

**Is the Constitutional Right to Work a Right of Nationals or
Everyone? : Revisiting the Debate through a Capabilities-
Approach Response to Objections against Human-rightisation
of Labour Rights**

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Abstract

The constitutional rights to and at work is conventionally categorised as Staatsbürgerrecht (rights of nationals), rather than Jedermannsrecht (human rights). Foreigners are thus considered not entitled to such rights. However, this view is in sharp contrast with ‘human-rightisation’ of international labour rights. More importantly, it fails to consider the purpose and role of labour rights and laws. This paper suggests that the constitutional debate about the nature of rights about work should be informed by the developments of international labour rights, and labour law scholars’ insights about the aim of labour laws. This paper challenges the Staatsbürgerrecht view from a labour-law-oriented perspective. By engaging the lively debate, ‘are labour rights human rights?’, this paper argues that the constitutional right to work and rights at work should be human rights.

Some commentators reject that labour rights are human rights because, allegedly, human-rightisation prioritises civil and political rights, while marginalising economic, social and cultural rights, hence labour rights. Some commentators doubt whether access to work is worthy of being a right if the access can be facilitated by lower working conditions. Some further argue that labour rights necessitate a national boundary, which is in constant tension with the universal tendency of human rights. Underlying these scepticisms is the perception that rights about work are a zero-sum game of resource distribution, to

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which foreigners should not join. Notably, the same perception is shared by the literature of the Staatsbürgerrecht view regarding the constitutional rights to and at work. This paper offers an alternative normative framework for labour rights with the insight of the capacities approach. The capacities approach perceives labour rights as the means to cultivate fundamental human capacities. To this aim, all workers, regardless of nationality, by their very participation in the labour market, should be protected by the constitutional rights to and at work.

Keywords: Right to Work, Rights at Work, Labour Rights, Rights of Nationals, Human Rights, Social Rights, Boundaries, Capabilities Approach, International Labour Organization, International Covenant on Economic Social and Cultural Rights