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Safe in Leicester Town?[1] Law's Reach to Those Working for Less Than the National Minimum Wage

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ABSTRACT

This article examines the origins of paragraph 2.42 of the guidance issued under the Modern Slavery Act 2015, which concerns identification. It traces the origins of this paragraph to a divergence of legal approach between the Supreme Court of India (SCI) and the International Labour Organisation on a presumption of economic coercion amongst those working for less than the legally mandated minimum wage. The approach of the ILO has since evolved, but its position in 2005–6 is reflected in paragraph 2.42. That which of the two approaches is taken matters can be seen in the response to wage conditions amongst garment workers in Leicester. The difference had two aspects: first, the characterisation of freedom or otherwise of those working for less than the minimum wage and second, responsibilities in law. It will be argued that the reasoning of the SCI provides a sounder starting point. The article will first consider relevant economic theories. Next, it will examine whether the guidance can legitimately prevent human rights law from drawing on breaches of labour law and how this affects responsibilities for fundamental labour rights. Following, UK national minimum wage law will be considered. Finally, amendment to the guidance is recommended, with practical illustrations.

1. INTRODUCTION

This article examines the origins of paragraph 2.42 in the statutory guidance to the Modern Slavery Act 2015 (MSA guidance) and argues for it to

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[1]William Shakespeare, Richard III, Act V, Scene V.

be changed. The paragraph concerns identification. It provides that 'forced labour cannot be equated (considered) simply with either working for low wages and/or in poor working conditions' or 'situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives'. First, the reaction to underpayment to Leicester's garment workers is taken to illustrate the ways in which the current guidance is deficient (2A). In the following section (2B), I examine the origins of the guidance. I discuss the reasoning in the judgment of the Supreme Court of India (SCI) in *People's Union for Democratic Rights and others v Union of India and ors* (the PUDR case),[2] the subsequent position of the ILO in 2005, which has been copied into the MSA guidance, as well as the evolution in the ILO position since 2005. I conclude that the MSA guidance now stands apart from the ILO in the position it has taken, that its approach fails to reach new forms of forced labour and explain why that matters (2C). In Section 3, I consider theories of free labour through economic theories of capabilities (3A) and of monopsony power (3B), contrasted with the theory of perfect competition and thus labour market freedom (3C). In Section 4, I consider the role and reach of law (4A), including over informal work (4B). In Section 5, I consider whether recent developments in the UK in mechanisms of enforcement will advance identification of forced labour. In Section 6, I consider the practical outcomes of amended guidance, taking as an example recent developments in Leicester. In Section 7, I conclude that the current approach misses a vital link between payment under the lawful minimum wage and a state of labour where freedom is not present. To remedy this deficiency, paragraph 2.42 of the MSA guidance should be removed.

Here, study of the reasoning of the apex court of another jurisdiction—in this case, the Supreme Court of India in the 1980s—is carried out because that reasoning led directly to an opposing position taken by the International Labour Organisation (ILO). The judicial reasoning was thus diverged from in policy guidance by the ILO and the UK Government. Neither the ILO nor the UK government are of course bound by the SCI. However, since the origins of forced labour lie in international law, the development of the doctrine from a court which was then clearly positioned in the Global South is used to shed light on the international standard. The two divergent approaches (SCI compared to the current UK) draw from differing theories of freedom, drawn, respectively, either from the economic theories of Amartya Sen and Joan Robinson or from a classical free-market

[2][1982] AIR 1473, 1983 SCR (1) 456.

approach. Next, competing views of legal categorisation are considered, using a socio-legal approach. Pre-existing empirical research into the pay conditions of garment workers in Leicester is drawn upon throughout, to illustrate the practical effects of the current guidance, and why it should be changed. In terms of future empirical research and practical application, consideration is given to how a new approach, stripped of the exclusion in paragraph 2.42 and based on a rebuttable presumption, might be developed.

2. WAGES AND FREEDOM

A. Wages for Garment Workers in Leicester

Wages and the bartering of labour are seen in the dominant—capitalist—framework, as the very mark of freedom, constituting a bright line from chattel slavery.[3] This bright line has come under strain from formulations of unfree labour, including debt bondage, forced labour and modern slavery, the umbrella term used in the Modern Slavery Act 2015. ln practice, wages are central to both free and unfree labour.[4] In 2017,[5] 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%) forced to work. This was followed by threats of violence (17%), acts of physical violence (16%) and threats against family (12%) depicted in Figure 1.

Pay and conditions are not isolated elements (a point already made in 1901 by the Webbs in *Industrial Democracy*[6]) and they intertwine in a downward spiral. But in this spiral, wages play a crucial part. As well as being of central importance, wages have the advantage of precise identification. 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 precision could offer a useful mechanism for formalisation and the identification of coercion through wages.

Instead, the very opposite has happened. The Government's guidance on modern slavery draws a hard division between low pay and modern slavery and

[3] Adam Smith, *Wealth of Nations* (London and Edinburgh: W. Strahan and T. Cadell, 1776).

[4] 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' (2021) 6(1) *BHRJ*, that wages are under-studied.

[5] *Global Estimates of Modern Slavery: forced labour and forced marriage* (ILO, 2017 Executive Summary) Accessed 18 October 2024.

[6] Beatrice and Sidney Webb, *Industrial Democracy* (London, printed by the authors for trade unionists of the UK, 1901), 773–784.

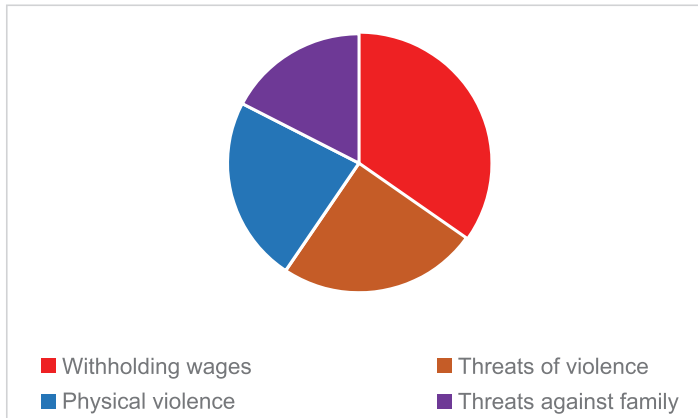

Figure 1: Forms of Coercion in Work (source: ILO).

thus on the one hand issues which are a matter for labour law alone and on the other hand issues characterised as for human rights or criminal law. The relevant paragraph (paragraph 2.42) was described in relation to work conditions in Leicester as 'crucial' for deciding that modern slavery was not occurring.

There have been many reports on the poor wages and conditions of garment workers in Leicester. In 2015, as the then Modern Slavery Bill was making its way through Parliament, the Ethical Trade Initiative (ETI) published commissioned primary research on garment work in Leicester.[7] Key findings in Chapter 4 are set out in Box 1.

The researchers concluded that it was not clear which tier of the supply chain benefited from these wage malpractices, which resulted in around £50 million a year in underpaid wages. 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' and to note at the very start of the Chapter that 'some of the problems discussed tend to be more associated with India, China and Southeast Asia'.

An article by an investigative journalist in 2018[8] reported poor pay and conditions amongst garment workers in Leicester. Since then, there has been

[7]Nikolaus Hammer, Réka Plugor, Peter Nolan, Ian Clark, 'New Industry on a Skewed Playing Field: Supply Chain Relations and Working Conditions in UK Garment Manufacturing. Focus Area: Leicester and the East Midlands' (Centre for Sustainable Work and Employment Futures, University of Leicester, 2015), 22–23, 43–48.

[8]Sarah O'Connor, 'Dark factories: Labour exploitation in Britain's Garment Factories'. https://www.ft.com/content/e427327e-5892-11e8-b8b2-d6ceb45fa9d0 Accessed 16 October 2024.

BOX 1

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

widespread attention on this sector in this city. On 30 June 2020, Labour Behind the Label published a report[9] 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 5 July 2020, the *Sunday Times* published an article by an undercover journalist who had got a job in a factory packing clothes destined for Nasty Gal, one of the Boohoo Group's brands, and had been told by other workers that he could expect to be paid as little as £3.50 an hour.

The widespread adverse publicity during Covid led Boohoo PLC to commission a report from Alison Levitt (then) QC, the open version of which was published in September 2020.[10] The report is a striking mix of extreme criticism of the practices of Boohoo and the lack of any deep consideration of law, with the conclusion there was no modern slavery occurring. That was despite evidence of exploitation in wage levels and in methods of calculation, as the Levitt report itself recorded:

> 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

[9] https://labourbehindthelabel.org/report-boohoo-covid-19-the-people-behind-the-profit/ Accessed 18 October 2024.

[10] Levitt, *Independent Review into the boohoo Group PLC's Leicester Supply Chain*, Open Version, https://www.business-humanrights.org/en/latest-news/independent-review-into-the-boohoo-group-plcs-leicester-supply-chain/, Accessed 18 October 2024.

> 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.[11]
>
> …
>
> 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.[12]

Levitt went on to identify the lack of any formal supply systems, since '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. Subcontracting 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 the future, it should aim to have a direct contractual relationship with those who make its clothes'.[13] It is not clear whether, by makers of clothes, Levitt meant the suppliers or the workers.

The issue of payment under the minimum wage was examined by Levitt with plentiful evidence that it was 'commonplace'.[14] However, instead of examining further the mechanisms of underpayment as this article has sought to do, the issue is left to the later Chapter 7, where Levitt says that she will only examine liability under criminal law.[15] She does discuss whether

[11] Levitt, (n10), 42.
[12] Levitt, (n10), 210 Accessed 3 January 2025.
[13] Levitt (n10), 214 Accessed 3 January 2025.
[14] Levitt (n10), 116–119 Accessed 18 October 2024.
[15] Levitt (n10). 193 Accessed 18 October 2024.

freedom to choose is in fact illusory,[16] but does not reach any conclusions on the data she sets out. Equally, she describes monopsony power but does not say that is what it is. On the issue of breach of the national minimum wage (NMW), she concludes that even if factory owners have committed offences, there is no suggestion Boohoo 'conspired' with them. She concludes[17] that there is 'no evidence in this case which would establish even a *prima facie* case of modern slavery'. In so doing, she quotes—for her 'crucially in this context'—paragraph 2.36 [*sic*—at the time paragraph 2.38, now paragraph 2.42] of the statutory guidance under the Modern Slavery Act 2015.[18] That section of the guidance is set out in Box 2 below.

BOX 2

2.39. As with other forms of trafficking-related exploitation, a high level of harm and control or coercion is needed to trigger the UK's obligation under the Council of Europe Convention on Action against Trafficking in Human Beings.
2.40. Forced labour represents a severe violation of human rights and is a restriction of human freedom. The International Labour Organisation (ILO) defines forced work as: 'All work or service which is exacted from any person under the menace of any penalty and for which the person has not offered himself voluntarily'. However, there are five exceptions. See 'Forced labour exceptions'.
2.41. This definition is a useful indication of the scope of forced labour for the purposes of human trafficking. In Siliadan [sic] v France 2005 (Application no. 73316/01), the European Court of Human Rights took this as the starting point for considering a forced labour threshold and held that for forced labour, there must be work: 'exacted under the menace of any penalty which is performed against the will of the person concerned, that is, for which the person has not offered themselves voluntarily'.
2.42. Forced labour cannot be equated (considered) simply with either:

- working for low wages and/or in poor working conditions
- situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives.

[16] Levitt (n10), 120–121 Accessed 18 October 2024.
[17] Levitt (n10), 204–205 Accessed 18 October 2024.
[18] Issued under s49 of the Modern Slavery Act 2015. Now in the same terms in Version 3.11 at para.2.42 https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims/modern-slavery-statutory-guidance-for-england-and-wales-under-s49-of-the-mod

Why did the drafters of the guidance feel it necessary, amid a section on identification, to set out this single example of what forced labour is not? As required by the MSA itself,[19] the term modern slavery is to be construed in accordance with Article 4 of the European Convention on Human Rights and Fundamental Freedoms, and through it the ILO Convention 29 on forced labour. The guidance appears at the end of a section headed 'Trafficking: exploitation—forced labour'. Elsewhere[20] there is a correct reference to the relevance of the victim feeling they have no viable alternative in light of physical or psychological coercion under the heading 'forced or compulsory labour (victim not trafficked)'. Yet in paragraph 2.42 what is forbidden to the decision-maker is equation or even consideration (ie use as an indicator, thereby undermining the effect of indicators) of low pay or the worker feeling unable to leave a job for economic reasons. The guidance is issued to public authorities and other persons who might make relevant decisions on the sort of things which indicate that a person may be a victim of slavery[21] and also steers the arrangements to be made to determine whether someone is a victim of slavery.[22] Key for present purposes, paragraph 2.42 reflects a rejection of any link between low pay and forced labour. It repeats a 2006 position from the ILO word for word even though the approach of the ILO itself has since evolved and even though the context has moved from the international plane to the specificity of national law. It will be argued that this guidance is stripped of any recognition of the effect of economic power and powerlessness. This guidance may be revised from time to time[23] and this article argues for the deletion of the paragraph.

B. The Source of the Guidance: A Disagreement

The presence of this single paragraph can be traced back to a disagreement—implied if not expressed—between the SCI and the ILO. The starting point is the 1982 judgment of the SCI in *People's Union for Democratic Rights and others v Union of India and ors.*[24] The issue before the court,

ern-slavery-act-2015-and-non-statutory-guidance-for-scotland-and-northe#identify Accessed 18 October 2024.

[19] Section 1(2)

[20] Para.2.81.

[21] Section 49(1).

[22] Section 49(1)(d).

[23] Section 49(4).

[24] (Above) n2.

which came to it in its original (not appellate) jurisdiction, was exploitation of construction workers who had come from across India to work in Delhi on the 1982 9th Asiad Games. The non-governmental organisation bringing the case had commissioned investigations of the conditions of work. The case is often cited for its recognition of public interest litigation, but the focus here will be on its approach to whether or not workers who were paid under the minimum wage had been subjected to forced labour such that their treatment offended not only against the Minimum Wage Act 1948 but also against Article 23 of the Indian Constitution.[25] The factual finding was that 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.

The position taken by the respondent government was that this was a breach of the minimum wage legislation, not the Constitution, and that any remedy lay against the employers. Rejecting this, Bhagwati J held that constitutional principles were engaged. At paragraphs 487–488, he 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 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'.*[26]

[25] Article 23(1): Traffic in human beings and the beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.

[26] Emphasis added.

Decades later, ILO guidance published in 2005 took a different approach. It had the stated aim of providing lawmakers and law enforcement authorities with practical aid to understand and implement relevant standards and to take action accordingly. The publication stated crisply, 'the failure to pay the worker the statutory minimum wage does not constitute forced labour'[27] and 'the state or "a particular employer" cannot be held accountable for all external constraints or indirect coercion existing in practice'.[28] In 2006,[29] this statement was repeated and the guidance at paragraph 2.42 is self-evidently copied from the first part of this 2006 statement:

> 23. Forced labour cannot be equated simply with low wages or poor working conditions. Nor does it cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives. Forced labour represents a severe violation of human rights and restriction of human freedom, as defined in the ILO Conventions on the subject and in other related international instruments on slavery, practices similar to slavery, debt bondage or serfdom.

Light has since been shed on the context of the position taken in 2005–6, by the report's co-ordinator at the ILO.[30] Plant explains that the aim of the report writers was to distinguish between state-imposed forced labour and trafficking by private actors for exploitation. The reports were written in the wake of the 2000 UN Convention against Transnational Organized Crime[31] and its Protocols, which emphasised the criminal nature of trafficking for exploitation. Plant argues that the term 'exploitation' in the UN Convention resulted in the ILO seeking to distinguish this from forced labour under C029.

[27] International Labour Office, *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement* (2005) ILO Geneva, 19.

[28] ILO (n27), 22.

[29] International Labour Office, A Global Alliance against forced labour Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2005, ILO, 93rd Session, Report I (B) Geneva.

[30] Roger Plant, 'Combating Trafficking for Labour Exploitation in the Global Economy: The need for a differentiated approach' in Prabha Kotiswaran (ed.), *Revisiting the Law and Governance of Forced Labor and Modern Slavery* (Cambridge: CUP, 2017), 422–442. By 2017, Plant is arguing for recognition of newer forms of coercion and exploitation including a move away from focus on state-imposed forced labour. Plant refers to unspecified 1980s caselaw of the Supreme Court of India at 432 as an approach to bonded labour. At 431 he describes 'long standing coercive practices linked to poverty and discrimination' as 'unfinished business'.

[31] UN Convention against Transnational Organized Crime Adopted by UN Assembly 15 November 2000, entry into force 29 September 2003 https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html Accessed 27 October 2024.

An evolution in the ILO position can be seen by 2009, where a sharp line of distinction has given way to recognition of a link between forced labour and labour exploitation and 'a very thin dividing line between coerced and non-coerced exploitation':[32]

> …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.*[33]

In 2012, the ILO published indicators of forced labour, used to assist identification by 'criminal enforcement officials, labour inspectors, trade union officer, NGO workers and others', that is to say across the fields of criminal and labour law. Withholding of wages is an Indicator of forced labour. It is true that a note of limitation is struck: 'irregular or delayed payment does not automatically amount to a forced labour situation'.[34] This is clearly discussing time of payment, not level. Debt bondage, dealt with separately, is said to represent 'an imbalance between worker-debtor and employer-creditor'. There is no reference to imbalance as regards wages. The fact remains that withholding of wages, not limited to complete withholding, is an indicator. The significance of an approach guided by indicators is that, while not conclusive in themselves, they trigger further investigation. In this regard, they resemble a presumptive approach. The difference and similarities between the two approaches is discussed later. An even more fundamental shift was signalled in 2014, with the adoption of a Protocol to C029.[35] Through its Article 2, the Protocol emphasised the need for preventive action. This signalled a move towards a human rights approach,[36] in other words, a move, albeit in interpretation of the same basic instrument, to a victim-centred structural, protective approach rather than a penal approach focused on state-criminal law.

[32] International Labour Office, *The cost of coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights to Work* (Geneva: ILO, 2009), 8–9

[33] Emphasis added.

[34] https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang--en/index.htm (2012) Accessed 18 October 2024.

[35] P029—Protocol of 2014 to the Forced Labour Convention, 1930. Ratified by the UK on 22 January 2016. Date of entry into force 9 November 2016.

[36] Beate Andrees and Amanda Aikman 'Raising the Bar; The adoption of new ILO Standards against Forced Labour' in Kotiswaran Op Cit n.26, 359–394 at 383–386.

More recently, in 2018, the 20th International Conference of Labour Statisticians issued Guidelines concerning the measurement of forced labour. Applying C029, involuntary work is stated to include 'work with very low or no wages'.[37]The focus of the ILO has therefore sharpened onto low-level wages and its approach has progressed beyond the 2005 and 2006 statements, the latter of which has however been copied mechanically into the MSA Guidance. The final relevant development is that in 2019 the Centenary Declaration[38] called on members to ensure an adequate minimum wage, statutory or negotiated, as part of decent work. The ILO has a limited number of Conventions on wages[39], none of which form part of the 1998 Declaration, and none of which claim to guide the level of a wage by any reference to dignity or security. Recognition of a decent wage as a fundamental right does not bypass debates on free and forced labour but brings them into sharper focus. If someone's right to a decent level wage is being breached, that brings into clearer question the freely given quality of their labour. In practical terms, this means investigation and 'a prima facie case' (the term used by Levitt in her report for Boohoo PLC).

In February 2024, the ILO Meeting of Experts indicated a future focus on the living wage, with the development of instruments in an area where the ILO has not yet acted.[40] An ILO report in March 2024[41] makes clear the link between underpayment of wages and economic coercion giving rise to forced labour:

[37]ICLS/20/2018/3 https://www.ilo.org/sites/default/fiels/wcmsp5/groups/public/@dgreoports accessed 27 October 2024, at 2. Guidelines concerning the measurement of forced labour 5(d).

[38]International Labour Conference ILO Centenary Declaration, 2019, www.ilo.org accessed 18 October 2024

[39]ILO C026—The Minimum Wage-Fixing Machinery Convention (1928) 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 was supplemented in 1970 by ILO C0131—the Minimum Wage-Fixing Convention. Although C0131 refers to the problem of low wages and problem countries, it simply requires that wages be appropriate to the needs of workers and their families and to economic factors. The reference to wage-fixing machinery reveals the ILO's focus at the time on collective bargaining, and this is made explicit in ILO Recommendation R135—Minimum Wage-Fixing Recommendation, which was also agreed in 1970. In the meantime, C095—Protection of Wages Convention, 1949 and its recommendation R085—Protection of Wages Recommendation, 1949 (denounced by the UK in 1983) were concerned with the protection of freedom of the wage and restrictions on that freedom.

[40]https://www.ilo.org/gb/GBSessions/GB350/pol/WCMS_918004/lang--en/index.htm accessed 18 October 2024.

[41]ILO, *Profits and Poverty: The economics of forced labour* (ILO Geneva, 2024) https://www.ilo.org/publications/major-publications/profits-and-poverty-economics-forced-labour at p9.

> In situations of forced labour, underpayment of wages can take various other forms in addition to paying workers less than the statutory minimum wage, including failing to provide overtime pay when required, violations of other wage-related regulations and illegal deductions for recovery of recruitment fees and related costs. In some instances, the underpayment of wages involves workers being denied payment of wages altogether. In some forced labour contexts, wages are systematically and deliberately withheld as a means to compel the worker to remain in the workplace and to deny them the opportunity to change their employer.

What has been the fate of the 1982 SCI case? Bhatia[42] characterises the *PUDR* case as 'the road not taken': distinguished but remaining full of potential. Since Bhatia wrote, the SCI has adopted a similar approach to *PUDR* in *Gujarat Mazdoor Sabha and anor v The State of Gujarat,* Writ Petition (Civil) N.708 of 2020.[43] During the Covid pandemic, a number of states issued general exemptions under the Factories Act 1948, purporting to do so to attract inward investment and revive economic activity, and thus suspending labour legislation including on the minimum wage, on overtime and on working hours. The exact provisions suspended varied from state to state. The suspension by the State of Gujarat was challenged before the SCI by *Gujarat Mazdoor Sabha*, a federation of registered trade unions. The State of 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 SCI (DY Chandrachud) ruled that the ordinance was ultra vires, rejecting the submission that the blanket exemption from labour laws was necessary to maintain production.

The SCI 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, made significant departures from the mandate of the Factories Act, involving increasing the daily limit of working hours from

[42]Gautam Bhatia 'The Freedom to Work: *PUDR vs Union of India* and the meaning of "Forced Labour" under the Indian Constitution', online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3094640 (posted, 2018) accessed 18 October 2024.

[43][2020] 13 SCR 886

9 hours to 12 hours; the weekly limit from 48 hours to 72 hours; diminishing rest hours and removing overtime wages at the rate mandated by statute.[44] At paragraph 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 engage the Constitutional Directive Principles, which Indian states have the duty to apply.[45] The discretion given to the state 'did not permit destruction of the worker's *economic dignity* [emphasis added] 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*. [paragraph 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 worker's 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. [paragraph 44][46]

In the *Sabha* judgment, the SCI links specific statutory guarantees to more fundamental rights, including the prohibition on forced labour under Art 23 of the Indian Constitution. The constitutional human rights guarantee underpins the specific guarantee provided by labour law. The Court did not cite *PUDR*. The one case concerned suspension of the specific law, the earlier concerned lack of enforcement. But, it is argued here, in both cases the wider law is deployed to underpin the specific law. The approach of the SCI in 1982 still stands as the approach of the SCI in 2020. On the other hand,

[44] S.59 Factories Act 1948. The Factory Acts have now been replaced with four Labour Codes, including a Wages Code: https://labour.gov.in/labour-codes Accessed 10 November 2024.

[45] Art 37, Part IV, The Constitution of India. Art 39(a) sets the policy aim of adequate means of livelihood.

[46] Emphases added.

the stance of the ILO in 2005–6 has evolved, and thus paragraph 2.42 of the MSA guidance copies a stance which has since changed.

C. Issues Raised by the Difference of Approach

The judicial reasoning in the *PUDR* case is more subtle than is acknowledged in the early ILO statements set out above. Being paid below the legally mandated minimum wage, says the Court, can give rise to a presumption that labour is forced. Where someone is giving their work for less than the wage they are entitled to claim under the law, the presumption is that they are working under some compulsion. That presumption may be rebutted by, for example, evidence of freely given work for kinship or evidence that neither the worker nor the giver of work were aware of the legal minimum (though this second example is more fragile since ignorance of the law is no excuse for the employer. Legal empowerment of the poor will be discussed later). But it attracts investigation. As a method of avoiding unjustified exclusion from legal protection, this is seemingly unexceptional.[47] In contrast, the early guidance by the ILO, and the current MSA guidance take an approach which divorces the specific guarantees of labour law from wider law. On the MSA guidance *low wages and/or poor working conditions* are excluded from consideration. Something more is needed: low and poor are not enough. The same perspective underlines the second exclusion: that of *pure economic necessity*. This is excluded even if there is *a real absence … of employment alternatives*. These exclusions are wide. If the real absence of employment alternatives (such as a sole or dominant employer in town) is exploited so as to lower wages, this cannot, on the guidance, amount to forced labour unless some other force is at play—since a perceived absence of choice is also excluded, this would have to be physical force. Economic compulsion may take place outside the bounds of that relationship, but it does not affect that characterisation of waged labour as involving free agents. Equally, the minimum wage is reduced to a contractual responsibility. No presumptions arise when work is done for less than the lawful minimum. Underpinning this divergence is a differing vision of freedom. The court from the Global South views the wage firmly rooted in its socio-economic context. The narrow vision in the current UK guidance defers to the formal freedom of the wage-work bargain.

[47]See, for the use of a legal presumption, Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work Directive Preamble (31) and Article 5.

Why does this matter? In the UK, failure to pay the minimum wage can be enforced by the state under civil or even criminal law. Is this not simply a question of effective enforcement? It is true that enforcement of the minimum wage is, as was intended, through a wide array of possible state actions. But none of the enforcement methods involve prevention, or directly address the drivers of economic coercion. Further, it will be argued, in this second view of freedom and the wage, the law is unable to understand, let alone tackle, the unregulated sector where this breach of the law takes place, because the dynamics there do not match the paradigm bargain in the formal sector. Thus, the difference of approach on this one issue reveals deeper differences of approach to both economics and law. Economic analysis of the dynamics present in work done for less than the minimum wage is considered first.

3. ECONOMIC PERSPECTIVES

A. Freedom by Rational Choice or Capabilities?

The *PUDR* case (in 1982) is close in time to the first development by Sen (in 1979) of his criticism of rational choice through the capabilities approach. The same approach to freedom can be seen in both.[48] Sen later refers to his work on capabilities as 'a positive characterisation of freedom' and which he suggests could equally validly be called power.[49] He compares this with a negatively defined freedom in which unless someone is prevented from seeking a higher wage, he remains a free agent.[50] Sen himself recognises the implications for theory of rational choice.[51] The possible impact of Sen and Nussbaum's capabilities approach for labour law in general have already been recognised or refuted, analysed, and thoroughly discussed.[52] Sen's insight for present purposes is the radically different view of freedom which emerges from the socio-legal world of the Global South,[53] for example, the

[48] Amartya Sen, *Equality of What? The Tanner Lecture on Human Values* May 22, 1979; *Development as Freedom* (Oxford: OUP, 1999).

[49] Amartya Sen, 'Freedom of Choice: Concept and Content, Alfred Marshall Lecture' *European Economic Review* 32 (1988) 269–294, at 273.

[50] Sen (n49), 272–273.

[51] Sen (n49). 289–293.

[52] Brian Langille (ed) *The Capability Approach to Labour Law* (Oxford, OUP, 2019).

[53] Used in the sense intended by Antonio Gramsci in *La Questione Meridionale* (The Southern Question) (Torino, Ordine Nuovo, 1920) as an extractive relationship between North and South (in that case of one country).

daily wage labourer having to come into work during communal riots. It is an insight into restricted freedom exemplified in 2013 in the Rana Plaza calamity, 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 Capability Approach 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'.[54] Capability theory has recently shaped work of the UNDP.[55]

Capability theory may be broken down into 'at least three' components: individuals' resource endowments, capabilities (what they actually have the freedom to do), their economic functioning and conversion factors (how their capabilities are enabled).[56] Functionings differ from preferences in the classical economics model, the writers argue. It could be added that this takes one back to capabilities, in that the choice of the individual is governed by the actual capabilities they have. Deakin and Wilkinson observe[57] that the 'high level of generality and theoretical abstraction' of the capability theory as formulated by Sen and Nussbaum lends itself to 'adaptations which may be far from Sen's initial formulation' and draw attention to Sen's lack of a judicial theory. They discuss the role of capabilities 'as substantive economic freedoms' in the development of a theory of social rights. They argue, subject to a relevant judicial theory, that a capability approach would justify a wide range of interventions. In this article, it is argued that the capability approach allows for more sensitive and protective identification of forced labour, whereas voluntarism and a market-based approach simply fails to reflect the position of actors who lack resource endowments and whose capabilities are thus reduced. Deakin and Wilkinson point, for

[54] In Brian Langille 'What is Labour Law? Implications of the Capability Approach', in Langille (ed.), n. 52, pp. 123–140, at p. 138.

[55] http://hdr.undp.org/en/content/if-we-conceive-development-freedom-inequality-imprisonment accessed 18 October 2024

'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 18 October 2024).

[56] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: OUP, 2005), 275–353. See also Simon Deakin 'Competition, Capabilities and Rights' in Langille (ed) n. 52.

[57] Deakin and Wilkinson (n56), 347.

example, to the importance of the labour law in improving the capabilities of women with children.[58] The view of freedom in the *PUDR* judgment draws on this theoretical vein of capabilities. In the opposite theoretical corner is belief in a free labour market, in which equilibrium is reached through perfect competition. Competition also underscores the characterisation of wage (or other) exploitation by the bad employer. Competition and the work of another economist, is the issue to which we now turn.

B. Perfect or Imperfect Competition?

To the neo-classical economist, work for wages at below the minimum simply reflects local market conditions. It does not cloud the vision of a freely-entered-into wage-work bargain. 'Employers offering wages below the market-clearing wage will not be able to hire workers, and workers with a too-high reservation wage will not be able to find employment'.[59] The market-clearing wage is the point at which supply of labour and demand for labour reach equilibrium.

The relevance of monopsony[60] power to labour markets and wage levels, simply put, is that where there is a single buyer (monopsony), or a very limited number of buyers (oligopsony) purchasing goods or services, the rational behaviour of the buyer is to set the value of the good or service at a lower level than would be the case in perfect competition. Thus, the lower wage which results, lower than would result from a perfectly competitive market, is the product of this structural feature in the market. Manning[61] describes the 'asymmetry of economic power' as cured by the ability to exit as opposed to bargaining. The theory of monopsony has implications throughout the labour market, for example in studies of rising inequality.[62]Manning considers minimum wages to provide 'some protection' for those at the bottom of wage distribution and 'rising monopsony power' to have resulted from the 'decline' of the 'institution' of the minimum wage.[63]

[58] Deakin and Wilkinson (n56), 286.
[59] Deakin (n56), 147.
[60] Joan Robinson *The Economics of Imperfect Competition* (London: Macmillan, 1933; 2nd edition, London: Macmillan, 1969).
[61] Alan Manning 'Monopsony in Labor Markets: A Review' *ILR Review* 74(1), January 2021, 3–26.
[62] Manning (n61), 2.
[63] Manning (n61), 21.

Robinson's work has achieved great prominence in Global South-orientated scholarship. Its relevance to the asymmetry of economic power between big business buyers from the Global North and small businesses in the Global South and their workers has been recognised and applied, with case studies on denim production in Gujarat on how big suppliers in the garment sector have reduced monopsony power and consequent 'transformation of relations in the sector between buyers and sellers, producers and customers, and workers and bosses'.[64] Kumar observes that with the reduction in monopsony power resulting from consolidation of sellers, the 'elimination of middlemen' and the creation of 'full-package suppliers', 'the buyer-driven character of the value chain gives way to a kind of buyer-producer symbiosis'. He argues that this in turn enables workers to make demands on their employer (who now has economic strength) rather than the buyer (previously the monopsonist). Implicit in this conclusion is that the employment relationship enables greater voice. The example given is a successful campaign by workers to stop closure and relocation elsewhere.[65] In contrast, where the employer is weak, for example, because a low price per garment has been agreed, demands by workers are futile if aimed at a higher wage. This results from fissuring and an increasingly inequality between large and small companies.[66] Kumar recognises the weakness in a wholly employer-based strategy, as brands have been seen to prioritise the relationship with the seller company over the demands of the workers for those companies.[67]

C. Exit or No Exit?

Even with freedom restricted through reduced capability and subjection to monopsony power as sketched out above, can it not be said that exit provides the worker with freedom? This exit is said to be created by increasing the mobility of individuals on the labour markets. This theory is already answered by the analysis based on capabilities and monopsony power in the market.

[64] Ashok Kumar *Monopsony Capitalism, Power and Production in the Twilight of the Sweatshop Age* (Cambridge: CUP, 2020), 120–143.

[65] Kumar (n64),130–131.

[66] For a law and economics approach on the double impact of monopsony power business-business and business-worker and the significance of employee-replacement options, see Cynthia Estlund 'Losing Leverage: Employee Responsibility and Labour Market Power' (2023) 90 *University of Chicago Law Review* 437–468, at 441–442.

[67] Kumar (n. 64), 138.

As Menon[68] points out, theory of mobility unthinkingly applied to informal workers is meaningless. It is even more meaningless in a market dominated by monopsony, such as the Leicester garment sector. Exit onto the labour market, the vaunted mobility, is unemployment. The lower wage is accepted, even if it leads to in-work poverty. A demonstration on Spinney Hill on 1 October 2023 in Leicester by garment workers has focused on the fear of unemployment.[69] This was answered by the ILO in 2005–6 by restricting employer responsibility for wider labour market factors such as poverty and unemployment. But if the lower wage offered is caused by a wider economic factor (monopsony power), why should the economic reason for acceptance of that low wage not be relevant to assess worker freedom? Assuming in this context that the wage-work bargain is a sealed and level playing field can only be done by setting aside the economic perspectives just discussed and applying rational choice theory. For the employer, however, or at least the monopsonist, it is true that freedom to exit, in search of workers who will work for a lower wage, does remains real freedom. Rational choice remains a theory applicable to employer conduct. But economic theories of capabilities and monopsony power appear, persuasively speaking, to outweigh theories of rational choice and perfect competition in creating an understanding of restricted freedom amongst those who work in poor conditions for low pay. These divergent theories stand behind the difference between the approach of the current guidance and the jurisprudence, traced above.

The role of law is now analysed.

4. THE ROLE OF LAW

A. Labour Law and Loss of Freedom

The focus of this section is the challenge to labour law presented by work which is done for less than the entitlement set by law. Passing over the view that the role of law is simply to facilitate the economic mechanisms resulting in low wages,[70] the debate here instead focuses on the role of different categories of law in the response to unlawfully low wages. One view assumes more

[68] Nikhila Menon, *Mobility as Capability: Women in the Indian Informal Economy* (New Delhi, CUP: 2020).

[69] https://tribunemag.co.uk/2023/10/we-cant-eat-we-cant-feed-ourselves-leicesters-garment-workers-have-had-enough-2023 accessed 19 October 2024.

[70] See the website of the Coase-Sandor Institute for Law and Economics, https://www.law.uchicago.edu/coase-sandor accessed 21 October 2024.

or less free labour with a greater or lesser degree of exploitation (dealt with in labour law). The second assumes a loss of freedom of the worker (dealt with in human rights law, criminal law, constitutional law). It might be said that the position of the SCI was simply a reflection of its jurisdiction as a constitutional court, and that the original position of the ILO resulted from its being a work-focused tripartite agency. Context is key, but in so far as the MSA guidance paragraph 2.42—drawing on the divergent approaches—seeks to prevent considerations under the first area of law (labour law) giving rise to considerations under the second (human rights, criminal, constitutional law), it will be argued here that that is wrong, for reasons now discussed.

Recent labour law theory moves beyond the bilateral employment relationship to focus on 'structural injustice'.[71] This structural injustice may arise from positive intervention by the law, which results in unfreedom, or exclusion from protection which also results in injustice or unfreedom. Because of the role of law, this may properly be characterised as 'state-mediated injustice'. As Mantouvalou observes, 'focus on individual [employer] responsibility is, therefore, insufficient when dealing with structures of exploitation for it obscures a major source of the wrong'.[72] The achievement of the Supreme Court of India in *PUDR* lies in the liberation of the wage exploitation in that case from the narrow boundaries of the employment relationship. Mantouvalou's criticism of a limited perspective on 'bad apple' employers leads her to consider the effects of, and gaps in, legal frameworks. Mantouvalou's insight into labour law's boundedness by the employment relationship and employer responsibilities usefully captures the limitation of the approach of the MSA guidance. In the light of this insight, *Low wages, Poor working conditions, Pure economic necessity, real or perceived absence of employment alternatives*, are no longer external to the employment relationship or irrelevant to the characterisation of labour extracted through that relationship. A world of questions about labour law and its reach is opened up.

A range of writers argue against a binary framing of free/unfree labour. More specifically, Fudge[73] contends against a general theory of unfree labour

[71] Virginia Mantouvalou *Structural Injustice and Workers' Rights* (Oxford: OUP, 2023); see also, Virginia Mantouvalou 'Structural Injustice and the Human Rights of Workers' (2020) 73 *Current Legal Problems* 59–87, and Philippa Collins *Putting Rights to Work* (Oxford: OUP, 2022).

[72] Mantouvalou (n72), 8.

[73] Judy Fudge '(Re) Conceptualising Unfree Labour: Local Labour Control Regimes and Constrains on Workers' Freedoms' (2019) 10 *Global Labour Journal* 108–122 at 116–118; Judy Fudge, 'Modern Slavery, Unfree Labour and the Labour Market: Social Dynamics of Legal Characterization' (2018) 27 *Social & Legal Studies* 414–434, at 424–5.

or a continuum, instead arguing that constraints can be better identified through specific local labour control regimes, being interactions between commodification, exploitation, and disciplining. She argues further that the assignment of 'unfree labour' in a process of legal characterisation under the MSA betrays a neo-classical view of labour, forefronts criminal law as the best category to address instances, and sidelines the role of labour law. Adams[74] argues that characterisation of modern slavery serves to fortify a view of other labour as free, and that it divides law into labour law (to deal with free labour) and human rights and criminal law (to deal with unfree labour). Adams rightly criticises the 'dichotomy'[75] which she identifies between free and unfree labour given the subordination within the work relationship. Her overall argument is[76] that labour law is constitutive of dominant economic patterns. This is true, and has been said of colonialism as well as capitalism.[77] However, here, the characterisation of economic coercion and its effects is provided by economic perspectives. Further, capability theory does anticipate that freedom, in the sense of having some economic power to do the things valued by oneself, can be promoted through legal reform. As to the role of law, the core labour law principle of inequality of bargaining power prevents characterisation of a level playing field even for those paid at lawful levels. The issue here is whether wages at this unlawful level require a more fundamental legal characterisation and one which indeed concerns force/freedom. To the extent that the modern slavery umbrella term is restricted to physical coercion and masks the economic power inequalities of capitalism, Adams' criticism of a facile free/unfree distinction is not disputed. Cruz[78] also criticises the focus on rights rather than power in the context of sex work. Cruz argues that capitalist relations of re production are gendered, racialised and legal.[79] Free labour, she concludes, exists where waged and unwaged labour is embedded in a system of labour and social rights and protections.[80]

[74] Zoe Adams 'From Prevention to Empowerment: A New Model for UK Labour Law' (2024) 53 *ILJ*, 577–612.
[75] Adams (n74).
[76] Zoe Adams *The Legal Concept of Work* (Oxford: OUP, 2022).
[77] Mahatma Gandhi famously concluded 'the greatest injury (lawyers) have done to this country is that they have tightened the English grip'. MK Gandhi *Hind Swaraj* (Ahmedabad: Navajivan Publishing House, 1909) Chapter 9.
[78] Katie Cruz, 'Beyond Liberalism: Marxist Feminism, Migrant Sex Work, and Labour Unfreedom' (2018) 26 Feminist Legal Studies 65–92.
[79] Cruz (n. 78), 70.
[80] Cruz (n. 78), 72.

Relative definitions of unfree labour may emerge from radically different labour markets and economics.[81] Stanziani[82] has traced the interaction between the ending of chattel slavery, the Master and Servant Acts, and the rise of indentured labour across the Indian Ocean. In his analysis, the loss of freedom in the one place (for example in the Master and Servant Acts), facilitated the extreme constraints in indentured contracts. Stanziani closely analyses how legally constructed worker freedom diverged across Global North and South as the use of indentured labour contracts spread. Freedom in work is constructed under different historical lights.

The conclusion here is that there is indeed a valid legal formulation of unfree labour. It is one that benefits from specificity of the particular constraints of commodification, exploitation and disciplining, not from broad umbrella terms. It has qualities which are different from the subordination and control and extraction which are elements of the legally constructed employment relationship. Thus, coercion rather than exploitation, with its focus on limitation of choice rather than positive freedom, is a better focus, where the capital-labour relation is inherently exploitative. Central to identification is a capabilities analysis of freedom (for the worker). Central also is the bright precise line of minimum law and thus, regulation by labour law. As the Supreme Court in *PUDR* asks, why else would a worker give up a basic legal right if not from lack of social or economic freedom? Rights at work may not be power, but a lack of assertion of a legal right reveals the possibility of a lack of power.

Very low wages are in any case a breach of a human right. The recent focus of the ILO on levels of wages has been set out above. Reference to wage as a human right already appeared in human rights instruments. 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

[81] Judy Fudge, 'Modern Slavery, Unfree Labour and the Labour Market: n. 73.

[82] Alessandro Stanziani *Les métamorphoses di travail constraint: Une histoire globale XVIII-XIX siècles* (Paris: Presses d Sciences Po, 2020); Alessandro Stanziani *Labor on the Fringes of Empire: Voice, Exit and the Law* (New York: Palgrave Macmillan, 2018)

to those enjoyed by men, and remuneration which provides all workers, as a minimum with a decent living for themselves and their families. All these provisions underline the seriousness of unlawfully low wages. This is not to open up any breach of labour law (eg failure to pay a bonus) to reformulation as a loss of freedom, but to prevent unnecessary silos of law. Equally, it might be said that working below the minimum wage can be challenged using wage-based human rights instruments for just and favourable remuneration. This would reduce the analysis on freedom to an irrelevant *why*. Instead, it is a key element in analysis of worker power. Finally, human rights are *indivisible* and a breach of one may also be a breach of another. For this reason, the fact that 'just and favourable remuneration' is a human right also serves to underline its importance when considering free and unfree labour.

The final argument to be made is that legal identification of structural injustice requires allocation of responsibility beyond the narrow bounds of the employment relationship. Where the injustice is state-mediated, the state is the focus as creator of the structure (as well as its underlying role as creator of the legal framework). When tracing structures of injustice which are economic in nature, the responsibility of those wielding economic power must be considered. Here a distinction might be drawn between the political power of the state and the economic power of business, for example down a supply chain or in dominance of a market, as well as in its subordination of direct workers. In the Indian state of Rajasthan, workers use the word जिम्मेदार (Jawabdehi) when discussing the responsibility of the state while जवाबदारी (Jimmeddari) is used when workers discuss the accountability of their employers.[83] Other formulations might be between forward-looking responsibility and backward-looking responsibility, or prevention and remedy, or simply a duty of care. How might that responsibility take form? Voluntary contractual guarantees between buyer and supplier are a blunt way of ensuring a free wage.[84] Contractual practices vary and may be amended by the parties as they see fit to allocate risk. Indeed, Goudkamp[85] argues that the risk allocation in contract prevents a duty of care arising.

[83] Thanks to Shruti Iyer for this distinction at the SLSA Conference 2024.

[84] The UK Government declined to follow the JCHR 2017 recommendation that recognition of unions could be required in supply contracts, stating: 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.

[85] James Goudkamp 'Duties of care between actors in supply chains', (2017) 4 *JPI Law* 205–211.

But where the right is defined as fundamental, the law is moving towards a duty of due diligence down supply chains, opening up the responsibility beyond the immediate employer.[86] In that framework, joint liability[87] beyond the employment relationship is envisaged.[88] The developing body of hard and soft law on business and human rights identifies some form of accountability or responsibility (due diligence or duty of care) of companies for adverse impacts on human rights of business activities of subsidiaries and along supply chains.[89] In the UK, the conversion from modern slavery statements based on transparency to due diligence now has the support of a recommendation made by the Modern Slavery Act 2015 Committee.[90]

B. Labour Law and Informal Work

The narrow approach of paragraph 2.42 can also be criticised for applying assumptions drawn from formal work to informal work. The legal edifice built from protection of formal factory employees in terms of rights and rights assertion is unthinkingly applied to determine the freedom of informal workers.[91] Indeed, the precise characteristics of the informality may have been shaped by the precise regulatory shape of labour law, as empirical studies show.[92] This will include the way the work itself is done and the consequent obligations. Informal work was defined by the ILO at the ICLS 21st session as 'productive activities carried out by persons in employment that are, in law or in practice, not covered by formal arrangements such as

[86] Ingrid Landau *Human Rights Due Diligence and Labour Governance* (Oxford: OUP, 2023)

[87] Mark Anner, Jennifer Bair and Jeremy Blasi, 'Towards joint liability in global supply chains: Addressing the root causes of labour violations in international subcontracting networks' (2013) 35 *Com Lab Law & Pol'y* J 1; Beatrice Parance and Elise Groulx, 'Regards croisés sur le devoir de vigilance et le duty of care' (2018) *Journal du droit international (*Cluent), doctr. 2.

[88] Shelley Marshall *Living Wage: Regulatory Solutions to informal and precarious work in global supply chains,* (Oxford: OUP, 2019), 167–170.

[89] See the UN Draft Treaty at https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process; the EU Corporate Sustainability Directive and mandatory due diligence legislation, and the French Loi Devoir de Vigilance amongst a range of legislation across Europe.

[90] Modern Slavery Act 2015 Committee Report: The Modern Slavery Act 2015: becoming world-leading again. HL Paper 8 https://publications.parliament.uk/pa/ld5901/ldselect/ldmodslav/8/802.htm published 16 October 2024, Accessed 19 October 2024, at Chapter 5 para.227 and Recommendations 53–74.

[91] Diamond Ashiagbor 'Introduction: Narratives and Informality and Development' in Diamond Ashiagbor (ed.) *Re-imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart/Bloomsbury, 2019), 2–3.

[92] Simon Deakin, Shelley Marshall and Sanjay Pinto 'Labour Laws, Informality, and Development' in Ashiagbor (ed.) n. 91, 239, 241–243, 264–265.

regulations and laws that stipulate the rights and responsibilities, obligations and protection of the economic units and the workers'.[93] A detailed recommendation from the ILO[94] sets out steps to formalisation. This underreach of law in defining the arrangement is the key characteristic. Beyond that, the term 'informal' may encompass work which is based on a family or community network, or work which is not perceived as of commercial value, or where there is lack of organisation or knowledge of law, or capability to enforce it. In regulatory terms, informal work results in invisibility. Arguably, it is that lack of visibility which presents the biggest challenge to labour rights in supply chains,[95] also commented on in the Levitt Report. Informal work presents a challenge to labour law because the work relation is governed by debt or kinship or social relations or ignorance of law or powerlessness. These factors do not displace the minimum wage.[96] The relation underpinned by any of these factors may also amount to bonded labour.[97]

Deakin, Marshall and Pinto[98] argue that precarious work (where the law applies but aspects are not enforced) is to be distinguished from informal work. Even allowing for the importance of clarity of definition, the sewing work done in Leicester by women garment workers may fairly be characterised as informal rather than precarious. As recorded in the ETI report findings, summarised at the start of this chapter, there are no written contracts between the workers and the small units in Leicester, hours are extensive and unrecorded, and the wage is agreed by reference to wages in India even though the workers are in Britain lawfully. There is a structural aspect to this: the garment sewing is done as part of a supply or value chain, where the

[93] International Conferences of Labour Statisticians, 21st ICLS—11 to 20 October 2023, Resolution 1 para. 53. See also International Conference of Labour Statisticians at the ILJ (2003, 17th ICLS); International Conference of Labour Statisticians (2008, 18th ICLS); International Conference of Labour Statisticians (2013, 19th ICLS); International Conference of Labour Statisticians (2018, 20th ICLS); International Labour Office, *Women and Men in the Informal Economy, A Statistical Picture* (Geneva; ILO, 2024).

[94] Recommendation No 204 concerning the Transition from the Informal to the Formal Economy, adopted 12 June 2015, published 23 June 2015 (ILO).

[95] ManMohan S. Sodhi and Christopher S. Tang 'Research Opportunities in Supply Chain Transparency' (2019) 28 *Production and Operations Management* 2946–2959.

[96] *Uber v Aslam* [2021] UKSC 5, at para.78 per Lord Leggatt: 'Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it'.

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

[98] Deakin, Marshall and Pinto (n. 92), 239, 241–243, 264–265.

economic power is exercised by the purchaser, with whom the law imposes no direct relationship. As the Levitt report pointed out, the workers are invisible to the ordering company. Thus, the working space created is driven by its own rules, not by labour law. While this is commonplace in transnational supply chains, the unique fact here, driven by fast fashion, is that the chain originates in the UK rather than in India. On the available evidence, the garment workers are women legally but newly arrived from India or Bulgaria. Their English language skills are limited. They are offered work at a wage which is less than the legal entitlement in the UK but higher than that in India. They are told that they can only be employed at this level of wage. The challenge posed by this UK supply chain arrangement is a structural challenge to UK labour law, rather than simple non-compliance. Informal work is being shaped by gaps in national institutions and social relations, as well as defects in UK (contract based) labour law, rather than simply being an irregular phenomenon, This means that until labour law (through addressing forms of work and work relationship) is able to bring the informal structure back within regulation, it is inapt to deal with how informality is being created. The legal response—through constitutional or human rights law—demanded for an effective response must address the economic or social structural factors which have brought about the wage in issue.

5. THE NATIONAL MINIMUM WAGE FRAMEWORK

A. Design

It might be asked again why this issue cannot simply be solved by strong enforcement of the national minimum wage, which includes a state response. Put shortly, the minimum wage, in its design of an hourly rate and in its current enforcement system, does not currently reach the structural problem of informal work. The 1998 Act was the first national such intervention in the wage-work bargain,[99] but it was not the first minimum wage. In Britain, the 1890s saw debate on the best law to address the working pay and conditions of the 'sweated trades', such as tailoring, lace making, chain making and cardboard making. As is well known, the Webbs[100] argued for

[99] Rachel Reeves *The Women who Made Modern Economics* (London: John Murray, 2023), 27.

[100] Webb (n6), 766–784.

a legal minimum wage set at subsistence. Instead, the Trade Boards Act 1909 was enacted, drawing on the 1896 Factory and Shops Act in Victoria, and targeting the worst cases. Blackburn[101] argues that the 1909 Act was marked by close focus on the market and by collective laissez faire. The Act targeted sweated workers and required tripartite boards to fix, for the 'sweated' trades only, minimum wages or piece rates net of deductions. Its rationale was fair competition, expressed by Winston Churchill (while part of a Liberal government)[102] in the Parliamentary debates:[103]

> …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 'sweated trades' are thus seen as an anomaly, unlike conditions of healthy bargaining which 'weave labour and capital more closely together'.[104] Law has thus intervened, it is true, but without any modification to its structure of faith in the economics of a free wage-work bargain.

Drawing on Marxist economics,[105] Adams[106] explains the relationship between mainstream work and very low paid work arising out of collective and individual capitalism:

> [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

[101] Sheila Blackburn, *A Fair Day's Wage for a Fair Day's Work? Sweated Labour and the Origins of Minimum Wage Legislation in Britain* (London: Ashgate Publishing, 2007), 115–117. For the need to focus on the structures, performance and complexities of local labour markets, see Sheila Blackburn 'Between the Devil of Cheap Labour Competition and the Deep Sea of Family Poverty? Sweated Labour in time and place 1840–1914' (2006) 71 *Labour History Review* 99–121 at 108–111.

[102] For fuller discussion of Winston Churchill's role in social reform for the sweated trades, see Vernon Bogdanor 'Winston Churchill as One Nation Conservative' in 'One Nation Conservatism from Disraeli to Johnson (Special Issue)' (2023) 28 *French Journal of British Studies* ///C:/Users/Win10/Downloads/rfcb-10166.pdf accessed 22 December 2023.

[103] HC Deb 28 April 1909 vol. 4, Col 387.

[104] Ibid.

[105] Karl Marx and Friedrich Engels, *Wage-Labour, and Capital* (Cologne: Neue Rheinische Zeitung, 1847).

[106] Zoe Adams *Labour and the Wage* (Oxford: OUP, 2020). For Adams, the flaw in a NMW framework is that it is in reality a minimum hourly rate, based on wages for work done—and undermined by casualisation—and not 'remuneration', a responsibility to provide security. The scope of that responsibility is key.

> 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 society.*[107]

The 1909 Act was followed by the 1918 Act and then by the Wages Council Act of 1945, expanding the coverage of wages councils until they were abolished in 1983. After a period during which individual complaint for breach of agreement under the Wages Act 1986 was the only regulation of the wage/work bargain, a promised National Minimum Wage Bill was introduced on 26 November 1997, received Royal Assent as an Act on 31 July 1998 and came into effect on 1 April 1999.

During the Bill's second reading, the then Secretary of State for Trade and Industry promised:[108] 'The Bill will introduce, for the first time in the United Kingdom, minimum wage protection for all workers and will begin to end the scandal of poverty pay'. Warnings of large-scale unemployment by lobbyists for business proved unfounded. As of 2024, the hourly minimum rate for 21 year olds and over is £11.44, rising to £12.21 in April 2025. As of 1 April 2021 (the year of the reports during Covid on Leicester), the hourly wage for workers of 23 and over was £8.91 an hour.[109] Despite the fanfare, in terms of design, the wage is only a minimum hourly rate, allowing manipulation of hours.

B. Enforcement

On one view, all that is needed is proper enforcement of legal entitlement to a minimum wage. This is to overlook the precise problem in hand. The worker's lack of economic power is invariably accompanied by a lack of social power to insist on the legal right. Whether for this reason, or for revenue, the NMWA set up a system of state as well as individual enforcement. The effectiveness of that state enforcement will be considered, before considering issues of legal empowerment, individual and collective.

State enforcement is in the process of reform. Part 5 of the Employment Rights Bill[110] heralds the possibility of a more unified approach across areas

[107] Emphasis added.

[108] https://publications.parliament.uk/pa/cm199798/cmhansrd/vo971216/debtext/71216-15.htm#71216-15_head1 Accessed 18 October 2024

[109] https://digitallibrary.un.org/record/3806308?ln=en&v=pdf Accessed 18 October 2024.

[110] Introduced 10 October 2024 https://bills.parliament.uk/bills/3737 accessed 20 October 2024 (ERB).

of non-compliance with labour law, since it provides for enforcement of the National Minimum Wage Act 1998 and the Modern Slavery Act 2015 under the same Part 5 enforcement system (the body likely to be called the Fair Work Agency). A three-year enforcement strategy must be written by the Secretary of State upon advice from a tripartite advisory board.[111] There is power to obtain documents and to enter premises.[112] There is provision for Labour Market Enforcement undertakings and order.[113] However, no provisions are made for an inspectorate. It remains to be seen whether this unification of different enforcement systems results in a more unified analysis, as advocated above.

Enforcement of the minimum wage to date has not been impressive. This is despite the fact that the enforcement provisions[114] of the NMWA were impressive upon enactment, backing up individual enforcement with state enforcement.[115]Responsible companies 'as opposed to cowboys' had nothing to fear and a great deal to gain.[116] State enforcement was and is a system of notices of underpayment and penalties, backed up by civil and criminal rights to courts with reversal of the burden of proof.[117] Section 20 of the NMWA provided for the Inland Revenue[118] to bring an action, which did not derogate from any right of the individual to bring an action[119] in the employment tribunal for unlawful deductions where an enforcement notice had not been complied with. However, there has not been much evidence of a HMRC litigation strategy, with the Inland Revenue even missing the Tribunal time limit in one case.[120] This provision was repealed, with effect from 6 April 2009, under a Labour Government by the Employment Act 2008 through substitution of a new section 19–19H to replace ss 19–22F. This followed the Gibbons Review,[121] which recommended 'simple process to settle monetary disputes on issues such as wage…without the need for tribunal hearings'. The Parliamentary debates evince a concern of the Government to make enforcement yet more effective, and with emphasis on

[111] ERB cls. 75–76.
[112] ERB cls. 78–79.
[113] ERB cls. 84–94.
[114] ERB cls. 17–22.
[115] https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual Accessed 18 October 2024.
[116] HC Deb 16 Dec 1997,vol 303, Col 170.
[117] See n. 1150.
[118] HMRC from 18 April 2005
[119] NMWA 1998, s. 20.
[120] *HM Inland Revenue v Silk* EAT/0405/01
[121] Department of Trade and Industry, March 2007.

the enforcement strength of the HMRC.[122]The new provisions would 'significantly change the way in which we recover arrears of unpaid wages'.[123] This focus on payment of arrears together with a low chance of detection has been convincingly identified as a reason for continuing non-compliance, to which is added a lack of information on unlawful wages in the informal economy and a lack of individual or collective worker strength.[124] The HMRC has not brought a single claim of minimum wage breach in the tribunal in relation to Leicester.[125] Its naming and shaming lists do not disclose any Leicester garment factories. A recent news report revealed underpayment recovery but no prosecutions.[126]

The flaw in state enforcement has been its failure to appreciate the particular problems arising in an informal work sector. This has led to the relevant bodies adopting the model of rights assertion, suitable for the formal sector but wholly inadequate to deal with informalised work. The Low Pay Commission is the first example. The LPC has issued three stand-alone reports since 2017 on non-compliance and enforcement of the NMW. From the very start (#1, Executive Summary), they concede 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.[127] The LPC's admitted lack of focus on the grey economy has implications. In the same report, the LPC identified complaints[128] by workers themselves[129] as 'the most effective way of identifying underpayment'. At the same time, they noted that awareness of the NMW did not translate into confidence in the enforcement system. The LPC were aware of the knowledge gap, stating: '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'.

[122] HC Deb 11 June 2008, vol 477, Col 107WH, Ian McCartney.
[123] HC Deb 3 July 2008, Vol 478 Col 1004, John Hutton.
[124] Anna Stansbury 'Incentives to comply with the Minimum Wage in the United States and the United Kingdom' (2024) 78 *ILR Review* 190–216, at 209.
[125] https://www.gov.uk/employment-tribunal-decisions
[126] https://www.bbc.co.uk/news/articles/ce9gv7k2ym1o Accessed 27 November 2024.
[127] *Non-compliance and enforcement of the National Minimum Wage* (London: Low Pay Commission, 2020).
[128] To ACAS, to the HMRC or legal claims.
[129] Emphasis added.

In July 2022, the LPC finally published a report on Leicester,[130] despite 'the issue of illegal pay and working conditions' having 'been on our radar for a number of years'.[131] They identified the main mechanism of wage exploitation as being employer manipulation of hours of work and claw-back of pay, as well as non-payment for leave. They started with a question: 'Why [had] concerted efforts by enforcement bodies found relatively modest non-compliance in Leicester, when other bodies and individuals we spoke to believe[d] it to be widespread and flagrant?'[132]Their conclusion appears to be that workers are nervous of reporting their employers to state enforcement bodies. The 'central explanation for this disconnect' was 'absence of worker complaints and testimony'. The LPC also noted 'low expectations'. 'It is clear', they concluded, 'that the reporting process as currently constituted does not work for low-paid workers such as those we met in Leicester'.[133] As to the HMRC, they commented: 'In theory, these are strong powers which confer the right to enter locations and ask for documents. In practice, HMRC's approach is not to "fish" for offences. They seek permission from employers to enter premises and speak to workers. They will only enter a premise and request documents if they have first identified a risk of underpayment. This draws us back to the problems outlined in Chapter 2; a lack of reporting from workers undermines enforcement activity, at the same time as a lack of enforcement activity undermines the pipeline of worker reporting'.[134] The LPC recommended that individuals be able to nominate a third-party agent to act on their behalf,[135] though this referred to complaints to the HMRC, not legal claims.

The previous Director of Labour Market Enforcement was required to prepare a labour market enforcement strategy which 'assesses the scale and nature of failure to comply with the requirement for workers to be paid at least the NMW during the previous year and the forecast for the next two years'.[136] The introduction of this role in an immigration statute suggested its focus on the exploitation of those without immigration permission to be or work in the UK, as is explained in the Explanatory Notes,[137] which state with

[130] *Compliance and enforcement of the National Minimum Wage: the case of the Leicester textiles sector* (London: Low Pay Commission, July 2022)
[131] LPC, n. 130, para. 1.
[132] LPC, n. 130, Executive Summary, para. 1
[133] LPC, n. 130, para.2.20.
[134] LPC, n. 130, para.3.10.
[135] LPC, n. 130, para.4.13.
[136] Set up by the Immigration Act 2016, ss. 1–9.
[137] Explanatory Notes para 3: https://www.legislation.gov.uk/ukpga/2016/19/notes/division/3/index.htm accessed 18 October 2024.

some complacency: 'Protections are already in place to ensure that those entitled to work in the UK are paid at least the national minimum wage, enforced by the HMRC'. Lack of immigration permission is not the problem amongst garment workers in Leicester. A review of Operation Tacit was promised, but not delivered.[138]

This is not to dismiss the role of legal empowerment.[139] Knowledge of rights, voice and socio-economic support are all necessary. Further, as also argued above, if law does have a role, it should be capable of enforcement either individually, associatively (trade unions) or surrogately or in the public interest (non-governmental groups). Emphasis should be placed on building up representative organisations of the working poor.[140] One notable and enduring absence is the ability of third parties with a legitimate interest to enforce minimum wage claims. The possibility of allowing third-party actions such as by trade unions and other organisations so that 'the system would no longer need to rely on individuals who can so easily be victimised and intimidated' was unsuccessfully raised during debate in Parliament during the 2008 amendment.[141]

The picture that emerges overall from state enforcement to date is a reliance on complaints by the workers, not underpinned by any third-party enforcement mechanism, and with no real state enforcement either. There is minimal understanding of the informal sector in Leicester and the constraints upon freedom of the workers. The paradigm of enforcement of legal rights applies, with some limited suggestions for modification. Instead of closely following the approach recommended by the ILO for the informal sector, with attention to the mechanisms of exploitation, the state enforcers focus on why there are no complaints. The new enforcement framework will benefit from the recommendations of the Parliamentary Modern Slavery Act 2015 Committee on co-ordinated enforcement.[142] The Committee pointed to the prosecution rate (as against victims identified through the referral process, so already limited by the guidance) as a low 1.81%.[143] It is hoped that Part 5 of the Employment Rights Bill will indeed bring a more co-ordinated approach to enforcement and one better targeted at the

[138] https://www.gov.uk/government/publications/review-of-operation-tacit/review-of-operation-tacit.

[139] Report of the Commission on Legal Empowerment of the Poor *Making the Law Work for Everyone* (UN, 2008)

[140] Ibid, 45.

[141] HC Deb 14 July 2008, Vol 479, Col 58, John McDonnell.

[142] Modern Slavery Act 2015 Parliamentary Committee(n. 90), para.163.

[143] Modern Slavery Act 2015 Parliamentary Committee (n. 90), para.129.

specific problems in the informal sector. However, the benefit of unification in enforcement systems will be lost without a sound approach in hard and soft law.

6. THE GUIDANCE IN PRACTICE: BACK TO LEICESTER

In Leicester, a non-judicial scheme funded by Boohoo and Next now allows workers to raise grievances against their employers.[144] The claims have seemingly been for the money contractually owed rather than the statutory right. More generally, the fear of job loss has led to protests.[145] The protests were marked by fear that Boohoo would shift its supply chains. Thus, the spectre of unemployment, predicted by opponents to a national minimum wage but not realised, has returned.

On the other hand, 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%).[146] Boohoo's 15-page August 2021 Modern Slavery Statement[147]committed to mapping suppliers and indicated that it would open a manufacturing 'centre of excellence' facility in Leicester which employs 170 people. The Modern Slavery Statements from 2023[148] and 2024[149] both list a risk factor as 'withholding of wages'. Key indicators of risk under wages and working hours include high overtime wages, no breaks and cashback payments. The minimum wage is not mentioned.

Civil society has been very active and only a sample of their work is discussed here. The Rights Lab Nottingham[150] have been active visitors to Leicester.[151] Most recently, a report from other researchers concluded that

[144] Highfields Centre, Leicester. https://highfieldscentre.ac.uk/fabl/.

[145] https://tribunemag.co.uk/2023/10/we-cant-eat-we-cant-feed-ourselves-leicesters-garment-workers-have-had-enough-2023.

[146] https://www.businessinsider.com/boohoo-unscathed-covid-19-modern-slavery-allegations-analysts-2021-5.

[147] https://www.boohooplc.com/sites/boohoo.corp/modern-slavery-statement- aug-2021.pdf.

[148] https://www.boohooplc.com/sites/boohoo-corp/files/boohoo-modern-slavery-statement-2023.pdf.

[149] /https://www.boohooplc.com/sites/boohoo-corp/files/2024-09/boohoo-modern-slavery-statement-2024.pdf Accessed 19 October 2024.

[150] https://www.antislaverycommissioner.co.uk/about-the-commissioners-office/ Accessed 18 October 2024.

[151] https://www.gla.gov.uk/whats-new/press-release-archive/11082020-further-joint-visits-to-leicester-garment-factories/.

a focus on modern slavery resulted in unemployment by buyer companies pulling out of Leicester. The report followed interviews with workers and factory owners (though not buyers) and has been published in four languages,[152] identified mobility barriers such as language and having small children amongst the South Asian women who comprised most of the sewing workforce. According to the report, some compared their pay to pay in India, noting 'many also held favourable views of working for less than the minimum wage in the UK, as they compared it to their meagre earnings in India'.[153]

Would removal of paragraph 2.42 make any difference to the experience of Leicester's garment workers? It is concluded it would. First, there would be a changed approach to identification under the MSA. The ILO indicators would apply, without the excision created by paragraph 2.42. The MSA National Referral Mechanism already provides for a preliminary identification of reasonable grounds. This is followed by a conclusive decision which follows after closer consideration of all the circumstances. In the 2012 ILO document,[154] a single indicator might on its own point to forced labour. All a presumptive approach would mean is that the unlawfully low wages would rightly be regarded as an indicator of unfreedom, rather than excluded from consideration. The presumption would be rebutted if there is some other reason. The new single enforcement body combines enforcement of the NMWA and MSA, making a cross-cutting approach smoother. This would be consistent with an overall purpose of unified enforcement tackling informal, unregulated work across its manifestations. It should not be forgotten that the MSA has a range of purposes apart from prosecution, consistently with the reference, in its first section, to Article 4.

Second, academic researchers have also debated on whether there is a sharp line to be drawn between exploitation and forced labour, with some academics advocating a bright-line distinction.[155] Instead, it is here argued that following the presumptive approach, the researcher can better explore, through semi-structured interviews, the matter of 'how' work is done for an

[152] Nandita Dutta, Pankhuri Agarwal, Vivek Soundararajan, *What happened after the Boohoo Scandal? A multi-stakeholder Perspective of the Garment Industry in Leicester* (UKRI funded report, 2024) https://embed-dignity.com/outputs/reports/ Accessed 19 October 2024.

[153] Dutta (n153), 4.

[154] https://www.ilo.org/publications/ilo-indicators-forced-labour

[155] Jean Allain 'What is forced labour? A practical guide for humanities and social science research', in Genevieve LeBaron (ed.) *Researching Forced Labour in the Global Economy: Methodological Challenges and Advances* (London: British Academy, 2018), 78–93 at 84, citing the ILO 2005 Report and critical of the 2012 ILO Indicators.

unlawfully low amount. Was the agreement made in full knowledge of legal rights in the UK? If the worker compared wages favourably to the UK, did the cost of living affect that view? Did the speaker speak English? How new were they to Leicester? Was there a relevant debt and were any deductions from wage defined and limited and proportionate?[156] Does it matter whether the worker receives less because they owe the employer a debt for accommodation, or because third parties have broken items, or a middleman a debt for recruitment? Was there a sense of obligation or bond and to whom? Did the worker feel free to withdraw from the work? What founds the fear of unemployment? If unemployment is feared, why is an unlawfully low wage accepted? What was the nature of the work? Was it illegal due to its nature or the status of the worker (not the case in Leicester). If not, was it informal due to its nature? These questions permit a deeper analysis of how 'freedom becomes mitigated or constrained'.[157]

The authors of the Dutta report noted from factory owners that 'the pricing at which Boohoo was asking small manufacturers to produce garments made it unfeasible for them to pay the workers a minimum wage'.[158] Boohoo operated a 120-day credit system.[159] Boohoo was clearly the driver of the wage. The criticism made in the report is that allegations of modern slavery obscured this manipulation by brands and the lack of labour law regulation. It is argued instead that their conclusion supports rather than undermines the theory in this article. Instead of pulling out, buying brands should, under the soft law of the UN Guiding Principles on Business and Human Rights,[160] have exercised leverage to require the minimum wage to be paid down their supply chain rather than threatening to exit the chain. An important highlight was the garment workers' fear of unemployment. That fear, greater than that of an unlawfully low wage, demonstrates constraint through fear. On the stance in 2005–6 of the ILO, that poverty would be irrelevant to

[156] Which would in turn give rise to questions as to whether there is debt bondage within the meaning of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956 Art. 1: 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.

[157] ILO (n.32).

[158] Dutta (n.152), 11–12.

[159] Dutta (n.152), 12.

[160] UN Guiding Principles on Business and Human Rights (UN, New York, Geneva, 2011) Principle 19.

forced labour because the extractor of work has no wider responsibility. Instead, a fundamental rights approach results in determining the wider scope of responsibility for that wage agreed to through constraint. The conclusions of the Dutta report are simply another illustration of the unfitness of the current legal approach—focused exclusively on the employer relationship for wage issues and divorcing modern slavery from concrete issues of labour regulation.

7. CONCLUSION

Almost 43 years on, the Supreme Court of India judgment in *PUDR* still give rise to important questions about economic power and powerlessness, how economic coercion is to be identified, and whether minimum wage responsibility should be limited to the legal person identified as the employer (of workers) where that person, in fact, has insufficient control of price. The SCI's analysis draws on a deep understanding of the economics of the situation in which informal workers find themselves and opens up the wage-work bargain and the boundaries of the employment relationship to intervention on grounds of forced labour. The 2005–6 stance of the ILO, now evolved but still reflected in the current statutory guidance to the MSA, draws a sharp distinction between pay exploitation and forced labour and implicitly recognises that work may be done below the legal entitlement because of socio-economic perceived or actual restriction of choice, but characterises that as external to the employment relationship. The MSA guidance requires separate consideration of the minimum wage (national labour law) and modern slavery (criminal law, human rights). On this view, if the law is broken, it gives rise to issues only within that legal category. Instead, the SCI in *PUDR* looks at the structure of the injustice and allocates responsibility accordingly.

The *PUDR* principle is unlikely to give rise to wholesale permeability of all labour rights, whether arising from contract or statute, into fundamental rights. But the minimum wage is identifiable as fundamental. It has been put in place as a bare minimum for those who do not have bargaining strength, and for the purpose of ensuring at least a decent living.[161] It is the subject of

[161] 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.

international human rights instruments. The intervention of a wider range of law allows deeper consideration. The conclusion here is that, in the law's eyes, a presumption of economic coercion arises when a paid labourer is working for less than the legally mandated minimum for that society. The alternative, if the narrow definition continues to be applied under the formal definition of freedom, is for under-reach of the law to result. The Modern Slavery Act 2015 Committee heard submissions to this effect[162] but concluded that it did not have full time to consider definitions[163] and limited itself to saying that 'some' witnesses said they were 'broadly adequate'. 'Broadly adequate' is faint praise, if praise at all.

The second area of the SCI-ILO disagreement was the responsibility of the employer, party to the contract, for externalities. The narrow view kept considerations within the bounds of the work contract, the wider view looked at structures resulting unfree work. In the *PUDR* case, the wider responsibility was the state's, as commissioner of the construction works. In the case of Leicester, the economic power is that of the monopsonist, Boohoo PLC. The Leicester small factory owners, seen as employers by labour law, are little more than middlemen, price takers, 'only a step higher up the ladder than the worker'.[164] Tackling the constraint arising from this inequality of power requires an approach to fundamental labour rights which is not limited to the employment relationship.

A minimum wage mandated by law is already an intervention in freedom of contract in the interests of economic survival of the worker. Wage level is linked to dignity of living in numerous human rights instruments. Once a minimum living wage is defined as a fundamental right, a responsibility wider than the narrow employment contract follows. The developing body of hard and soft law on business and human rights identifies some form of accountability or responsibility (due diligence or duty of care) of companies for adverse impacts on human rights of business activities of subsidiaries and along supply chains.[165] In the UK, the conversion from modern slavery

[162] Modern Slavery Act 2015 Parliamentary Committee (n. 90) at para.268 the Committee refers to evidence that decision makers 'crowded out' issues of labour market coercion and exploitation, and that the extreme of modern slavery was vague and ill-defined such that the issue was 'exceptionalised'.

[163] Modern Slavery Act 2015 Parliamentary Committee (n. 90) paras. 264–268 labour exploitation—modern slavery. Recommendation 18 suggests that the guidance should be compliant with international obligations.

[164] Winston Churchill, in 1909.

[165] EU Directive 2024/1760.

statements based on transparency to due diligence now has the support of a recommendation made by the Modern Slavery Act 2015 Committee.[166]

To conclude, there is, clear, consistent, and documented evidence of women (mainly South Asian and Bulgarian) working in small Leicester garment factories below the national minimum wage. This is what can only be described as an area of informal work. The new enforcement regime promises a more unified approach, although it lacks some effective mechanisms. As ILO Recommendation 204[167] makes clear, two ways informal work can be regularised are by an efficient and effective labour inspection and promotion of social dialogue. Neither appear in the current enforcement framework.

Paragraph 2.42 of the MSA guidance detracts from rather than adds to the preceding sections, which simply refer on to ILO C029[168] and ECtHR case-law. The conclusion of this article is that, as evidenced in the Leicester case, this paragraph of the MSA guidance obscures and confuses the approach by the state and by business. It could simply be removed. As argued here, its narrow approach is inconsistent with a greater focus on the minimum wage as a basic labour right, even a human right and fundamental freedom, breach of which gives rise to presumptions of other fundamental unlawfulness. That is not to sideline labour law and its actors, but to emphasise it, and their, importance.

[166]Modern Slavery Act 2015 Parliamentary Committee (n. 90) at Chapter 5 para.227 and Recommendations 53–74.

[167]ILO Recommendation 204 (n94) at para.16(a) para.27.

[168]Commission, 'Proposal for a regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market (Ordinary legislative procedure (COD))' COM (2022) 453 ongoing.