

# COLLECTIVE VOICE, IRREGULAR MIGRANTS AND 'SOCIAL' COMMODIFICATION

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**Abstract:** Exploitation of irregular migrants is often understood as either an economic or criminal phenomenon. This article seeks to challenge this unduly narrow understanding by exploring the social dynamics of their exploitation. In doing so, I develop a 'social account' of 'commodification' that enables the more subtle, social forms of exploitative labour relations to be examined. Commodification here is a particular state of exploitation along the unfree labour continuum in which the worker's 'social character' is subordinated to their 'economic character'. Subordination occurs when workers are prevented from participating in workplace governance, rendering them instruments of production. I also consider the role of labour law in this account, exploring how workers' 'collective voice' supports and develops the social character by permitting and facilitating participation in workplace governance. Finally, I examine the extent to which irregular migrants are able to exercise collective voice at work and the implications for how their possible exploitation should be viewed. The lack of a collective voice should be viewed as a core feature of the exploitation of irregular migrant workers.

## A. INTRODUCTION

As the phenomenon of irregular migration becomes more prominent in the UK, the working conditions of irregular migrants is receiving greater attention. Irregular migration consists of: people who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visa. Trade unions have recently started acknowledging the specific issues pertaining to irregular migrants.<sup>1</sup> Labour law scholars have also begun specifically addressing the legal issues surrounding irregular migrant labour.<sup>2</sup>

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<sup>1</sup> TUC, 'Organising Migrant Workers: A National Strategy (TUC 2006) <<https://www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue173513.pdf>> accessed 12<sup>th</sup> May 2022; Trades Union Congress Commission on Vulnerable Employment, 'Hard Work: Hidden Lives' (2008) <<http://www.vulnerableworkers.org.uk/cove-report/full-report/index.htm>> accessed 10<sup>th</sup> May 2022.

<sup>2</sup> Alan Bogg and Tonia Novitz, 'Links Between Individual Employment Law and Collective Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014); Virginia Mantouvalou, 'Organising against Abuse and Exclusion: the Associational Rights of Undocumented Workers' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014).

There are two general tendencies (with exceptions) in the literature that limit the scope of the analysis of irregular migrant labour. Firstly, accounts of exploitation tend to focus on criminal offences such as modern slavery, trafficking and forced labour, or as an economic issue concentrating on wages,<sup>3</sup> overlooking the social dimensions of work. Near exclusive focus on the economic dynamics is particularly evident in the case of irregular migrant labour. Scholars such as Anderson, Ruhs,<sup>4</sup> and Mantouvalou<sup>5</sup> provide economic conceptions of exploitation regarding production costs and extracting value to produce profit. Secondly, the few existing analyses of irregular migrant workers' legal position and working conditions have been unduly narrow by focusing almost exclusively on the protection of individual human rights and the illegality doctrine.<sup>6</sup> The collective dimensions of their labour and the incorporation of irregular migrant workers into collective labour frameworks and mechanisms have scarcely been considered.

The limits of the literature in this regard mean that a key aspect of (non)exploitation has not been rigorously investigated, namely irregular migrant workers' 'voice'. This paper will therefore explore the issue of voice and consider how irregular migrant workers' voice, or lack of voice, impacts the freedom of their labour. Promoting worker voice is closely linked to the fundamental human right of freedom of association, and scholars have argued that 'labour needs to collectivise itself ... before it can act effectively against capital'.<sup>7</sup> At work, individual expression finds meaning through collective solidarity. Individual, isolated workers in a weak bargaining position, may, as is the case with irregular migrants, be in an additionally vulnerable position with low social capital, and worker's putative options are constricted by the construction of labour markets in accordance with employers' interests. This paper focuses on workers' 'collective voice'

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<sup>3</sup> Sam Scott, *Labour Exploitation and Work-Based Harm* (Policy Press 2017) 4, 6, 25.

<sup>4</sup> Martin Ruhs and Bridget Anderson, 'Semi-compliance and illegality in migrant labour markets: an analysis of migrants, employers and the state in the UK' (2010) 16(3) *Population, Space and Place* 195.

<sup>5</sup> Virginia Mantouvalou, 'The Right to Non-Exploitative Work' in Virginia Mantouvalou (ed), *The Right to Work - Legal and Philosophical Perspectives* (Hart Publishing 2015).

<sup>6</sup> Alan Bogg and Tonia Novitz, 'Links Between Individual Employment Law and Collective Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014); Trades Union Congress, 'Making a Rights-Based Migration System Work' (5 January 2006) <<https://www.tuc.org.uk/research-analysis/reports/making-rights-based-migration-system-work>> accessed 15<sup>th</sup> May 2022; Catherine Barnard, 'Enforcement of Employment Rights by Migrant Workers in the UK' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014); Patrick Taran, 'The need for a rights-based approach to migration in the age of globalisation' in R. Cholewinski, P. De Guchteneire, & A. Pecoud (Eds.), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge 2009).

<sup>7</sup> Paul Bagguley, 'Industrial citizenship: a re-conceptualisation and case study of the UK' (2013) 33(5) *International Journal of Sociology and Social Policy* 265, 266.

rather than expression as an individual right. Collective voice refers to labour law mechanisms that allow workers to contribute collectively to decisions that affect the governance of their workplace.

Examining the impact of collective voice on the freedom of labour requires an account of exploitation that goes beyond mere economic terms to incorporate its social dimensions. Collective voice has social dimensions and value and should not be reductively analysed in solely instrumental economic terms. Analysing the social dimensions of collective voice highlights the limitations of treating exploitation as having solely economic dimensions. One should be wary about accepting the primacy of economic interests and motivations in labour law and exploitation as this may limit their normative scope.<sup>8</sup> The concept of 'commodification' provides a promising means to avoid this reductivity and limited normativity as it facilitates analysing labour relations in social terms and avoids narrowing in on only the most extreme forms of exploitation. Thus far, however, it is an underdeveloped category at the relatively unexplored less extreme end of the unfree labour continuum, frequently referenced but rarely investigated in great detail.<sup>9</sup>

To rectify this gap, I advance a 'social account' of commodification that centres the more subtle, social forms of exploitative labour relations. The social account places the social dynamics of work at the centre of its analysis, with workers 'decommodified' when they are treated as social beings, emphasising 'the immorality of a market in which employers could treat workers as they might treat any other piece of merchandise'.<sup>10</sup> I regard commodification as a particular state of exploitation in which the worker's social character is subordinated to their economic character, thereby inhibiting and degrading the social capacities and opportunity to participate in the governance of their workplace. Instead, they are a mere economic instrument in the production process. A dignified existence is more than an economic question for, as Santilli writes, 'in order to feel at home ... with himself the individual must have a share in and a control over the forces of production'.<sup>11</sup> From this perspective, collective voice can be a critical factor in the decommodification of workers. It should be emphasised that my account of commodification is not intended to be a general formula of exploitation, but, in line with Wolff's approach to exploitation,

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<sup>8</sup> Ruth Dukes, 'A Global Labour Constitution' (2014) 65 *Northern Ireland Legal Quarterly* 283, 287-288.

<sup>9</sup> For example, see Judy Fudge, 'After Industrial Citizenship: Market Citizenship or Citizenship at Work?' (2005) 60 *Industrial Relations* 63; Tonia Novitz, 'Past and Future Work at the International Labour Organisation: Labour as a Fictitious Commodity, Countermovement and Sustainability' (2020) 17(1) *International Organisations Law Review* 10; Scott (n 1).

<sup>10</sup> Julia Davidson, 'Let's go outside: bodies, prostitutes, slaves and worker citizens' (2014) 18(5) *Citizenship Studies* 516, 523.

<sup>11</sup> Paul Santilli, 'Marx on Species-Being and Social Essence' (1973) 13(1) *Studies in Soviet Thought* 76, 85.

is to identify a particular norm and element of the labour relationship we may regard as exploitative.<sup>12</sup>

Three questions are at the core of the exploration into collective voice's role in irregular migrant commodification: 1) why does an absence of collective voice lead to commodification; 2) using the UK as a case study, how can workers exercise collective voice; and 3) do irregular migrants in the UK exercise collective voice and what is the effect on their labour? The paper adopts the following structure to examine these questions. In Part B I seek to develop the social dimension of commodification. Drawing upon the work of Marx, Bogg, and Polanyi I argue that a worker is commodified when their social character is subordinated to their economic character such that they are unable to participate in the governance of their workplace. This 'social account' of commodification centres the social dynamics of participation and industrial democracy in labour relations. Part C examines how collective voice is advanced through labour law institutions and mechanisms and its impact upon the social dimension of commodification. In Part D, I examine to what extent irregular migrants can access these mechanisms to exercise collective voice. I also address the consequences for their commodification. I argue that the structural position and legal regulation of irregular migrant workers inhibits their opportunity and capacity to exercise collective voice at work. I conclude in Part E that, in addition to poor terms and conditions, the inhibition of participation in workplace governance commodifies irregular migrant workers. Irregular migrants' experience provides a stark example of commodification as their social character is severely deteriorated and subordinated to their economic character. Commodification therefore has distinctly social dimensions. The conditions of irregular migrant labour shows that labour law must also respond to the social dynamics of exploitation by improving workers' collective voice and empowering participation in workplace governance.

## **B. THE 'SOCIAL ACCOUNT' OF COMMODIFICATION**

Scholarship on various concepts of exploitative relations such as precarity, forced labour, and slavery has benefitted from the recent development of the 'unfree labour continuum' breaking away from the cumbersome and rigid binary divide.<sup>13</sup> However, the less extreme end of the

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<sup>12</sup> Jonathan Wolff, 'Structures of Exploitation' in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018) 176-177.

<sup>13</sup> Judy Fudge, 'What Makes Labour Free? (And Why This Question Matters)' (Futures of Work, 24 May 2019) <<https://futuresofwork.co.uk/2019/05/24/what-makes-labour-free-and-why-this-question-matters/>> accessed 22

continuum is relatively unexplored and one category of exploitative relations that is only given superficial attention is commodification. Commodification thus far has primarily been regarded as an economic form of exploitation. The International Labour Organisation's 1944 declaration 'Labour is not a commodity' represents the post-war settlement's narrow and limited recognition of economic exploitation without acknowledging the social dynamics of exploitation in capitalist labour relations.<sup>14</sup> The social dimensions of work and exploitation that could be incorporated into commodification have been given little attention. Limiting labour law to instrumentalist, market-based arguments has been strongly critiqued by scholars such as Dukes, Polanyi, and Sinzheimer.<sup>15</sup> Taking inspiration from their broad critique, in this section I shall advance a social account of commodification. On this account, commodification, as a form of exploitation, occurs in social terms when workers are unable to participate in the governance of their workplace. As a result, their social character is subordinated to their economic character thereby commodifying them as an instrument of production. From this perspective, exploitation, properly understood, is not just an economic question but also a social question.

In order to develop this 'social account of commodification', this part starts by explaining and adopting Marx's split between the labourer and labour power as its starting point to develop the notions of a social character and economic character.<sup>16</sup> I depart from Marx in the critical sense of denying the disembodiment of labour, for both the social character and the economic character are present throughout work. Secondly, I argue that applying Polanyian 'subordination' to particular relationships determines, whether they are treated as social beings or as if they are a mere instrument of production, disempowered of participatory social capacities and therefore 'commodified'. Finally, denying or inhibiting participation in the governance of the workplace is the principal means of subordinating the 'social character' to the 'economic character'.

### ***1. The 'social character' and 'economic character'***

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January 2020; Genevieve Lebaron, 'Unfree Labour Beyond Binaries' (2015) 17(1) *International Feminist Journal of Politics* 1; Sebastien Rioux and others, 'Capitalism and unfree labour: a review of Marxist perspectives on modern slavery' (2020) 27(3) *Review of International Political Economy* 709.

<sup>14</sup> Davidson (n 10), 524.

<sup>15</sup> Hugo Sinzheimer, 'Die Demokratisierung des Arbeitsverhältnisses' in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Frankfurt/ Cologne 1976); Dukes (n 8); Karl Polanyi, *The Great Transformation: the Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001).

<sup>16</sup> Ian Hunt, 'Labour and Labour-Power' (1989) 52(1) *Radical Philosophy* 22.

Throughout his writings, particularly on alienation, Marx distinguished ‘labour’ from ‘labour-power’.<sup>17</sup> The latter represents the worker’s productive capacities that he can sell to the capitalist, as a commodity, in exchange for a wage.<sup>18</sup> Labour-power means the skills typically possessed by workers which can be used in production, essentially the capacity to engage in productive work. The commodification of labour-power is essential to Marx’s understanding of the economic exchange that drives capitalist production and the generation of profit.<sup>19</sup> Labour refers to the manner in which labour power is exercised. The manner of production is not predetermined. It depends not only on the workers skills etc. but also its social and legal environment and organisational structures. Drawing upon Marx’s divide between ‘labour’ and ‘labour-power’, central to the social account of commodification is the recognition of the social character and economic character embodied within workers. These characters are institutionally separate ‘but functionally integrated and co-constitutive’<sup>20</sup> of labour. Both describe different aspects of workers’ creative productive capacities that are present throughout a workers’ productive activity; one cannot neatly disentangle the worker’s productive capacities from their non-economic life as a social being.<sup>21</sup>

The economic character draws upon Marx’s use of labour-power. This character reflects the basic instrumental capacity to engage in economic production, capable of being controlled and directed by external actors. A workers’ skills, physical strength, problem-solving intelligence, work ethic etc. may be included. Workers in this sense are valued as living machines rather than empowered social actors, largely devoid of independent social, participatory qualities. Creativity, autonomy and agency are valued solely by reference to whether they increase their productive capacity. As far as the employer is concerned, the worker is simply an abstraction without the capacity or need for social action. As far back as Aristotle it was recognised that workers (or slaves in Aristotle’s case) may be reduced to ‘animated tools’.<sup>22</sup> More recently, Collins points out that workers, by virtue of their labour-power, may be used as ‘instruments’ of the employer.<sup>23</sup> Collins

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<sup>17</sup> Karl Marx, *Capital: Volume I* (Penguin Classics 1990) 271.

<sup>18</sup> *ibid* 272-274.

<sup>19</sup> Matt Zwolinski, ‘Exploitation’, *The Stanford Encyclopaedia of Philosophy* (20 December 2001) <<https://plato.stanford.edu/entries/exploitation/#ConcExpl>> accessed 24 May 2020.

<sup>20</sup> Benjamin Selwyn and Satoshi Miyamura, ‘Class Struggle or Embedded Markets? Marx, Polanyi and the Meanings and Possibilities of Social Transformation’ (2014) 19(5) *New Political Economy* 639, 653.

<sup>21</sup> Davidson (n 10).

<sup>22</sup> Barry Nicholas, *An Introduction to Roman Law* (rev edn, OUP 1979) 70.

<sup>23</sup> Hugh Collins, ‘Is the Contract of Employment Illiberal?’ in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018) 53.

further acknowledges that employer control of labour-power, the economic character, brings the risk that it will solely exist to support the promotion and fulfilment of the goals of the employer.<sup>24</sup> As the economic character consists of instrumental productive capacities, where it promotes the goals of the employer, the economic character does not, in isolation, have an independent existence but may be alienated from the worker and in essence belong to the employer. In this sense, the economic character of workers in a capitalist system may only contribute to their life instrumentally and not constitutively, a process powerfully described by Gardner: 'it is as if one's working life is not part of one's life ... the demands she faces at work are not seen as demands of her life. They are demands for her work, which is conceived as an alien force consuming what would otherwise be her life'.<sup>25</sup> The economic character might manifest an economic power that can attract higher wages or safer conditions, but in a similar way that a machine might be more expensive or require better maintenance than others. The economic character might be rewarded through economic ends, yet it is limited to an instrumental value in which the productive capacities promote the goals of the employer.

The social character refers to workers' capacity to control the content of productive activity. Two points are key here in regards to how productive capacities, ie the economic character, are deployed and exercised. Firstly, it is important to acknowledge that work is a social activity. The workplace is a social space, where workers function as social beings. Durkheim and Marshall's 'recognition of the importance of work to provide a ... social space, a place that nurtures the social'<sup>26</sup> showed that 'social engagement' emerges from group interaction in the workplace and 'can be witnessed at the level of the shop-floor and beyond'.<sup>27</sup> The European Court of Human Rights regards a worker as a social being at work, acknowledging that the right to a 'private social life' encompasses the workplace,<sup>28</sup> and that it is 'in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world'.<sup>29</sup> Furthermore, the basic fact of economic production generally requires workers to labour together and provides a social status, an expression of their role in society. Mantouvalou observes

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<sup>24</sup> *ibid* 54.

<sup>25</sup> John Gardner, 'The Contractualisation of Labour Law', in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018) 43-45.

<sup>26</sup> Tim Strangleman, 'Rethinking industrial citizenship: the role and meaning of work in an age of austerity' (2015) 66(4) *The British Journal of Sociology* 673, 679.

<sup>27</sup> *ibid*.

<sup>28</sup> *Bărbulescu v România* [2017] I.R.L.R 1032, [74]-[80]; *Botta v Italy* (1998) 26 E.H.R.R. 241, [32].

<sup>29</sup> *Neimietz v Germany* (1993) 16 E.H.R.R. 97, [29].

that, of its many intangible benefits, ‘work is a central element of a person’s identity not only because of the value of work for people’s self-perception, but for the social status that it confers, and for socialisation’.<sup>30</sup> The workplace is where we meet many of our friends and develop social relations, bringing psychological benefits as we feel valued in society.<sup>31</sup>

Secondly, within this social space workers can exert control over their creative productive capacities. How production is organised and workers’ productive capacities directed is central to the ‘social account’ of commodification. Drawing upon Marx’s concepts of ‘species-being’ and alienation, the social character constitutes workers’ capacity to independently control and direct their creative productive forces. According to Marx, work is an extension of man’s being, a free conscious activity constitutive of what men are. Marx writes ‘as individuals express their life so they are. What they are, therefore, coincides with what they produce and how they produce’.<sup>32</sup> The ‘species-being’ represents the free conscious activity of man, consciously expressing himself in objective production. The innate human potential to creatively produce is realised when man engages the totality of his capacities. The social character reflects the capacities of workers that are constitutive of their own independent life. Workers have non-instrumental dimensions, broadly their own capacity or will, the ability to form their own goals independent from the employer.<sup>33</sup> Collins writes that ‘labour ... is not a mere instrument ... because a worker is capable of forming his or her own independent plans and acting upon them’.<sup>34</sup> Work is also a locus of opportunity, creative fulfilment, and self-realisation as a flourishing productive human. The social character is constitutive of workers being in control of their productive capacities.<sup>35</sup> Thus it is not simply the worker’s productive forces that matter but how they are unleashed and the social action governing them that are essential to a fully formed view of exploitation. The social dimensions of labour are an essential aspect of free, dignified and fulfilling work that cannot be overlooked.<sup>36</sup> Work is not just an economic activity but a distinctive social act, a potentially free and conscious self-realising

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<sup>30</sup> Virginia Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13(3) *Human Rights Law Review* 529, 549.

<sup>31</sup> *ibid.*

<sup>32</sup> Karl Marx, *The German Ideology* (Martino Fine Books, 2011) 409.

<sup>33</sup> Collins (n 23) 53-54.

<sup>34</sup> *ibid.*

<sup>35</sup> Denise Reaume, ‘Individuals, Groups and Rights to Public Goods’ (1988) 38(1) *University of Toronto Law Journal* 1, 9.

<sup>36</sup> *ibid.*; Santilli (n 11).



activity.<sup>37</sup> We can therefore regard the social character as the sum of the social capacities and qualities necessary to independently control and direct one's own creative productive capacities.

## **2. Subordination of the social character to the economic character**

The elucidation of the two characters embodied in workers is one that is capable of penetrating the diverse labour dynamics and relationships that exist within modern capitalist production without being limited to the economic terms upon which the worker enters employment. The next stage in developing the social account is to question what the exploitative dynamic regarding the two characters is. Holistically analysing the relative position of the workers' social and economic character enables us to determine whether the worker himself as a social being is commodified.

As part of his critique of market society, the core of Polanyi's theory of commodification is the notion of subordination.<sup>38</sup> Polanyi's argument first states that labour is a fictitious commodity on the basis that it 'is a human activity which cannot neatly be detached from the rest of life or be stored'.<sup>39</sup> This makes it an 'inappropriate subject for exposure to fluctuating market value'<sup>40</sup> as allowing 'the market mechanism to be sole director of the fate of human being ... would result in the demolition of society'.<sup>41</sup> According to Polanyi, a 'self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere'<sup>42</sup> and 'to include ... (fictitious commodities) in the market mechanism *means to subordinate the substance of society itself to the laws of the market*'.<sup>43</sup> Polanyi's critique of liberal capitalism warns of the dangers of subjecting social relations to abstract economic forces.<sup>44</sup> It rests on a condemnation of a market society, in which the society is subordinated to the requirements of markets, exposing 'the manner in which capitalist markets privilege economic demands over the social'.<sup>45</sup> Polanyi acknowledges the importance of social engagement capacities and qualities to prevent the utopian dangers of a disembedded market governing society.

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<sup>37</sup> Thomas Wartenberg, "'Species-Being" and "Human Nature" in Marx' (1982) 5(2) *Human Studies* 77, 79-81.

<sup>38</sup> Karl Polanyi, *The Great Transformation: the Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001).

<sup>39</sup> Novitz (n 9) 15.

<sup>40</sup> *ibid.*

<sup>41</sup> Polanyi (n 38) 76.

<sup>42</sup> *ibid.* 74.

<sup>43</sup> *ibid.* 75 [Emphasis added].

<sup>44</sup> Polanyi (n 38).

<sup>45</sup> Stuart Rosewarne, 'Globalisation and the Commodification of Labour: Temporary Labour Migration' (2010) 20(2) *The Economic and Labour Relations Review* 99, 104.

Just as Polanyi's disembodied market deprives people of important human, social qualities and the means to control productive forces,<sup>46</sup> so too does the subordination of the worker's social character to their economic character. Where the fate of workers is governed and directed by employer demands and market mechanisms, Polanyi's notion of subordination discerns the way in which the relationship between the worker's social and economic character produces exploitation. The idea of the social being subordinated to the economic constitutes the core element of exploitation in social commodification. When the worker's social character is subordinated to their economic character, they are being exploited in social terms. Subordination of the social character to the economic character is the dehumanising force that situates workers as abstract instruments, abandoning the social, creative, productive qualities and capacities to the economic imperatives of production governed by employers and abstract market forces.

As Wolff illustrates, it is important to identify a breached norm that constitutes exploitation. Exploitation is a heavily normative concept that involves a morally dubious arrangement, which breaches a moral norm. In this case, the norm can be said, per Marx, to be the undermining of the conditions for flourishing as a human being. Although the wages may be adequate, there is something fundamentally demeaning and damaging about a working relationship where workers are unable to realise and fulfil capacities by exerting independent control over their creative productive capacities.<sup>47</sup> When subordinated, Collins writes, workers 'must always subordinate or sacrifice their personal wishes to those that support the promotion and fulfilment of the goals of the employer'.<sup>48</sup> A dominant economic character, controlled and directed by authoritarian workplaces, reduces the worker to a mere instrument of production and exploits them by using their economic character whilst inhibiting their ability, through their social character, to determine and realise for themselves how their working life is governed and exercised. The totality of life becomes fragmented and degraded.<sup>49</sup> As such, the analysis of exploitation should examine whether and how working conditions enable workers to flourish as social, autonomous human beings, and not be reduced to economic instruments subordinating their agency to the objectives

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<sup>46</sup> Hüseyin Özel and Erdal Yılmaz, 'What Can Marxists Learn From Polanyi' (ResearchGate, 16 September 2014) <[https://www.researchgate.net/publication/255580966\\_What\\_Can\\_Marxists\\_Learn\\_From\\_Polanyi](https://www.researchgate.net/publication/255580966_What_Can_Marxists_Learn_From_Polanyi)> accessed 8 June 2022, 3

<sup>47</sup> Wolff (n 12) 176-179.

<sup>48</sup> Collins (n 23) 54.

<sup>49</sup> Özel and Yılmaz (n 46), 5.

of capital. The next subsection will address work's potential for social engagement and flourishing.

### **3. *Participation in workplace governance***

On the 'social account' of commodification, how production is governed is a critical element of exploitation. It is important to be explicit about the anti-democratic, class-based reality of the workplace and the power differentials involved. In capitalist economies, as a default rule, private property confers upon owners' authoritarian control over the workplace with very little constraint.<sup>50</sup> Almost all companies are established as organisations governed through autocratic hierarchical command structures.<sup>51</sup> The law recognises and constructs this organisational reality through the doctrine of the 'employer/managerial prerogative'. Employers commonly exercise enormous, arbitrary power over their workers through unilateral decisions that employees must obey. Racabi has listed the tremendous breadth of employers' decision-making power, enhanced by the incomplete nature of employment contracts.<sup>52</sup> The argument that capitalist workplaces are authoritarian has a long tradition, notably through Marx, Engels, Laski and GDH Cole, but is widely recognised by contemporary scholars too. Racabi characterises employers as 'sovereigns' in the workplace,<sup>53</sup> whilst Collins writes that the 'contract of employment embraces an authoritarian structure'.<sup>54</sup> Gardner has provided an especially powerful critique, illustrating the authoritarianism and alienation concomitant to the default employment relationship. He writes that 'contracts of employment can be used to assign vast authority in the employment context, potentially subjecting people for a significant proportion of their time to a regime of petty rules and capricious directions which, if it were replicated outside the workplace, would be classified as the apparatus of a totalitarian regime'.<sup>55</sup>

Contrasting the authoritarianism of the workplace with the social and moral importance of work in our lives, exhibited through the social character, highlights the tension 'between the employer's reliance on the entitlements of private ownership and the workers' claim, based upon

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<sup>50</sup> Gardner (n 25) 44; Collins (n 23) 56.

<sup>51</sup> Eric Dirnbach, 'Why is the workplace a dictatorship?' (Organizing Work, 12 September 2019) <<https://organizing.work/2019/09/why-is-the-workplace-authoritarian/>> accessed 20<sup>th</sup> May 2022.

<sup>52</sup> Gali Racabi, 'Abolish the Employer Prerogative: Unleash Work Law' (2021) Berkeley Journal of Employment and Labor Law, Forthcoming, 6-8.

<sup>53</sup> *ibid* 8.

<sup>54</sup> Collins (n 23) 48.

<sup>55</sup> Gardner (n 25) 46; Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton University Press 2017).

values of respect, equality, and self-determination, to have a voice in the management of the business'.<sup>56</sup> The potential divergence between the social and economic character is derived from how production is organised, notably when it has an autocratic structure and workers have little control over their own productive capacities. Various scholars have thus advocated democratising the workplace by enhancing worker participation in its governance, thereby providing them with greater control and freedom to determine how their creative productive capacities are exercised within social institutions. Laski observes there is as much of a 'right to be concerned with the government of industry as there is to be concerned in the government of politics'.<sup>57</sup> Furthermore, the concept of industrial citizenship evokes the idea belonging to the workplace as a social institution and brings the social participatory ideals of citizenship to the employment domain.<sup>58</sup> Building upon T. H. Marshall, Strangleman writes that industrial citizenship speaks of 'workplace culture, norms and values' that in part provide a framework linking individuals to community.<sup>59</sup> Workers are provided with a sense of belonging and unity with their productive capacities. Participative engagement in the shared practice of governance designates workers as democratic stakeholders imbued with social qualities that transcends the status of a mere 'instrument of production'. Free, independent worker participation in its governance juxtaposes and 'ameliorate[s] the harshness of the market[']s'<sup>60</sup> singular concern for economic capacities. It brings to the fore dignifying and liberating social actions. There is a dignity in being taken seriously as a participant in the governance of your own life.

Participation in the governance of the workplace, challenging the default authoritarianism of the employment relationship's structure, is critical to ensuring the social character is not subordinated to the economic character as work does not simply become the exercise of productive capacities for the economic benefit of others. It enables the worker to exert meaningful, independent control over their capacities for creative production and pursue self-determination and self-realisation. Equally, if participation in workplace governance is inhibited, the way in which workers' productive capacities, ie their economic character, are exercised is determined and directed by external actors and market forces. Commodification has a de-democratising effect in

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<sup>56</sup> Hugh Collins and others, 'Does Labour Law Need Philosophical Foundations?' in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018) 26.

<sup>57</sup> Harold Laski, *A Grammar of Politics* (George Allen & Unwin Ltd 1934) 112.

<sup>58</sup> Fudge 'After Industrial Citizenship' (n 9) 636, 646-647.

<sup>59</sup> Strangleman (n 26) 676-677.

<sup>60</sup> Fudge, 'After Industrial Citizenship' (n 9) 635.

the workplace. The worker does not have an independent say over how their economic character is deployed and it exists instrumentally for the benefit of others. Therefore, his or her social character is subordinated to his or her economic character. Inhibiting participation in the governance of the workplace prioritises workers as economic instruments and institutes a process of exploitative degradation of the social character.<sup>61</sup>

I am not the first to suggest a link between participation in workplace governance and exploitation; for present purposes it fills a gap in the conceptual development of commodification and labour law's approach to irregular migrant labour. Outside the commodification literature, capabilities and republican theorists have observed the link. For example, one of Martha Nussbaum's central capabilities in dignified labour is the capability to control one's environment.<sup>62</sup> Pettit's model of republican freedom also centres procedural, contestatory norms in the notion of non-domination.<sup>63</sup> In a legitimate social order, workers should be able to 'combine together in solidarity so that they can participate in decision-making and contest workplace decisions affecting them via discussion and consultation with management'.<sup>64</sup> The social account of commodification is not inconsistent with various philosophical inquiries into the meaning of free, dignified labour. Exploitation has a distinctly social dimension. It constitutes more than just the economic, productive aspects of work but extends to independently controlling the exercise of social, productive capacities and qualities through which workers can flourish and acquire self-fulfilment.

### **C. THE EXERCISE OF COLLECTIVE VOICE**

Having set out the 'social account' of commodification and arguing that participation in workplace governance is essential to preventing commodification, the analysis now turns to how workers can participate in the governance of the workplace. This question is particularly pertinent to labour lawyers. As the law partly 'constitutes the labour market and determines the relative power of the actors within it',<sup>65</sup> a key question for labour scholars should be how labour law can empower the social character and prevent its subordination. As a vocation concerned with social justice,<sup>66</sup>

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<sup>61</sup> Selwyn and Miyamura (n 20) 641.

<sup>62</sup> Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Oxford University Press 2011).

<sup>63</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

<sup>64</sup> David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour law' in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018) 111.

<sup>65</sup> Hugh Collins, 'Against Abstentionism in Labour Law' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence* (Clarendon Press 1987) 87.

<sup>66</sup> Hugh Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Review* 468.

various aspects of labour law with social dimensions impinge on a worker's social character. These aspects have a plurality of values, but one that is especially pertinent to my argument is 'collective voice'. Workers exercising collective voice is essential to participation in workplace governance. Normatively legitimate social institutions promote the voice of potentially vulnerable parties, which, in the case of workers, can be exercised through collective organisation, collective bargaining, and strike action.<sup>67</sup> The analysis first examines the value of voice in general terms before exhibiting how labour law, using the UK as a case study, can facilitate the exercise of collective voice. It is concluded that labour law has a pivotal role in empowering the social phenomena of workers' collective voice.

### ***1. The value of voice in workplace governance***

The value of voice at work is widely recognised. From an instrumentalist perspective, labour rights can be justified on the basis that they serve economic purposes. In this model, worker voice may be valued and justified because it generally improves efficiency.<sup>68</sup> Dukes, however, has critiqued the narrowness of instrumentalist economic arguments that accept the primacy of economic interests and motivations.<sup>69</sup> With reference to Polanyi and Streeck, Dukes argues that a model that emphasises the social democratic dimensions of labour law 'allows us to argue for the legitimacy in themselves of workers' claims to human dignity, liberty and equality'.<sup>70</sup> From this perspective, voice can be seen more clearly to have a participatory and democratic value that advances social interests and rights as well as economic ones. The critique is in keeping with my development of the 'social account' of commodification against primarily economic perspectives of commodification.

Recognition of the value and legitimacy of worker voice should centre upon its participatory and democratic value. In the Polanyian narrative that Dukes draws upon, voice has an important role in ensuring that the social sphere is not subordinated to economic forces.<sup>71</sup> On this basis, voice has a far more expansive role and normative benefit to workers than under instrumentalist models as it allows workers to register interests that are not economic but social, far from being subservient to or derivative of interests in economic efficiency in the workplace.<sup>72</sup>

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<sup>67</sup> Cabrelli and Zahn (n 64) 111.

<sup>68</sup> Bob Hepple, *Labor Laws and Global Trade* (Hart 2005) 255.

<sup>69</sup> Dukes (n 8) 287-288.

<sup>70</sup> *ibid* 288.

<sup>71</sup> Novitz (n 9) 16.

<sup>72</sup> Dukes (n 8) 288.

As well as the value of the content of 'voice', the fact of exercising voice has an innate, non-instrumental value. Sinzheimer,'s work is a prominent example of attention being drawn to the democratising function of labour law,<sup>73</sup> whilst Bogg and Ewing have also illustrated that voice has fundamental democratic significance.<sup>74</sup> Exercising voice empowers workers to combine together in solidarity to participate in decision-making and contest workplace decisions.<sup>75</sup> In recognition of its participatory and democratic value, voice is a central pillar of the International Labour Organisation's 'decent work agenda' through its promotion of 'social dialogue' and is derivative from the ILO Declaration on Fundamental Principles and Rights at Work 1998. It should be emphasised that the democratic and participatory value of exercising voice is limited, if the exercise of voice is primarily valued by reference to economic efficiency.

The meaningful exercise of voice has to be collective. For subordinate parties in a relationship, weak when atomised and isolated from one another, acting collectively can reshape or re-define power relations. Employers have a broad authority to fix limits on freedom of speech by taking advantage of the individual worker's subordinated position.<sup>76</sup> To counteract this authority, collective voice is, in Kahn-Freund's words, 'a countervailing force to counteract the inequality of bargaining power' by dynamically contesting and challenging the managerial prerogative.<sup>77</sup> Whereas commodified labour is individualised, workers need to collectivise before they can act effectively against employers and the power of capital.<sup>78</sup> In complex structures like the workplace, organising to exercise collective voice is a co-operative act that enables workers to participate in democratic governance otherwise unobtainable individually. Collective voice does not require all workers to hold precisely the same view. In the context of the workplace, collective voice requires individuals to accept majority decisions and express solidarity with their fellow workers through the collective mechanisms exercising that voice.<sup>79</sup>

## **2. *Exercising collective voice in the UK***

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<sup>73</sup> Dukes (n 8) 283.

<sup>74</sup> Alan Bogg and Keith Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33(3) *Comparative Labour Law and Policy Journal* 379.

<sup>75</sup> Cabrelli and Zahn (n 64) 111.

<sup>76</sup> Collins (n 23) 58.

<sup>77</sup> Paul Davies and Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 18.

<sup>78</sup> Paul Bagguley, 'Industrial citizenship: a re-conceptualisation and case study of the UK' (2013) 33(5) *International Journal of Sociology and Social Policy* 265, 266.

<sup>79</sup> Jack Barbalet, 'Citizenship: Rights, Struggle and Class Inequality' (Open University Press 1988) 26.

Using the UK as a case study, there are three core mechanisms that exercise collective voice by workers: 1) trade unionism and collective organisation; 2) collective bargaining; and 3) strike action. The list is not intended to be exhaustive but provide key examples of how collective voice can be exercised and its connection to industrial governance.<sup>80</sup> Other forms of collective voice, such as work councils, may be more prominent in other jurisdictions.

*a) Trade unionism and other forms of collective organisation*

The collective organisation of workers generally takes place through trade unions. This has traditionally taken the form of industrial unionism or craft unionism in which workers are organised by trade unions on the basis of the industry or trade in which they work. These forms tend to operate in standard, full-time industrial employment centred upon workplace experiences and status as workers (and not other characteristics that may intersect). Trade unions in these models are the exclusive means of organisation. As formerly industrial economies like the UK have transformed into service economies with large migrant populations, non-traditional forms of collective mobilisation, notably, community-based organisation have been shown to be feasible and desirable.<sup>81</sup> The concept of community unionism, in which unions form alliances and work in cooperation with community based-organisations to achieve specific common goals, is increasingly used to address migrant workers, particularly in the USA.<sup>82</sup> Trade unions in the UK, as Bogg and Novitz observe, are also ‘creatively using alternative ways of meeting (through churches and community groups) so as to ensure access to participation’ for migrant workers.<sup>83</sup> Worker organisations also include worker centres, immigrant rights movements, and community campaign groups.<sup>84</sup> Two recent campaigns in the UK exemplify alternative forms of organisation. The ‘Justice for Domestic Workers’ campaign began with community groups and attracted involvement from major unions such as UNITE.<sup>85</sup> Secondly, the ‘Justice for Cleaners’ campaign sought to secure a living wage and unionise migrant (some irregular) cleaners working in various

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<sup>80</sup> One could also include worker representation on board of directors, work councils, and wage boards, but they are rare in the UK.

<sup>81</sup> Zhe Jiang and Marek Korczynski, ‘When the ‘unorganizable’ organize: The collective mobilization of migrant domestic workers in London’ (2016) 69(3) *Human Relations* 813, 834.

<sup>82</sup> Simon Black, ‘Community Unionism: A Strategy for Organising in the New Economy’ (2005) 14 (3) *New Labor Forum* 24; Janice Fine, ‘Community Unions and the Revival of the American Labour Movement’ (2005) 33 *Politics & Society* 153.

<sup>83</sup> Bogg and Novitz (n 6) 363.

<sup>84</sup> Michelle LeVoy and Nele Verbuggen, *Ten Ways to Protected Undocumented Migrant Workers* (PICUM 2005) 9; R Milkman, ‘Immigrant Workers, Precarious Work, and the US Labor Movement’ (2011) 8 *Globalization* 361.

<sup>85</sup> Jiang and Korczynski (n 81).



offices, including Canary Wharf. The campaign involved several community organisations, some ad hoc, supported by UNITE and TGWU.<sup>86</sup> The campaigns show that previously dispersed and isolated workers, such as irregular migrants, have the potential to organise collectively through non-traditional methods. They demonstrate the empowerment and solidarity that can be engendered through expressive collective action. In these contexts, organisation on the traditional basis of workplace experience is difficult and success often depends upon additional community support on an intersecting basis.<sup>87</sup>

Collective organisation, whether through traditional forms of trade unionism or non-traditional community organisation, exercises collective voice in three ways. Firstly, forming or joining an association is an inherently expressive act. Many trade unions and community groups promote a particular ideology/philosophy, social goals or conceptions of justice and dignified, decent work.<sup>88</sup> By joining the association, workers express solidarity and agreement with that ideology, goal, etc. They express a collective identity and put on a united front, establishing a voice at work independent from the employer and creating a sense that they can exercise some control over their working lives.<sup>89</sup> Secondly, as Ewing argues, trade unions have regulatory and representative functions through which unions can engage in bargaining processes and represent and promote the interests and views of its workers.<sup>90</sup> We may call this the 'representative voice' of associations in which their collective strength instrumentally protects and facilitates worker voice by providing a conduit and checking the authority of employers that may suppress worker voice.<sup>91</sup> Finally, collective organisation promotes workers' participation in exercising their voice. Unions and community groups provide an inclusive, participatory space and the confidence to express oneself.<sup>92</sup> Greater awareness of rights, information and available options influence and facilitate worker voice. For these reasons, the exercise of collective voice advanced by collective organisation transcends economic considerations (though ultimately they will be highly relevant

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<sup>86</sup> Stephen Mustchin, 'Unions, learning, migrant workers and union revitalization in Britain' (2012) 26(6) *Work, Employment and Society* 951, 956.

<sup>87</sup> Jane Wills, 'Making Class Politics Possible: Organizing Contract Cleaners in London' (2008) 32(2) *International Journal of Urban and Regional Research* 305, 320.

<sup>88</sup> Virginia Mantouvalou, 'Organizing Against Abuse and Exploitation: The Associational Rights of Undocumented Workers' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014) 382-383.

<sup>89</sup> Stuart White and Martin O'Neil, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds.), *Philosophical Foundations of Labour Law* (Oxford University Press 2014) 259-260.

<sup>90</sup> Keith Ewing, 'The Function of Trade Unions' (2005) 34(1) *Industrial Law Journal*, 3-4.

<sup>91</sup> Nien-he Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31 *Social Theory and Practice* 155.

<sup>92</sup> Mantouvalou, 'Organising against Abuse' (n 88) 385.

to the organisation effort) as it, in part, constitutes a social aspect of employment by forming an expressive association with other people based on a common interest. Fundamentally, without some form of collective organisation promoting voice, workers would struggle to have a voice.<sup>93</sup> As a collective front, workers are more likely to be respected as dignified, autonomous beings.

b) *Collective bargaining*

For workers to have a voice, collective bargaining is essential.<sup>94</sup> The right of collective bargaining and for workers to be given voice ‘in the preparation and application of social and economic measures’ was recognised in Article III(e) of the ILO’s 1944 Declaration of Philadelphia. Collective bargaining enables the articulation of concerns, demands and ideas pertinent to decisions on workplace governance. The ECtHR’s doctrine of the ‘right to be heard’<sup>95</sup> implicitly acknowledges that collective bargaining entails expression. The concurring opinion in *Demir v Turkey*<sup>96</sup> further recognised collective bargaining as a form of social dialogue. More explicitly, the Superior Court of Québec in *Québec (Procureure Générale) v. Commission des relations du travail, division des relations du travail* sought to balance the free expression of workers in mobilising to bargain collectively with the employer’s property rights.<sup>97</sup>

It is not uncommon to adopt an instrumentalist view of collective bargaining as an economic tool designed to maximise workers’ terms and conditions based on their collective bargaining power. On this view, collective bargaining is primarily a ‘rule-making process’,<sup>98</sup> undertaken ‘with a view to the regulation of terms and conditions of employment’<sup>99</sup> leading to ‘collective agreements that codify good labour standards for workers’.<sup>100</sup> However, it is important not to neglect the participatory and expressive dimensions of collective bargaining. Instrumentalist approaches to collective bargaining ‘obscure the participatory dimension of collective bargaining’ and the fact that collective bargaining, in an otherwise authoritarian workplace, has a uniquely ‘democratic quality’.<sup>101</sup> Collective bargaining is a form of social dialogue that enables workers to

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<sup>93</sup> *ibid* 398.

<sup>94</sup> Bogg and Ewing (n 74).

<sup>95</sup> *Swedish Engine Drivers Union v Sweden* (1978) E.C.C. 1, [40]; *National Union of Belgian Police v Belgium* (1979-80) 1 E.H.R.R. 578, [39].

<sup>96</sup> (2009) 48 E.H.R.R. 54.

<sup>97</sup> Stephane Fillion, 'Freedom of expression during collective bargaining: what are the limits' (HR Daily Advisor, 9 April 2017) <<https://hrdailyadvisor.blr.com/2017/04/09/freedom-of-expression-during-collective-bargaining-what-are-the-limits/>> accessed 27 May 2022.

<sup>98</sup> Syed Hameed, 'A Theory of Collective Bargaining' (1970) 25(3) *Industrial Relations* 531, 538.

<sup>99</sup> Article 4 ILO Convention no.98.

<sup>100</sup> Bogg and Ewing (n 74) 405.

<sup>101</sup> *ibid*.

participate in the governance of the workplace and express their demands and objectives.<sup>102</sup> As Bogg and Ewing write, ‘in collective bargaining, workers join together and exercise collective democratic control over their working lives. Workers become actively engaged in the practice of self-government as a community of citizens, rather than passive recipients ... through the assertion of our collective agency’.<sup>103</sup> By providing workers with direct input into governing their working conditions, collective bargaining values workers’ voice and democratic participation. As noted above, collective bargaining does not require all workers to share the same view, but to accept majority decisions, express solidarity, and collectively put on a united front against employer power.

We should also consider how collective bargaining is conducted. Undoubtedly, trade unions are key to institutionalised forms of collective bargaining. UK law sets out a detailed process in Schedule 1A Trade Union and Labour Relations (Consolidation) Act 1992 for trade unions to be recognised by employers for the purposes of engaging in collective bargaining. Furthermore, the ECtHR in *Demir v Turkey* referred to collective bargaining as a trade union freedom.<sup>104</sup> The tendency to view collective bargaining as an exclusively trade union activity is reflective of the decline of collective laissez-faire and its replacement with a system of increased formalisation and state regulation. However, collective bargaining can take non-institutional forms ie trade unions are not a necessary conceptual part. Whilst in practice matters of efficacy and the interventionist legal regulation of industrial relations mean that formally recognized methods of collective bargaining are conducted by trade unions ‘countervailing labour power is not synonymous with trade union power’.<sup>105</sup> It can lie beyond the confines of well-structured, formal trade unionism in unsophisticated, informal ways. As trade union representation rates decline and areas of the economy in which it is difficult to organise, such as the gig economy and other grey, precarious areas of the secondary segment, expand, it is important to imagine more expansive conceptions of collective bargaining that are not reduced to trade unionism. This is not to say trade unions and trade union organising are not important to exercising collective voice. They evidently do so by fostering a sense of collective identity, organising and institutionalising a bargaining unit, and pooling resources and collective power into negotiations. The basic point, however, is that we

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<sup>102</sup> *ibid* 387.

<sup>103</sup> *ibid* 405.

<sup>104</sup> *Demir* (n 96), [139].

<sup>105</sup> Davies and Freedland (n 77) 20.

should be open to new dynamic and creative forms of collective bargaining that could be promoted and protected as expressive enterprises where formal trade unions engaging in institutionalised collective bargaining is absent. This expansive, non-institutional approach refocuses our gaze on the normative participatory and expressive dimensions of collective bargaining.

The history of collective bargaining exemplifies that it can exist outside formal institutions and processes. Dynamic forms of informal, non-institutional collective bargaining operating outside trade union permission or procedures, such as shop floor bargaining by ad hoc worker groups, were a fairly common feature during collective *laissez-faire*.<sup>106</sup> Flanders describes this phenomenon as the fragmentation of collective bargaining, not conducted by institutionalised union representatives but by informal, autonomous, non-institutional work groups.<sup>107</sup> Kahn-Freund also doubted whether dynamic, informal modes of collective bargaining are necessarily institutionalised. He recognised that ‘the outstanding example of dynamic bargaining is probably provided by ‘unreformed’ bargaining by shop stewards at plant and work-group level, and yet bargaining machinery at this level is often anything but institutionalised’.<sup>108</sup> Non-institutional collective bargaining reflects a decentralised and informal expression of collective voice. In the migrant worker context, relatively non-institutional forms of collective bargaining can also recently be seen in relatively ad hoc, transitory campaigns such as the ‘justice for cleaners’ and ‘justice for domestic workers’ campaigns detailed above.

### **3. *Strike action***

As Collins and others observe, workers’ ultimate power is to take strike action and refuse to work until the employer listens and accedes to some of their demands.<sup>109</sup> Strike action can be perceived to have an expressive function in two ways, one instrumental the other normative. Firstly, from an instrumental perspective, strike action supports collective bargaining as a negotiation tactic. On this basis, strike action’s expressive function is derivative of collective bargaining’s expressive function. Without the possibility of strike action, it is often argued, collective bargaining decays into ‘collective begging’.<sup>110</sup> As Mantouvalou writes, ‘the right to strike is an essential means that

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<sup>106</sup> *ibid* 85-86.

<sup>107</sup> Allan Flanders, *Collective Bargaining: Prescription for Change* (Faber & Faber, 1967) 28.

<sup>108</sup> *ibid* 74.

<sup>109</sup> Collins and others (n 56) 26.

<sup>110</sup> Tonia Novitz, ‘The Perils of Collective Begging: the case for reforming collective labour law globally and locally too’ (2020) 44(2) *New Zealand Journal of Employment Relations* 3; Keith Ewing and John Hendy, ‘The Dramatic Implications of Demir and Baykara’ (2010) 39 *Industrial Law Journal* 2, 47.

workers have to control the environment, and to resist the power of the employer to abuse the inequality inherent in the employment relation'.<sup>111</sup> Strike action therefore materially affects the form of expression advanced by workers' collective negotiations with employers.

Bogg and Estlund provide an alternative account of expression in strike action. On their normative, republican-freedom account, the right to strike consists of fundamental basic liberties, including 'voice', and encompasses a concern to protect and facilitate the contestation of employers' prerogative power.<sup>112</sup> Strike action in itself has an expressive foundation as a means of 'contesting the employer's discretionary decision-making as it bears on the employee's life at work' and 'underscoring a grievance or a demand'.<sup>113</sup> Strikes are therefore underpinned by the 'freedom to express what one thinks'.<sup>114</sup> Its expressive basis is not limited to instrumentally supporting collective bargaining. Scholars such as Langille and Davies have also recognised that strike action has, in part, a normatively expressive foundation.<sup>115</sup>

Labour law, to conclude this section, has a crucial role in empowering workers' social character through collective voice mechanisms that facilitate participation in workplace governance. In developing labour law's 'normative programme',<sup>116</sup> it is crucial not to overlook its expressive and participatory dimensions that promote empowerment and self-determination. Addressing exploitation requires supporting and empowering workers to engage in collective social action that contributes to workplace governance. The workplace is not just an economic space but a social space, governance of which is essential for social fulfilment, self-determination and self-realisation. Labour law needs to recognise this is a key aspect of commodification and provide the foundations for 'workers to emancipate themselves from structures of arbitrary power'.<sup>117</sup>

#### **D. THE COLLECTIVE VOICE OF IRREGULAR MIGRANT WORKERS: COMMODIFICATION IN ACTION**

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<sup>111</sup> Mantouvalou 'Labour Rights in the European Convention on Human Rights' (n 30), 554.

<sup>112</sup> Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018), 250. The other basic liberties that compose the right to strike are, on their account, exit and association.

<sup>113</sup> *ibid* 238.

<sup>114</sup> Pettit (n 63) 103.

<sup>115</sup> Brian Langille, 'What is a Strike?' (2009-2010) 15 *Canadian Labour and Employment Law Journal* 355; ACL Davies, *Employment Law* (Pearson 2015) 459.

<sup>116</sup> Cabrelli and Zahn (n 64) 118.

<sup>117</sup> Bogg and Estlund (n 113) 251.

The collective dimensions of the social character in commodification requires analysing the structural conditions and position of the worker(s). Determining whether the social character is primary or subordinate to the economic character requires situating individual workers in a collective context focusing on social structures. When analysing exploitation, we are concerned with the structural conditions that produce it, not simply individual opportunistic wrongs. Examination of the structural conditions should not be limited to enumerated rights, which may struggle to penetrate the social structures inhibiting collective voice, particularly in the grey or invisible areas of the labour market's secondary segment. As the EU Agency for Fundamental Rights recognises, rights struggle to influence aspects of the economy that exist in the shadow of the state and away from formal processes.<sup>118</sup>

Irregular migrant workers, as shown in this section, are a stark example of how suppressing the social character through inhibiting collective voice is a significant factor in exploitation. Presently, the scholarship tends to focus on economic explanations and conceptions of exploitation regarding irregular migrants, such as the '[saving] on the costs of the organisation of work and social reproduction',<sup>119</sup> the 'worker discount'<sup>120</sup> and a general concern with labour costs.<sup>121</sup> In the case of irregular migrants this is due to the scarce consideration given to their collective dimensions, instead focusing on individual dimensions by approaching workers as atomised individuals at work.<sup>122</sup> There are only slim references to an absence of trade union activity in industries irregular migrants commonly work.<sup>123</sup> This limited analysis is also evident in some case law. For example, Lord Toulson in *Patel v Mirza*<sup>124</sup> acknowledged the economic vulnerabilities of employees but not the potential social vulnerability vis-à-vis the employer (aside from a precarious immigration status). This section therefore has the dual purpose of concretely applying the

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<sup>118</sup> European Union Agency for Fundamental Rights, 'Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States' (Luxembourg, 2011) 7.

<sup>119</sup> Sara Farris, 'Migrants' Regular Army of Labour: Gender Dimensions of the Impact of the Global Economic Crisis on Migrant Labor in Western Europe' (2015) 63(1) *The Sociological Review* 123.

<sup>120</sup> Shahram Khosravi, *Illegal Traveller: An Auto-Ethnography of Borders* (Palgrave 2010).

<sup>121</sup> Ruhs and Anderson (n 4) 198-199.

<sup>122</sup> Giuseppe Sciortino, 'Between Phantoms and Necessary Evils: Some Critical Points in the Study of Irregular Migrations to Western Europe' (2004) 24(1) *IMIS-Beitrag* 17, 41.

<sup>123</sup> European Union Agency for Fundamental Rights, 'Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States' (Luxembourg, 2011); United Nations, 'Issue Brief #6: Irregular migration and regular pathways, including decent work, labour mobility, recognition of skills and qualifications and other relevant measures' (Geneva, 2017).

<sup>124</sup> [2016] UKSC 42, [35]-[37].

arguments developed above and expanding the analysis of irregular migrant labour by foregrounding the exercise, or non-exercise, of their collective voice.

This section first provides an overview of irregular migrants' rights in international instruments that pertain to collective voice before analysing the structural conditions in the UK that curtail irregular migrants' exercise of collective voice. From this analysis, a clear conclusion can be drawn that irregular migrants are commodified in social terms, not just economic terms. Labour law's response to exploitation of irregular migrants should therefore not be limited to improving the economic terms of work (eg wages), but extend to empowering collective voice, amongst other means of enhancing participation in workplace governance.

### ***1. The human rights of irregular migrants***

The rights of irregular migrants related to collective voice are recognised in various international instruments. Freedom of expression and freedom of association are protected by Article 10 and Article 11 of the European Convention on Human Rights. (ECHR) The Strasbourg court has held in landmark cases such as *Wilson and Palmer v United Kingdom*,<sup>125</sup> *Enerji Yapi-Yol Sen v. Turkey*,<sup>126</sup> and *Demir v Turkey* that Article 11 protects collective bargaining and strike action as core trade union freedoms. Article 1's jurisdictional scope does not distinguish on the basis of migration status. In its words: 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention'. The scope of ECHR rights covers irregular migrants. The Council of Europe Parliamentary Assembly has noted 'the Convention requires that its contracting parties take measures for the effective prevention of human rights violations against vulnerable persons such as irregular migrants' and that 'restriction on freedom of assembly, association and expression should not extend beyond what is reasonably necessary'.<sup>127</sup> Migration status has also been included as a status that can be protected from discrimination under Article 14,<sup>128</sup> which applies where an action falls within any of the scope of the ECHR rights. The ECHR's socio-economic sister, the European Social Charter, expressly protects the rights to organise, collective bargaining and strike action in Article 5 and Article 6. However, irregular migrants are largely excluded from the scope of the European Social Charter by Appendix 'Scope of the Social Charter in Terms of Persons Protected'.

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<sup>125</sup> [2002] ECHR 552.

<sup>126</sup> [2009] ECHR 2251.

<sup>127</sup> Articles 12-14 Council of Europe Parliamentary Assembly Resolution 1509/2006.

<sup>128</sup> *Hode and Abdi v UK* App. no. 22341/09 (ECtHR, 6 November 2012).

At the UN, the right to form and join a trade union is found in Article 23 Universal Declaration of Human Rights, Article 22 International Covenant on Civil and Political Rights, and Article 8 International Covenant of Economic, Social and Cultural Rights. Article 26 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families specifically confers a right on irregular migrants to join trade unions and enjoy their services and activities. Under Article 40, however, irregular migrants do not have the right to form trade unions. The UK has not ratified the convention. International Labour Organisation (ILO) Convention 87 and Convention 98 protect freedom of association and the right to organise and collective bargaining respectively. They do not distinguish between migration statuses. The ILO's Committee on Freedom of Association has, in a complaint against Spain's restrictions, established the right of irregular migrants to form and join trade unions.<sup>129</sup>

Finally, in an advisory opinion, the Inter-American Court of Human Rights has ruled that the exclusion of irregular migrants from labour rights is unlawful. The opinion states: 'Labo[u]r rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition... [T]he migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment'.<sup>130</sup> The rights that could not be excluded include the right to freedom of association and correlated expression.

## ***2. Structural conditions silencing collective voice***

Despite international recognition of the human rights of irregular migrants regarding collective voice, the UK's domestic legal regime, illegality doctrine, and the structural conditions of irregular migrant labour significantly curtail irregular migrant's collective voice. In practice, UK law falls well below international standards. The law's regulation of irregular migrant work and its construction of the labour market actively contributes to the commodification of irregular migrants.

It is important to first situate irregular migration within a global context. Poor conditions may be tolerated and collective action further discouraged due to global inequalities between the UK and the migrant's country of origin. The conditions of irregular migrant labour cannot be

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<sup>129</sup> *Case No 2121 (Spain)* (ILO Committee on Freedom of Association, 2002) [559-61].

<sup>130</sup> *Advisory Opinion OC-198/03 on Juridical Condition and Rights of the Undocumented Migrants* (InterAmerican Court of Human Rights, 17 September 2003).



understood solely by reference to the labour market of an isolated nation-state.<sup>131</sup> 'Global inequalities mean some may be prepared to take on jobs at wages and conditions that many UK nationals will not consider', especially when the standards unacceptable in the host country are nonetheless higher than in their country of origin.<sup>132</sup> Remittances are often a central reason for tolerating exploitation,<sup>133</sup> as irregular migrants in the UK temporarily 'see work as a means to make money to send home and elevate their status there'.<sup>134</sup> These factors internally discourage collective action to demand conditions that would be considered acceptable by prevailing UK standards. An example of this phenomena is Leicester's garment factories in which an hourly wage of £5 is considered above average and worthy of pride.<sup>135</sup> Global inequalities and economic imperatives discourage expending time and energy into collective social action that could instead be used to maximise economic productivity.

The 'tough' immigration framework which shapes and governs the labour market position of irregular migrants provides further barriers to collective bargaining. Irregularity is one of the many immigration statuses produced by the state, a legal creation rather than a natural state of existence.<sup>136</sup> Irregularity does not merely entail a social relation with the state, but also a social relation with other social structures, eg the workplace, that acts as a constraint over forms of social engagement including collective action against the employer. An 'irregular' status guides migrants towards the secondary segment of the labour market<sup>137</sup> and denies the legal right to form socially visible organisations like trade unions.<sup>138</sup> The 'institutionalised uncertainty'<sup>139</sup> creates a space of 'forced invisibility, exclusion and subjugation'<sup>140</sup> that makes 'visible' collective voice difficult and

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<sup>131</sup> Hannah Lewis and others, 'Hyper-precarious lives: Migrants, work and forced labour in the Global North' (2015) 39(5) *Progress in Human Geography* 580, 593.

<sup>132</sup> Martin Ruhs, 'Immigration and Labour Market Protectionism' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014) 65.

<sup>133</sup> Susan Ferguson and David McNally, 'Precarious Migrants: Gender, Race and the Social Reproduction of a Global Working Class' (2015) 51(1) *Socialist Register*.

<sup>134</sup> Harald Bauder, *Labour Movement: How Migration Regulates Labour Markets* (Oxford University Press 2006).

<sup>135</sup> Sarah O'Connor, 'Dark Factories: Labour Exploitation in Britain's Garment Industry' (*Financial Times*, 17 May 2018) <<https://www.ft.com/content/e427327e-5892-11e8-b8b2-d6ceb45fa9d0>> accessed 24 May 2020.

<sup>136</sup> Ruhs and Anderson (n 4) 197.

<sup>137</sup> Bauder (n 136) 28, 32.

<sup>138</sup> Article 40 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>139</sup> Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment and Society* 300.

<sup>140</sup> Nicholas De Genova, 'Migrant Illegality and Deportability in Everyday Life' (2002) 31(1) *Annual Review of Anthropology* 419, 427.

risky. With no clear paths to regularisation, the status of irregular can become embedded, further prolonging and deepening the aversion to risky and ‘visible’ collective voice.<sup>141</sup>

The illegality doctrine is also pertinent. Illegality has the effect of reinforcing the perception of a weak social position vis-a-vis the employer. *Okedina v Chikale*<sup>142</sup> has ‘softened’ the doctrine’s application against irregular workers where the relevant provisions are sections 15 and 21 Immigration, Asylum and Nationality Act 2006 and exposed contract claims to the worker-protective influence of *Patel v Mirza* common law illegality.<sup>143</sup> However, in regards to statutory illegality applied to the Immigration Act 2016’s criminal regime, the *Okedina* judgment may not be particularly helpful to irregular migrants. As Bogg writes, *Okedina*’s reasoning, particularly the endorsement of *Hall v Woolston Hall Leisure Ltd*’s ‘knowledge and participation test’,<sup>144</sup> may result in implied statutory prohibition when applied to the 2016 Act’s regime of dual criminal liability.<sup>145</sup> A further problem, as Kerr LJ observed in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*,<sup>146</sup> is that statutory prohibition ‘depends upon considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations’. As it is difficult to distinguish *Phoenix* from *Okedina* under the 2016 Act’s regime,<sup>147</sup> the end result for irregular migrants caught by the illegal work offence in section 34 Immigration Act 2016 will likely be a harsh application of statutory illegality. This is compounded by section 24B (5) Immigration Act 1971 designating their wages as liable to confiscation under the Proceeds of Crime Act 2002. Here the law directly reproduces and consolidates vulnerability to exploitation.<sup>148</sup> By imposing criminal liability on the worker, the Act goes well beyond the protective paradigm suggested by Bogg,<sup>149</sup> and into the realms of punitive hostility. The purpose of the criminalization regime is to create a hostile environment that drives irregular migrants out of the country through

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<sup>141</sup> David Bacon and Bill Ong Hing, ‘The Rise and Fall of Employer Sanctions’ (2011) 38(1) Fordham Urban Law Journal 77, 101.

<sup>142</sup> [2019] EWCA Civ 1393.

<sup>143</sup> Alan Bogg, ‘*Okedina v Chikale* and Contract Illegality: New Dawn or False Dawn’ (2020) 49(2) Industrial Law Journal 258, 259.

<sup>144</sup> *Hall v Woolston Hall Leisure Ltd* [2001] 1 W.L.R. 225 [71]

<sup>145</sup> Bogg (n 145) 282.

<sup>146</sup> [1988] Q.B. 216 [273].

<sup>147</sup> Bogg (n 145) 276.

<sup>148</sup> Virginia Mantouvalou, ‘Legal Construction of Structures of Exploitation’ in Collins and others (eds), *The Philosophical Foundations of Labour Law* (Oxford University Press 2018) 197.

<sup>149</sup> Bogg (n 145) 277.

economic destitution and social isolation. Criminalization produces more compliant, not more protected, workers.

Whilst the illegality doctrine has not been directly applied to mechanisms for collective voice, the strength of the doctrine matters as it potentially increases employer power, heightening the vulnerability of workers. With no clear path to regularisation, compliance and discipline become structurally embedded. It is extremely difficult to exercise social power and participate in governing your work if your labour is designated as a criminal act. The illegality doctrine weakens irregular migrants' social position and disempowers them, making it less likely that collective voice mechanisms such as collective bargaining will be seen as a valid option. Bogg and Novitz have suggested that if the statutory rights regarding trade union membership, collective bargaining, and strike action in TULRCA 1992 are characterised as statutory torts, they may avoid the harsh application of illegality to contractual claims,<sup>150</sup> but no illegality case law has yet directly addressed this point.

The criminalisation of irregular migrant work further creates a 'palpable sense of deportability'<sup>151</sup> by its enforcement through immigration raids under Part 3 and Schedule 8 Immigration Act 2016. It is well documented that the effect of 'deportability' is for those who cannot risk discovery to avoid organising collective action against mistreatment or poor working conditions.<sup>152</sup> 'Studies on the impact of sanctions have shown workers are pushed into more exploitative working arrangements, less likely to report violations and more resistant to organising efforts'.<sup>153</sup> Denunciation is a powerful tool to discourage collective action as workers are too frightened to risk deportation by complaining about treatment.<sup>154</sup> 'Rather than an end in itself, deportation is a means to intensify the profound vulnerability of workers who live with the knowledge that they are inherently deportable'.<sup>155</sup> When continuing residence is contingent on the goodwill of employers and the arbitrary whim of the state in policing migration laws,<sup>156</sup> irregular migrants are likely to avoid putting their 'heads above the parapet' by engaging in collective bargaining. Where this fear intensifies, workers become silenced and employers are in a strong

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<sup>150</sup> Bogg and Novitz (n 6) 368-369.

<sup>151</sup> De Genova (n 142) 439.

<sup>152</sup> John Burnett and David Whyte, *The Wages of Fear: Risk, Safety and Undocumented Work* (PAFRAS 2010) 24.

<sup>153</sup> Alice Bloch and others, 'Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave employers' (2015) 35(1) *Critical Social Policy* 132, 135.

<sup>154</sup> Bacon and Ong Hing (n 143) 8-9.

<sup>155</sup> Ferguson and McNally (n 135).

<sup>156</sup> Rosewarne (n 45) 105.

position to exploit workers. Irregular migrants are pushed further to the margins, moving from formal to informal work where they are better hidden but where collective action is more difficult to organise and sustain.<sup>157</sup>

The perception of temporariness and lack of social capital enforced through their structural position, however, inhibits collective voice and restricts the capacity to engage in long-term organised union and community action campaigns. As Ahmad writes, irregular migrants are ‘living off borrowed time’.<sup>158</sup> The perception that they will only be in a certain job or in the UK for a short period of time can result in a ‘lack of social attachment’<sup>159</sup> and a preparedness to forgo struggling for better conditions. The primary focus becomes maximising short-term economic opportunities. The pressure to maximise ‘the now’, especially for ‘target earners’ sending remittances, turns attention away from engaging in collective, social action that could help obtain better future conditions but risk losing what little they already have.<sup>160</sup> Such temporariness combines with the scarcity of social capital to discourage forms of collective action such as unionisation, collective bargaining, and strike action. Rational long-term planning and predictability are subordinated to short-term adaptation,<sup>161</sup> particularly in the demanding conditions of the secondary labour market segment characterised by temporary labour shortages and frenetic periods of intensity. Without long-term expectations rooted in social capital, collective social action is discouraged in favour of maximising productive capacities in economic life. Bogg and Novitz also observe that the ‘intended brevity of a migrant worker’s stay may also be an obstacle’ to trade union organisation,<sup>162</sup> a fact also recognised by Fitzgerald and Hardy.<sup>163</sup> Long term stability is also an obstacle to alternative forms of community organising.<sup>164</sup>

As a result of these factors, irregular migrants tend to work in areas of the labour market with fragmented industries and low-profit enterprises which, by their nature, make collective social action difficult.<sup>165</sup> With reference to labour market segmentation theory, irregular migrants

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<sup>157</sup> Bloch and others ‘Employer sanctions’ (n 156) 136.

<sup>158</sup> Ali Nobil Ahmad, ‘Dead Men Working: Time and Space in London’s (‘illegal’) Migrant Economy’ (2008) 22 *Work, Employment and Society* 301, 309.

<sup>159</sup> Anderson (n 141) 305.

<sup>160</sup> *ibid* 312.

<sup>161</sup> Ahmad (n 161) 311.

<sup>162</sup> Bogg and Novitz (n 6) 363.

<sup>163</sup> Ian Fitzgerald and Jane Hardy, ‘“Thinking Outside the Box”? Trade Union Organizing Strategies and Polish Migrant Workers in the United Kingdom’ (2010) 48(1) *British Journal of Industrial Relations* 131, 145.

<sup>164</sup> Jiang and Korczynski (n 81) 816.

<sup>165</sup> Bloch and others ‘Employer sanctions’ (n 156) 141.

facilitate the secondary segment.<sup>166</sup> In the UK, this mainly entails labour-intensive industries reliant on low-cost employment such as agriculture, food processing, construction, hospitality, and social care.<sup>167</sup> Irregular migrants commonly take flexible, casual jobs marked by temporary periods of ‘frenetic intensity’ that are poorly paid, monotonous, and dangerous.<sup>168</sup> In these precarious, fragmented sectors unionisation rates are already low. Hidden, fragmented work in the secondary labour market has produced a ‘representation gap’<sup>169</sup> that structurally restricts organised trade union support.<sup>170</sup> The fragmented, casual and frenetic nature of the work also makes non-traditional and non-institutional forms of organisation and collective bargaining difficult to organise. Low unionisation hinders development of collective voice.

Alongside the legal obstacles produced by the criminalisation of irregular work, access to formal, trade union centred collective voice is restricted by gateway concepts like ‘employment’ (section 230(3)(a) ERA 1996), ‘personal work’ (section 230 (3)(b) ERA 1996) and ‘employment relationship’ (Article 11 ECHR), as seen in *R.(on the application of The Independent Workers Union of Great Britain) v Central Arbitration Committee and Rooffoods Ltd t/a Deliveroo*<sup>171</sup>. The High Court held that the riders’ unfettered and genuine right of substitution must be a contra-indicator of worker status and therefore the riders fell outside the scope of Article 11’s trade union rights. The judgment should be approached with caution, however, as it was restricted to the meaning of Article 11 ECHR, limited by constitutional considerations of the relationship between Strasbourg and domestic courts and hampered by procedural restrictions. It was also unable to fully consider the Court of Appeal decision in *Uber BV v Aslam*.<sup>172</sup> The Supreme Court’s decision in *Uber BV v Aslam*,<sup>173</sup> agreeing with the majority in the Court of Appeal, provides greater promise for the use of the ‘statutory purposive’ approach to expansively interpret the personal scope of employment law to include more work relationships within statutory employment rights. However,

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<sup>166</sup> Michael Piore, *Birds of Passage: Migrant Labour and Industrial Societies* (Cambridge University Press 1979) 35-43.

<sup>167</sup> Bridget Anderson and Martin Ruhs, ‘Migrant Workers: Who Needs them? A Framework for the Analysis of Shortages, Immigration, and Public Policy’, in Anderson, B. and Ruhs, M. (eds.), *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy* (Oxford University Press 2010) 29.

<sup>168</sup> Maya Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (Verso 2019) 42.

<sup>169</sup> Novitz (n 9), 32; Brian Towers, *The Representation Gap: Change and Reform in the British and American Workplace* (Oxford University Press, 1997); Edmund Heery, ‘The Representation Gap and the Future of Worker Representation’ (2009) 40(4) *Industrial Relations Journal* 324.

<sup>170</sup> Focus on Labour Exploitation, *Risky Business: Tackling Exploitation in the UK Labour Market* (FLEX 2017).

<sup>171</sup> [2018] EWHC 3342 (Admin).

<sup>172</sup> [2018] EWCA Civ 2748.

<sup>173</sup> [2021] UKSC 5.

the very presence of legal gateways and the potential for judicial misapplication do present obstacles to unionisation. The purposive approach can only mitigate the problem of personal, contractual categories that may be manipulated to exclude employment rights. It cannot solve the problem caused by the presence of qualifying gateway concepts.<sup>174</sup>

There may also be issues around legal trade union recognition in these workplaces. The statutory recognition procedures are complex and it is unclear what effect irregular migrants in the bargaining unit may have. Bogg and Novitz note that the specific vulnerabilities of migrant workers are not given any weight in the Code of Practice dealing with union access to workers and unfair practices during union recognition and derecognition ballots.<sup>175</sup> The limits of the Code are illustrated by the pressures placed upon migrant workers in *Unite the Union v Kettle Foods Ltd*<sup>176</sup> (eg they were told they would be made to go on strike ) that the Central Arbitration Committee (CAC) concluded did not constitute an unfair practice. The CAC did not consider the special vulnerabilities presented by migration status.<sup>177</sup> The anti-union practices deployed by employers can become very intense. In *Kettle Foods* and *Unite the Union v Cranberry Foods Ltd*,<sup>178</sup> union organisers reported intense anti-union campaigns by employers using the anti-union labour consultancy group, The Burke Group, to pressure workers into rejecting collective organisation efforts by trade unions.<sup>179</sup> It is not unreasonable to assume these practices persist outside of reported cases.

The obstacles faced to organisation and collective voice do not absolve trade unions of all responsibility. Historically, trade unions have been actively hostile or insufficiently supportive of migrant workers.<sup>180</sup> Whilst the traditional hostility has been shed as unions have become more willing towards working with migrant workers, their approach remains somewhat ambivalent. Positive, inclusive stances have not translated into long-term strategies. Most activity is still rather

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<sup>174</sup> Bogg and Novitz (n 6) 376.

<sup>175</sup> *ibid* 378.

<sup>176</sup> CAC Case No TUR1/557/2007.

<sup>177</sup> Bogg and Novitz (n 6) 378.

<sup>178</sup> CAC Case No TUR1/708/2010.

<sup>179</sup> Bogg and Novitz (n 6) 377-78; John Logan, *U.S. Anti-Union Consultants: A Threat to the Rights of British Workers* (TUC 2008) 10.

<sup>180</sup> John Wrench, 'British Unions and Racism: Organisational Dilemmas in an Unsympathetic Climate' in R Penninx and J Roosblad (eds), *Trade Unions, Immigration, and Immigrants in Europe 1960-1993* (Berghahn Books 200) 133; Goodfellow (n 171) 57-71.

nascent and piecemeal, lacking co-ordinated long term strategies.<sup>181</sup> Trade unions have also at times been cautious of working outside their own structures with alternative groups.<sup>182</sup> Community unionism has not gained a foothold in the UK and unions are largely opposed to the formation of worker centres and other forms of migrant-specific organisations.<sup>183</sup> Though there are some examples of community groups exerting collective voice through specific campaigns, they were transient and limited in scope. Protests involving irregular migrants are often centred upon immigration-based claims regarding deportation, detention, and regularisation.<sup>184</sup>

In instances when irregular migrants subvert the structural conditions inhibiting collective voice, they are often met by legal and incentivized employer retaliation. Employers often use ‘threats to employees and cooperation with immigration authorities to derail worker organisation and to suppress dissent’.<sup>185</sup> There are numerous examples of employers denouncing ‘troublesome’ staff to immigration enforcement when they attempt to bargain collectively. When workers at one of its training centres protested against a wage cut, Deliveroo assisted in an immigration raid by allegedly supplying the authorities with names and photos of select workers.<sup>186</sup> The raid resulted in three arrests for immigration offences. The contract cleaning company Amey denounced six of its workers to immigration authorities under the pretext of a training session. At the time the cleaners were attempting to organise collectively and resisted Amey’s move to ‘rationalise’ staff numbers’.<sup>187</sup> Another cleaning company, ISS, used a similar tactic of fake ‘emergency staff meetings’ to hand over workers one by one to immigration officers. Nine cleaners who had been campaigning for a ‘living wage’ were arrested and detained.<sup>188</sup> Finally, the Joseph Rowntree

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<sup>181</sup> Heather Connolly, Stefania Marino and Miguel Martinez Lucio ‘Trade union renewal and the challenges of representation: Strategies towards migrant and ethnic minority workers in the Netherlands, Spain and the United Kingdom’ (2014) 20(1) *European Journal of Industrial Relations* 5, 15.

<sup>182</sup> *ibid*

<sup>183</sup> Heather Connolly, Miguel Martinez Lucio, and Stefano Marino, *Trade Unions and Migration in the UK: Equality and Migrant Worker Engagement without Collective Rights* (University of Manchester 2012) 14; Mustchin (n 86) 961.

<sup>184</sup> Milena Chimienti and John Solomos, ‘The Transnational Mobilization of Irregular Migrants’ in Spencer S. and Triandafyllidou A. (eds) *Migrants with Irregular Status in Europe* (IMISCOE 2020); Pierre Monforte and Pascale Dufour, ‘Comparing the protests of undocumented migrants beyond contexts: collective actions as acts of emancipation’ (2013) 5(1) *European Political Science Review* 83.

<sup>185</sup> Bloch and others ‘Employer Sanctions’ (n 156), 135; Burnett and Whyte (n 155).

<sup>186</sup> Corporate Watch, ‘Snitches, Stings & Leaks: How Immigration Enforcement Works’ (CorporateWatch.org, 30 August 2016) <<https://corporatewatch.org/snitches-stings-leaks-how-immigration-enforcement-works-2/>> accessed 22 September 2019.

<sup>187</sup> *ibid*.

<sup>188</sup> *ibid*; Solidarity federation, ‘Sweep ISS out of SOAS’ (SOLFED, 14 June 2009) <<http://www.solfed.org.uk/sweep-iss-out-of-soas>> accessed 24 September 2019.

Foundation's 2012 report into the UK food industry found that dismissal and denunciation were regularly used to prevent workers from complaining. One worker stated that:

the piece-rate was too low and some of them did not want to go to work, the whole team rebelled. They were then dismissed and drove away from the farm. They treated us like dogs...I was dismissed because I did not like that treatment...by doing so, they set an example to other pickers, what will happen if you complain.<sup>189</sup>

The Byron Burgers case exemplifies how denunciation and co-operation can be incentivized. As Bales writes, Byron's 'collusion with immigration enforcement is motivated primarily by financial concerns - avoiding the full civil penalty and receiving a discount'.<sup>190</sup>

To surmise, there are a plethora of obstacles to irregular migrants exercising collective voice by participating in workplace governance. The structural conditions experienced by irregular migrants, much of which is attributable to the law as a direct result of restrictions on migrant labour and indirectly through its construction of a segmented, precarious labour market, work to systematically silence a large group of workers, rendering them vulnerable to commodification.

### ***3. Commodification as a consequence of silencing irregular migrant workers' collective voice and denying participation in workplace governance***

Various conclusions on commodification and the appropriate role for labour law in de-commodifying irregular migrants can be drawn from the preceding analysis. Firstly, the social character of irregular migrant workers is heavily curtailed. Owing to collective voice's normative values and instrumental form of contestatory, democratic social dialogue, workers are deprived of a critical means of participating in workplace governance. Collective voice will not be the only factor contributing to this result, but it is a significant one. Without collective voice, irregular migrant workers labour as largely disorganised, disciplined and obedient workers. Rosewarne writes of 'labour being shoved about, used indiscriminately',<sup>191</sup> depriving the workers of the opportunity to develop vital associative and expressive bonds by its constant mobility and temporariness. Often isolated from other workers, the essential social participative capacities are diminished, as they are unable to contest the demands of employers. A Joseph Rowntree

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<sup>189</sup> Sam Scott and others, *Experiences of Forced Labour in the UK Food Industry* (Joseph Rowntree Foundation 2012) 64.

<sup>190</sup> Katie Bales and others, 'Immigration Raids, Employer Collusion and the Immigration Act 2016' (2017) 46(2) *Industrial Law Journal* 279.

<sup>191</sup> Rosewarne (n 45) 105.



Foundation report observes a backdrop of isolated powerlessness, as no one they interviewed entertained the prospect of collective action.<sup>192</sup>

The authoritarian workplaces in which irregular migrants generally work make it easy for employers to exert control over workers' social capacities and qualities, dominating their working lives. The inability to exercise collective voice is evident. Dissent, complaints and 'rebellion', ie a say in the conditions, systems and decisions of the workplace, are difficult and risky. These conditions demonstrate that the only interest or value afforded is the sweat of their labour, not their inherent value as social beings with the capacities and qualities for workplace governance. Without the opportunity or means to exercise collective voice, their ability and capacity to govern their working lives is severely curtailed. What happens to them in their working life is, in essence, entirely determined by external forces.<sup>193</sup> The social dimensions of exploitation are intensified. They produce more like automated, economic instruments than autonomous, creative social beings.

The social character is highly subordinate to the economic character. The social dynamics of their labour degrade non-economic aspects of their work. Their temporary use, 'instrumentally managed'<sup>194</sup> to fill labour shortages and extract sweated labour,<sup>195</sup> combined with their vulnerable immigration status, creates an immense pressure to utilise every minute in the UK for economic means.<sup>196</sup> Without the means or opportunity to unionise or bargain collectively, irregular migrants' focus becomes solely on maximising their economic capacities, paying scarce attention to their degraded social status.<sup>197</sup> With a severely curtailed scope for collective voice that enables participation in governance there is a dearth of social power. This enables social exploitation-treating workers solely as if they were economic instruments who will not complain, organise or otherwise 'cause trouble' in resisting their social character's subordination to their economic character. Irregular migrant workers are often treated by employers as purely economic instruments that can be disposed of whenever they seek to manifest their social character and exercise social power.

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<sup>192</sup> Scott and others (n 192).

<sup>193</sup> Ahmad (n 161) 303.

<sup>194</sup> Goodfellow (n 171) 104.

<sup>195</sup> Alice Bloch and others, 'Employment, Social Networks and Undocumented Migrants: The Employer Perspective' (2015) 49(1) *Sociology* 38, 41.

<sup>196</sup> Ahmad (n 161) 310.

<sup>197</sup> Bauder (n 136) 32.

Finally, the case of irregular migrants shows that, in order to be effective, labour law must act in an empowering, preventative manner rather than as a compensatory remedy for victims. It is necessary to strengthen the social character *before* it becomes curtailed and subordinate, otherwise it becomes much more difficult to intervene against exploitation. The subordination of the social character creates a vicious circle in which commodified workers respond to their exploitation, not by engaging in collective action but by increasing their reliance on their economic character, thereby further increasing its domination. It is thus necessary to change social and legal structures rather than provide for individualised remedies concerning exploitative micro-transactions. Due to the growing overlap between labour law and immigration law, it may also be necessary to engage in reform of the immigration control system in order for irregular migrants to exercise fundamental rights through labour law mechanisms without the fear of arrest by the Home Office and subsequent deportation. Their precarious, vulnerable immigration status flows directly into their precarious, vulnerable labour market position. Carens has advocated for the imposition of a ‘firewall’ between the exercise of fundamental rights and immigration control.<sup>198</sup> The UK could also take a cue from California’s efforts to ban employers from denouncing their workers to immigration control.<sup>199</sup>

The case of irregular migrant workers provides a clear example of commodification in action. With essentially zero participation in workplace governance, no social action or engagement during their work, scarce opportunities for social development or self-determination, the social character is subordinated to their economic character. Commodification exemplifies that exploitation has social dimensions. Expanding the conceptual framework of commodification could adapt the way free labour and exploitation are approached. Furthermore, the specific consideration of collective bargaining reveals it to be a significant factor in the commodification framework. Without the means or opportunity to engage in this vital form of social action, irregular migrants are susceptible to having their social character subordinated to their economic character, consequently becoming exploited ‘commodified workers’. Creating the conditions for collective voice to thrive should be a priority for labour law’s social, empowerment driven response to exploitation.

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<sup>198</sup> Joseph Carens, ‘The Rights of Irregular Migrants’ (2008) 22 *Ethics and International Affairs* 163, 167.

<sup>199</sup> Immigrant Worker Protection Act 2017 (AB 450).

## **E. CONCLUSION**

The workplace is not just an economic space where exploitation is an economic question with an economic solution. It is a social space in which people can pursue self-determination and self-realisation. A narrow focus on economic outcomes overlooks the social dynamics of labour relations producing exploitation. It is not only through raising and enforcing economic aspects of labour law that exploitation is resisted but by empowering the social character by supporting the conditions in which workers can develop the capacities and qualities necessary to participate in collective social action to govern and control their working lives. To empower dignified and free labour, labour law needs to look beyond purely economic mechanisms towards the ability and capacities to exercise collective voice and participate in the governance of the workplace.

Authoritarian workplaces in the secondary segment of the labour market involving irregular migrant labour exhibit the oppressive and exploitative subordination of workers' social character to their capacities for economic production. In such situations, work is merely a means of economic survival, rather than a form of creative productive expression with the capacity for self-determination, development and self-realisation. It isn't simply unsafe working conditions, low wages or economic commodification of their labour-power that leads to exploitation. A worker can receive a decent wage but still be treated as a mere instrument of production. They might be economically valuable instruments of production, but instruments nonetheless. Work cannot be decommodified, if workers are not treated and valued as social beings, if their capacity and qualities to govern their working lives are not empowered, if their input into the governance of production is entirely secondary to economic production itself.

The social account of commodification refocuses attention on the social aspects of work and the need for humans to have at least some basic participation in governing their working lives before they can be considered free and dignified workers. Commodification shows that exploitation is not limited to economic and criminal perspectives. It should also be understood as a social phenomenon. Commodification views exploitation through the prism of work's social dimensions, workers as social beings and envisages free, dignified labour as empowering the social character to control the economic character. To fight exploitation, 'it is important to consider the potential for collective action...in order to empower workers ...'.<sup>200</sup> A socially exploitative job

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<sup>200</sup> Scott and others (n 192) 65.

cannot be dignified.<sup>201</sup> Efforts should be made to make the workplace, in all its variants, a place where workers' participative qualities and capacities are built so that they can be involved in decisions that affect them.<sup>202</sup> If the narrow economic focus continues, the 'concept of exploitation risks becoming a powerful rhetorical device but with limited normative scope'.<sup>203</sup> In 1791, Wilhelm von Humboldt posited that 'whatever ... is only the result of instruction and guidance, does not enter into his very nature; he does not perform it with truly human energies, but merely with mechanical exactness' and so when the labourer works under external control 'we may admire what he does, but we despise what he is'.<sup>204</sup> This remains as true as ever.

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<sup>201</sup> Mantouvalou, 'The Right to Non-Exploitative Work' (n 5) 40.

<sup>202</sup> Michelle LeVoy and Eve Geddie, 'Irregular Migration: Challenges, Limits and Remedies' (2009) 28(4) *Refugee Survey Quarterly* 87, 108.

<sup>203</sup> Mantouvalou 'The Right to Non-Exploitative Work' (n 5) 188.

<sup>204</sup> Noam Chomsky, *Year 501: The Conquest Continues* (1 edn, Verso 1993) 19.