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The Right to Fair Pay and Two Paradigms of Prison Work

Is it both morally wrong and legally wrong to pay prisoners less than a fair wage for the work they perform in prison or under supervision of the prison authorities? What counts as a fair wage in the context of prison labour? Is fair pay inside prison different from a fair wage for free labour in the labour market? My main approach to this question is to reflect on the meaning and implications of the human right to fair pay, which was first included in the Universal Declaration of Human Rights 1948 and subsequently incorporated in many international conventions on human rights. Although moral standards are broader in scope than respect for human rights, the focus on human rights law provides a useful guide to a preliminary answer to both the moral and the legal question of the legitimacy of unpaid or badly paid prison labour.

Historically the human right to fair pay in free labour markets has been understood as expressing three rather different (though broadly compatible) justifiable moral principles.[1] First, there is a universal right to join train unions and organise workers for the purpose of collective bargaining in order to achieve equal bargaining power and fair pay. Second, there is a universal right to pay that is sufficient for a worker (and any dependants) to live a life of dignity. Third, there is a universal right to pay that is fair in comparison to co-workers and similar comparators, as in the example of equal pay for women for like work performed by men. The central question here is whether prison labour should be excluded from any or all of these three meanings of the human right to fair pay, and, if so, to what extent? Although the dominant view in the United Kingdom is that prison labour is and ought to be excluded from any protections for fair wages, my purpose is to contest this assumption. The central argument is that prison labour is properly regarded to some extent as a market transaction to which modified applications of the right to fair pay should be applicable rather than, as under the conventional paradigm, as merely part of the disciplinary regime of punishment and rehabilitation within prisons. In practical terms, although the paper does not advocate the application of the statutory minimum wage to prisoners, it accepts that the minimum wage provides a relevant standard to which only limited justifications for reductions are valid.

1. Prisoners' Wages: the current law in the United Kingdom

[1] A Bogg, H Collins, ACL Davies, V Mantouvalou, *Human Rights at Work* (|Hart Publishing, 2024) Chapter 10.

Regarding the current law, in summary,[2] for work in prisons, the National Minimum Wage Act 1998 is excluded. In England and Wales, under the Prison Service Order 4460, governors of prisons set the rate of pay for work done inside prisons, though there is a minimum weekly rate of £4 per week. The position in Scotland is slightly better with a minimum rate of £9 per week. These minimum rates have lasted for decades and there is no uprating to take account of inflation. Although prisoners are paid greater amounts in practice, the wages are usually derisory. As a rule of thumb, for most prisoners what they earn in prison in a *week* is equivalent to what they earned in an *hour* outside as free labour.[3] For work done by prisoners outside of prisons, as in work for external contractors provided by prisoners in open prisons, the statutory minimum wage applies. These outside wages are subject to the normal deductions for tax and national insurance and child maintenance. In addition, after the prisoner has received £20 out of this net weekly pay, the Governor of the prisoner can deduct a levy of up to 40% of the wages as a contribution for support to victims of crime and as a contribution to the cost of their upkeep.[4]

It is also important to note another vital difference between prisoners' pay and wages in the free market. Instead of receiving cash, prisoners in the United Kingdom (UK) receive credit to their personal account. This credit can only be spent on items approved by the prison authorities. Furthermore, prison rules restrict the amount that can be spent each week, depending on the privileges that prisoners have earned through compliant behaviour. The standard amount that they are permitted to spend is about £15, but at the beginning of a prison sentence it is often much less. Even if prisoners' pay was higher, therefore, they would not have access to those wages without a radical change in the incentives and earned privileges system. Getting access to the wages they have earned is a privilege, not a right, which is dependent on discretionary decisions of prison officers. In effect, prisoners' wages need to be earned twice, once through work, and then by compliant behaviour approved by the prison staff.[5]

2. Are Prison Wages Pay?

[2] Cf Virginia Mantouvalou, *Pay for Work in Prison*, UK Labour Law Blog (December 12, 2022).

[3] Matthew Maycock and Daniel McGregor 'I do enjoy the work, but I think the wages in the jails are shocking': Analysing prisoner wages as a pain of imprisonment using Foucault's artifice' (2023) 4 *Incarceration* 1, 15; 'Pay prisoners National Minimum Wage', says union leader, *Inside Time Reports*, 4th April 2022 – reporting wages of about 50p an hour in prison workshops.

[4] Prisoners' Earnings Act 1996 s.2, which was only brought into effect in 2011. The details of the levy were set in the Prison Rules. Rule 31A. The levy was held by the High Court to be within the state's wide margin of appreciation to determine what was a proportionate interference with the prisons' right to their wages in (*R) S v Secretary of State for Justice & (R) KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) [2013] 1 WLR 3079.

[5] Alison Liebling, 'Incentives and Earned Privileges Revisited: Fairness, Discretion, and the Quality of Prison Life' (2008) 9 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 25.

A crucial premise of this enquiry into the fairness of pay in prisons is that the payments made to prisoners should be understood as wages in exchange for the work performed. The question can then be asked whether the remuneration is fair according to some moral standard, such as the principle that the value of the wages received should be roughly commensurate with the value of the work performed. But UK governments have never accepted that the payments received by prisoners should be understood as analogous to a market transaction that can be assessed for the justice of the exchange.

Work in prisons started in the UK in the early nineteenth century as a form of punishment: the sentence handed down by a court for serious crimes might be 10 years of imprisonment and hard labour.[6] At the time, such harsh sentences may have been regarded as reforms, because they often replaced capital punishment or deportation to remote and dangerous corners of the world. By the beginning of the twentieth century, many governments around the world tried to exploit forced labour in prisons as part of an economic strategy to build infrastructure, clear land, and produce cheap goods.[7] This 'prison industrial complex' functioned primarily by the threat of physical violence or starvation, but it was also appreciated that the motivation of the workers and therefore productivity might be improved by granting privileges for hard work. Privileges could include earlier release from prison or small payments with which prisoners could purchase items such as food and tobacco. These privileges were not understood as payments for the work, but rather a small carrot to improve productivity by encouraging co-operation in the forced labour productive system.

Yet from the commencement of prisons and the system of incarceration at the beginning of the nineteenth century, work was also justified as a way of achieving the moral transformation of the prisoners as part of the goal of rehabilitation.[8] Work was praised as a vehicle for prisoners to learn to live a law-abiding, productive life, before they were discharged into the community. The performance of work was part of a prisoner's moral education about how to live an organised, conforming, and compliant life. As Foucault observed:

> 'The labour by which the convict contributes to his own needs turns the thief into a docile worker. This is the utility of remuneration for penal labour; it imposes on the convict the 'moral' form of wages as the condition of his existence…. The wages of penal labour do not reward production; they function as a motive and measure of individual transformation: it is a legal fiction, since it does not represent the 'free' granting of labour power, but an artifice that is presumed to be effective in the techniques of correction.' [9]

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[6] Hard Labour Act 1822.

[7] Although examples of concentration camps under Nazi Germany, the gulags under Stalin, and the Ouija camps in the PRC spring to mind, it should not be forgotten that in the USA F D Roosevelt created the Federal Prison Industries, Inc, now doing business as Unicor, which uses badly paid prison labour to make products for sale on the open market, with a preference given to their products by the government. It can be described as a prison-military-industrial complex because prison labour supplies virtually all the uniforms and protective gear for the US department of defence.

[8] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London, Penguin, 1979) 239.

[9] Ibid 243.

This interpretation of prisoners' wages is accurately summed up by Maycock and McGregor: 'Put crudely, prisoners do not receive payment because they are working but, instead, they are working because the work itself (and the 'moral form of wages') is useful as a disciplinary mechanism'.[10] Similarly, Fassin observes:

> 'Emphasis is placed on the importance of work in helping the inmate to gain a sense of responsibility and to reform, to admit his wrongdoing and make amends for it, to commit to the path of re-entry. The possibility of this work producing wealth and serving society is played down.'[11]

On this interpretation of the function of paid work in prisons, it resembles the practice of sending children to school. It is compulsory because children need to be educated in how to lead a self-disciplined good life and realise their potential. Just as children do not need to be paid to go to school, so too wages for prisoners are unnecessary because the real benefit to them lies in their moral improvement and their preparation for life outside prison. On this dominant view, wages in prison should be regarded like pocket-money for children, to provide an incentive and reward for good behaviour. And pocket money can also be forfeited, of course, for disobedience and bad behaviour.

From a critical point of view, however, the government's labelling of these payments as 'wages' is a deliberate obfuscation that is designed to make the work resemble paid work outside prison. It is a misrepresentation which is believed to be necessary to create the impression that prisoners achieve self-respect and self-fulfilment through work, whereas the critics like Foucault would claim that it is merely a technique for making prisoners docile and saving on the costs of incarceration. The critics argue that if work and training are supposed to prepare prisoners for their future lives outside of prison and to give them a sense of self-worth and autonomy, restricting them to pocket money is not going to teach them the value of work and how to manage their finances. Those lessons can only be learned if the wages are much more closely approximated to the wages of free labour.[12]

Even though this last point makes the case for paying prisoners a decent wage for their work as part of the goal of rehabilitation, the purpose of the payment is not usually regarded by governments and in law as the same as a market exchange. For free labour, fair pay is measured by standards that are often linked to market rates or notions of desert, as we will consider in subsequent sections. These standards are not regarded as directly applicable to prison work in most, perhaps all, countries. The moral purpose behind imposing work for a rehabilitative goal is believed to justify departure from the normal standards of fair pay, ranging from modest deductions to cover the expense of the upkeep of the prisons and

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[10] Matthew Maycock and Daniel McGregor '"I do enjoy the work, but I think the wages in the jails are shocking": Analysing prisoner wages as a pain of imprisonment using Foucault's artifice' (2023) 4 *Incarceration* 1.

[11] Didier Fassin, *Prison Worlds: An Ethnography of the Carceral Condition* (Cambridge, Polity Press, , 2017) 204.

[12] James J. Maiwurm & Wendy S. Maiwurm, 'Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms' (1973) 7 *U Mich JL Reform* 193.

training costs, to the derisory sums paid in the UK, to the absence of any payment at all in some states of the USA. But this conventional view that prison wages are not really payment for work but serve an educational purpose needs to be challenged. To do so this article considers in more detail the different ideas about what constitutes fair pay in free markets. It then considers whether those ideas should be applicable to prison labour. In each case, it considers the extent to which the law supports or obstructs the application of a particular conception of fair pay to prison labour.

3. What is meant by the idea of fair pay or just remuneration?

Some people believe that fair pay is the same as the market rate for pay. This was in essence the view of the judges who created the English common law of contract. They endorsed the principle that the terms of a contract were fair if both parties had freely consented to it and each had provided consideration – work in return for pay. We see that view regularly repeated today, for instance, in the case of the astronomical salaries and bonus of chief executives. We are told by the boards of companies and their regulators that these multi-million-pound salaries are the market rates because these gifted individuals are worth it and the shareholders are happy to pay. Therefore, the pay is not excessive but entirely fair.

Relying on this contention that the market rate is always fair, it is sometimes argued that prisoners are being paid the market rate for their work and that similarly this is fair. This proposition may seem plausible where the work being performed by prisoners is such that no business would be prepared to employ someone to do the work at an ordinary market rate or the minimum wage, because the products of the work are worthless or valued so little that the job would not be viable in an open market. The sort of work used in this example is breaking up rocks by hand or sewing mailbags. While the sort of work that produces goods of extremely low market value may still be present in prisons, this is not the kind of work that is generally available in the UK. Many prisoners perform domestic work such as cooking, cleaning, and laundering, all of which is not without a market value and could be paid at a normal market rate. Better educated prisoners can be employed teaching literacy and other skills to inmates. Whilst it may be true that some prison work could not be paid at the national minimum wage without incurring a loss for the prison in the sense that the wages would exceed the economic benefit, that will not usually be the case. Thus the absence of pay or low rates of pay for prisoners cannot be justified by reference to the ordinary market principles of the common law of contract.

But I do not think that most people share the moral stance of the common law at least in respect of contracts of employment. They may not endorse the Marxist view that all wage labour is exploitation because the employer creams off the surplus value created by the performance of work rather than paying the worker properly. What many people do understand is that the market rate for pay can at times dip below what workers need to survive, leaving them in abject poverty. That might happen when

there are high levels of unemployment or when a powerful (monopsonist) employer can impose wage cuts or avoid inflation-matching increases. As Adam Smith pointed out, employers often enjoy superior bargaining power because many workers need to maintain their income to survive, so they take the first job offer they receive, whereas employers can hold out and live off their capital until the market price of labour is to their liking.[13] The common and popular view is therefore that, in the general framework of the capitalist system, wages can sometimes be unfair even if they are paid at the market rate.

The more controversial question is how to determine what is a fair or just wage. During the twentieth century, three rather different views of the meaning of the right to fair pay emerged in international declarations of labour rights and standards.

1. **Collective bargaining**: a fair wage is produced by the market, provided that there is equality of bargaining power between capital and labour. Equality would be achieved by trade unions bargaining collectively on behalf of workers with their employers. Through collective bargaining, workers would receive a fair share of the profits of the business. Everyone should therefore have the right to become a member of a trade union for the representation of his or her interests through effective collective bargaining. The law would also need to prevent unfair competition in the labour market such as products made by unpaid slave and prison labour.
2. **A living wage.** A fair wage would be a living wage through which a worker and his or her dependants could achieve a decent standard of living appropriate for the society in which they lived. There must be sufficient income not only to afford subsistence and shelter but also the ability to live a life of dignity. That living wage could be achieved by minimum wages and/or welfare benefits. A safety net of a minimum level of income would be applied to those unable to work either as a result of recession and high levels of unemployment or because the workers had become infirm or disabled.
3. **Relative wages within organisations**. A third interpretation of the meaning of a fair wage requires fair differentials between the wages of different groups of workers within productive organisations. For instance, this view rejects discrimination in rates of pay on grounds of sex or race. More generally, fair pay should reflect a person's contribution to the success of a productive organisation. Differences in rates of pay can only be justified if they are deserved.

To a considerable extent, these three interpretations of the right to fair pay are compatible.[14] They were combined, for instance in the Declaration of Philadelphia in 1944 at the formation of the

[13] A. Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* (1776, Harmondsworth: Penguin, 1970 edn), p.169.
[14] Tensions may arise, however, if a collective agreement produces levels of wages for different groups in an organisation that result in differentials that do not satisfy the principle of equal pay for equal work.

International Labour Organisation (ILO).[15] Article III(e) requires member states to respect the right to collective bargaining,[16] and Article III(d) requires "policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection". Similarly, the Universal Declaration of Human Rights 1948 article 23[17] and the European Social Charter 1961[18] both support the right of workers to join a trade union for the protection of their interests and state that workers should receive a wage that is sufficient for a life of dignity, which can be understood as a decent standard of living for themselves and their dependants. They also require non-discrimination in pay: equal pay for equal work.

Many kinds of workers have been excluded from the right to fair pay in national laws. In the past, women were excluded either by law or in practice from the right to fair pay. Today, excluded groups typically include young workers, trainees, temporary workers, independent contractors, and, of course, the subject of this essay: prisoners. We need to consider next the justifications advanced for such exclusions from the three different conceptions of the right to fair pay and whether they are adequate and proportionate.

3. Collective Bargaining and the Right to Fair Pay

Should prisoners be excluded from the right to fair pay, understood as the right to join a trade union for the purpose of collective bargaining? Of course, prisoners do sometimes organise and take collective action in protest at prison conditions. Action may include refusals to work as instructed; in effect strike action. Prison authorities normally respond to such disobedience with sanctions such as solitary

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[15] Declaration concerning the aims and purposes of the International Labour Organisation, The General Conference of the International Labour Organization, Twenty-sixth Session in Philadelphia, 10/05 1944.

[16] Ibid, III(e): "the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures".

[17] Article 23 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests.

[18] Article 4 – The right to a fair remuneration With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties undertake: 1 to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; 2 to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; 3 to recognise the right of men and women workers to equal pay for work of equal value; 4 to recognise the right of all workers to a reasonable period of notice for termination of employment; 5 to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards. The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage fixing machinery, or by other means appropriate to national conditions. Article 5 concerns the right to organise a trade union and Article 6 requires the state to support collective bargaining between trade unions and employers.

confinement, loss of privileges, and removal to a prison with harsher conditions. These protest organisations sometimes call themselves trade unions and may be supported by established unions.[19] My question here is about the legal and institutional framework. Do prisoners have the legal right to form trade unions with the potential to compel their employer to bargain over the terms and conditions for prison work? Or are prisoners vulnerable to oppressive disciplinary action even for trying to form a representative organisation?

It is worth recalling the text of Article 11 of the European Convention on Human Rights (ECHR).

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

This legally binding right throughout Europe has been interpreted to include not only the right to join a trade union, but also to have a trade union represent the interests of their members in suitable ways that might include collective bargaining, and, subject to many restrictions, for a trade union to organise industrial action in support of collective bargaining.[20] It is also established that an employer's imposition of detriments on workers for exercising their right to join a trade union for the purpose of collective bargaining is in principle a breach of Article 11(1).[21]

In considering whether prisoners have the right to form and join a trade union and to engage in collective bargaining, we need to consider three questions. The first concerns the personal scope of the right to form and join a trade union: in short, who has the right? The second question is whether it is necessary for the right-holder to have a contract with an employer, and if so, what kind of contract. On the assumption that the former questions have been answered in a way that is favourable to prisoners, the third question is whether the right including collective bargaining is justifiably excluded for prisoners on the kinds of grounds mentioned in Article 11(2) such as public safety or health.

(a) **Personal scope**.

[19] For example, the Incarcerated Workers Organizing Committee (IWOC), is a prisoner-led section of the Industrial Workers of the World: https://incarceratedworkers.org/about.
[20] *Demir and Baykara v Turkey* [2008] ECHR 1345.
[21] *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.

Article 11 states that the right to join a trade union applies to 'everyone', and there is no express exclusion of prisoners either in Article 11(2) or in relevant ILO Conventions. It can be argued, however, that while the general right to freedom of association is applicable to everyone, the right to join a trade union, as a particular instance of an association, is confined to those types of people who usually join trade unions, namely workers. That interpretation is strengthened by the point that a trade union is a type of association with a very particular purpose. Its purpose is to further the interests of its members by bargaining with employers. In determining the personal scope of the right to form and join trade unions, it is arguable that the purpose of trade unions necessarily limits the personal scope to the kinds of people who need an association for the protection of their interests against employers.

Using the 'integrated approach', the European Court of Human Rights (ECtHR) usually interprets Convention rights in a way that is consistent with other sources of international law, including ILO conventions. An integrated approach to Article 11 that seeks harmony with ILO Conventions would suggest that the right to join a trade union does not apply to everyone, but only to persons who can be classified as employees or workers because ILO Conventions confer rights on 'workers', not everyone.[22]

The UK Supreme Court has held that the ECtHR has accepted the interpretation of Article 11 that the right to become a member of a trade union is confined to workers. In *Sindicatul "Pastorul cel Bun" v Romania ("The Good Shepherd")*,[23] the question was whether an organisation to represent the interests of priests and lay members of the Archdiocese of Craiova could be registered as a trade union. The Grand Chamber held that as members of the clergy fulfilled their mission through an employment relationship, their right to be a member of a trade union fell within Article 11. The Court further held, however, that the Romanian courts' refusal to register the trade union was justified under Article 11(2) because it pursued a legitimate end in a proportionate way. In the *Deliveroo* case,[24] the UK Supreme Court interpreted this decision as holding that the Article 11 right to join a trade union was confined to persons in an employment relationship, though not necessarily one characterised as employment under domestic law. This interpretation of the jurisprudence of the ECtHR is questionable because it confuses what the Court said was a sufficient condition for falling within the scope of Article 11 (namely an employment relation) with a necessary condition, an issue that was not before the Court in *Pastorul cel Bun.*

The question of whether being an employee or a worker was a necessary condition of the personal scope of Article 11 was in issue in *Manole v Romania*.[25] The case concerned an organisation

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[22] ILO Convention on the Freedom of Association and Protection of the Right to Organise 1948 (98) Article 2 "Workers ... without distinction whatsoever, shall have the right to establish and ... to join organisations of their own choosing without previous authorisation."

[23] *Sindicatul "Pastorul cel Bun" v Romania* [2014] IRLR 49 (Grand Chamber ECtHR).

[24] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2023] UKSC 43, [2024] ICR 189, [40].

[25] *Manole and "Romanian Farmers Direct" v. Romania*, , (16 June 2015 App no. 46551/06).

formed to represent the interests of independent smallholder farmers and contractors to those farmers. Even though the members were independent small businesses, not employees, the ECtHR held that their organisation was in principle entitled under Article 11(1) to be registered as a trade union, though again the Court applied Article 11(2) to permit the state to justify the exclusion. But the UK Supreme Court in the Deliveroo case distinguished this precedent on the ground that arguably the case was decided simply on the ground of freedom of association in general, because the organisation was in reality a trade association rather than a trade union that could function effectively without being recognised as a trade union.

In the *Deliveroo* case, therefore, the Supreme Court held that the right to be a member of a trade union under Article 11(1) was confined to workers and did not apply to everyone.

(b) The concept of worker

That interpretation of Article 11 then raises the question of whether prisoners are workers. If prisoners fall outside the legal definition of worker, they may be excluded from the right's personal scope and therefore there will be no need for any more explicit exclusion from access to the right. The meaning of 'employee' or 'worker' under Article 11 is autonomous in the sense that it is not determined by the meaning of those words in domestic law.

Although every legal system draws a distinction between workers and independent contractors, the boundary between these different kinds of contractual arrangements is often disputed. Two points seem to be widely accepted and are highlighted in ILO Recommendation No 198.[26] First, a court should not be overly influenced by the language of the contract and in particular any assertions that it falls on one side of the line or the other. Because both parties may have reasons to try to influence the legal classification of their relationship, such as tax avoidance, courts understand that they should try to establish from the practice of the performance of the contract what was the reality of the arrangement, whatever the contract may say. The second point is that there is no simple test in which one or more criteria are necessary conditions for the classification of someone as a worker. Instead, the courts must use a multi-factor approach to determine the proper classification. Each of these factors or criteria must be considered and the result viewed in its totality, without giving disproportionate weight to any particular factor.[27]

Could prisoners be regarded as workers under a multi-factorial approach? Prisoners satisfy many of the factors that typically point to the existence of an employment contract. The work is carried

[26] ILO Recommendation Employment Relationship No 198 (2006).
[27] Unfortunately in the *Deliveroo* case, (n 22), the Supreme Court, though acknowledging both points, failed to apply them by giving considerable weight to a term of the contract that said that the drivers could substitute another person to make the delivery and then using the factor that employees usually cannot substitute another person to do their job as a necessary condition rather than simply one factor among many in order to reach the conclusion that the drivers were not workers for the purpose of Article 11.

out according to the instructions and under the control of another party, is performed solely or mainly for the benefit of that other party, it must be carried out personally by the worker, and there are periodic payments to the worker that provide a principal source of income. Despite prison work satisfying most of the factors in the multi-factor test, the courts seem likely to exclude prisoners from the scope of Article 11.

The ECtHR has drawn the kind of distinction outlined above between free market contracts for work and work that is educational and morally instructive as part of a policy of rehabilitation. The ECtHR has stated that 'prison work differs from the work performed by ordinary employees in many aspects. It serves the primary aim of rehabilitation and resocialisation, is aimed at reintegration, and is obligatory'.[28] Using this contrast, the Court held that the Russian authorities were justified under Article 11(2) in excluding prisoners from the right to form trade unions even though they satisfied many of the criteria for being a worker.

The UK courts appear to reach the same conclusion by a different, formalistic, legal technique. They insist that to qualify as a worker, the work must be performed under a contract. The contract is a symbol of free market labour. The absence of a contract can be used to exclude prison labour from workers' rights. This condition is usually applied to any claims involving employment law rights, including the right to be a member of a trade union.[29] Why do UK courts believe that prisoners do not have a contract for work?

In the first place, it is not the practice in prisons of making a formal or explicit contract for the performance of work in return for pay. The practice is rather that the prisoner is directed by the prison authorities to perform work. It is true that prisoners may refuse to work and consequently lose all privileges and languish in their prison cells. To that extent, the arrangement for prison work resembles a contract, because the prisoner's consent is necessary. Yet it is unrealistic to describe the relationship as having been created by the consent of the parties, as is normal in contractual relations. There is hardly any consent from either party: the prison authorities are legally required to offer some work for the purpose of rehabilitation and saving on the costs of running a prison, and prisoners have little choice to perform the work when instructed to so under threat of prison disciplinary sanctions.

Furthermore, although courts have the power to imply contracts based on the conduct of the parties, they do so only if it is necessary to invent a contract to explain and regulate the legal relationship. In the case of prisoners, however, an implied contract is not a necessary basis for explaining the payment of prisoners. The relationship can also be explained simply as the exercise of

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[28] *Yakut Republican Trade Union Federation v Russia* [2021] ECHR 1033.

[29] The existence of a contract of employment is not necessary for claims in the tort of negligence or vicarious liability of the employer for injuries at work. For this reason, a prison may be vicariously liable for injuries inflicted carelessly on other prisoners or staff, *Cox v Ministry of Justice* [2006] AC 660 (UKSC). Income tax and national insurance payable on wages earned may also not require a contract but apply to a publicly regulated office. Although the government denies that it would be liable for the employer's contribution to national insurance for prison wages, it does not take the risk of becoming liable by paying wages above the thresholds.

public authority under the administrative rules that govern prisons. These rules fix all relevant matters such as hours of work and rate of remuneration, so there is no need to invent a contract to explain and regulate the relationship. This characterisation of prison work as a public law arrangement fits better the idea that prison work is not contractual but serves an educational and a rehabilitative purpose.[30] For this reason, the courts seem to have assumed that prison work is not governed by a contract and is therefore excluded from all workers' rights.

The UK Supreme Court in *Cox v Ministry of Justice* accepted that prisoners do not work under a contract of employment.[31] The Court did not expressly say that there was no contract at all, but that view seems to have been assumed without being decided. In addition, it has been held by the Divisional Court that there is no contractual entitlement to prison wages, even when the work has been performed, though once paid, the prisoner owns the sum of money credited to his account, which seems to characterise the payment as a gift or gratuity rather than an entitlement.[32] These arguments tend to point to the conclusion that prisoners lack a contractual relationship and therefore cannot be classified in law as workers. That conclusion was drawn by an employment tribunal judge in *Pimm v Sodexo Justice Services*.[33] The tribunal heard several claims brought by a convicted prisoner from prison, all of which depended on a finding that he was a 'worker' as defined in the Employment Rights Act 1996. That statutory definition expressly requires the existence of contract. The judge struck out the claim on the ground (a) that the prisoner had no contract of any kind, so could not be a worker within the statutory definition; and (b) considering a purposive approach, it was not the purpose of the legislation to include convicted prisoners. The judge pointed out, apparently in shock and disbelief, that if the claimant were found to be a worker, he would be entitled to a paid holiday.[34] Although employment tribunal decisions have no precedential authority, the judge provided a reasonable interpretation of the binding cases in saying that prisoners do not work under contracts at all.

(c) Justified exclusion

In the absence of a contract to perform work in return for remuneration, it seems unlikely that prisoners could be classified as workers for the purpose of enjoying the right to membership of a trade union

[30] This is also the view in Germany: Christine Graebsch, Melanie Schorsch, *Prison Conditions in Germany*, European Prison Observatory (Antigone Edizioni, Rome, 2019), 27, and France: Article 713-3 of the Code of Penal Procedure, 'labour relations of incarcerated persons are not subject to a contract of work', though there is a sui generis arrangement that provides through regulations similar features to contracts: Sophie Robin-Olivier, 'Recent reforms of prison work in France: still stones on the way toward equal rights', (2024) 15 *European Labour Law Journal* xxx.

[31] *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660.

[32] *R v Secretary of State for the Home Department ex parte Davis* (CA) [25 April 1994 unreported].

[33] *Pimm v Sodexo Justice Services Limited; Secretary of State for Justice (Intervener*) Case Number: 3312375/2019 (ET).

[34] Unlike the National Minimum Wage Act 1998, there is no exclusion of prisoners from the Working Time Regulations 1998 SI 1996/2803.

under Article 11(1). Even assuming that prisoners fall within the personal scope of the right to form a trade union, it is likely that a justification for exclusion or restriction of the rights of prisoners to join trade unions could be advanced under Article 11(2) ECHR. An exclusion might be justified on the ground that the formation of trade unions, collective bargaining, or strike action pose a threat to 'public safety.' That possibility was accepted by the ECtHR as the main ground for decision in *Yakut Republican Trade Union Federation v Russia*.[35] The Court held that such an exclusion was within the margin of appreciation of the national government. By deferring to their judgment, the Court did not have to consider the puzzling question of under what circumstances collective bargaining or the withdrawal of labour in prisons would threaten public safety.

Yet it is worth noticing in that case that Russian law contained an express exclusion of prison inmates from forming a trade union. In most countries there is no such explicit exclusion. If so, it might be hard for national authorities to justify the exclusion of prisoners from Article 11 because they might not be able to point to a legal basis for the exclusion, which is an essential condition for a justified exclusion. A national government would have to argue instead that although there is no express legal exclusion, such an exclusion was foreseeable because of the absence of a contractual basis for prisoners claiming employment law rights.

4. **A Living Wage**

The second articulation of the right to fair pay is often summarised as a right to a living wage. For example, Article 23 (3) of the Universal Declaration of Human Rights 1948 states:

> 'Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'.

There are two common objections made to the application of Article 23(3) to prisoners. The first is that prisoners do not deserve a life of dignity, and the second is that in fact they receive sufficient remuneration and benefits in kind to meet the standard set by the human right.

(a) Have prisoners forfeited the right to dignity?

Have prisoners forfeited the right to live a life of dignity by their commission of a crime? If so, by implication, the human right to fair pay as a living wage would not apply to prisoners at all. Their punishment is a loss of dignity, so it would be a contradictory to recognise that they have a right to a

[35] *Yakut Republican Trade Union Federation v Russia* [2021] ECHR 1033.

wage that enables them to live a life of dignity. The ECtHR denies, however, that prisoners should be deprived of their human rights other than the right to liberty.

> 'The Court reiterates that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention; they continue to enjoy the right to respect for family life; the right to freedom of expression; the right to practise their religion; the right of effective access to a lawyer or to a court for the purposes of Article 6; the right to respect for correspondence; and the right to marry.'[36]

The rights mentioned by the ECtHR do not include social and economic rights such as the right to fair pay, but that omission may be explained by the point that the ECHR does not include those rights, so for the most part the Court does not consider such claims. Even for those rights that are mentioned, it is unrealistic to suppose they are invariably protected. For instance, connection with the inmates' family may be lost by the removal of the privilege of visits, the lack of funds to buy phone credit, and the inability to send earnings home.

Furthermore, an exclusion from a right to a living wage may tend to undermine the official purpose of work in prison. Where the aim of imprisonment is seen at least in part as rehabilitation, so that the ex-offender can indeed begin to live a life of dignity outside prison, it seems to be necessary, in order to prepare for such a life, to enable prisoners to benefit from and begin to enjoy the fruits of living a dignified life whilst still in prison. Prison work and education provide some of the main mechanisms for preparing prisoners for a life of dignity after release. But not all work serves that purpose. Pointless, arduous, and poorly remunerated work is unlikely to contribute to rehabilitation. It is arguable, therefore, that if the main purpose of imprisonment for most prisoners is regarded as rehabilitation and the resumption of a life of dignity, their work should contribute to their experience of learning to live a life of dignity, and to that end, work should be remunerated at a level that provides recognition of the dignity of the prisoner. Unfortunately, poor wages may nevertheless be appropriate for socialising convicts for preparation for entry into the lowest paid rungs of the labour market, which may be the only option for many on their release.[37]

In support of this argument that rehabilitation requires a living wage, the German Constitutional Court has held the prison authorities to account for not taking the goal of rehabilitation as seriously as they should in their policies for incarceration. Ultimately the goal of rehabilitation is grounded on the right to dignity, which is fundamental to the German Basic Law. When the argument for a decent wage for prisoners for the sake of the goal of rehabilitation was initially advanced before the German Court,

[36] Ibid [23]. Compare: 'A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken away from him by law.' *Coffin v. Reichard 143 F.2d 443 (6th Cir. 1944*) 445.
[37] Maycock and McGregor(n 3), 11.

it held that the democratic legislature must judge what amount was appropriate, taking into account other benefits obtained by prison work such as early release.[38] While that principle remains valid, the Court decided in 2023 that because prison wages had hardly improved at all in several decades, they were not serving the goal or rehabilitation and were undermining human dignity.[39] Provincial governments were required to be able to demonstrate that their level of wages and other kinds of benefits such as early release for hard work were designed to fulfil the goal of rehabilitation and the right to dignity, taking into account the latest research and the costs of different measures. In two years' time, when the provincial governments and legislatures adopt new schemes that comply with the ruling of the Court, it seems likely that the level of wages will rise significantly, though it also seems unlikely that wages will amount to more than a small percentage of the relevant market wage or minimum wage.

(b) Board and lodging

A further objection to paying prisoners a living wage is that they already receive board and lodging for free, so at most they require pocket money for a living wage. If, as seems likely, the human right to a living wage or a wage sufficient for a life dignity can be achieved by a mix of cash payments, benefits in kind, and public welfare support, it is arguable that the right is satisfied by the provision of board and lodging for prisoners, topped up by modest payments for the work that they perform. If so, it can be claimed that prisoners already enjoy the right to fair pay in the sense of a living wage in accordance with the Universal Declaration of Human Rights. That conclusion may be challenged in two ways.

First, even if some allowance should be made for board and lodging, the total notional income of prisoners is likely to fall far below what is required in international law. For instance, article 4 of the European Social Charter 1961 has been interpreted by the European Social Committee to require that minimum net remuneration must not fall below 60% of net average wage.[40] The necessary calculation would be to discover whether the combination of prison wages and benefits in kind such as food and lodging could be valued at 60% or more of the average wage. Given the rather basic provision in prisons of food and lodging, together with wages paid at 10% or less of the National Minimum Wage, it is improbable that total income meets international standards.

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[38] BVerfG, 24. March 2002, 2 BvR 2175/01, -juris. Early release may be the sole benefit obtained from work in many jurisdictions eg Greece: Vasiliki Artinopoulou, Evangelos Kamarakis, *Prison Conditions in Greece, European Prison Observatory* (Antigone Edizioni Rome, September 2019).

[39] BVerfG, Judgment of the Second Senate of 20 June 2023 - 2 BvR 166/16 – 'Prisoner Compensation'. For detailed discussion see: Maria Azinovic, 'Resocialisation through prisoner remuneration: The unconstitutionally low remuneration of working prisoners in Germany' (2024) 15 European Labour Law Journal xxx.

[40] Zoe Adams and Simon Deakin, 'Article 4: The Right to a Fair Remuneration' in N Braun, K Lorcher, I Schomann and S Clauwaert (eds), *The European Social Charter and the Employment Relation* (Oxford, Hart Publishing, 2017),, 198, 205-2011.

Second, even if we disregard international standards for a living wage and focus on the question of whether prisoners can live a life of dignity, it must be questioned whether their wages plus benefits in kind enable them to live a life of dignity. Such a life arguably is only achieved when individuals have access to necessities in life. Prisoners may have food and shelter, though the food is basic sustenance and the accommodation overcrowded, but the prison does not supply them with many other kinds of necessities for a dignified life. Prisoners need to buy their own clothes, shoes, books, stationary, postage stamps, legal services, hobby materials, television rental, credit for the prison pay-phones, non-prescription medications, tobacco, religious items such as prayer mats, and most toiletries.[41] Many also purchase additional food items from the prison canteen, which may not be necessary for survival, but in many cases of favourite foods and treats like chocolate, coffee, and fresh fruit, are a normal feature of human life. Rates of pay in prisons are unlikely to be sufficient to meet those needs for a dignified life. Even if prisoners earned enough from their work to pay for such items, further rules restrict how much they are permitted to spend in most cases to £15.50 a week, a maximum fixed in 2008.[42] Furthermore, most items have to be purchased via the prison canteen from a list of about 450 items, which may not include what the prisoner hopes to purchase. [43] Thus the argument that prisoners already receive a living wage is misconceived.

(c) Infirmity and dependants

There are two further dimensions of this conception of the human right to fair pay as a living wage that have a potential bearing on the situation of prison workers.

The first concerns income in old age or infirmity. The possibility of living a life of dignity extends to those twilight years.[44] To achieve that goal when paid work is no longer possible, older prisoners need to be given an income to purchase the items mentioned in the previous paragraph. State pensions are stopped during incarceration, though private pensions can be credited to the prisoner's account. Prisons give pay to those over retirement age, but the amount is inadequate to meet even minimal additional needs beyond those that are met by the prison and so retired prisoners often choose to work so they can supplement the basic 'retirement pay'. Those who are unable to work (for health reasons or due to a lack of activity places) either struggle financially in prison or rely on family or friends to send additional money if they can.[45] If these prisoners are discharged, the older or infirm prisoners must receive a pension from either the state or a former employer or have personal savings.

[41] HM Inspectorate of Prisons, *Life in prison: Earning and spending money* (January 2016) 3.
[42] Ibid 4, discussing the incentives and earned privileges (IEP) scheme.
[43] Ibid 11.
[44] In article 45 of the Charter of the Organization of American States,'fair wages' seems to include wages that ensure life, health, and decent standard of living for worker and his family, both during his working years and in his old age or when he can no longer work.
[45] HM Inspectorate of Prisons(n 39), 6.

The problem facing long-term prisoners is that, owing to the lack of contributions, they will not qualify for either a state or a private pension, and they certainly will not have any substantial savings. So, even if the right to fair pay is satisfied by board and lodging and a small payment, the important dimension of the right to a decent income in old age is certainly not vindicated. [46]

The second dimension that also needs to be considered is that article 23(3) of the Universal Declaration of Human Rights concerns the dignity not only of workers but also of their dependants. The standard required is further elucidated in article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." The reason why the right is recognised is that the universal interest is for the whole family unit to enjoy a life of dignity. Many prisoners have dependants. These dependants may receive small state welfare payments such as Universal Credit, which is often not sufficient for essential needs, as the growth in the number of foodbanks illustrates.[47] If prisoners were paid a decent wage, which was then passed directly to dependants, it might contribute to ensure the vindication of the right to a living wage for the family as a whole. Unfortunately, there is a risk that for every penny earned by the prisoner, the family's universal credit will be reduced, thereby undermining the purpose of paying a decent wage. In the end, this issue might boil down to a contest between the Home Office and the Department of Work and Pensions about who should pay for support for the dependants of working prisoners.

The wages produced by prison work clearly fall far short of the living wage required by international labour law standards. Not only is this true of the income produced for the prisoner, but also little account seems to be taken of the two dimensions of the provision of income during old age and support for dependants. It is argued that it would be a mistake to give prisoners more cash in prisons, because that would provoke conflict and violence inside the prison.[48] Assuming that to be true, however, there is no reason why wages earned should be kept in an account and either disbursed when the prisoner is discharged or distributed to dependants.

5. Relative Wages

As well as the right to form trade unions for the purpose of collective bargaining and the right to a living wage, a third conception of the right to fair pay concerns relative pay between workers.[49] Pay can be

[46] *Stummer v. Austria* [GC], no. 37452/02, §§ 93-94, ECHR 2011.
[47] The Trussel Trust reports that the number of emergency food-parcels they distributed in the UK has risen from about 1.3 million in 2017-18 to nearly 3 million in 2022-23. https://www.trusselltrust.org/news-and-blog/latest-stats/end-year-stats/
[48] HM Inspectorate of Prisons (n 39), 4.
[49] Hugh Collins, 'Fat Cats, Production Networks, and the Right to Fair Pay' (2022) 85 *Modern Law Review* 1.

unfair because one worker is paid more for doing the same job for no good reason, or because the payment of one worker is excessive for what he or she does compared to others in the same organisation. Unlike the second conception that concerned a minimum level of pay, this third conception is about disparities and relativities in pay. This conception of pay normally functions within organisations. The question that is raised is whether the levels of pay are fair as between the different workers within the organisation. An example of this view of the right to fair pay is the right to equal pay for work of equal value, which is enshrined in EU law and declarations of human rights.

In order to determine whether the relativities are fair, the analysis usually relies on a concept of desert. The question is whether one person deserves to be paid more than another. If they are both performing the same job, it is hard to justify a disparity in pay. Differences in pay might be justified under the principle of desert if either one worker performs the job more productively or if the value of the contribution of one worker is greater than others because of the higher skills and education required. There might also be a premium paid for jobs that no-one wants to do on the ground that those who take on those tasks deserve some kind of additional compensation.

The actual wages paid to prisoners inside UK prisons is not a matter of public record and differs between prisons. Within the same prison, prisoners are not paid the same rate per hour. Based on anecdotal evidence, one recent report contains the following estimate: Basic prison work such as cleaning and catering – around £8-15 per week; Vocational training – up to £20 per week; Highly skilled labour such as tutoring – up to £40 per week.[50] Although the actual wage rates are abysmal, far below those for workers outside prison, as this list reveals, the relative wages between different kinds of work performed in prison appear to track the pattern of wage differentials in ordinary business organisations and government. The principle of desert seems to be applied to prison labour. These reported differentials appear to be influenced also by the aim of rehabilitation. A policy of rehabilitation requires equal if not more weight to be given to education and training whilst in prison, so that on release prisoners have a real chance of obtaining employment. The pursuit of education and training should therefore be rewarded as much as or more than pay for menial jobs around the prison. But that result is not always achieved: market forces in the shortage of supply of prison labour for menial and unpleasant jobs may be permitted to subvert the goal of rehabilitation by diminishing financial rewards for skills training.[51]

The principle of desert in settling the fairness of pay does not usually apply between different organisations or employers. It is the relative wages within a particular employer that are measured by desert. But can prisoners argue that they should be paid a similar rate for standard jobs such as cooking and cleaning as is paid to other workers in other prisons or even for free labour working for the Ministry

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[50] Imran Khan, 'How Much Do Prisoners Get Paid in the UK in 2023?' *Prison Inside* blog, 25 September 2023. These numbers are supported by other, older sources: 'Wages varied from £5 to £16 per week, with the most being offered for kitchen jobs, followed by trolley repair'. Ben Crewe, *The Prisoner Society: Power, Adaptation, and Social Life in an English Prison* (Oxford University Press, 2009), 32.
[51] Crewe, *The Prisoner Society*(n 48)*,* 45.

of Justice or the Home Office? The reason for setting a minimum rate of pay for prison work may have been a response to the prisoners' complaint of different rates of pay between prisons, but by leaving the rate in England at £4 a week, well below what any prisoner is paid, the rule no longer serves that purpose. Furthermore, the wages paid for those standard domestic jobs inside prisons bear no relation to free market rates even for direct employees of the ministries that govern prisons.

Prisoners are permitted to earn rather more than these derisory sums if they have the privilege of working outside the prison for a private contractor. In that case, the prisoner is paid the ordinary market rate for the job. That superior pay is necessary to prevent prisoners from undercutting free workers in obtaining work. Governors of these open prisons have a discretion to impose a levy on income earned from private contractors. The levy is not usually kept by the prison but is given to the official victim support fund. Although it is undesirable and unlawful without special legal exemption to give an employer a discretionary power to make deductions from wages, the discretion is limited to 40% of the wages earned over £20, and the prison does not usually have a conflict of interest in retaining the wages. The purpose of the levy is said to be to prevent prisoners from living a comfortable life in prison. Prison governors regularly exercise their discretion not to impose a levy in order to make work economically viable for prisoners nearing release. [52]

The incentive system that operates inside prison to encourage prisoners to behave and co-operate with staff does not affect the amount of pay, merely the extent to which the prisoner can access that income to buy items at the canteen. This incentive system for good behaviour is clearly at odds with the idea that prison work should be paid a market wage. It also conflicts with the goal of rehabilitation because the wages may have been earned through good behaviour and the pursuit of dignity through labour. Its purpose is in part to prevent inmates from enjoying any luxuries and to confer huge discretionary power on prison officers to impose economic sanctions on prisoners in addition to the normal disciplinary controls of stricter detention measures and fines for clear breaches of the rules of the prison. These seem weak justifications for depriving prisoners of their derisory wages from hard work.

6. Two Paradigms of the Right to Fair Pay in Prisons

Does the human right to fair pay apply to prisoners? The dominant paradigm in the UK and many countries is that the sums paid to prisoners for working should not be understood as wages or payments in return for work. Instead, these payments represent a small incentive to participate in rehabilitative work activity. Payment represents a kind of pocket money which prisoners can use to purchase

[52] *(R) S v Secretary of State for Justice & (R) KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) [2013] 1 WLR 3079.

necessities and perhaps as well a few luxuries like chocolate bars at the prison shop. Because of this dominant paradigm, prisoners cannot enjoy the right to join a trade union and engage in collective bargaining to improve their wages because they lack any kind of contractual relationship to perform work. Similarly, the absence of any kind of market transaction for work performed in prisons is used as a justification to avoid the application of international standards for a right to fair pay. In response to the third conception of fair pay as relative pay, governments often set minimum rates or standard rates for prison work. However, with minimum rates set unrealistically low, prisons do in fact pay rather different wages, which gives rise to complaints and attempts to shop around for a better paying prison. We noted in addition that the actual rates of pay may matter less to inmates than the amount that they can draw down each week, which, though governed by standard rules, seems to be ultimately at the discretion of prison officers.

This dominant paradigm that prison work is not paid work, but rather an educational and rehabilitative opportunity, has been challenged throughout the paper on two main grounds. First, a rival paradigm regards prison work as work that produces goods and services of economic value to the employer, whether that be the prison or an external contractor. Prison work is therefore at least in part a market transaction that should be formalised as a contractual relation. It is not just an opportunity for moral instruction. Secondly, in any case, a coherent rehabilitation strategy would try to help prisoners to develop skills and work experience and learn the value of working in co-operation with others by receiving the normal incentive of a decent wage, albeit reduced for the cost of their maintenance. If there are valid concerns about the risks created by increasing the amount of cash in prisons, the solution is to put most of the wages into a fund that is distributed to dependants or made available on release from prison. A rehabilitation strategy would also remove discretionary elements from the payment system, so that the income received is not subject to arbitrary deductions and indefinite withholding.

In accordance with this second, market paradigm, it is tempting to propose that prisoners should receive at least the national minimum wage applied in free markets, for only that level of wages can provide the dignity required from work and the reward needed for the educational purpose of rehabilitation. Yet unless external contractors can pay less than the minimum wage, they are unlikely to want to use prison labour because of its additional administrative costs, the frequent need to provide training, and the difficulty of disciplining labour that has very little to lose.[53] Applying a minimum wage might therefore lead to the drying up entirely of what are already scarce work opportunities apart from internal prison services. On the other hand, consumers may boycott products that are produced by badly paid prisoners, which would also deter external contractors from using prison labour. Furthermore, the reason why prison may be less productive than work in free markets is precisely because the low pay is

[53] Fassin, *Prison Worlds* (n 11), 205.

demotivating. A balance needs to be struck between paying a decent wage but one that permits contractors to make a profit even with increased administrative costs. At present, the derisory wages paid in the UK for the lucky few who obtain paid work in prisons clearly strike the balance in the wrong place.

Not all legal systems fully accept the dominant paradigm that denies that prison wages are payment for work. There is weak support for the rival paradigm that regards prison work as an economic activity, which benefits the nation's wealth, as well as probably helping prisoners to rehabilitate. For instance, the Committee of Ministers of the Council of Europe has declared that member states should require 'equitable remuneration for the work of prisoners.'[54] Although this statement is vague, by emphasising that the remuneration is paid for work, the Council of Europe's recommendation implies that an equitable measure of remuneration should be in some sense commensurate with the value of the work provided which might be measured by the external market rate paid for that kind of work.

In France, the Penal Code links the pay of prisoners to the statutory minimum wage.[55] The rate is set at 45% of minimum wage of the outside world for inmates who produce goods for the external market. Inmates performing service work inside the prison are entitled, according to the type of work, to 33%, 25%, 20% of the statutory minimum wage.[56] Some of the salary is retained for victim compensation and board and lodging, and 10% is saved for the prisoner on release. Although these amounts are not always paid and fall short of the international standard for a minimum wage of 60% of the average wage, they can produce an income of a few hundred Euros a month for the lucky few who are get a job.[57] Although the dominant paradigm in France remains one that emphasises the moral purpose of prison work,[58] these reforms have taken a step towards regarding the work to some extent as an economic exchange. But there is clearly a long way to go before workers in prison earn a living wage that is equal to market rates.[59]

In Italy, prisoners are entitled to be paid a salary equal to the two thirds of that stated for the same job by the relevant collective agreement.[60] However, deductions are made for board and lodging and prison fines, and in practice salaries can be illegally withheld for years by the prison authorities.[61] Similarly,

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[54] Council of Europe: European Prison Rules (2006), as revised by Recommendation (2006)2-rev *on 1 July 2020*, Article 26.10.
[55] Article D412-64 of the Code pénitentiaire, as amended by Decree No. 2022-655 of 25 April 2022.
[56] Marie Crétenot, Barbara Liara, *Prison conditions in France*, European Prison Observatory, (Rome 2013).
[57] Fassin, *Prison World* (n 11), 202.
[58] Ibid, 204.
[59] Sophie Robin-Olivier, 'Recent reforms of prison work in France: still stones on the way toward equal rights', (2024) 15 *European Labour Law Journal* xxx.
[60] Italian Penitentiary Code Article 22, as amended by the Italian Penitentiary Reform <Law No 123> with effect from 10 November 2018).
[61] Susanna Marietti, *Prison conditions in Italy,* European Prison Observatory 2nd edn (Rome, 2019) 17.

in Austria, wages of prisoners are linked to a high proportion of collectively agreed rates for manual workers, though there is a deduction of about 75% for the costs of board and lodging, and the remaining 25%, after deductions for tax and national insurance, is held by the prison authorities until release.[62] In both Italy and Austria, therefore, there is some recognition of the right to fair pay set by relevant collective agreements. While the deductions may be excessive, the link to market rates has been established.

In Europe, what is emerging is a political contest between two paradigms regarding wages for prisoners. The traditional view, which still dominates in the UK, is that at most remuneration should be pocket money, to help with necessities and to motivate prisoners to conform to the prison disciplinary regime. Prisoners do not have a contract for work and therefore do not have to be paid at all. How this paradigm can be reconciled with the goal of rehabilitation is never explained, and as we noted, the German Constitutional Court has decided in effect that it cannot. A modern view, emerging in France, Italy, and Austria, is that prison wages should be treated as a contractual payment in return for work and that wages should be determined by reference to a statutory minimum wage or relevant collective agreements. Proportionate deductions from pay can be imposed to account for the costs of imprisonment and to fund victim compensation, but prisoners should receive wages linked to the statutory minimum wage or a relevant collective agreement, which they can save to help them manage the transition of release from incarceration. This second paradigm seems to be much more in accord with the human right to fair pay and therefore can be regarded as both morally and legally superior to the traditional paradigm that still applies in the UK.

[62] Bundesgesetzes über den Vollzug der Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen vom 26. März 1969, as amended by Maßnahmenvollzugsanpassungsgesetz 2022 vom 30. Dezember 2022, BGBl I Nr. 223/2022.