

Regulating for Globalization

Trade, Labor and EU Law Perspectives

On the Nature of Work and the Purpose of Labour Law: Part I

Dáire McCormack-George (Courts Service of Ireland) · Wednesday, April 17th, 2019

Introduction

Earlier this month, I presented a paper at the [Socio-Legal Studies Association Annual Conference at the University of Leeds](#), ‘On the Nature of Work and the Purpose of Labour Law’. A version of the paper as presented at the conference is available online [here](#). In this blog, I begin to summarise some of my key research findings as presented at the conference. More generally, this blog commences a series of blogs on the nature of work and its regulation which will be published over the coming months.

The blog commences with a brief analysis of skills, culminating in an analysis of work as skilled activity. This then sets the theoretical and logical foundation for the series of blogs to follow.

Skills

Skills have been described as a ‘slippery concept’, resulting in mixed meanings in different disciplines (Francis Green, *Skills and Skilled Work: An Economic and Social Analysis* (OUP 2013 24). In economics, skills are viewed as part of ‘human capital’, the value of a person’s current and future prospective earnings. In sociology, by contrast, skills are considered part of the work process itself. And in psychology, great emphasis is placed on the nature of learning in the skills process.

Reflecting on these contrasting approaches in his recent monograph, Francis Green advocates the ‘PES’ approach to skills, namely,

- Productive: using skills at work are productive of value;
- Expandable: skills are enhanced by training and development; and
- Social: skills are socially determined.

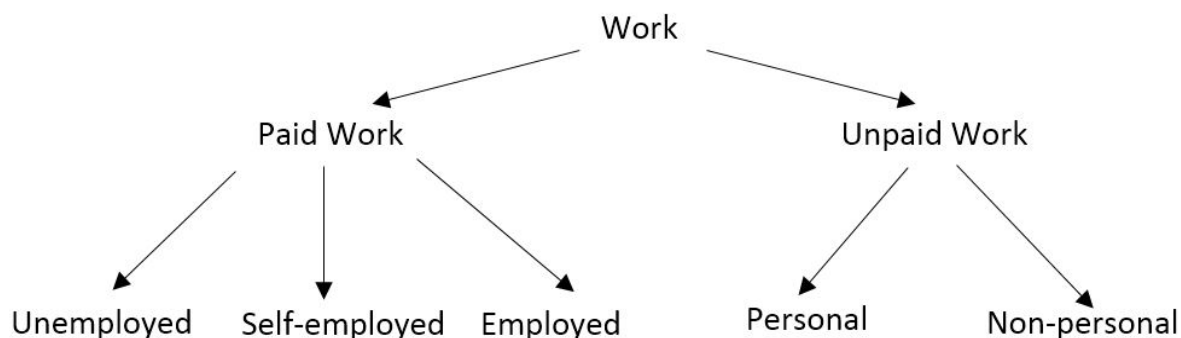
In my view, much of this approach provides an accurate reflection of what ‘skills’ are. However, the approach could be improved in two ways. First, the notion of productivity needs to be expanded to include those activities which are productive but which are not used at work. One need only think of productive activity which takes place in the home which, from a feminist perspective, should be considered as ‘skilled’ activity. A second amendment to Green’s approach concerns (c). Are skills socially determined? In my view, skills consist of two dimensions; call them the ‘internal’ dimension and the ‘external’ dimension. The internal dimension is the inherent capacity which people have—this will vary amongst populations. The second dimension is the

external development of that capacity. To put the point quite vividly, a person who is unable to walk will not be able to walk by social construction, but the way that person's *capacity* to walk is construed, and the extent to which any such inhibition to that capacity affects that person's goals, ambitions and pursuits—their well-being—is largely socially constructed. Accordingly, I define 'skills' as 'any (internal) capacity capable of (external) development'. The definition is broad in scope so that it can potentially include many forms of skilled activity, not being limited to work itself. Rather, it seeks to determine the nature of human activity as skilled, with work being only one way of using one's skills.

Work

If human activity is skilled, then what is work? In my view, the hallmark of work is *productivity*—that is, using and developing skills in a productive manner. Productive activity is the hallmark of work. Such a definition, be it heuristic or conceptual, has been accepted by at least some philosophers (see James Nickel, 'Is there a Human Right to Employment?' (1978-1979) 10 *Philosophical Forum* 149, 158-159; James Nickel, 'Giving up on the Human Right to Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (OUP 2015) 138).

This definition is, however, broad and even vague. But it needs to be to take into account different types of productive activity. It is, however, possible to further refine what we mean by work. We can adopt the following distinctions:



Some explanation of these distinctions is warranted. Paid work thus appeals to our contemporary understanding of work in the *paid* labour market.^[1] Within the paid labour market, we can distinguish between those who are self-employed, those who are employed, and those who are unemployed. I include those who are unemployed because, in most cases, unemployed people are now commonly assumed to be (paid) 'job-seekers' and may have certain social welfare entitlements which provide them with the most basic means for survival.^[2] These distinctions may seem sharp and clear-cut as stated here. However, there is a rich literature on further distinctions which can be drawn between, for example, full-time and part-time workers, and the extent to which personal service is required of the individual. Accordingly, I defer to the academic authorities on those matters.^[3] Moreover, these distinctions are not sharp and are largely based on differences of degree rather than kind; more specifically, they are based on differences in the degree of subordination, dependence and inequality of the person undertaking the work in question. There may also be a question concerning whether these concepts can or should apply to unpaid work but I do not explore that here. The distinction drawn in respect of unpaid work correlates with that of paid work, namely, work which is not remunerated.^[4] I further distinguish between personal and non-personal unpaid work to refine Nickel's broad conception. Accordingly, personal unpaid work

includes, as Nickel suggests, an arduous afternoon cultivating one's flowerbeds.[5] By contrast, non-personal unpaid work includes work which is, factually, for the benefit of another.^[6] This would, obviously, capture much unpaid care work, but it would also include much volunteer work and so-called 'unfree' labour, such as forms of modern slavery.

I have already suggested that paid work corresponds with work in the paid labour market. Is that to say that there is an unpaid labour market? In my view, there is. The evidence for this claim is two-fold. First, unlike the paid labour market, it generally lacks institutionalisation through appropriate regulation, moral, social and legal.[7] But the lack of an institutionalised environment does not suggest that there is an absence of complex relations of exchange and supply and demand. As noted in chapter 2, section III.A, anthropologists have noted the role of such relations even in primitive societies.[8] Second, the notion of a 'market' generally suggests the supply and demand of some commodity—in the case of the labour market, that of labour. Is there a supply of and demand for unpaid work? In my view, there is. As I suggested in chapter 2 section III.A, such supply and demand forms the very basis of our culture—a culture which emphasises autonomy—the ability to create one's own reasons, values and skills through the choices one makes and which is based upon our complex practices of exchange, mutual recognition, validation and so forth.

Another question concerns the utility of the distinctions drawn between paid and unpaid work. Is it implicit in these distinctions that unpaid work should be converted into paid work? In general, the answer is no. However, the unitary concept of work does have two dimensions of relevance to that question. It is, firstly, descriptive in the sense that it attempts to provide an overarching and general definition—the productive use of one's skills—which accurately reflects and responds to our intuitions about work in the real world. Second, it may have normative implications for the organisation and regulation of work. The distinctions drawn should be understood as ones of degree rather than kind. Simply drawing and using these distinctions may provide some people with grounds for claiming that their work should be protected differently. For example, in respect of unpaid work in general, as Andrea Komlosy notes, whether it should or could be commodified, ie, converted into paid work, is very much open to question.[9] Moreover, the difference between f—say, a skill or type of work—being valuable and being valued can be expressed as follows. The fact that people maintain and support f suggests that it is *valued*, but whether f is *valuable* depends on normative arguments about the goodness or badness of f. Accordingly, by analogy we can say that whether or not some kind or type of work should or should not be valued in money or monies terms does not depend on how it is currently valued but rather on normative claims about the value of such work. This point is of extraordinary significance. If this were not the case, then we risk every area of law being swallowed up by labour and employment law. That is not what is advocated here. Rather, I argue that, while much if not all activity which requires regulation may indeed be work, the goals of regulation will depend on the context and the normative concerns of each area.

Finally, the distinctions developed and deployed here may be of use for defining and clarifying new areas of research. In the economic sociology of work, for example, it is only relatively recently that unpaid work has been analysed in a similar manner to paid work.[10] Accordingly, it is suggested that unpaid work should form the basis of future research agendas in the social sciences.

Conclusion

To sum up, in this blog post, I have argued

- All human activity constitutes skilled activity;
- The hallmark of work is productivity, and hence work involves the productive use of one's skills.

As mentioned at the outset, this is the first in a series of posts. Part II of this blog will address one of the fundamental rights in facilitating people's productive use of their skills, namely, the right to work.

[1] See Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialisation, Employment and Legal Revolution* (OUP 2005) who advocate for a 'law of the labour market' which displaces 'employment law'.

[2] Tom Boland, 'Seeking a Role: Disciplining Jobseekers as Actors in the Labour Market' (2017) 30 WES 334.

[3] Paul Davies and Mark Freedland, 'Employees, Workers and the Autonomy of Labour Law' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000); Mark Freedland, *The Personal Employment Contract* (OUP 2003); Mark Freedland and Nicola Countouris, *The Legal Construction of Personal Work Relations* (OUP 2011); and Jeremias Prassl, *The Concept of the Employer* (OUP 2016).

[4] For a helpful overview, see Stephen Edgell, Heidi Gottfried and Edward Granter (eds), *The SAGE Handbook of the Sociology of Work and Employment* (SAGE Publications 2016) part V.

[5] See also Applebaum (n 1) ch 20 who offers ironing as a candidate for work.

[6] I add the caveat 'factually' because, normatively and psychologically, the unpaid non-personal worker may, to the extent measurable, benefit greatly from the work, perhaps more so than the person for whom the unpaid non-personal work is undertaken.

[7] Noah Zatz, 'The Impossibility of Work Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 235.

[8] Hugh Collins, *Regulating Contracts* (OUP 1999) 104.

[9] Andrea Komlosy, *Work: The Last 1,000 Years* (Verso Books 2018) ch 4 distinguishes between work frameworks, conceptually paid categories of labour relations, grey areas at the intersection of work and non-work and work across regions and categories.

[10] *The SAGE Handbook of the Sociology of Work and Employment* (n 10).

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