⁶ <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/programmes/communities/index.aspx>

³⁷ Mohan Sodhi, Op Cit

The second is that low wages in developing countries allow for an efficient global factory and stimulate growth in developing countries as well as bringing prosperity and formalisation. Noted at the outset is that

India's GDP is now higher than the UK³⁸ and that it is also home to multinational parent companies. such as Vedanta. However, the constant at the very bottom of the pile is the low paid worker in India.

In 2019, when announcing the EU new legislative initiative³⁹ on 'mandatory due diligence' down supply chains, European Justice Commissioner Didier Reynders said: "*Inequality is as much of a systemic threat as climate change.*" Wage inequality drives the migration of workers, whether of workers from India to Britain or in Leicester or of workers poor states in India to rich ones. It drives the migration of capital to source goods and services in the global factory where labour is cheapest. Legislation to regulate supply chains creates greater responsibility and accountability but it does not address the issue of how wages are used as a means of coercion.

In contrast, some of the detailed field studies are identifying monopsony power as the driver behind the downward pressure on wages. An Oxfam report on workers on the Assam tea plantations⁴⁰ reported some workers are paid a daily wage of Rs 137. Oxfam reported a lack of payslips being provided, inadequate collective voice, poor health and safety. They identify inequality of power between suppliers and buyers (monopsony). Crucially, they identify that for the internal Indian market, supermarkets and brands retain 58.1% of the final consumer price, with tea workers pay 7.2%. In the UK, even with black tea a loss leader, this falls to 66.8% and 4%. Oxfam recommends that the government of Assam implement a daily minimum wage of Rs 351.

Suspension of labour laws in 14 Indian states, April and May 2020

So far, the economic inequality considered has been end user/direct employer/worker and their relations. However, what if the very guarantor of a minimum wage, the state, is affected by the promise of large inward investment? This stark and recent illustration of *subterritoriality* is the suspension of most labour laws through ordinances made in April and May 2020 at the start⁴¹ of the Covid pandemic by 14 (out of 28) Indian states: Maharashtra, Madhya Pradesh, Haryana, Uttarakhand, Odisha, Assam, Bihar, Karnataka, Rajasthan, Punjab, Goa, Himachal Pradesh, Uttar Pradesh and Gujarat. All ordinances suspended legal limits to working time.

³⁸ <https://www.weforum.org/agenda/2020/02/india-gdp-economy-growth-uk-france/>

³⁹ Approved by Parliament March 2021 https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

⁴⁰ Oxfam International *Addressing the Human Cost of Assam Tea* (2019) at 117

⁴¹ India was under lockdown from 24 March 2020



Some states such as Karnataka suspended and then withdrew the ordinance almost immediately. The greatest number of suspensions was in Uttar Pradesh, which on 6 May 2020 suspended 35 out of 38 labour laws, including the National Minimum Wage Act 1948 but not the Bonded Labour Act, for a period of 3 years. Gujarat did not include the 1948 Act, but, on 17 April and 20 July 2020, suspended labour laws such as the higher pay rate for overtime and limits on working time (The stated reason given by state governments as reported in the press was to attract investment and revive economic activity, and revealed the logic of a race to the bottom). 10 Indian trade unions appealed in June to the ILO, which intervened. The central government then publicly wrote to the state governments, distinguishing between labour reforms and the suspensions.

The suspension by the State of Gujarat was challenged in the Supreme Court in *Gujarat Mazdoor Sabha and anor v The State of Gujarat*, Writ Petition (Civil) N.708 of 2020.⁴² Gujarat argued that the suspensions were permitted by Section 5 of the Factories Act (introduced in the Factories (Amendment) Act 1976, as an emergency measure). On 1 October 2020, the Court (CY Chandrachud) ruled that the ordinance was ultra vires. The Coronavirus did not constitute an emergency: ‘the economic hardships caused by Covid-19 certainly pose unprecedented challenges to governance. However, such challenges ‘are to be resolved by the State Governments within the domain of their functioning under the law, in coordination with the Central Government’. The Court rejected the submission that the blanket exemption was necessary to maintain production. The Court found that no nexus

⁴² https://main.sci.gov.in/supremecourt/2020/11439/11439_2020_34_1501_24245_Judgement_01-Oct-2020.pdf

had been shown between the blanket exemption from labour laws and the need to ensure the security of the state.

The Court then considered the purpose of the Factories Act, the product, it said, 'of a long struggle of worker unions to secure the right to human dignity in workplaces that ensure their safety and well-being'. It traced the Factory Acts from the first Factory Act in 1881, dating from the cotton mills in Mumbai in 1851 with 'inhuman' 'working hours, welfare measures and wages' and culminating in the 1962 Factories Act. The notifications by Gujarat, the Court held, 'make significant departures from the mandate of the Factories Act. They (i) increase the daily limit of working hours from 9 hours to 12 hours; (ii) increase the weekly work limit from 48 hours to 72 hours, which translates into 12 hour work-days on 6 days of the week; (iii) negate the spread over of time at work including rest hours, which is typically fixed at 10.5 hours; (iv) enable an interval of rest every 6 hours, as opposed to 5 hours; and (iv) mandate the payment of overtime wages at a rate proportionate to the ordinary rate of wages, instead of overtime wages at the rate of double the ordinary rate of wages as provided under Section 59.' At §41 the Court identified that 'the principle of paying for overtime work at double the rate of wage is a bulwark against the severe inequity that may otherwise pervade a relationship between workers and the management.'

Importantly for this discussion, the Court then went on to identify labour welfare as an integral part of the constitutional vision and to describe the Constitutional Directive Principles as 'informing state policies'. The fact that they are described as not justiciable did not obscure this and the discretion given to the state 'did not permit destruction of the worker's economic dignity based on the rights available under the statute'. The Court then goes on to place freedom and equality as the constitutional aims achieved through laws which protect against economic coercion:

Ideas of 'freedom' and 'liberty' in the Fundamental Rights recognized by the Constitution are but hollow aspirations if *the aspiration for a dignified life can be thwarted by the immensity of economic coercion*. [§42]

The 'right to life' guaranteed to every person under Article 21, which includes a worker, would be devoid of *an equal opportunity at social and economic freedom*, in the absence of just and humane conditions of work. A workers' right to life cannot be deemed contingent on the mercy of their employer or the State. *The notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and right against forced labour* that are secured by Articles 21 and 23 of the Constitution. [§44]

In the *Sabha* judgment, Justice Chandrachud places freedom and equality centre stage as the aim of the Constitution and of labour legislation. The Directive principles inform and connect the limited choices faced by those in poverty and the suspension of the very specific labour rights to overtime pay and maximum working time. Here, judicial examination of not of the bargaining on wages, but recognises the context of limited choices of the would be worker and of the effect of reduction in legal protection. This goes beyond an approach founded on rebalancing unequal bargaining power to full recognition of *economic coercion*.

This is not a single case at a point of crisis. Related problems of under-protection by the state, outside the scope of this paper, arise in SEZs. Raible⁴³ considers SEZs in the context of extraterritoriality. Parwez⁴⁴ (2015) traces the use of rules, amendments and recommendations by States in undermining labour rights which the SEZ Act 2005, on the face of it, preserves. He notes that the Indian SEZ Act is silent on the MW, leaving it to states. In 2016, the Committee on Social Economic and Cultural Rights issued General Comment No 23 on the right to just and favourable conditions of work. They pointed out that the importance of the right *had yet to be realized*. *Workers in special economic, free trade and export processing zones are often denied the right to just and favourable conditions of work through non-enforcement of labour legislation*.

5: PREVENTION

i: A living wage?

Rani and Belser⁴⁵ examine rates of compliance in 11 developing countries including India and posit that low minimum rates may lead to high rates of compliance. They recognise that whatever the answer, the wage must sustain.

Reference to wage as a human right appears throughout human rights instruments. It is, however, described in a variety of ways. The UN Declaration Article 23(1) and (3) refers to *just and favourable conditions of work and the right to just and favourable remuneration ensuring for himself [sic] and his family **an existence worthy of human dignity**, and supplemented, if necessary, by other means of social protection*. Article 7, UN International Covenant Social Economic and Cultural Rights of 1966 echoes the reference to *just and favourable conditions of work, **fair wages** and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, and **remuneration which provides all workers, as a minimum with a decent living** for themselves and their families*. This right is to be

⁴³ Lea Raible *Human Rights Unbound: A theory of extraterritoriality*, (2020, OUP)

⁴⁴ Parwez S 'Modified Labour Welfare Measures for Special Economic Zones and Implications, Indian Journal of Industrial Relations' Vol 50, n3, Jan 2015 386-396

⁴⁵ At 394

read with the related right to *safe and healthy working conditions*.

The ILO has a limited number of Conventions on wages, none of which form part of the 1998 Declaration, and none of which contain the delineation of a wage. Minimum Wage-Fixing Machinery Convention, 1928. C026 was ratified by India on 10 January 1955. It was ratified by the UK on 14 June 1929 and denounced on 25 July 1985. It requires wage fixing machinery to fix minimum rates for workers employed in certain trades or parts of trades (in particular in home working trades). It does not define the wage by any reference to dignity or security. It was supplemented in 1970 by C0131. Although C0131 refers to the problem of low wages and problem countries, it simply requires that wages be appropriate to needs of workers and their families and to economic factors. The reference to wage-fixing machinery reveals the ILO's focus on collective bargaining, and this is made explicit in ILO Recommendation R135 which was also agreed in 1970. In the meantime, C095 and its recommendation Ro85 (denounced by the UK in 1983) were concerned with protection of freedom of the wage and restrictions on that freedom. More recently, the Centenary Declaration (2019) calls for a minimum wage, statutory or negotiated. In India, the National Minimum Wage Act 1948 reflected a strong focus on the need for the wage to be defined so as to provide for food, clothing for a family. The Tripartite Committee of Fair Wage" "The minimum wages must be provided not merely for the bare subsistence of life but also for the preservation of efficiency of the workers by providing for some measures of education, medical requirement and amenities"

A living wage, as advocated at www.livingwage.org.uk. reflects these factors rather than, as with trade boards, close attention to the market. Marshall⁴⁶ cogently advocates as a first pathway to reducing work which is informal and precarious, a global living wage. She rightly notes the incentive in poor countries to keep levels low as a perceived competitive advantage. The global living wage, in accordance with the Anker Manual⁴⁷ would be based on local living costs. There would be numerical differences but equal purchasing power. Anker identify that at present many national minima are below the living wage.

ii: Will a remuneration model prevent?

Adams argues cogently for a framework for the wage based on remuneration and it is not proposed to attempt to improve that argument here. She also criticises the proposed EU Directive as a missed opportunity.⁴⁸

In India, the Mahatma Gandhi Rural Employment Act 2005 provides 100 days guaranteed employment to rural workers. It is thought to have been a strong reason why day labourers walked thousands of miles home in 2020.

The remuneration model, of course, implies a relation.

⁴⁶ Shelley Marshall *Living Wage: Regulatory Solutions to informal and precarious work in global supply chains*, (OUP, 2019) at 152-165

⁴⁷ Anker R and M *Living Wages around the world*, (2017, Elgar)

⁴⁸ <https://uklabourlawblog.com/2020/11/12/the-eu-minimum-wage-directive-a-missed-opportunity-by-zoe-adams/>
Accessed 26 November 2021

iii: Redefining responsibility for wage

One theory of dynamics in supply chains is that downward pressure by economically powerful buyer⁴⁹ on prices and working time create a pressure on supplier companies which is transferred to their workers. Kumar⁵⁰ argues instead that an increase in big supply companies (he cites Arvind Mills in India) has decreased monopsony power, increased suppliers' bargaining power and in turn workers' bargaining power against their direct employers. This may be so but it accepts the limitation in labour law, that pay is a matter for the direct giver of work and the worker. Given the drive from and power of the buyer identified above, it undermines the potential for prevention.

For the labour lawyer, the idea of an employment relationship between a buying company and a worker for a supplying company is radical. The worker category in UK law expands the employment relationship in matters of pay, but requires a direct contractual relationship. The employment relationship has been fragmenting through casualisation, contractualisation of risk and responsibility. ILO R198 recognises the problem in identifying employment relationships in transnational provision of services, but its recommendations are directed at identification of the employment relationship.

The developing body of hard and soft law on business and human rights enables review of these limits in requiring some form of responsibility of companies for adverse impacts on human rights of business activities of subsidiaries and along supply chains.⁵¹ Whether the responsibility is of due diligence and duty of care remains debated. The exact basis for joint liability has been formulated.⁵² Responsibility for wages beyond the employment relationship is Marshall's second advocated pathway.⁵³ The responsibility Marshall refers to is due diligence. I argue that a greater responsibility of substantive duty can be argued for, going beyond the current understanding of employment relationship and building on prevention of wage-related human rights violations. Although the characterisation of a human right may apparently limit this improvement to the framework, it will reduce the capacity for distancing and creating invisibility.

At present, supervision of minimal pay, if it occurs at all, takes place through contractual terms in supply chains. For the labour lawyer, contractual guarantees between buyer and supplier are a blunt way of ensuring a free wage. The very welcome Unilever undertaking in 2021⁵⁴ to ensure a living wage is paid to those who supply them

⁴⁹ Robinson J, (1969) *The Economics of Imperfect Capitalism*, St Martin's Press

⁵⁰ Kumar A *Monopsony Capitalism: Power and Production in the Sweatshop Age* (2020, CUP)

⁵¹ See the UN Draft Treaty, the EU Draft Proposal and mandatory due diligence legislation, most notably in the French Loi Devoir de Vigilance.

⁵² Anner, M, Blair J and Blasi J: (2013) Towards joint liability in global supply chains: Addressing the root causes of labour violations in international subcontracting networks 35 *Com Lab Law & Pol'y* J 1

⁵³ Shelley Marshall *Living Wage: Regulatory Solutions to informal and precarious work in global supply chains*, (OUP, 2019) at 167-170

⁵⁴ Unilever: <https://www.unilever.com/planet-and-society/raise-living-standards/a-living-wage> (accessed 26 November 2021)

directly with work or services by 2030 signals a change in procurement and purchasing practices rather than the assumption of a direct duty. It is possible that rigorous enforcement by Unilever will achieve the same end as a duty, but contractual practices vary and may be amended by the parties as they see fit to allocate risk. Indeed, Goudkamp⁵⁵ argues that the risk allocation in contract prevents a duty of care arising.

iv: Recognising the transnational role of trade unions

Blackett and Trebilcock⁵⁶ point out that while labour law has responded to inequality at national level through the doctrine of inequality of bargaining power, there is no such direct compact- or indeed doctrine- at transnational level. Sukthankar (Blackett: 2016) traces the attempts and setbacks for unions attempting to organise globally across North and South. The role of unions is at present defined narrowly as defending the pay and conditions of its members. If poor labour conditions are defined only in terms of fair competition, the contractual approach set out above is likely to prevail. Marshall sees international trade unions as essential to a new framework. This includes the Core ILO Conventions CO87 and CO98 (neither of these yet signed or ratified by India).

Negotiation and social dialogue on wages was a feature of the Trade Boards Act and remains in some countries (for example Italy) the method of agreement on the NMW. A sectoral system of Fair Pay Agreements is being implemented in New Zealand in 2022.⁵⁷ That is not the case in Britain or in India, where the national minimum is state set. The method of arriving at the minimum wage is not examined in this article, which considers the NMW as a red line alert on modern slavery. Its weakness would in any event be its focus on the national minimum, and so the issue remains cross-border functions of unions. Here, there again appears to be a disjunct between traditional national employment law and human rights law: through which the potential victims and actual victims of modern slavery fall. In traditional national employment law, 'trades' already organised are strong, but the 'sweated' trades suffer from lack of organisation.

One of the criticisms of the UK Modern Slavery Act is the absence of trades unions in the legislative scheme, whether in designing the Statement, or in checking whether down the supply chain, people are at risk of modern slavery. Workers and their representatives have their interest defined as the interest of their members. Workers and their representatives *in supplying countries* are often outside the CSR definitions of stakeholders. Unions would also provide early warnings on labour conditions at risk of degenerating. Consultation with trades unions is not suggested in the Guidance, still less required. In its response to the JCHR 2017 report which adopted submissions from TUC and ETI that recognition of unions could be required in supply contracts, the Government

⁵⁵ Goudkamp J Duties of care between actors in supply chains, 2017, JPI Law, 4, 205-211

⁵⁶ Blackett A and Trebilcock A *Research Handbook on Transnational Labour Law*, (2015, Elgar)

⁵⁷ <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/fair-pay-agreements/#:~:text=The%20Fair%20Pay%20Agreement%20system,in%20that%20industry%20or%20occupation.>

retreated to freedom of contract:

The Government notes the Committee's recommendation that recognition of trade union membership in suppliers' workforces should be made a condition of commercial supply contracts, but does not agree that the State should intervene in commercial arrangements in this way.

In contrast, the French Loi de Vigilance Art 225-102-4-1 §4 requires an assessment of risk and mitigation of that risk to be drawn up in concert with unions and which gives standing to collective bodies such as unions as well as NGOs to enforce the requirement to provide a Plan. The involvement of trade unions in this legislation stems from their stronger role in French labour law. Although it is limited to the role of unions in the Plan ie within the nation, it is a recognition of the interests in unions in this issue of transnational inequality.

6: CONCLUSION

The NMW framework is limited by a failure by enforcement bodies to focus on those at the edges of the labour market, most vulnerable because of poverty or migration. Although it is a clear red line for identification purposes, it is less clear that it works to prevent unfreedom in the face of monopsony power or increasing economic inequality. They are seen as low value individuals from whom wages as well as labour can be extracted.

There is an even more fundamental problem in differing minima across countries, which has led to a weak transnational framework. This can be filled by voluntary accords and by living wage initiative. However, the continuing reports of modern slavery along supply chains with their endless subcontracting suggest that mobile capital is not, as contended, embarking on a raising of standards. In India, the economic power of inward investment even led in 2020 to suspension of labour laws, including in some states the minimum wage.

If it is genuinely wished to prevent modern slavery, whether in Leicester or India or elsewhere this wage framework needs to change in three ways. First, the wage must be a one enabling living; Second, the hourly rate simply creates insecurity and vulnerability to economic coercion and should provide remuneration as argued by Adams; Third, responsibility for wage should stretch up the supply chain. Fourth and finally, a more central role should be given by Modern Slavery legislation and the developing international law to trade unions in the Global North and the Global South. These redefinitions are not radical - radical would be the sharing of value across labour and capital income – but they are necessary to prevent men, women and children spiralling into modern slavery at the edges and intersections of our national employment systems.

Annex 1

As mentioned above, a NMW is the dominant model of wage regulation. Alternative interventions have been, and are, available. The alternatives to be considered in this section are, in turn: sector specific wage fixing; in Britain, truck legislation aimed at work which is paid in kind; and, in India, legislation against bonded labour.

Britain: The Trade Boards Act 1909

In Britain, the 1890s saw debate on the best law to address the working pay and conditions of the 'sweated trades'. The lowest paid and most vulnerable workers in mainland Britain were home workers in the 'sweated trades', in tailoring, lace making, chain making and cardboard making. In *Industrial Democracy* (1901), the Webbs argued for a legal minimum wage set at subsistence. Instead, the Trade Boards Act 1909 was enacted. It drew on the 1896 Factory and Shops Act in Victoria. It targeted sweated workers and required tripartite boards to fix, for the 'sweated' trades only, minimum wages or piece rates net of deductions. Winston Churchill, MP, in moving the first reading in Parliament (1909b). Hansard (HC), 5th ser., vol. 4.), put the fair competition case:

...where you have what we call sweated trades, you have no organisation, no parity of bargaining, the good employer is undercut by the bad, and the bad employer is undercut by the worst...where those conditions prevail you have not a condition of progress, but a condition of progressive degeneration.

The trade boards framework was targeted at the worst cases. Seltzer and Borland (2018) consider the evidence that under the 1896 Factory and Shops Act in Victoria the boards set pay at levels close to the market, rather than based on subsistence. They cite examples of interstate or overseas competition being considered during hearings to set pay. This, they conclude, may be one reason for the modest impact on levels of employment. Similarly, Blackburn (2009) argues that the 1909 Act was marked by close focus on the market and by collective laissez faire.

The 1909 Act was followed by that of 1918 and then by the Wages Council Act of 1945, setting up a system of sector by sector collectively bargained pay. The Wages Councils were abolished in 1983. After a period during the Thatcherite government during which individual complaint for breach of agreement under the Wages Act 1986 was the only regulation of the wage/work bargain, the National Minimum Wage Act 1998 was enacted by the Labour government swept to power in 1997.

Britain: The anti-truck legislation

As of the 1890s, the dominant model of intervention in the wage/work bargain was the truck legislation, of which the most recent was the Truck Act 1896, which prohibited all but reasonable deductions from the wage. In 1411, a Colchester ordinance required weavers to be paid in gold or silver rather than goods or food and in 1464, the first Truck Act (4 EDW IV c.1) applicable to the cloth trade, required payment in cash of the realm. Truck (from the French *troquer*, to bargain) systems used the provision of goods to take wages below the level of their nominally agreed rate, through overvalued goods. The objection to this was seemingly not the exchange system *per se*. There has been discussion about the aims of the legislation, whether as a device to avoid collective bargaining by guilds with inflated prices of goods or as a monopsonistic device of impeding labour force mobility, or a reaction to a shortage of coins. Looked at through a purely economic lens, the legislation represented a move into the monetarised labour and wage dependency of the industrial revolution. The Truck Acts were consistent with an economic policy geared towards free markets. The recompense for the worker's labour was freedom to spend it as they would. Campaigners against truck work likened it to slavery, for example in 1829 (cited by Frank: 5): *His condition is just so far above that of a slave, as that he is not subject to being bought and sold as chattels in the market, and this is nearly all the pre-eminence he has to boast, and Under the truck system, the labouring man is almost as much a slave as ever were the West Indian slaves (because) he eats and drinks and wears what his master chooses.*

As a framework designed to address feudal and quasi feudal forms of labour, the legislation attracted support for different reasons: workers and unions (for better conditions of work); shopkeepers (for free trade), money paying employers (for competition). Opponents of the legislation argued that it prevented reasonable deductions. This view was supported by Hilton (1960), who argued that the Truck legislation had become an encumbrance on reasonable and useful deductions. Frank (2020) argues that Hilton's view is based on ignoring the situation of workers in marginal and sweated jobs and that the legislation was judged solely against its use for mainstream workers, not for situations of truck which still occurred. Frank concludes 'Unfair and excessive deductions from wages and workplace fines were a growing grievance for many workers, particularly female workers in marginalised or sweated trades. As had so often been the case, it was the workers in the most precarious and least unionised trades that felt the greatest impact of these dishonest practices. Workers in sweated trades and female outworkers continued to have their meagre wages clawed back'.

Frank concludes that the legislation did have an effect and that, contrary to the views of Hilton, 'the

gradual effect of the dissemination of knowledge about the plight of marginal workers on accepted norms of respectable business is manifest in the effectiveness of factory inspectors promoting the idea that modern management did not discipline through fines and convincing employers to voluntarily abandon many deductions from wages.'

Frank (2020:206-210) traces how the legislation was contested until its end. Unions contended that under section 1 of the 1831 Act, any fine was void. Employers argued otherwise and judges agreed in *Charmer v Cumming* (1846) and *Redgrave v Kelly* (1889). This led to the 1896 Truck, which in section 1 permitted fines so long as they were reasonable. After the 1896 Act had entered into law, the House of Lords in *Williams and others v North Navigation Collieries (1889) Limited* [1906] AC 136, hearing a case on the 1831 Act, held that fines could not be deducted from wages.

Further inroads were made by the Wages Act 1986. The ominous start to the process was denunciation on 16 September 1983, of CO95, the 1949 ILO Protection of Wages Convention, Article 6 of which prohibits employers from limiting in any manner the freedom of the worker to dispose of his wages, and RO95. The 1980s amendments removed the role of the state through inspections: the remedy was a claim by the individual to the Employment Tribunal. The limited types of reasonable deductions allowed by the 1896 Act were replaced by any deductions which had been agreed in writing in advance. Criminal sanctions were removed from the legal framework. These toothless provisions were only given a new lease of life when 'wages properly payable' included those payable under the National Minimum Wage Act 1998.

India: The Bonded Labour System (Abolition) Act 1976

The Bonded Labour System (Abolition) Act 1976 was announced by Prime Minister Indira Gandhi in her broadcast to the nation on 1 July 1975 (6 days after the declaration of Emergency), and was initially by ordinance. The focus was agricultural work, and landless labourers. Indira Gandhi declared: *the practice of bonded labour is barbarous and will be abolished. All contracts or other arrangements under which services of such bonded labour are now secured, will be declared illegal. We will propose to take action by stages to liquidate rural indebtedness.* She also announced a review of minimum wages for agricultural labour.

The 1976 Act identified a variety of forms of bonded labour. It placed responsibility for enforcement on the States and on Vigilance Committees within those states. It is widely agreed that the 1976 Act has been ineffective, despite the constitutional underpinning of Art 23. In *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; (1984) 3 SCC 161 on an application by an NGO complaining of bonded labour in stone quarries across Haryana, the Supreme Court issued orders for

investigation and rehabilitation. The case was not deemed suitable to close until 2014. In *Neeraja Chaudhary v State of Madhya Pradesh* AIR 1984 SC 1099; (1984) 3 SCC 243, Bhagwati J began his judgment:

This is yet another case which illustrates forcibly what we have said on many an occasion that it is not enough merely to identify and release bonded labourers but it is equally, perhaps more, important that after identification and release, they must be rehabilitated, because without rehabilitation, they would be driven by poverty, helplessness and despair into serfdom once again.

Bhagwati J stated that in that case the labourers had no, or nominal, remuneration. Unlike the UK Wages Act, and perhaps because of its constitutional underpinning, the 1976 Act does not defer to the contractual bargain. It therefore continues to have purpose but suffers from significant under-enforcement.

Tiwari (a former civil servant who worked on this issue) also identifies widespread denial of the existence of bonded labour by States, which he terms 'abolition by redefinition'. Instead, the labour was described as 'attached labour', reading the relationship as relational rather than coercive. Here is another example of the advantage of the objective precision of the wage as an indicator. Interestingly, of the indicators in a list from Circular AC 9027/77-920 Dept of Labour and Employment, Bihar, the final indicator is *whether the daily wages given to the labourer are at par with prevalent wages for the same category of labour in the area and he is not paid less*. Tiwari ascribes this lack of identification to tension between a federally fixed law and the 'apathy' by the enforcers of the law: states. Tiwari's overall conclusion is that, despite significant interventions by the Supreme Court, the law remains 'a dead letter'. It is a law apart and has not been included in the Wages Code 2019.

Both the truck legislation and the Bonded Labour Act had the apparent merit of a targeted approach. However, both were ineffective. This appeared to be for two reasons. First, arguments over identification were put in the way of action. A focus on the relational quality of bonded labour or truck led to less, not more, identification. A modern methodology of in kind benefits would assess the value of the work (Anner: 294-305). This leads in turn to the wage. Second, the labour groups targeted were precisely those vulnerable people who were not able to organise and who relied on state enforcement, which was not present.

References to Annex

Blackburn S (2007) *A Fair Day's Wage for a Fair Day's Work?* Ashgate

Blackburn S (2009) Curse or Cure? Why was the enactment of Britain's 1909 Trade Boards Act so Controversial? *British Journal of Industrial Relations* 47: 0007-1080 pp 214-239

Cohn S (2007) After the Black Death: labour legislation and attitudes towards labour in late-medieval western Europe *Economic History Review*, 60, 3 ,pp 457-485

Frank C (2020) *Workers, Unions and Payment in Kind*, Routledge

Frank C (2020) Cashless Pay, Deductions from Wages, and the Repeal of the Truck Acts in Great Britain, 1945-1986 *Labor History* 61:2 :122-137.

Hilton GH (1960) *The Truck system including a history of the British Truck Acts 1465-1960*, Heffer, Cambridge, 1960, pp6-9.

International Labour Office (2005) *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement* ILO, Geneva

International Labour Office, (2009) *The cost of coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights to Work* (Geneva at p8-9)

International Conference of Labour Statisticians at the ILJ (2003, 17th ICLS) International Conference of Labour Statisticians at the ILJ (2008, 18th ICLS) International Conference of Labour Statisticians at the ILJ (2013, 19th ICLS) International Conference of Labour Statisticians at the ILJ (2018, 20th ICLS) ILO R198 (2006) ILO R204 (2015).

International Labour Office, *Global Estimates on Modern Slavery*

Parance B, Groulx E, (2018) Regards croisés sur le devoir de vigilance et le duty of care, *Journal du droit international (Cluent)*, doct. 2.

Selzer and Borland (2018) The Impact of the 1896 Factory and Shops Act on the Labor Market of Victoria, Australia *The Journal of Economic History* Vol 78 No 3 785-821

Tiwari, R.K. *Human Rights and Law: Bonded Labour in India* (Foundation Books, 2011)

p74 UN Committee on Social Economic and Cultural Rights

General Comment No 23 (2016) on the right to just and favourable conditions of work

General Comment No 24 (2017) on state obligations under ICESCR in the context of business activities

The City Law School
City, University of London
Northampton Square
London EC1V 0HB

T: +44(0)20 7040 3309

E: law@city.ac.uk



Email enquiries:
law@city.ac.uk



Telephone enquiries
+44 (0) 44 02 7040 5787



Find out more, visit
www.city.ac.uk/law

www.city.ac.uk/law