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Human Rights as Foundations for Labour Law

Introduction

Doubts over the soundness of traditional justifications of labour law have sparked an increased interest in the theoretical aspects of the discipline. Understanding the principles and values underpinning labour law is necessary to ensure our analysis of the law and proposals for reform are sound. In addition, strong normative foundations are needed to prevent the discipline being undermined by its opponents, in both the legal and political arenas. A divide has emerged between scholars who have attempted to re-invigorate old narratives about the foundations and purpose of labour law, and those who have opted instead to replace them. One potential new source of foundations is to develop a rights-based justification rather than focusing on the more traditional approaches of social justice or efficiency.[1] It might be possible to develop a rights-based foundation for labour law using theories of constitutional rights, or theories of justice,[2] and private law theory can also provide useful insights.[3] Rather than pursuing these options however, this chapter explores the potential for human rights to provide the normative foundations of labour law.

In this chapter the term human rights is primarily used in a moral rather than in a legalistic sense. Human rights are taken to be universal moral rights that make up an important and distinct body of norms, and which exist independently of any legal or institutional recognition. The lists of rights contained in international treaties or domestic constitutions are not taken as determining what counts as a human right. Instead, questions about which rights are human rights, and the nature and content of these rights, must be answered by a philosophical theory. Although the duties generated by human rights do not depend on their recognition by the state, human rights are norms which society should endeavour to realise and fulfil for all people, and this will often involve the creation of legal protections, policy initiatives and social institutions.

[1] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).
[2] ibid.
[3] Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 7.

There are at least two reasons why it is important to consider whether human rights can provide a philosophically sound underpinning for labour law. First, given that labour law is frequently aligned with human rights in practice, it is important to know whether this is legitimate as a matter of theory. Many human rights documents contain rights relevant to labour lawyers, and labour law issues are frequently discussed and analysed through the lens of human rights. Despite this, there has been little research into the relationship between labour law and human rights on the theoretical level, or the philosophical legitimacy of using human rights to provide the foundations for labour law. But without sound philosophical arguments we cannot in good faith use ideas of human rights to provide the foundations of labour law.[4] Using human rights as foundations without making these supporting arguments will undermine the justification of labour law and make it more vulnerable to attack. Human rights may be seen as attractive foundations for labour law because of their normative force and political salience, but a coherent philosophical justification is needed if human rights are to provide firm foundations. The second reason this enquiry is important is that it is necessary for assessing whether human rights can provide attractive foundations for labour law. In order to decide this we first need to establish what forms of regulation are justified under a human rights approach, and what a human rights-based labour law might look like. Much of the current literature discusses the benefits and drawbacks of using existing human rights mechanisms to protect workers, but this instrumental question is different to assessing whether human rights can provide adequate normative foundations.[5]

This chapter aims to give an overview of contemporary perspectives on human rights, and map out their implications for labour law. Section two briefly considers the current landscape regarding human rights as a foundational perspective for labour law. Sections three and four then evaluate the potential of some prominent theories of human rights for providing foundations for labour law. Section three considers the place of labour law within theories of human rights that see them as triggers for action in the international arena, and section four does the same for theories that see them in purely moral terms. These approaches can only be briefly summarised here, and there are many other theories that might feasibly provide human rights foundations for labour law. The theories discussed were chosen not because they are necessarily the most persuasive, but because they are among the most prominent, and taken together they provide a good introduction to philosophical perspectives on human rights. The

[4] Collins (n 1) 144.
[5] Virginia Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 European Labour Law Journal 151.

focus of this chapter is on examining the likely implications of each conception for labour law rather than a detailed assessment of their merits. Clearly, however, a theory must be coherent and plausible in order to provide the foundations that labour law needs. Despite these caveats this chapter aims to lay the groundwork for, and indicate the potential of, future research on human rights as a foundational perspective for labour law.

(2) Labour Law and Human Rights

Labour law is already aligned with, and influenced by, ideas of human rights, so it seems natural to consider their potential for providing the foundations of labour law. There are provisions relating to both individual and collective labour law in international human rights documents[6] and domestic constitutions.[7] Although human rights mechanisms are not always effective at protecting workers in courts, they have been used with some success,[8] and the rights to collectively bargain and to strike are recognised by the European Court of Human Rights.[9] In addition, human rights rhetoric has been adopted by trade unions and other organisations when campaigning for improvements in working conditions.[10] The UN Guiding Principles on Business and Human Rights, and the growing debate over corporate

[6] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) arts 23-4; International Covenant of Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 7; Charter of Fundamental Rights of the European Union (26 October 2012) 2012/C 326/02 ch 4; European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163 arts 1–9; American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter- American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) art 14; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 15; Arab Charter on Human Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)art 34; Association of Southeast Asian Nations Human Rights Declaration (adopted 18 November 2012) art 27; Social Charter of the Americas (adopted 18 October 1961, entered into force 26 February 1965) ETS 35 art 8

[7] The right to work is in 136 domestic constitutions, to strike in 98, to rest and leisure in 81, to equal pay in 100, to a safe work environment in 85, and 77 contain anti-child labour provisions. See 'The Constitute Project' https://www.constituteproject.org/.

[8] Kevin Kolben, 'Labor Rights as Human Rights' (2009) 50 Virginia Journal of International Law 449; Astrid Sanders, 'A "Right" to Legal Representation (in the Workplace) during Disciplinary Proceedings?' (2010) 39 Industrial Law Journal 166; Mantouvalou (n 5).

[9] *Demir and Baykara v Turkey* (2009) 48 EHRR 54; KD Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 Industrial Law Journal 2.

[10] Kolben (n 8); Mantouvalou (n 5).

responsibility for human rights, provide further examples of the increasing links between the two fields.[11]

This alignment of labour law and human rights is intuitively appealing; both are motivated by a desire to improve the human condition, and both are often seen as protecting human dignity. Furthermore, the strength and salience of human rights seems to offer the chance to settle long running disputes regarding the justification of labour law. Despite this, there has until recently been little attention paid to the philosophical legitimacy of justifying labour law using the idea of human rights. Most literature that assesses human rights as a foundational perspective for labour law does so from an instrumentalist perspective, which considers whether human rights mechanisms can be used to effectively protect workers rights and endorses human rights foundations to the extent that this is possible.[12] An instrumentalist assessment of whether human rights can provide adequate foundations for labour law presents a mixed picture, and there is an ongoing debate over the benefits and drawbacks of framing labour law in terms of human rights.[13] Such arguments are important, and will likely influence whether it is a good idea to adopt human rights as a foundational perspective, but they are distinct from the question of whether human rights can provide philosophical foundations for labour law. Human rights can be capable of justifying labour law at the normative level even if existing human rights mechanisms do not adequately protect workers. This chapter takes what Mantouvalou calls the normative approach, which examines human rights as a matter of theory and considers their implications for labour law.[14]

Several scholars who have considered the philosophical alignment of labour law with human rights have raised objections to the legitimacy of this approach. These generally take the form of identifying differences between human rights and labour rights, and arguing that these

[11] Surya Deva and David Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013); Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237.
[12] Mantouvalou (n 5) 156.
[13] Jay Youngdahl, 'SOLIDARITY FIRST: Labor Rights Are Not the Same as Human Rights' (2009) 18 New Labor Forum 31; Lance Compa, 'Solidarity and Human Rights: A Response to Youngdahl' (2009) 18 New Labor Forum 38; Kolben (n 8); Guy Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet' (2012) 34 Comparative Labor Law & Policy Journal 217; KD Ewing and John Hendy QC, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 Industrial Law Journal 391.
[14] Mantouvalou (n 5) 152; Pablo Gilabert, 'Labor Human Rights and Human Dignity' (2016) 42 Philosophy & Social Criticism 171.

make it impossible for human rights to provide foundations for labour law.[15] So human rights are said to be timeless, universally applicable standards of the highest moral importance, whereas labour law norms are less urgent, and neither timeless nor universally applicable. Other objections include the argument that human rights regulate the 'vertical' relationship between individuals and the state while labour law is primarily concerned with the 'horizontal' relationship between employer and employee, and that human rights are too individualistic to accommodate the collective aspects of labour law.

Many of these objections can be responded to persuasively.[16] However, it is often unclear what philosophical conception of human rights is being used in the existing literature, which makes it impossible to know why human rights must have the particular characteristics that are attributed to them. One response to arguments such as 'human rights are too individualistic to provide foundations for labour law' is simply to say that many theories of human rights do take our social interests into account, and can therefore justify collective labour law regulation.[17] But this response is not available unless we are clear on what philosophical conception of human rights we are using, and the nature and characteristics of human rights under this theory. To avoid this problem, this chapter examines particular conceptions of human rights, mapping the extent to which each might provide the foundations of labour law.

There is no agreement between theorists as to the best philosophical conception of human rights, and almost everything about them is contested; from their nature and foundations to their very existence. However, there is some degree of consensus among philosophers of human rights that they are individual entitlements, whose normative force does not depend on legal or political recognition, that are distinct from other norms in some important way, and which all people hold equally.

[15] Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages'(2007) 8 Theoretical Inquiries in Law 719; Kolben (n 8); Collins (n 1).
[16] Mantouvalou (n 5).
[17] Collins and Mantouvalou 'Human Rights and the Contract for Employment' in Alan Bogg, Mark Freedland and Nicola Countouris (eds), *The Contract of Employment* (OUP 2016).

The main division in contemporary human rights discourse is between political and naturalistic approaches.[18] Political theories view human rights as a post-war phenomenon, and take the modern practice of human rights as their starting point for developing a theory. These theories define human rights as norms that have a particular political function in the domestic or international arena. In contrast, naturalistic theories view human rights as the modern equivalents of natural rights, and define them as moral rights held in virtue of humanity with no inherent political function. As we shall see, substantial differences exist between particular conceptions within each of these broad categories. But there is also some overlap between political and naturalistic approaches. A political theory might see human rights as universal moral rights that have some additional political function, and naturalistic theories deny only that human rights by their nature have a political function, not that they never have important political implications.

Before moving on to consider some political and naturalistic conceptions of human rights, it is worth noting that there are at least two way of approaching the relationship between labour law and human rights. First, labour law has an important role to play in ensuring that human rights, such as privacy and freedom of expression, are properly protected in the workplace. Literature that looks at the impact of human rights on labour law is often written from this perspective.[19] Therefore the role or purpose of labour law is, at least in part, to protect human rights. The second approach is different, and focusses on the potential for human rights to provide the foundations of labour law. Protecting the privacy, expression and religious freedom of employees is undoubtedly an important part of labour law. But if human rights cannot also justify core elements of labour law, such as protections from dismissal or trade union rights, then it is hard to see them as providing the foundations of the discipline. Enquiries into human rights and labour law could therefore focus on either of these dimensions; the protection of traditional human rights and civil liberties at work, or the question of whether human rights can provide the foundations of labour law. This chapter is primarily concerned with the latter approach.

[18] S Matthew Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 Journal of Moral Philosophy 327; Rowan Cruft, S Matthew Liao and Massimo Renzo, 'An Overview' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

[19] Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 Modern Law Review 619; Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 Modern Law Review 912.

That said, no firm dividing line exists between thinking one important aim of labour law is the protection of human rights, and viewing human rights as the foundations for labour law. For example, they collapse into each other to some extent if rights to fair remuneration, decent working conditions, and to collectively bargain and go on strike are human rights. Even if this is not the case, some core elements of labour law might be justified using linkage arguments and human rights. For example, the right to life could require the introduction of health and safety regulations in the workplace, and the right to freedom from slavery and forced labour requires the introduction of some minimum labour standards.[20] Similarly, the right to freedom from discrimination will require the introduction of a substantial body of equality norms in the sphere of employment. Some protection against dismissal can also be justified using linkage arguments, as allowing employees to be dismissed for exercising their rights to privacy or religion significantly prevents people from effectively enjoying those rights.[21] Collins points out that the rights to free choice of occupation, decent working conditions, and protection from unemployment, might all be seen as elements of more general rights, namely to liberty, dignity and subsistence.[22] The line between 'protecting human rights at work' and 'human rights as the foundations of labour law' is therefore a blurred one.

However, if human rights are to provide the philosophical foundations of labour law, they must mandate and require the introduction of core labour law norms. A theory of human rights that demands the protection of civil rights in the workplace certainly does valuable work, and will be relevant for labour law. But it cannot provide a foundational perspective for labour law if it does not also justify elements such as protection from dismissal, decent working conditions, and the freedoms to strike and bargain collectively. The remainder of this chapter focuses on this question, identifying which, if any, labour law protections are justified by some prominent theories of human rights.

(3) Political Theories of Human Rights

[20] *Siliadin v France [2005] ECHR 545*.
[21] *Redfearn v United Kingdom* [2012] ECHR 1878.
[22] Hugh Collins, 'Is There a Human Right to Work?' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Bloomsbury Publishing 2014) 24.

Human rights may have become an "ethical lingua-franca"[23] but until recently they were relatively neglected by philosophers. This is no longer the case, and there now is a voluminous body of philosophical literature in this area. A philosophical conception of human rights must make the term sufficiently determinate to be useful, by making their existence conditions clear, setting out the grounds for deciding their content, and indicating how conflicts between rights can be resolved.[24] It should also address the questions of what type of statement a declaration of human rights makes, how the rights it entails should be promoted, and how proposed rights can be defended or challenged.[25] Finally, a theory should have at least some degree of 'fit' with current uses and understandings of human rights in morality and practice.[26] It is difficult to define the level of fit needed, and a theory should not just aim to replicate those rights found in international human rights documents.[27] But if a theory of human rights does not adequately justify and explain key rights, such as freedom of expression or freedom from torture, then this is a strong indication that the label of human rights is being misapplied.

One trend that has emerged in the contemporary debate is the rise of 'political' theories of human rights, which see their defining characteristic as being the particular political role they play. Such theories take the modern practice of human rights or international human rights law as their starting point and attempt to develop a normative theory of human rights that fits this practice. Their method is often implicitly an interpretivist one, seeking to develop the most normatively attractive theory that has the requisite degree of fit.[28] Political human rights theorists have proposed that human rights have various roles, at both the international and domestic level - for example, as being standards for determining the internal legitimacy of a regime,[29] or protecting human interests that are matters of common concern in the

[23] John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) 75; Joseph Raz, 'Human Rights Without Foundations' in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (OUP 2010).
[24] James Griffin, 'Replies' in Roger Crisp (ed), *Griffin on Human Rights* (OUP 2014) 225.
[25] Amartya Sen 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315, 318–19.
[26] John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 Current Legal Problems 1, 17.
[27] George Letsas, 'Dworkin on Human Rights' (2015) 6 Jurisprudence 327, 330.
[28] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).
[29] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011).

international arena.[30] Some political theories do not even think human rights must be 'rights' in the sense normally understood.[31]

Perhaps the most prominent strand of political theories sees human rights as rights whose violation justifies intervention with a sovereign state. Several theorists take this approach, under which human rights are individual entitlements which delineate the boundaries of state sovereignty. John Rawls was the original proponent of this view, believing that human rights are the 'class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy'.[32] For him human rights are therefore distinct from the constitutional rights of liberal states; they are norms whose violation provides justified, but defeasible, grounds for military intervention by other states and acts of civil disobedience by citizens. This appears to equate the conditions for internal authority with the boundaries of sovereignty, which is problematic as not every state action that oversteps its authority is a justified reason for intervention.[33] Ultimately, however, the critical benchmark for something being a human right is that it is a trigger for military intervention.[34] States that fail to introduce policies and legislation adequately protecting human rights therefore leave themselves open to justified military coercion.

The conception of human rights proposed by Rawls does not see labour law norms as matters of human rights, so cannot provide foundations for labour law. The question of what counts as a human right is to be answered by applying Rawls' well-known 'original position' at the international level, with public reason being used to determine which rights liberal and decent Peoples would agree upon as conditions for cooperation behind the veil of ignorance.[35] This leads to an extremely minimalist list of human rights, excluding many commonly accepted rights such as freedom of expression and association, as well as all socio-economic rights besides subsistence.[36] For labour law norms to be grounded in human rights, a state's failure to introduce and enforce them would have to leave them open to justified military coercion.

[30] Charles R. Beitz, *The Idea of Human Rights (*OUP 2009); Charles R Beitz, 'From Practice to Theory' (2013) 20 Constellations 27.
[31] Allen Buchanan, *The Heart of Human Rights* (OUP 2013); Beitz (n 30).
[32] John Rawls, *The Law of Peoples* (2nd edn, Harvard University Press 1999) 79.
[33] Raz (n 23) 330–1.
[34] John Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 Philosophy Compass 938, 942.
[35] Rawls (n 32) 60.
[36] ibid 65.

With the exception of the freedom from slavery and forced labour, labour law does not plausibly meet this criteria. Failure to regulate for decent work or introduce a right to bargain collectively would not be seen as justified grounds for military intervention by participants in the international original position. Most core aspects of labour law therefore have no place in this theory of human rights.

In addition to this failure, there are several good reasons for not adopting Rawls' view of human rights as triggers for military intervention. First, the political approach to human rights aims to develop theories which fit the practice, but this conception excludes many rights that are generally seen as central to the modern practice.[37] Second, although human rights are sometimes used as justifications for military action, Rawls affords this role much greater significance than it has in practice, and ignores the broad range of other functions played by human rights.[38] Finally, the method of justifying human rights via public reason and the original position has been criticised as making their content extremely difficult to determine.[39] Given these drawbacks, it is no surprise therefore that Rawls' theory has not been widely adopted by philosophers of human rights.

However, the view that human rights are triggers for intervention remains influential, and Raz builds on this core insight when developing his conception of human rights.[40] Raz still views human rights as norms whose violation justifies interference with an otherwise sovereign state, but he departs from Rawls in three ways. First, the justification of military coercion is not the benchmark for what counts as a human right. Instead a right is a human right if it justifies 'any international action against violators, provided that they are actions which normally would be impermissible being violations of state sovereignty'.[41] This significantly lowers the threshold for something being a human right, and results in a less austere list of human rights. Second, human rights do not have the function of determining the legitimacy or internal authority of states. Third, human rights are moral rights which must be justified using ordinary moral reasoning, rather than by public reason in the international original position. Under this modified 'triggers for intervention' theory, human rights are the sub-set of moral rights whose violation justifies external interference with a sovereign state.

[37] Dworkin (n 29); cf Letsas (n 27).
[38] Charles R Beitz, 'Rawls's Law of Peoples' (2000) 110 Ethics 669, 687; James Griffin, 'Human Rights and the Autonomy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 343.
[39] Griffin (n 38) 343.
[40] Raz (n 23) 328.
[41] ibid footnote 21.

There are three 'layers of argument' for determining what counts as a human right: human rights must be moral rights; they must impose duties on government; and there must not be state immunity from interference regarding violations of the rights.[42]

Although Raz is sceptical of a human right 'not to be exposed to excessively and unnecessarily heavy, degrading, dirty and boring work'[43] the theoretical framework he proposes can justify some key labour law norms as human rights. In order to determine the implications of this conception of human rights for labour law we need to unpack each of these three layers of argument. The first requirement, that human rights must be moral rights, requires some theory of what moral rights are and how they are justified. There are various approaches which can be taken to establishing that there are moral rights to labour law protections.[44] For Raz, moral rights are protections of individuals' interests, and exist where an interest is important enough to hold others to be under a duty to protect or refrain from interfering with it.[45] For labour law to be a matter of moral rights under this interest-based approach it must be shown that certain interests of workers are sufficiently important to hold others to be under duties to respect or protect them. This would likely be possible for several important areas of labour law. For example, a moral right to education is generated by the interest in being 'equipped with whatever knowledge and skills are required for him to be able to have a rewarding life',[46] and this would include the right to be provided with the skills and training needed to participate in the labour market. The significant roles that work plays in our lives mean that our interest in working justifies a moral right to work,[47] and this would include a right to working conditions which support these underpinning interests.[48] A right to minimum standards at work might also be justified by the interest employees have in working under terms and conditions which allow them to lead a rewarding life. The right to work might also include a right to non-discriminatory access to work, grounded in our interests in dignity and self-respect.[49] It is likely that moral rights to limits on the use of managerial discretion can be justified by reference to workers' interests in liberty and freedom from arbitrary power. The interest of individual workers in free association and not being subject to unequal bargaining power arguably justifies a right for them to form trade unions and

[42] ibid 336.
[43] ibid 321.
[44] Gilabert this volume; Bogg and Estlund this volume.
[45] Joseph Raz, *The Morality of Freedom* (Clarendon 1986) ch 7.
[46] Raz (n 23) 336.
[47] Collins (n 22).
[48] Gilabert (n 14).
[49] Bogg (n 3) 25.

attempt to bargain collectively. A right to strike might either be required as part of freedom of association, or justified through a combination of association, expression and freedom from forced labour.[50] A moral right to some protection from dismissal could be generated by the interest in avoiding the harm that comes from dismissal. There is not space here to discuss the justification or content of these rights in depth, and such arguments would no doubt be contested. But it seems that several elements of labour law will pass the first stage of Raz's theory.

The second layer requires a human right to generate duties for governments. Although under this conception human rights can be held against international organisations, domestic institutions, and individuals, there must always be state duties.[51] The question is whether the state should be the 'guarantor' of these rights.[52] In the context of workers' rights, employers rather than the state are the most obvious duty-bearers. But there are several reasons to think that the state will also have duties to protect and help realise them. Long years of experience tell us that unregulated labour markets result in the 'worst possible conditions'[53] for workers, and will result in widespread violations of workers' moral rights. Given the bureaucratic power of modern states, and the extent to which they are involved in regulating labour markets, it is appropriate that the state should guarantee workers' rights. The labour market is constituted by state legal systems, so the state necessarily has a major role in determining whether worker's moral rights are realised. In light of this, it is reasonable to think workers' moral rights will impose at least some duties on Government, for example to ensure the law does not permit or encourage the violation of moral rights.

The final requirement for labour law to have foundations in Raz's theory of human rights is that there must not be 'immunity from interference' regarding workers' rights.[54] When it comes to matters of human rights it is not legitimate for a state to claim that 'I, the state, may have acted wrongly, but you, the outsider are not entitled to interfere. I am protected by my sovereignty.'[55] The question therefore is whether a state's violation of workers' rights is a defeasibly justified ground for action being taken against it by external actors that would normally be ruled out by sovereignty. This in turn requires a moral theory of sovereignty

[50] Bogg and Estlund (n 44)
[51] Raz (n 23) 329.
[52] ibid 336.
[53] Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans, Green and Company 1902) 560–1.
[54] Raz (n 23) 336.
[55] ibid 332.

which sets out the scope of immunity it provides, and the circumstances in which its value can be defeated. For Raz, state sovereignty consists in the ability of a state to deny the need to account for their actions towards outside actors and bodies.[56] On this view sovereignty gives immunity from condemnation by external agents, as well as any other diplomatic or economic interferences. Labour law norms that pass the first two layers of argument will therefore be human rights if their violation justifies interferences such as these.

Violations of some labour law norms clearly provide justified grounds for intervention. For example, failing to introduce workplace safety standards, allowing widespread discrimination at work, or banning trade unions are all justified reasons for publicly condemning a state. Condemnation by the ILO and other UN bodies for violations of labour rights is widely regarded as justified, and while condemnation by other Governments is less common, this has more to do with political expediency than such actions being impermissible interferences with sovereignty. Violations of some workers' rights are also justified grounds for imposing trade sanctions or withdrawing financial support or foreign aid from a country. For example, the rights to association, freedom from forced labour, the abolition of child labour and elimination of discrimination contained in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work are included in several free trade agreements.[57] In contrast, some labour law norms are obviously not sufficient to justify intervention; the right of employees to a written copy of their terms and conditions for example.[58] The status of rights to voice at work, collective bargaining, working time regulations, minimum wages, and protection from dismissal is unclear, but these core elements of labour law might not be sufficiently important to justify intervention with a sovereign state.

Determining which areas of labour law have foundations in Raz's theory requires more thorough arguments than those sketched above. But the preceding paragraphs indicate that some areas of labour law can feasibly be justified using this conception of human rights. However, there are several drawbacks with viewing labour law's foundations in this way. One potential issue is that philosophical arguments about the existence of moral rights and the value of sovereignty are going to be contentious and complex. This might lead some to dismiss any theory which relies on such arguments as an attractive way of justifying labour law. But philosophical arguments are almost always contentious, and there will be similar

[56] Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory 31, 42.
[57] The recent EU-Canada trade deal is just one example of this.
[58] Employment Relations Act 1995, s.1

disputes over attempts to establish labour law's foundations using theories of justice, or ideas about exploitation or non-domination. A second reason for doubting whether this theory provides appropriate foundations for labour law is that it might require us to prove too much. The first two layers seem to be sufficient to provide foundations for labour law; if workers' rights are moral rights that impose duties on Government then why concern ourselves with the question of whether the rights can be classed as human rights or not? The possibility of developing a rights-based justification along these lines is certainly an interesting prospect. However, the focus of this chapter is on assessing the ability for theories of *human* rights to provide these foundations, and the final layer does matter if we want to establish the legitimacy of basing labour law in human rights. Finally, Raz's view of human rights could be criticised for ignoring the many other roles they play in addition to being triggers for intervention.[59]

Political theories of human rights might struggle to provide appropriate philosophical foundations for labour law for more general reasons. If labour law has foundations in political theories of human rights it must play the same political function as human rights, whatever that is. But labour law has traditionally been understood as having its own distinct functions, such as counteracting employers' bargaining power[60] or promoting industrial democracy.[61] Viewing labour law through the lens of political theories risks losing sight of these functions. However, this need not be the case. There may be multiple valid and overlapping approaches to justifying labour law, and the fact that some labour law norms have the same function as human rights does not mean that they cannot also play other roles. Another worry is that political theories of human rights are only formal theories of human rights, and do not provide substantive arguments for determining what counts as a human right.[62] It is true that political theories are often incomplete, in that they do not do everything that a philosophical conception must do. Both Rawls and Raz's theories are examples of this; they require substantive arguments to be made to establish what counts as a human right, as well as the content of these rights. Further philosophical work may therefore be needed in order for political theories to provide foundations for labour law. But this work is not impossible, and

[59] Griffin (n 38) 344.
[60] Otto Kahn-Freund, *Kahn-Freund's Labour and the Law* (Paul Davies and Mark Freedland (eds), 3rd edn, Stevens 1983).
[61] Webb and Webb (n 53); Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Laws* (OUP 2014).
[62] Liao and Etinson (n 18).

this critique does not rule out the political approach altogether. It just indicates that further thought is needed to properly understand the implications of these theories for labour law.

(4) Naturalistic Theories of Human Rights

Naturalistic theories make up the second major strand in contemporary human rights philosophy, and see human rights as moral norms with no inherent political function.[63] Although the intellectual history of human rights is the subject of ongoing debate,[64] naturalistic theorists reject the argument that human rights should be understood as a post-war phenomenon. Instead they situate themselves in the same natural rights tradition as scholars such as Grotius and Locke.[65] But modern theories have come a long way from these roots; they are usually secular rather than grounded in appeals to religious authority, and although they tend to be less practice focused, they do generally aim to fit the contemporary human rights culture to some extent. The central features of naturalistic conceptions are to see human rights as moral rights held 'simply in virtue of their humanity', that are justified using ordinary moral reasoning.[66]

One leading naturalistic theory of human rights is proposed by James Griffin, who sees human rights as protecting 'personhood'. Personhood means Humanity's distinctive capacity for normative agency; the ability to choose and pursue one's own conception of the good life.[67] According to Griffin we have human rights to the conditions of normative agency. Being a normative agent requires one to be able to choose a path through life free from external control, so we have an abstract human right to autonomy and those things needed to choose one's own conception of the good life. Having made these choices one must be free to pursue them with at least some chance of success, so we also have abstract human rights to liberty and minimum provision.[68] The right to liberty is infringed when the pursuit of one's choices is blocked, whether by physical restraint or other means such as threats or social

[63] Naturalistic theories are also sometimes described as 'orthodox' or 'traditional' theories
[64] Flynn, 'Human Rights in History and Contemporary Practice' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012); Christopher McCrudden, 'Human Rights Histories' (2015) 35 Oxford Journal of Legal Studies 179.
[65] James Griffin, *On Human Rights* (OUP 2008) 10–11.
[66] Tasioulas (n 34) 938.
[67] Griffin (n 65) 33.
[68] ibid.

disapproval.[69] The right to minimum provision requires more than just what is necessary for sustenance but does not extend to a flourishing life, or even a 'satisfactory' standard of living.[70]

These three abstract rights, to autonomy, liberty, and minimum provision, provide an umbrella framework within which more determinate human rights can be worked out. Under each higher level right there are a series of more specific rights. For example, the right to autonomy includes human rights to life, health, free expression and assembly and to a level of education which allows one to make autonomous choices.[71] The content of human rights is influenced by 'practicalities', which are empirical considerations about society and humanity.[72] Practicalities are not an independent ground of human rights, but are used to make the scope and content of human rights more determinate. In addition there are derived human rights which 'arise from applying a basic human right to a particular time and place'.[73] The existence and content of derived human rights is context-dependent. The right to a free press, for example, cannot exist in societies with 'no press, or even the concept of one', but in societies where it does exist it is a central element of the right to freedom of expression and so has the status of a derived human right.[74] Griffin argues that this framework generates most, but not all, rights that commonly feature in human rights documents.[75]

Initially the prospects for this conception of human rights providing foundations for labour law do not look good. Griffin rejects a human right to work, or to decent conditions of work, arguing that these are matters of justice rather than human rights.[76] He also does not recognise a human right against discrimination, or to equal pay for equal work.[77] It is not that Griffin thinks that discrimination is morally permissible, or that fairness does not demand equal pay; it is just that they do not impact a person's normative agency so are not matters of human rights. But despite this, some key areas of labour law do have foundations in Griffin's conception of human rights.

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[69] ibid 160–4.
[70] ibid 183.
[71] ibid 33.
[72] ibid 37–9.
[73] ibid 327.
[74] ibid 50.
[75] James Griffin, 'Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights' (2001) 101 Proceedings of the Aristotelian Society (Hardback) 1..
[76] Griffin (n 65) 207–9.
[77] ibid 42.

A right to work, in the sense of a right not to be blocked from working and to the promotion of employment opportunities, can be justified under Griffin's theory despite his rejection of it. Rather than a human right to work Griffin thinks there is a right to adequate options to live in a 'productive, interesting, enjoyable way',[78] and the right to work should be seen as a derived human right coming under this more basic right. Work plays a significant role in our lives in addition to being a source of income;[79] Griffin himself acknowledges that the value of work consists in the dignity of contributing to society and having 'something absorbing, demanding and useful to do'.[80] Work provides the main way that people are able to live productive and meaningful lives in our current societies; there should therefore be a derived human right to work in current conditions. Griffin appears to recognise this point when he says that the right to adequate options and the right to work can be reconciled by seeing them as operating on different levels of abstraction. It is unclear therefore why he continues to class the right to work as an unacceptable human right.

The right to autonomy includes rights to the capacities needed to pursue a worthwhile life, and it could be argued that some areas of labour law protect these essential capacities. In modern industrialised societies, being able to access the labour market will be part of most people's conception of a worthwhile life. Action to remove barriers to people accessing the workplace might be required as part of this; parental leave or flexible working for example, or duties of affirmative action or reasonable adjustment for those who would otherwise struggle to access the labour market. Accessing the labour market also requires adequate training and prohibitions of discrimination, so human rights to these things might plausibly be included in Griffin's theory. This use of capacities echoes those who favour of using Sen's idea of 'freedom as capabilities' to provide foundations for labour law.[81]

There may be no human right to decent working conditions on Griffin's approach, but the abstract right to liberty protects the ability to pursue one's own conception of a worthwhile life, which includes the ability of workers to pursue decent working conditions. When coupled with the human right to associate freely, which is an essential element of

[78] ibid 208.
[79] Collins (n 22); Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) chs 3–4;.
[80] Griffin (n 65) 208.
[81] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005); Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).

autonomy,[82] the right to liberty provides foundations for the right to form trade unions and campaign for better working conditions, as well as attempt to bargain collectively. A right to strike might also be justified using these two rights as it is necessary for workers to have any chance of success in the pursuit of decent working conditions.[83] Alternately the right to strike might be justified as a derived human right under the rights to freedom of expression, association, and freedom from forced labour,[84] all of which are included in Griffin's theory. However, the right to liberty only protects the pursuit of one's conception of a worthwhile life with some chance of success, so is not a substantive guarantee of decent working conditions. Further, while trade unions must be able to campaign and attempt to bargain collectively, there is no requirement for employers to listen or engage in collective bargaining, as these are not conditions of normative agency.[85]

Human rights protect the conditions for normative agency, so working conditions that are not compatible with workers' being normative agents will violate their human rights. Normative agency requires 'more than a life entirely devoted to the struggle to keep body and soul together',[86] and several areas of labour law can be seen as protecting conditions of personhood. Workplace health and safety regulations, for example, would be required as part of the human right to health. A minimum level of health is needed for normative agency, and unsafe working conditions pose a threat to this in the same way as safe roads and working sewage system which are required by the right to health. Personhood also requires restrictions on working time. Without leisure time to contemplate what makes a worthwhile life people will be just as incapable of being autonomous self-deciders as if they lack education. Similarly, without protected time to pursue one's idea of a worthwhile life, there is no liberty to achieve these ends and no realistic prospect of success. This right to leisure time would likely include some periods of sustained leave, however it does not extend to paid holiday. The right to minimum provision demands that workers have adequate resources for normative agency during any periods away from work. However, there is no requirement that these resources be provided by paid leave, and a system of government subsidies during periods away from work would also be sufficient to protect normative agency.

[82] Griffin (n 65) 159.
[83] Gilabert (n 14).
[84] Bogg and Estlund (n 44)
[85] Griffin (n 65) 247–55.
[86] ibid 47.

Some restrictions on discrimination and dismissal also have foundations in the personhood conception of human rights. Despite Griffin rejecting rights against discrimination and to equal pay, discriminatory treatment which impacts normative agency is impermissible. As being a member of a scorned or belittled group would likely undermine one's autonomy, discrimination on the basis of sex, disability, race or religion violates human rights.[87] Discriminatory actions by employers, including dismissals, on these grounds would therefore come within the protection of human rights. More generally, there must be protections against dismissals which threaten normative agency, so dismissals which infringe on privacy, expression, or association would be violations of human rights. Without this there would be a chilling effect on people's ability to enjoy these rights, undermining their normative autonomy.

It is impossible to fully consider the implications of Griffin's theory for labour law here. One important issue that has not been discussed is how to deal with conflicts of human rights between workers and employers. But on the basis of this cursory review it seems likely that some aspects of labour law will be included within this conception of human rights. However, there are criticisms of this account which might make us think twice before drawing conclusions about its ability to provide sound foundations. Normative agency might be seen as a Western value, and therefore as too parochial to form the basis of universal human rights.[88] The reliance on normative agency as the sole value grounding rights leads to strained interpretations of some rights[89] and denies human rights to people without the capacity for normative agency such as children or the severely disabled. It is also not clear what theory of 'rights' Griffin is using in his theory.[90] Although the personhood theory has been defended against some of these critiques[91] it might still be thought to lack the coherence needed to provide foundations for labour law.

John Tasioulas develops a naturalistic theory which aims to avoid these problems, and proposes that human rights be understood as those universal moral rights held simply in virtue of humanity. Moral rights are norms which generate duties owed to identifiable individuals, that apply regardless of the duty-bearer's motivation, and that exclude at least

[87] ibid 42.
[88] Miller, 'Personhood versus Human Needs as Grounds for Human Rights' in Roger Crisp (ed), *Griffin on Human Rights* (OUP 2014).
[89] James W. Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 54; Tasioulas (n 26).
[90] Raz (n 23); Tasioulas, 'Taking Rights out of Human Rights' in Roger Crisp (ed), *Griffin on Human Rights* (OUP 2014).
[91] See for example Griffin

some competing reasons for action.[92] Tasioulas' builds on a 'Razian' interest-based view of moral rights,[93] with a right existing when 'an individual's interest in the object of the putative right…has the requisite sort of importance to justify the imposition of duties on others'.[94] But although rights are generated by interests they are also grounded in human status. An 'intimate union' exists between interests and moral status; interests would not be capable of grounding rights if they were not underpinned by human status, and the 'status of individuals is to be honoured primarily by respecting, protecting and advancing their interests'.[95]

On this view human rights are a sub-set of moral rights, namely those moral rights held 'simply in virtue of humanity'. Given that moral rights are partly grounded in human status or dignity, they can all be seen as held in virtue of humanity to some extent. However, a moral right is only held 'simply' in virtue of humanity in the requisite sense if it is generated by a universal human interest. Tasioulas says that human rights are justified by reference to 'basic interests, for example, interests in health, physical security, autonomy, understanding, friendship, achievement, play, etc.'[96] The interests capable of grounding human rights are open ended, and each right is likely to be justified by reference to a range of basic interests.[97] In addition, human rights need not be strictly timeless, and can be justified within particular historical contexts.[98]

According to this conception, a human right exists when (1) for all persons within a given historical context the object of the supposed right serves their basic interests, (2) these interests are *pro tanto* sufficiently important to justify duties for others to respect or protect it and, (3) these duties represent feasible claims given human nature and historical context.[99] The second stage requires the interests of each individual to be sufficient to generate a right when considered alone, rather than the interests of everyone in society being considered together. The underlying interests 'must have a very specific *kind* of moral importance, namely, [they] must be capable of generating a duty'.[100] In addition to importance to

[92] John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 27–8.
[93] See Raz (n 45).
[94] John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 50.
[95] Tasioulas (n 26) 9.
[96] Tasioulas (n 94) 50.
[97] ibid 51.
[98] Tasioulas (n 92) 35–6.
[99] Tasioulas (n 94) 50–51.
[100] ibid 62.

wellbeing, this requires it to be logically possible and feasible for the right to be realised, and any duties generated cannot be overly burdensome.[101] The existence of human rights will vary over time; universal interests may be *pro tanto* sufficient reasons for imposing duties in some socio-historic conditions but not in others. The content of rights will also vary, as assessments of feasibility and burdensomeness depend on technological advancements and availability of resources.

The most direct way for labour law norms to come within this theory would be if it were possible to justify a human right to decent working conditions. Many universal interests are furthered by having decent working conditions, including interests in having a decent standard of living, health, autonomy, being treated equitably and with dignity, and in not being exploited. If these interests are sufficient to meet the threshold of generating *pro tanto* duties Tasioulas' theory would appear to establish a right to decent working conditions, subject to considerations of feasibility and burdensomeness. However, there is a problem with establishing a human right to decent working conditions. It must be shown that *all* humans have their universal interests furthered by the proposed human right, but the right to decent conditions at work only furthers the universal interests of those actually in work. The right therefore appears to be conditional on particular transactions or relationships, rather than being held simply in virtue of humanity. Tasioulas' theory could include a right to decent working conditions despite this. People might have the right prior to entering work, with the duties being to not create or contribute to the existence of poor working conditions and further duties owed to people actually in work. Although the existence of human rights cannot be conditional, the concrete duties they generate can depend on circumstances, within certain limits. The content of human rights can be situation dependent as long as the conditions are not too remote from most peoples' lives and do not rely on proper names.[102] The condition of being in work satisfies both these conditions, so a human right to decent working conditions might well exist under this conception despite the complicating factor of conditionality. Working out the content of this right requires much further work, but could well include many core labour law norms such as non-exploitative rates of pay, protection from discrimination, safe working conditions and limits on working time.

Even without a human right to decent working conditions, several areas of labour law can be given foundations in Tasioulas' theory in less direct ways. Duties to protect or promote

[101] ibid 57–60.
[102] ibid 38–9.

labour standards are generated by other human rights. For example, the human rights to health and physical safety will impose duties to ensure that people are not working under dangerous conditions, and this might also include minimum rest periods and maximum working hours, as important elements of maintaining physical and mental health.[103] A right not to be exploited could be justified via our universal interests in being treated with dignity and in not being exploited or used purely as a means to an end.[104] This would include duties not to create or support exploitative working conditions or rates of pay. Duties to permit and promote the formation and campaigning activities of trade unions are imposed by our human rights to freedom of association and expression, which in turn are grounded in the basic interests of association and expression. Our basic interests in autonomy and having a say in decisions which affect us are arguably sufficient to establish a human right to democracy, or at least to political participation. This might possibly include duties for the state to promote industrial democracy, or for employers to inform and consult workers when taking decisions which will have a significant impact on their lives. Finally, a right to strike might be justified using rights to freedom of association, expression, and freedom from forced labour,[105] which can all be justified under the framework proposed by Tasioulas.

The right to work can also be used as a vehicle for justifying other areas of labour law. A human right to work can be justified as serving the basic interests of all humans in accomplishment, social inclusion, and autonomy,[106] as well as our interest in self-realisation.[107] This right contains negative duties not to block access to the labour market, as well as positive duties to promote opportunities to work. Given the important interests underpinning the right to work it may also impose duties on employers not to dismiss people without good reason or adequate process. Furthermore the right necessarily includes duties in respect of minimally decent working conditions; the right to work must contain duties to promote working conditions capable of serving the interests in accomplishment, social inclusion, autonomy and self-realisation that underpin it.[108] Poor working conditions prevent the right to work from serving the interests that underpin it; the right to work must therefore be a right to *minimally decent* work.

[103] The Working Time Regulations 1998 were introduced on health and safety grounds.
[104] Although a right not to be exploited might sound far-fetched it is no less plausible than Tasioulas' human right not to be betrayed - see Tasioulas (n 26).
[105] See Bogg and Estlund (n 44).
[106] John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10 European Journal of Philosophy 79, 91–2.
[107] Collins (n 22).
[108] ibid 36; Gilabert (n 14) 179.

Much more work is needed to properly establish that labour law norms can be included in this theory of human rights. But even if such arguments can be sustained Tasioulas' theory might not provide human rights foundations for labour law. He might be accused of changing the subject altogether and offering an account that has no relevance to contemporary understandings of human rights. The theory certainly does not fit well with human rights in international human rights law, where they are seen as applying primarily to governments and protecting things of particular importance. Many rights included in Tasioulas' conception do not have either of these features, for example the rights to participate in family decisions, or to not be insulted or betrayed. However, it is possible that international rights documents are not exhaustive lists of human rights, and that a theory of human rights must fit the broader culture of human rights rather than international human rights law.[109]

More problematic is the fact that under this theory, and the naturalistic approach in general, human rights do not necessarily have any implications for the law. Human rights are not demands for legalisation; they are not what Feinberg calls 'ideal moral rights'.[110] Naturalistic conceptions might therefore provide *moral* foundations for labour law norms without actually providing foundations for labour *law*. Because Tasioulas sees human rights in purely moral terms, further argument is needed to determine whether they require legal protection. I cannot discuss here the circumstances under which it will be appropriate for moral rights to be translated into law. However, if the state is a duty-bearer of human rights they usually fulfil their duties by introducing policies and legislation, and even where individual employers are the duty-bearers it may still be appropriate for the law to get involved as a guarantor of the rights. Although all naturalistic theories face the problem of bridging from morality to law it is comparatively easy to make this move under theories which see human rights as protecting key elements of wellbeing, such as Griffin's personhood account. States are widely accepted as having duties to promote the wellbeing of citizens.[111] So if human rights protect important elements of wellbeing, such as the capacity for normative agency, a state will have duties to implement laws and policies realising human rights. But while there are numerous various ways in which naturalistic human rights theories can have legal implications, it must still be remembered that these do not flow automatically from classifying workers' rights as human rights.

[109] Tasioulas (n 92) 40.
[110] Joel Feinberg, *Social Philosophy* (Englewood Cliffs 1973), 85
[111] Alan Bogg, 'Only Fools and Horses' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015).

Conclusion

The aim of this chapter has been to help bridge the gap between labour law and the philosophy of human rights. It is clear that several of the arguments against aligning labour law with human rights in the existing literature, such as importance or timelessness, are not applicable under some particular conceptions of human rights. However, examining these theories does show that we must be cautious about adopting any particular theory as providing labour law's foundations. Rawls' conception has very limited scope for including labour law protections, and although Raz's theory is more promising, it still only includes those rights that justify action on the international stage. What's more, political theories are often incomplete and require further substantive moral reasoning to determine which areas of labour law are included. Naturalistic theories appear more likely to include labour law norms, with both Griffin and Tasioulas' theories providing foundations for some core elements of labour law, but the move from morality to law under naturalistic theories might be complicated.

This chapter has focussed on the philosophical legitimacy of justifying labour law via human rights. But one reason to doubt whether human rights present an attractive and useful foundational perspective is that the foundations of labour law should be acceptable to as wide a group of people as possible, and theories of human rights might be too contested and controversial to do this. It could also be argued that we should look to more far-reaching or ambitious ideas than human rights such as justice or maximal dignity.[112] Both of these possibilities need to be considered further before a human rights foundation is endorsed. Finally, human rights will likely only provide partial foundations for labour law, which could lead to a two-tier system that undermines those areas that are not protected as human rights. However, the fact that some labour law norms do not have their foundations in human rights does not prevent human rights from playing an important role in justifying the discipline.

[112] Gilabert (n 44)

Labour law is quite likely to be morally overdetermined, with multiple persuasive and overlapping justifications. If this is the case, labour lawyers should shift towards a pluralistic view of labour law's foundations and make use of every justificatory argument at their disposal.