

Labour Law and Human Rights:  
Legal and Philosophical Perspectives

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## Declaration

'I, Joe Atkinson, confirm that the work presented in this thesis is my own.

Where information has been derived from other sources, I confirm that this has been

indicated in the thesis.'

## Abstract

There is a widespread belief that labour law is amid a protracted existential crisis, in part caused by uncertainty over the discipline's justification and normative foundations. Against this background, the purpose of this thesis is to examine human rights as potential foundations for labour law and deepen our understanding of the relationship between labour law and human rights. It argues that human rights are an important justificatory idea for labour law and provide a normative benchmark and moral standard that can be used to evaluate existing legal frameworks and guide reforms. In developing this claim, the thesis first identifies a 'normative gap' in labour law's traditional justificatory narrative, which is rooted in the idea of counteracting employees' unequal bargaining power, and suggests that a pluralistic approach be pursued to filling this normative gap. It then argues that a normative and philosophical approach must be adopted to fully understand the relationship between human rights and labour law, with a specific philosophical conception of human rights being adopted as the basis for the analysis. A theory of human rights is then set out and used to identify the normative implications of human rights for labour law. Under this theory, workers' human rights must be legally protected against employer infringements, and legal frameworks must be established to secure decent working conditions for all, as well as mechanisms that enable workers to exercise voice and make themselves heard. Finally, the thesis demonstrates how human rights theory can be operationalised to assess existing labour law rules, by scrutinising the reforms introduced by the Trade Union Act 2016 from philosophical and legal human rights perspectives. In sum, the thesis demonstrates that human rights are an important foundational perspective for labour law and can provide a philosophical framework to address pressing issues facing the discipline.

## Impact Statement

This thesis represents the first sustained examination of the relationship between labour law and human rights from a normative and philosophical, as well as legal, perspective. It significantly deepens existing academic understanding of the relationship between labour law and human rights, and clarifies the role that human rights can play in justifying and providing a foundational perspective for labour law. It is hoped the thesis will have significant impact in academia, and open new avenues for future research, by demonstrating how a philosophical human rights perspective can be used to evaluate existing legal frameworks and address pressing issues facing labour law. By demonstrating how human rights theory can help provide coherent and convincing normative foundations for labour law the thesis also equips labour lawyers with an important response to ideological and de-regulatory critiques of labour law.

This thesis also has the potential to impact outside of academia. By clarifying and highlighting the values that underpin labour law, the argument developed in this thesis can help guide the courts' interpretation and application of the law, particularly in cases where they are assessing the proportionality of existing legal frameworks. By providing a normative benchmark and moral standard by which existing labour law frameworks can be evaluated, this thesis also provides a tool by which policymakers can identify areas of law which fail to meet this threshold and are therefore in need of reform. More specifically, the analysis of the Trade Union Act 2016 from a human rights perspective may be useful for trade unions or NGOs considering bringing a human rights challenge to this legislation.

I intend to maximise the impact of this thesis by disseminating the arguments via workshops, conference presentations, articles and, possibly, a monograph. I will also engage with policy makers, trade unions and think tanks who are working on labour law issues to advocate for adopting a human rights approach to their work, and seek opportunities for collaboration. In doing so I hope to bridge the gap between academia and legal practice.

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## Abbreviations

BEIS	Department for Business Energy and Industrial Strategy
BIS	Department for Business Industry and Skills
BoRR	Band of Reasonable Responses
CAC	Central Arbitration Committee
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CUP	Cambridge University Press
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EU	European Union
EUWA	European Union Withdrawal Act 2018
HoL	House of Lords
HRA	Human Rights Act 1998
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultral Rights
ILO	International Labour Organization
IVF	In Vitro Fertilisation
JCHR	Joint Committee on Human Rights
MoJ	Ministry of Justice
NGO	Non-Governmental Organisation
NUT	National Union of Teachers

OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PDAU	Pharmacists' Defence Association Union
RMT	National Union of Rail, Maritime and Transport Workers
SoS	Secretary of State
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUA	Trade Union Act 2016
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
UN	United Nations

## Chapter 1: Introduction

There is a widespread belief among labour lawyers that the discipline is undergoing a protracted existential crisis,<sup>1</sup> underpinned and in part caused by uncertainty over labour law's normative foundations. This thesis contributes to the current debate on the justification and normative foundations of labour law, by examining human rights as a potential foundational perspective for the discipline.

Dissatisfaction with labour law's traditional justificatory narrative, that it exists to counteract unequal bargaining power between employers and employees,<sup>2</sup> has caused a 'crisis of confidence' among labour lawyers,<sup>3</sup> and prompted a search for a 'new normativity'.<sup>4</sup> There

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<sup>1</sup> K. Ewing, 'The Death of Labour Law?' (1988) 8 OJLS 293; C. Estlund, 'The Death of Labor Law?' (2006) 2 Annual Review of Law and Social Science 105; M. Vranken, *Death of Labour Law?: Comparative Perspectives* (Melbourne University Press 2009); A. Hyde, 'What Is Labour Law?' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006); M. D'Antona, 'Labour Law at Century's End: An Identity Crisis' in J. Conaghan, R. Fischl and K. Klare (eds), *Labour law in an era of globalization: transformative practices and possibilities* (OUP 2004); H. Arthurs, 'Labour Law After Labour' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); A. Hyde, 'The Idea of the Idea of Labour Law: A Parable' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); G. Davidov, *A Purposive Approach to Labour Law* (OUP 2016) ch 1.

<sup>2</sup> O. Kahn-Freund, *Labour and the Law* (2nd edn, Stevens 1977) 6. See Chapter 2 for discussion.

<sup>3</sup> A.C.L. Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 Current Legal Problems 269.

<sup>4</sup> This phrase is used in B. Langille, 'Labour Law's Theory of Justice' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 111–115; Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

are concerns that labour law's traditional justificatory narrative does not equip labour lawyers with the tools to adequately respond to ongoing ideological and economic attacks on the discipline, which portray trade unions as possessing unjustifiable monopoly power, and labour rights as unnecessary interventions with the efficient operation of labour markets.<sup>5</sup> The lack of clear and coherent normative foundations has also contributed to labour law's failure to keep up with changing patterns of production and labour market practices.<sup>6</sup>

This perceived need to identify new sources of labour law's normativity has led to a surge in theoretically-minded literature examining the idea, goals, purposes, and foundations of labour law.<sup>7</sup> Until recently however, there was relatively little literature on the justification of labour law; philosophers 'have had much more to say about welfare rights and ideal distributions than about labor rights'.<sup>8</sup> Despite existing as a legal field for over a century

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<sup>5</sup> R. Nozick, *Anarchy, State, and Utopia* (Basic Books 1974); F. Hayek, *Law, Legislation and Liberty* (Routledge 1982); R.A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1992); R.A. Epstein, 'In Defense of the Contract at Will' (1984) 51 *University of Chicago Law Review* 947.

<sup>6</sup> H. Arthurs (n 1); J. Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); K. Stone and H. Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage 2013); P. Schoukens and A. Barrio, 'The Changing Concept of Work: When Does Typical Work Become Atypical?' (2017) 8 *Eur. Lab. LJ* 306.

<sup>7</sup> See for example H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018); H. Spector, 'Philosophical Foundations of Labor Law' (2005) 33 *Florida State University Law Review* 1119; G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); B. Langille (ed), *The Capability Approach to Labour Law* (OUP 2019); D. Cabrelli and R. Zahn, 'Special Issue: Theories of Domination and Labour Law: A New Conception for Legal Intervention?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 331; A. Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 7.

<sup>8</sup> A. Gourevitch, 'Quitting Work but Not the Job' (2016) 14 *Perspectives on Politics* 307, 308.

therefore, philosophical enquiry into labour law's foundations is only now 'emerging as a new field of scholarship'.<sup>9</sup>

It is against this backdrop that this thesis sets out to examine the relationship between labour law and human rights, and the potential for human rights to offer foundations and normative guidance for the discipline. This thesis provides the first full-length analysis of these issues from a normative and philosophical, as well as legal, perspective. It makes an original contribution in several ways. It identifies the need to pay greater attention to human rights theory, and to specific philosophical conceptions of human rights, when examining the relationship between human rights and labour law. It clarifies and makes explicit the different ways in which human rights are relevant for and connected to labour law. It also works through the normative implications of a specific theory of human rights for labour law, demonstrating how and why human rights can provide foundations for key aspects of the discipline, and how the insights gained from human rights theory can be used to analyse and evaluate existing labour law legislation and doctrine.

## **1. Why Human Rights?**

It is important to better understand the relationship between human rights and labour law given that the two are *already* frequently aligned in practice. Many human rights documents

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<sup>9</sup> H. Collins, V. Mantouvalou and G. Lester, 'Introduction: Does Labour Law Need Philosophical Foundations' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 1.

contain rights relevant to labour law,<sup>10</sup> and human rights litigation has been used to protect workers' rights, albeit with mixed success.<sup>11</sup> In addition, labour law issues are frequently discussed and analysed through the lens of human rights,<sup>12</sup> and the two fields are increasingly aligned in NGO and trade union campaigns.<sup>13</sup>

To date, however, there has been little research into the relationship between human rights and labour law at the theoretical level, or the philosophical legitimacy of using human rights

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<sup>10</sup> Universal Declaration of Human Rights (1948), Articles 23–24; International Covenant of Economic, Social and Cultural Rights (1966), Article 7; Charter of Fundamental Rights of the European Union (2012), Chapter 4; European Social Charter (Revised) (1996), Articles 1–9; African Charter on Human and Peoples' Rights (1981), Article 15; Arab Charter on Human Rights (1981), Article 34; Association of Southeast Asian Nations Human Rights Declaration (2012), Article 27; Social Charter of the Americas (1961), Article 8.

<sup>11</sup> K. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *ILJ* 2; J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267; A. Bogg and R. Dukes, 'Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd*' (2017) 46 *ILJ* 543; A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *ILJ* 126; A. Bogg and K. Ewing, 'The Implications of the *RMT Case*' (2014) 43 *ILJ* 221.

<sup>12</sup> See generally L. Compa and S. Diamond, *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press 1996); J.A. Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press 2006); C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010); J.R. Bellace and B. Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar Pub 2019); P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005); V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *HRLR* 529; K. Kolben, 'Labor Rights as Human Rights' (2009) 50 *Va. J. Int'l L.* 449; V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 *Eur. Lab. LJ* 151; V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>13</sup> L. Compa, 'Corporate Social Responsibility and Workers' Rights' (2008) 30 *Comparative Labor Law & Policy Journal* 1; K. Kolben (n 12); F. Kahraman, 'A New Era for Labor Activism? Strategic Mobilization of Human Rights Against Blacklisting' (2018) 43 *Law & Social Inquiry* 1279.

as foundations for labour law.<sup>14</sup> Much of the literature on human rights and labour law addresses the protection of non-labour-related human rights at work rather than human rights as potential foundations for the discipline,<sup>15</sup> or does not examine the relationship between human rights and labour law from a normative perspective.<sup>16</sup> But without sound philosophical arguments ‘we cannot in good faith invoke’ human rights as foundations for labour law.<sup>17</sup> Indeed, advocating human rights as foundations without making these supporting arguments is likely to actively undermine the justification of labour law.

Another reason for choosing to focus on human rights is that they seem to be a natural, and potentially important, foundational idea for labour law. Intuitively, both human rights and labour law seem to be concerned with improving the human condition and to have common ‘moral goals’.<sup>18</sup> Although contested,<sup>19</sup> human rights are often regarded as a potentially

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<sup>14</sup> Although see H. Collins, ‘Theories of Rights as Justifications for Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); V. Mantouvalou, ‘Are Labour Rights Human Rights’ (n 12); P. Gilibert, ‘Labor Human Rights and Human Dignity’ (2016) 42 *Philosophy & Social Criticism* 171.

<sup>15</sup> For example, L. Vickers, *Freedom of Speech and Employment* (OUP 2002); L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd edn, Hart 2016); H. Collins, ‘The Protection of Civil Liberties in the Workplace’ (2006) 69 *MLR* 619; V. Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’ (2008) 71 *MLR* 912; P. Collins, ‘The Inadequate Protection of Human Rights in Unfair Dismissal Law’ (2018) 47 *ILJ* 504; G. Morris, ‘Fundamental Rights: Exclusion by Agreement?’ (2001) 30 *ILJ* 49.

<sup>16</sup> V. Mantouvalou, ‘Are Labour Rights Human Rights’ (n 12).

<sup>17</sup> H. Collins, ‘Theories of Rights’ (n 14) 144.

<sup>18</sup> E. Albin, ‘Introduction: Precarious Work and Human Rights’ [2012] *Comp. Lab. L. & Pol’y J.* 1, 10.

<sup>19</sup> H. Collins, ‘Theories of Rights’ (n 14); V. Kumar, ‘Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess’ in R. Buchanan and P. Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice*. (Hart 2016); K. Kolben (n 12); C. McCrudden, ‘Labour Law as Human Rights Law: A Critique of the Use of “Dignity” by Freedland and Kountouris’ in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart); J. Youngdahl, ‘Solidarity First: Labor Rights Are Not the Same as Human Rights’ (2009) 18 *New Labor Forum* 31.

valuable foundational perspective for labour law,<sup>20</sup> largely because the salience and moral weight of human rights are thought to offer a strong normative grounding for the discipline.<sup>21</sup> Given this, and the relative lack of existing research on these issues, it is important to determine whether human rights do in fact provide coherent and attractive foundations for labour law, and what a human rights-based labour law might look like.

## 2. Human Rights within a Pluralistic Vision of Labour law

One important point to emphasise before going further is that this thesis does not propose that human rights should be regarded as the *sole* normative foundation for labour law. Instead it merely defends human rights as one important strand in a pluralistic vision of labour law's foundations. Human rights are not mutually exclusive with other justifications of labour law, such as those based on freedom as capabilities or non-domination,<sup>22</sup> democracy,<sup>23</sup> social

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<sup>20</sup> H. Arthurs (n 1); H. Collins, 'Theories of Rights' (n 14); H. Collins and V. Mantouvalou, 'Human Rights and the Contract for Employment' in M. Freedland and others (eds), *The Contract of Employment* (OUP 2016); P. Gilibert (n 14); L. Compa, 'Solidarity and Human Rights: A Response to Youngdahl' (2009) 18 *New Labor Forum* 38; J. Atkinson, 'Human Rights as Foundations for Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018); P. Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005); V. Mantouvalou, 'Are Labour Rights Human Rights' (n 12).

<sup>21</sup> H. Arthurs (n 1); J. Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37 *Dalhousie LJ* 601.

<sup>22</sup> D. Cabrelli and R. Zahn, 'Civic Republican Political Theory and Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>23</sup> V. Mantouvalou, 'Democratic Theory and Voices at Work' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014); R. Dahl, *A Preface to Economic Democracy* (Univ of California 1985).



justice,<sup>24</sup> and economic arguments.<sup>25</sup> This reflects the fact that labour law may well be morally overdetermined, with the discipline having multiple possible justifications.

Although not always made explicit, there is an emerging consensus in favour of this pluralistic approach to labour law's foundations.<sup>26</sup> The literature can often 'be read as articulating views about what should be regarded as the principal aim of labour law, without denying that other aims and principles could be sensibly incorporated into labour law as well.'<sup>27</sup> This is welcome, because the 'contextual' nature of labour law, in that it regulates a specific context or aspect of life,<sup>28</sup> means any single theory is likely to provide only partial foundations for the discipline.

This thesis should be read in this spirit of pluralism. It endorses the view that the process of renewing the foundations of labour law must be 'multipronged',<sup>29</sup> that focussing exclusively on a single justificatory framework blinds us to the benefits of other approaches,<sup>30</sup> and that we should seek to understand all the 'diverse justifications' that exist for labour law.<sup>31</sup> It aims to

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<sup>24</sup> G. Davidov, 'Distributive Justice and Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>25</sup> H. Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 30 ILJ 17.

<sup>26</sup> For example, B. Hepple, 'Four Approaches to Modernisation of Individual Employment Rights' in R. Blanpain and M. Weiss (eds), *Changing Industrial Relations and Modernisation of Labour Law: Liber Amicorum in Honour of Professor Marco Biagi* (Kluwer 2003); M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) ch 9.

<sup>27</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 20.

<sup>28</sup> H. Collins, 'The Productive Disintegration of Labour Law' (1997) 26 ILJ 295.

<sup>29</sup> S. Gamonal C. and C. Rosado Marzán, *Principled Labor Law: U.S. Labor Law through a Latin American Method* (OUP 2019) 17.

<sup>30</sup> H. Collins, 'Labour Law as a Vocation' (1989) 105 LQR 468.

<sup>31</sup> A. Bogg (n 7) 20.

contribute to this research agenda by developing a deeper understanding of the relationship between labour law and human rights.

### 3. The Need for Foundations

The lack of extensive philosophical or theoretical work on labour law's foundations reflects the more practically-minded approach that has dominated the field, due to the sociological method and pragmatic attitude of labour lawyers.<sup>32</sup> Historically, the discipline has 'mostly comprised technical legal analysis for the purpose of assisting legal practice, or evaluative discussion about the policies embodied in legislation, or calls for activist interventions through the legal process and collective industrial action by workers'.<sup>33</sup> It might therefore be asked why it is necessary to break from this tradition and enquire into labour law's normative foundations. This view is perhaps best captured in Hepple's statement that '[l]abour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power relationships.'<sup>34</sup>

Hepple's dismissal of the necessity and importance of philosophical thinking about labour law is unwarranted however; labour law cannot help but be an exercise in applied ethics. The first reason for this is that *all law* is necessarily an exercise in applied ethics. Law embodies the

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<sup>32</sup> *ibid* 8.

<sup>33</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 2.

<sup>34</sup> B. Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 30.

coercive power of the state, and necessarily has distributive effects,<sup>35</sup> so should not be used to enforce rules that are morally unjustifiable.<sup>36</sup> Lawmakers must attempt to ensure the law is consistent with moral principle, which is not possible without knowing the principles that underpin the law.<sup>37</sup> In addition, ethical considerations are important when courts are interpreting legal rules and principles, so the development and application of labour law by the courts cannot avoid being an exercise in applied ethics to some extent.<sup>38</sup>

Furthermore, labour law must be an exercise in applied ethics because it concerns the legal regulation of a hugely important aspect of our economic and social lives.<sup>39</sup> Labour law has significant distributive effects, influences people's ability to participate and live a decent life in their community, and impacts many basic human interests including autonomy and wellbeing. The rules dealing with a subject such as this cannot avoid having moral implications, and labour law is therefore a particularly appropriate site for law being regarded as involving applied ethics.

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<sup>35</sup> J. Gardner, 'What Is Tort Law for? Part 2. The Place of Distributive Justice' in J. Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2013).

<sup>36</sup> This is true even for those who adopt a positivist division between the questions of what the law is and what it should be, H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon 1997); J. Bentham, *An Introduction to the Principles of Morals and Legislation* (H.L.A. Hart and J.H. Burns eds, OUP 1996).

<sup>37</sup> For discussion see R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) ch 3.

<sup>38</sup> N. Stavropoulos, 'Legal Interpretivism' in E. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2014 ed, 2014); R. Dworkin, *Law's Empire* (Hart 1998); R. Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 400–419.

<sup>39</sup> V. Schultz, 'Life's Work' (2000) 100 *Columbia Law Review* 1881; D. Wiggins, 'The Meaning and Value of Work' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014); A. Veltman, *Meaningful Work* (OUP 2016) 35–70.

Normative theorising about labour law is also important for practical reasons. A sound philosophical account and justification of labour law is essential to adequately respond to ideological and economic critiques and deregulatory political agendas; ‘careful reflection about underlying moral and political principles and values can serve to provide firmer foundations’ for the discipline.<sup>40</sup> Understanding the foundations of labour law also helps us scrutinise and identify problems with existing labour law rules, by providing an appropriate benchmark against which to evaluate legislation and case law.<sup>41</sup>

More positively, the normative foundations of labour law can be used to guide reforms and work out how the law can be improved or updated.<sup>42</sup> Philosophical thinking about labour law’s foundations ‘should help us to understand better what we believe should be the proper scope and purpose of the subject’.<sup>43</sup> Bogg also points out that answers to theoretical questions about labour law can be ‘of great practical significance’ because they can influence courts decision-making.<sup>44</sup> Courts need a good grasp of the foundations and aims of labour law when they are interpreting and filling gaps in legislation, particularly if they adopt a purposive approach to interpretation,<sup>45</sup> as well as when determining the proportionality of labour law protections in constitutional litigation.<sup>46</sup> If judges appreciate the underlying values of labour

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<sup>40</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 30; G. Davidov, ‘Articulating Labour Law’s Goals: Why and How’ (2012) 3 Eur. Lab. LJ 130.

<sup>41</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 3.

<sup>42</sup> *ibid*; G. Davidov, *A Purposive Approach to Labour Law* (n 1) 15–6; F. Hendrickx, ‘Foundations and Functions of Contemporary Labour Law’ (2012) 3 Eur. Lab. LJ 108.

<sup>43</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 10.

<sup>44</sup> A. Bogg (n 7) 31–2.

<sup>45</sup> See G. Davidov, *A Purposive Approach to Labour Law* (n 1).

<sup>46</sup> G. Davidov, ‘Articulating Labour Law’s Goals’ (n 40) 147–8.

law protections they are more likely to interpret and apply the law in ways that are favourable to workers.

Finally, without an understanding of labour law at the theoretical and philosophical level we have no way of identifying or knowing what labour law is, i.e. what the boundaries and content of the subject are,<sup>47</sup> and without a 'constituting narrative' of some kind there is no reason for viewing or teaching labour law as a distinct area of law.<sup>48</sup>

So while Hepple is correct that labour law is the result of social struggle,<sup>49</sup> there is still room for 'normative theorizing about how things should be'.<sup>50</sup> Reducing labour law to class conflict is 'normatively unappealing as a complete account of the field'.<sup>51</sup> Similarly, the fact that 'the forces of political economy' rather than normative theorizing 'will almost certainly determine the individual and collective fate of workers',<sup>52</sup> does not mean that theoretical enquiries are of no consequence. Hepple's 'militant empiricism' should therefore be rejected,<sup>53</sup> and theoretical research into labour law be viewed as no less important than other approaches.

#### 4. Method

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<sup>47</sup> B. Langille, 'Labour Law's Theory of Justice' (n 4) 104; A. Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015) 79.

<sup>48</sup> B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006) 15–17.

<sup>49</sup> A. Hyde, 'A Theory of Labor Legislation' (1990) 38 *Buffalo Law Review* 383.

<sup>50</sup> B. Langille, 'Labour Law's Theory of Justice' (n 4) 103.

<sup>51</sup> A. Hyde, 'What Is Labour Law?' (n 1) 53.

<sup>52</sup> H. Arthurs, 'Can Davidov's Legal Slingshot Slay the Goliath of Political Economy? On Guy Davidov's A Purposive Approach to Labour Law' (2017) 16 *Jerusalem Review of Legal Studies* 1, 13.

<sup>53</sup> A. Bogg (n 7) 33.

The task of identifying the normative foundations of labour law is complicated by the ongoing debate about the proper scope and boundaries of the discipline, and the symbiotic relationship between the philosophical foundations of labour law and its content and scope.<sup>54</sup> In some sense an “empty” functional definition of labour law would suggest that labour law includes all the norms that concern the labour market’.<sup>55</sup> But in order to be useful in the ways described above, a theory of labour law must justify and provide foundations for the norms and protections that are generally recognized as making up the core of labour law. As Collins says, it ‘should justify the existence and weight of such typical rules and principles of labour law as minimum wages, safety regulations, maximum hours of work, the outlawing of discrimination against particular groups, and the recognition of a trade union for the purposes of collective bargaining’.<sup>56</sup> This thesis therefore focusses on the relationship between human rights and those legal protections generally recognised as labour law’s core domain; ‘labour law’ is used here to encompass the law dealing with trade unions, collective bargaining, and industrial action, but also individual labour standards and protections such as health and safety law, statutory minimum wages, protections from unfair dismissal and discrimination at work, and limits on working time.

A normative account of labour law is not one which merely describes legal protections or explains their historical development, but rather gives an account of the philosophical theories

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<sup>54</sup> J. Howe, ‘The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011).

<sup>55</sup> G. Mundlak, ‘The Third Function of Labour Law: Distributing Labour Market Opportunities Among Workers’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 315.

<sup>56</sup> H. Collins, ‘Theories of Rights’ (n 14) 137.

and normative values which underpin and justifies these protections.<sup>57</sup> While some degree of fit is needed between any proposed foundational framework and existing legal rules, this need not, and cannot, be perfect, because the content of labour law is the result of political conflict and compromises.<sup>58</sup> The ‘contextual’ nature of labour law means that it cannot exist simply for its own sake and the normativity of labour law must come from some external source.<sup>59</sup> Justifications of labour law must therefore draw on broader values and ideas from moral and political philosophy.<sup>60</sup>

However, there is a need for caution when seeking to identify the philosophical foundations of labour law in moral and political theory. It may not be legitimate to simply ‘transplant’ methods or concepts from moral and political theory to the labour law context if these were originally developed to analyse the state.<sup>61</sup> Normative theory may also only be able to provide limited guidance on concrete legal questions, as the ‘questions that interest those seeking to find the normative foundations of labour law will simply not be answered except in broad terms’.<sup>62</sup> Finally, when theorising about labour law we must be avoid the trap of simplifying or failing to do justice to the complex realities of life, and recognise the contested and

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<sup>57</sup> G. Davidov, ‘Articulating Labour Law’s Goals’ (n 40); H. Collins, V. Mantouvalou and G. Lester (n 9); R. Dworkin, *Law’s Empire* (n 38).

<sup>58</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 2–3.

<sup>59</sup> In contrast to some accounts of private law, E.J. Weinrib, *The Idea of Private Law* (Revised edition, OUP 2012). This point is made by S. Deakin, ‘Labor Law: The Pragmatist’s Guide — Comments on A Purposive Approach to Labour Law’ (2017) 16 *Jerusalem Review of Legal Studies* 28, 29; A. Bogg (n 7) 16.

<sup>60</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 13; A. Bogg (n 7).

<sup>61</sup> H. Collins, V. Mantouvalou and G. Lester (n 9) 14–18.

<sup>62</sup> *ibid* 19–20.

contextual nature of moral theory.<sup>63</sup> These considerations should not stop us from theorising about labour law, but they do indicate that care is needed when doing so.

## 5. Outline of the thesis

Chapter 2 sets the scene for the thesis' examination of human rights as a potential source of labour law's normative foundations. It considers the discipline's traditional justificatory narrative, rooted in inequality of bargaining power, and argues that while descriptively accurate this account of labour law is normatively inert, so cannot provide an adequate foundational account of the discipline. This creates a 'normative gap' in labour law's foundations, which must be filled by either *realigning* the discipline with new philosophical ideas or attempting to *reinvigorate* the traditional narrative by reference to (old or new) substantive values. It is suggested, however, that even a reinvigorated traditional narrative cannot provide a satisfactory account of labour law, and that the best path forward is to adopt a pluralistic approach to labour law's foundations that retains the insights provided by the traditional narrative but supplements it with new justificatory theories.

Chapters 3 and 4 explore the relationship between labour law and human rights in the labour law literature and as currently exists under English law. Chapter 3 sets out the numerous links that exist between the two fields in law and practice, as well as in their underlying values.<sup>64</sup>

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<sup>63</sup> A. Bogg (n 7) 33.

<sup>64</sup> V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights' (n 12); V.A. Leary, 'The Paradox of Workers' Rights as Human Rights' in L. Compa and S. Diamond (eds), *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press 2003); K. Kolben (n 12).



These make human rights a natural candidate for providing labour law's foundations. In addition, the inalienability and normative significance of human rights make them appear a potentially important foundational perspective for the discipline.<sup>65</sup> However, the chapter also demonstrates that some scholars are reluctant to adopt a human rights approach to labour law, largely due to doubts about whether human rights can effectively ground the discipline.<sup>66</sup>

Chapter 4 surveys the relevance and impact of human rights on English labour law, looking at both the protection of civil liberties at work and the use of human rights as foundations for core labour law protections. This survey demonstrates the existence of a 'patchwork quilt' of mechanisms protecting human rights at work, and that some aspects of domestic labour law must now be regarded as underpinned by human rights due to the influence of European human rights law. However, the influence and benefits of human rights for domestic labour law have so far been limited.<sup>67</sup> Chapter 4 concludes by arguing that we must adopt a more normative and philosophical approach if we are to properly understand the normative implications of human rights in this context, rather than relying on positivist or instrumental analyses.<sup>68</sup>

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<sup>65</sup> H. Collins, 'Theories of Rights' (n 14).

<sup>66</sup> L. Compa (n 20); G. Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet' (2012) 34 *Comp. Lab. L. & Pol'y J.* 217; C. McCrudden (n 19); V. Kumar (n 19).

<sup>67</sup> P. Collins (n 15); D. Cabrelli, E. Reid and D. Visser, 'Examining the Labour Law & Social Dimension of Human Rights: The UK and South Africa', *Private Law and Human Rights* (Edinburgh University Press 2013); V. Mantouvalou, 'The Human Rights Act and Labour Law at 20 (Forthcoming)' in A. Bogg, A. Young and J. Rowbottom (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart 2020); H. Collins and V. Mantouvalou (n 20).

<sup>68</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 12); J. Atkinson (n 20).

Chapter 5 begins the thesis' examination of the relationship between human rights and labour law on the normative philosophical level. It discusses the philosophical objections to grounding labour law's normativity in human rights, and maps the place of labour law norms within some prominent philosophical conceptions of human rights.<sup>69</sup> This analysis makes clear that while human rights do have the potential to justify labour law, there is a need to focus more closely on *specific* philosophical conceptions to fully understand the relevance and implications of human rights for the legal regulation of work. This is necessary both to adequately respond to the arguments against grounding labour law in human rights,<sup>70</sup> as well as being a prerequisite for identifying which, if any, labour law protections have human rights foundations.

Building on this insight, Chapter 6 sets out a detailed philosophical account of human rights, as moral rights generated by universal human interests that make up conditions of a decent human life,<sup>71</sup> and argues the philosophical objections to human rights as normative foundations for labour law do not hold under this conception of human rights. The key elements and characteristics of this conception of human rights are discussed and clarified, as is the content of the duties to respect, protect and fulfil human rights, and the relationship between these moral human rights and the law. Although human rights do not necessarily

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<sup>69</sup> J. Rawls, *The Law of Peoples* (2nd edn, Harvard University Press 1999); J. Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31; J. Griffin, *On Human Rights* (OUP 2008); J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1.

<sup>70</sup> See H. Collins, 'Theories of Rights' (n 14); K. Kolben (n 12); G. Mundlak (n 66); V. Kumar (n 19).

<sup>71</sup> Drawing on, among others, J. Tasioulas (n 69); J.W. Nickel, *Making Sense of Human Rights* (2nd ed., Wiley 2007); S.M. Liao, 'Human Rights as Fundamental Conditions for a Good Life' in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

demand legal protection on this view,<sup>72</sup> they will often need to be secured via legal frameworks.

Chapter 7 argues that the philosophical theory of human rights set out in Chapter 6 has important consequences for labour law and the legal regulation of work. Two significant implications are advanced. First, that workers' non-labour related human rights, such as freedom of expression, belief, and the right to privacy, must be legally protected against infringements by employers. Second, that human rights provide foundations for rights to decent working conditions and to voice at work, which require the state to establish and enforce legal protections and supportive frameworks that ensure everyone can access work with decent conditions, and that workers are able to make their views heard by employers. A human right to decent working conditions can be justified as part of a broader human right to work, as this must be a right to work in conditions sufficiently decent to further the interests that underpin it, which include self-realisation, autonomy, self-esteem and the development of personal relationships.<sup>73</sup> A human right to voice at work can be derived from a combination of the more basic rights to expression, association and freedom from forced labour,<sup>74</sup> or

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<sup>72</sup> A. Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315.

<sup>73</sup> J.W. Nickel, 'Is There a Human Right to Employment?' (1978) X *Philosophical Forum* 149; V. Mantouvalou, 'The Right to Non-Exploitative Work' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014); H. Collins, 'Is There a Human Right to Work?' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>74</sup> A. Bogg and C. Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014); A. Bogg and C. Estlund, 'The Right to Strike and Contestatory Citizenship' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

alternately be defended as a prerequisite for the protection and realisation of workers' other human rights against employer infringements.

Finally, Chapter 8 provides an illustration of how the theoretical framework and philosophical arguments developed in the thesis can be operationalised to scrutinise existing labour law rules and identify areas in need of reform. It does this by evaluating the Trade Union Act 2016 against the normative benchmark set by human rights, arguing that the Act's reforms to trade union political funds and ballot thresholds for lawful industrial action fall short of this moral standard. These provisions breach human rights at the normative philosophical level because they represent an unjustified failure by the state to respect workers' human rights to association and voice at work, and they should also be found incompatible with the legal protections of human rights contained in English law.

## Chapter 2: The Traditional Narrative

### 1. Introduction

This chapter considers the landscape of labour law theory and sets the stage for this thesis' examination of the relationship between labour law and human rights. Chapter 1 discussed the importance of labour law having firm normative foundations and suggested that dissatisfaction with the traditional understanding of these foundations was one cause of the discipline's ongoing existential crisis. Before examining the relationship between human rights and labour law it is therefore important to consider labour law's traditional narrative in more detail. What is this orthodox justification of labour law, and why is it no longer convincing, if indeed it ever was?

This chapter begins by examining the core elements of labour law's traditional narrative, which is framed in terms of unequal bargaining power between employers and employees. Section 2 argues that while much of the traditional narrative's diagnosis is sound, the idea of unequal bargaining power lacks the normative content needed to justify labour law. There is therefore a 'normative gap' in the traditional understanding of labour law, which must be filled by some additional value or normative argumentation.

Section 3 then considers possible responses to this normative gap. The failure of the traditional narrative appears to present us with a choice between attempting to *reinvigorate* the theory of labour law as a necessary countervailing force to unequal bargaining power, or *realigning* the

discipline with new justificatory foundations. In recent years labour lawyers have proposed a range of new theories and concepts to fill the normative gap through reinvigoration or realignment. In filling the normative gap, it is also suggested that we have the option of returning to, and building on, the values and ideas seen as underpinning the traditional narrative by those who originally espoused it. This includes ideas such as freedom and dignity that are closely related to supposedly 'new' proposed foundations for labour law.

In Section 4 however, it is argued that even a reinvigorated traditional narrative will not be capable of providing an adequate justificatory account of labour law's foundations. Although it continues to provide valuable insights, a theoretical account of labour law that focusses solely on inequality of bargaining power is not a descriptively accurate reflection of modern labour law. Such an account is also too narrow in personal and regulatory scope, and fails to capture the full range of normative concerns that are at stake in the legal regulation of work. This chapter therefore concludes by arguing that a pluralistic approach should be adopted to filling the normative gap in labour law's foundations, theory of labour law, which draws on a range of values and normative ideas.

## **2. Labour Law's Traditional Narrative**

There is no universally accepted theory of labour law's foundations. This is unsurprising given that disagreements over the justification, aims, and purposes exist for every area of law, and that justificatory theories may vary between jurisdictions. There does however, seem to be a shared view of labour law's 'traditional' foundational narrative, at least in the UK and

other developed economies. This is the idea that labour law exists to equalise bargaining power between employers and employees.

The classic statement of labour law's traditional narrative is by Kahn-Freund, that the 'main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.<sup>1</sup> Wedderburn similarly describes the 'traditional analysis' of labour law's underpinning philosophy in terms of combatting workers' lack of power when selling their labour.<sup>2</sup> The idea that labour law exists to aid employees 'who do "and must" lack bargaining power is the moral foundation of the constituting narrative of labour law'.<sup>3</sup> This continues to be the 'common narrative'<sup>4</sup> and 'received wisdom'<sup>5</sup> regarding labour law's foundations.<sup>6</sup>

To properly understand and assess this traditional narrative we must unpack its core elements. This theory of labour law's justification and purpose starts with the premise that there is an inevitable conflict between employees and employers. It then claims that in capitalist labour markets, save for in exceptional circumstances, employers will have superior bargaining power to workers and so be able to gain the upper hand in these conflicts. Finally,

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<sup>1</sup> O. Kahn-Freund, *Labour and the Law* (2nd edn, Stevens 1977) 6.

<sup>2</sup> B. Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *ILJ* 1, 3.

<sup>3</sup> B. Langille, 'Labour Law's Theory of Justice' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 105.

<sup>4</sup> G. Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities Among Workers' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 317.

<sup>5</sup> B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006).

<sup>6</sup> *Autoclenz Ltd v Belcher* [2011] UKSC 41, [35]; P. Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 *OJLS* 869.

it is concluded from these two points that labour law must intervene on the side of workers as a countervailing force to equalise their bargaining power. These are the three pillars of the traditional account of labour law's normative force.

However, although the traditional narrative's claims of inherent conflict and unequal bargaining power are largely sound, these premises are not in themselves sufficient to reach the conclusion that labour law must exist as a countervailing force to this inequality.

### ***2.1 Inherent conflict between employer and worker***

Although the nature and extent of conflicts between employers and workers is the subject of debate,<sup>7</sup> such conflicts are self-evident for most labour lawyers. Kahn-Freund approvingly cites the 'pluralistic' view of industrial relations that such tension is unavoidable,<sup>8</sup> stating it is 'sheer utopia to postulate a common interest in the substance of labour relations'.<sup>9</sup> However, his claim that the only 'interest which management and labour have in common ... is that the inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures' is somewhat overstated,<sup>10</sup> as both parties also have some shared interest in the continued success of the productive enterprise they are jointly engaged in. This aside, there are multiple sources of inherent conflict in employment relationships.

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<sup>7</sup> P. Ackers, 'Rethinking the Employment Relationship: A Neo-Pluralist Critique of British Industrial Relations Orthodoxy' (2014) 25 *The International Journal of Human Resource Management* 2608.

<sup>8</sup> O. Kahn-Freund (n 1) 27; H. Clegg, 'Pluralism in Industrial Relations' (1975) 13 *British Journal of Industrial Relations* 309.

<sup>9</sup> P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (3rd ed., Stevens 1983) 28.

<sup>10</sup> *ibid* 27.



The most obvious conflict is the opposing interests of employers and workers regarding the distribution of the enterprises' output. Both sides want to maximise their share; employers in the form of profit or reinvestment, and workers in the form of higher wages and better conditions. Classic economists recognised that this creates an unavoidable conflict of interests between labour and capital,<sup>11</sup> and Kahn-Freund says that this conflict over distribution is 'what labour law is very largely about'.<sup>12</sup>

Another source of tension between employer and worker is the fact that workers are required to subvert their interests in favour of those of their employer. In capitalist modes of production, hierarchical control is needed to organise and manage the process of production, so employment relationships necessarily involve subordination of workers' autonomy and time to the benefit of their employer. As Collins points out, the 'practical authority' of employers and subordination of workers inherent in employment relationships is in tension with workers' fundamental interests.<sup>13</sup>

## ***2.2 Inherent inequality of bargaining power***

The second pillar of the traditional narrative is the claim that inherent inequality between the bargaining power of employers and employees means that employers will 'win' the conflicts of interest that inevitably exist between them. This is more difficult to establish. It is important

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<sup>11</sup> A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (for W Strahan and T Cadell 1776) 81.

<sup>12</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (n 9) 27.

<sup>13</sup> H. Collins, 'Is the Contract of Employment Illiberal' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

to do so however, given that the traditional narrative uses this inequality as the central means to justify labour law.

Neoclassical economics reject the very notion of 'unequal bargaining power' as incoherent, but the term is best understood as a critique from outside of market theory rather than an empirical claim from within it.<sup>14</sup> But one need not fully adopt the neoclassical economic viewpoint to doubt the existence of a necessary imbalance between employers and employees. Collins points out that Kahn-Freund himself says little about why this intrinsic inequality exists, and argues that inequality of bargaining power provides shaky normative foundations for labour law because there is insufficient reason to think that such an imbalance is inherent between employer and employee.<sup>15</sup> While there will be some exceptions however, there are good reasons to think that an imbalance of bargaining power in favour of employers will usually exist and is a systematic feature of labour markets.

It is true that Kahn-Freund does not discuss the causes of unequal bargaining power in much detail. He thinks that it is a 'clear and hardly controverted ... elementary proposition'.<sup>16</sup> Similarly, Wedderburn is apologetic about his description of the 'elementary norms' which make up the traditional analysis, and does not expand upon the causes of 'the inherent weakness of the individual worker *vis-à-vis* his employer'.<sup>17</sup> One reason Kahn-Freund does give for the existence of unequal bargaining power is that employers represent 'an accumulation of material and human resources' so are already bearers of collective power, in

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<sup>14</sup> B. Langille, 'Labour Law's Theory of Justice' (n 3) 105.

<sup>15</sup> H. Collins, 'Labour Law as a Vocation' (1989) 105 LQR 468, 478–9.

<sup>16</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (n 9) 17.

<sup>17</sup> B. Wedderburn (n 2) 3.

stark contrast to individual workers.<sup>18</sup> Kahn-Freund does not explain how this difference creates unequal bargaining power, but the most plausible interpretation is that the unequal resources of employer and employee creates an imbalance in the extent to which each needs the other, thereby creating an imbalance of bargaining power.

A fuller explanation of the existence of inherently unequal bargaining power is provided by Beatrice and Sidney Webb in their ground-breaking work on industrial democracy. They begin by making a similar point to Kahn-Freund, that employers have superior power because they represent capital, but for the Webbs this is just one of several reasons why the 'individual workman ... stands in all respects at a disadvantage compared with the capitalist employer'.<sup>19</sup> Perhaps the most important factor being that workers need to sell their labour in order to survive, while employers are not subject to demands of the same immediacy.<sup>20</sup> The pressing needs of workers means they are prevented from holding out for a better deal during bargaining, as they are under considerable pressure to accept the first job they are offered regardless of terms. The Webbs agree with Adam Smith that 'the workman may be as necessary to his master as his master is to him, but the necessity is not so immediate'.<sup>21</sup> Employers therefore have substantial power to dictate the terms of employment relationships on a take it or leave it basis, and this remains true today.

The argument that inherently unequal bargaining power exists between employers and workers due to differences in their needs is rejected by Collins, who argues that employers

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<sup>18</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (n 9) 17.

<sup>19</sup> S. Webb and B. Webb, *Industrial Democracy* (Longmans 1902) 658.

<sup>20</sup> *ibid* 656.

<sup>21</sup> A. Smith (n 11) 81.

are subject to the pressing demands of capital markets so cannot necessarily exit the market temporarily or hold out for a better deal themselves.<sup>22</sup> There may be some truth to this. However, for all but the smallest of employers, these demands and the need to make a profit do not bite as quickly or as drastically as workers' need to find paid work to support themselves and their families. Simply put, the costs to the individual of not finding work are substantially higher than those to the employer of any individual worker not accepting the terms they are offered. This creates a structural imbalance of bargaining power.

The second source of unequal bargaining power identified by the Webbs is the informational asymmetries that exist between workers and employers or, in their words, 'the difference in the knowledge of the circumstances'.<sup>23</sup> Employers are aware of the pressing need for most individuals to find employment as quickly as they can, and usually also know the state of the labour market and on what terms it will be profitable to employ the worker. In contrast, workers do not know how desperate the employer's needs are for new staff, nor the current market value of their labour power.<sup>24</sup>

Another factor contributing to employers' superior bargaining power in modern labour markets is the relative ease with which capital can be relocated in comparison to labour. This may not be true with respect to some large-scale industrial plants but, in most instances, it is more difficult and costly for workers to relocate their lives and families than it is for a business to move. Globalisation has exacerbated and added an international dimension to this, and capital now moves around the world considerably more smoothly than labour. If workers in

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<sup>22</sup> H. Collins, 'Labour Law as a Vocation' (n 15) 479.

<sup>23</sup> S. Webb and B. Webb (n 19) 661.

<sup>24</sup> *ibid* 567.

one country refuse to accept an employers' terms, businesses can move somewhere with lower operating costs.<sup>25</sup> This amplifies the inequality of bargaining power between employers and employees.

Collins is sceptical of inherently unequal bargaining power, because he believes this would only follow from an oversupply of labour, and thinks there is no reason to suppose that such an oversupply is a permanent feature of labour markets.<sup>26</sup> A Marxist approach to political economy would argue that there will necessarily be an oversupply, or 'reserve army', of labour under a capitalist system of production.<sup>27</sup> Even without subscribing to this position, economists argue that there is a 'natural rate' of unemployment that will be present in any capitalist economy with stable inflation.<sup>28</sup> Given that governments aim to maintain stable levels of inflation, there will therefore tend to be a surplus of labour in modern economies. Of course, there will be instances where there are skills shortages in specific industries, and there may be periods where there is an oversupply of jobs compared to jobseekers. But these are the exception, and the Webbs' assessment that there will usually be more applicants than jobs remains accurate.<sup>29</sup>

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<sup>25</sup> H. Arthurs, 'Who's Afraid of Globalization? Reflections on the Future of Labour Law' in J.D.R. Craig and S.M. Lynk (eds), *Globalization and the Future of Labour Law* (CUP 2006).

<sup>26</sup> H. Collins, 'Labour Law as a Vocation' (n 15) 478.

<sup>27</sup> F. Engels, *The Condition of the Working Class in England* (V. Kiernan ed, Penguin 1987) 149; K. Marx, *Capital: A Critique of Political Economy* (Penguin 2004) ch 25.

<sup>28</sup> M. Friedman, 'The Role of Monetary Policy' (1968) 58 *American Economic Review*; J. Stiglitz, 'Reflections on the Natural Rate Hypothesis' (1997) 11 *The Journal of Economic Perspectives* 3.

<sup>29</sup> S. Webb and B. Webb (n 19) 660.

Even without any systemic oversupply of labour however, an imbalance of bargaining power between employers and employees is a pervasive feature of capitalist labour markets due to their unequal resources, access to information, and urgency of needs.

### *2.3 Labour law as a necessary countervailing force*

Having established that the traditional narrative's claims regarding inherent conflict and unequal bargaining power are sound, at least in most cases, we can now turn to its final pillar; the idea that labour law is justified because it acts as a countervailing force against employees' inherent inequality of bargaining power.

According to the traditional narrative, there are two main regulatory techniques deployed by labour law to counteract the superior bargaining power of employers.<sup>30</sup> First, 'procedural' measures that permit and promote the collectivisation of labour. These create a balance of collective forces on both sides and so equalise the bargaining power between workers and their employer. Second, 'substantive' legal protections, either adding mandatory terms to the employment relationship or introducing minimum legal standards. Rather than equalising the bargaining power of workers and employers, these substantive protections have the effect of taking certain matters off the bargaining table altogether, thereby setting limits to the benefits that employers can achieve by virtue of their superior bargaining power.

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<sup>30</sup> B. Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16 *European Journal of International Law* 409.

However, focussing on *how* labour law can best counteract employers' superior bargaining power glosses over the claim that it is *justified* in doing so. This is the normative claim at the heart of the traditional narrative. But the need for such legal intervention does not follow automatically from the two premises established above, namely the existence of inherent conflicts and systemically unequal bargaining power. We must therefore examine this final pillar of the traditional narrative in more detail.

Davies and Freedland explain that Kahn-Freund sees the 'central purpose of labour law ... as that of maintaining an equilibrium between employers and workers'.<sup>31</sup> This need for equilibrium justifies the existence of labour law and motivates intervention with the employment relationship. However, there has been nothing said so far explaining *why* we should care about this equilibrium, and what reasons we have for ensuring the bargaining power of labour and capital is evenly balanced. The existence of unequal bargaining power between employers and workers therefore needs to be problematised if it is to provide foundations for labour law. As Langille says therefore, despite being 'the moral foundation of the constituting narrative of labour law' the idea of combatting inherently unequal bargaining power 'stands in need of explanation'.<sup>32</sup>

Empirical claims about the existence of unequal bargaining power cannot in themselves provide a normative justification for the law getting involved as a countervailing force. This would be attempting to derive an *ought* from an *is*. What's more, there will rarely, if ever, be perfectly balanced bargaining power in any contractual relationship, and no general principle

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<sup>31</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (n 9) 2.

<sup>32</sup> B. Langille, 'Labour Law's Theory of Justice' (n 3) 105.

exists that the law should intervene to equalise bargaining power. Labour law cannot therefore be justified simply by pointing out the existence of unequal bargaining power, something more is needed. We must give convincing reasons for why this inequality is troubling, and why it justifies labour law's existence as a countervailing force.

Bogg clearly articulates this need for deeper foundations, saying "[i]nequality of bargaining power" is, in itself, normatively inert without understanding what kind of equality we are interested in, and equality of what, and equality for whom, and why subordination might itself be an objectionable relational state of affairs'.<sup>33</sup> He concludes that identifying the normative justification of labour law 'requires labour lawyers to reach beyond their discipline to the realm of value and reasons', including those found in 'general political theory'.<sup>34</sup>

A normative edge must therefore be inserted into the traditional narrative if it is to provide foundations for labour law. Nothing in the sketch of the traditional narrative set out above provides this necessary bridge from the existence of unequal bargaining power to the need for labour law to act as a countervailing force, signalling the existence of a 'normative gap' in labour law's traditional foundational theory.

### **3. Mind the (Normative) Gap**

The normative gap in the traditional narrative, which sees labour law justified as a bulwark against unequal bargaining power, has caused some to give up on it as a justification for

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<sup>33</sup> A. Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015) 106.

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



labour law, and search for new ideas. Langille, for instance, believes that there is nothing in the traditional narrative that can fill this gap, and that its proponents have no response to the question of why we are interested in or concerned about unequal bargaining power.<sup>35</sup> He accuses the traditional narrative of having ‘no deeper account of why ... more equal labour markets, and their outcomes, are a good thing’,<sup>36</sup> and concludes that ‘labour law needs a more substantive normative ideal than the resources made available by the idea of equality operating in the bargaining context can provide’.<sup>37</sup>

Given the importance of firm normative foundations, as outlined in the previous chapter, there is a pressing need to fill this normative gap and identify adequate justificatory foundations of labour law. There are two ways in which scholars might attempt to do this. First, the focus on bargaining power could be abandoned altogether, and labour law’s foundations *realigned* along new lines. Second, the traditional narrative could be *reinvigorated* by articulating why inequality of bargaining power is problematic and demands the existence of labour law protections. In recent years scholars have proposed a range of new theoretical frameworks as means of reinvigorating or realigning labour law’s foundations. In addition to these, there is also the option of returning to the writings of early labour law scholars and attempting to flesh out more fully the values that can be identified in their work.

### ***3.1 Realigning labour law’s foundations***

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<sup>35</sup> B. Langille, ‘Labour Law’s Theory of Justice’ (n 3) 110.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid* 111.

Much of the recent debate surrounding labour law's foundations has involved scholars suggesting a range of new theoretical frameworks on which to base the discipline.<sup>38</sup> A prominent suggestion for *realigning* labour law's normative foundations is to envisage labour law as 'labour market regulation' rather than as a countervailing force to unequal bargaining power. However, broadening the focus from bargaining power to labour market regulation in this way does not *in itself* provide normative foundations for labour law. The concept of 'labour market regulation' is as devoid of normative content as 'inequality of bargaining power'. The questions of why we need to regulate the labour market, and what our goals are in doing so, remains to be answered. One possible answer to this question is that labour law should aim to regulate the labour market in ways that promote economic competitiveness and prevent market failures, with the ideological underpinning of this approach being to maximise efficiency.<sup>39</sup>

Another common approach to realigning the normative foundations of labour law is to draw on ideas developed in political philosophy. Several labour lawyers have proposed realigning labour law with Nussbaum and Sen's idea of freedom as capabilities for instance,<sup>40</sup> and Fudge proposes a new foundational theory of labour law that combines a capability approach with the idea of democratic equality.<sup>41</sup> The republican idea of freedom as non-domination has also

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<sup>38</sup> See for example, the list given in A. Hyde, 'The Idea of the Idea of Labour Law: A Parable' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011).

<sup>39</sup> H. Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 30 ILJ 17.

<sup>40</sup> S. Deakin and F. Wilkinson, *The Law of the Labour Market Industrialization, Employment, and Legal Evolution* (OUP 2005); B. Langille, 'Labour Law's Theory of Justice' (n 3); see generally B. Langille (ed), *The Capability Approach to Labour Law* (OUP 2019).

<sup>41</sup> J. Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011).

emerged as another approach to understanding the purpose and justification of labour law.<sup>42</sup>

Other philosophical ideas suggested as foundations for labour law include theories of social justice,<sup>43</sup> democracy,<sup>44</sup> and fundamental rights.<sup>45</sup>

It is evident from this that there is no consensus over what the new justificatory approach should be. Furthermore, while many ideas have been suggested as normative foundations, much more work needs to be done in understanding how these theories relate to labour law and considering whether they provide adequate and attractive foundations for the discipline. This will involve scrutinising the persuasiveness and coherence of suggested foundational frameworks, identifying which aspects of labour law they can (and cannot) justify, and working through their implications for the interpretation and reform of labour law.

### ***3.2 Reinvigorating labour law's foundations***

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<sup>42</sup> D. Cabrelli and R. Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 339; K. Breen, 'Freedom, Republicanism, and Workplace Democracy' (2015) 18 *Critical Review of International Social and Political Philosophy* 470; D. Cabrelli and R. Zahn, 'Civic Republican Political Theory and Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>43</sup> G. Davidov, 'Distributive Justice and Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>44</sup> V. Mantouvalou, 'Democratic Theory and Voices at Work' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014); A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009); R. Dahl, *A Preface to Economic Democracy* (Univ of California 1985).

<sup>45</sup> H. Collins, 'Theories of Rights as Justifications for Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 *Eur. Lab. LJ* 151; J. Atkinson, 'Human Rights as Foundations for Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

Rather than working to develop new justificatory theories some labour lawyers have attempted to *reinvigorate* the traditional narrative grounded in unequal bargaining power. If the 'normative gap' diagnosis is correct, then reinvigorating the traditional narrative must involve identifying the reason(s) why unequal bargaining power is sufficiently problematic to justify labour law. For example, it might be argued that without the existence of labour law as a countervailing force unequal bargaining power necessarily leads to working conditions that are inhumane, exploitative, or that violate workers' dignity, and that legal intervention is justified in preventing this. Alternately it could be argued that in the absence of labour law protections, unequal bargaining power creates unjust distributions of resources, or results in relationships that undermine workers' dignity or freedom.<sup>46</sup>

It is sometimes difficult to determine whether scholars writing about the foundations of labour law are intent on reinvigoration or realignment. Davidov, for example, argues that unequal bargaining power is a placeholder for concerns about the inherent vulnerabilities workers face in employment relationships, specifically democratic deficits and an inability to spread risks.<sup>47</sup> In doing this, Davidov presents himself as developing a more thorough understanding of labour law's traditional narrative. This might well be accurate; inequality of bargaining power could create democratic deficits and prevent workers from spreading risk, and these vulnerabilities could be so problematic as to justify the creation of labour law protections to equalise bargaining power. However, it is also possible to interpret Davidov as proposing new normative foundations for the discipline. The idea that workers must be

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<sup>46</sup> Justifications of labour law grounded in theories of justice, capabilities or non-domination might therefore all be used to re-invigorate the traditional bargaining power analysis, as well as offering entirely new foundations.

<sup>47</sup> G. Davidov, *A Purposive Approach to Labour Law* (OUP 2016) ch 3.

protected from having their vulnerabilities exploited by employers might provide foundations for labour law quite independently of any notion of unequal bargaining power.

### ***3.3 Revisiting the normative underpinnings of the traditional narrative***

While scholars have proposed a range of new theoretical frameworks to reinvigorate or realign labour law's foundations, it is possible that we should not be so quick to reach for new foundational ideas. Dukes believes that some attempts to identify new justifications for labour law 'reject the old ways as outdated and unhelpful without appearing to delve very deeply into the question of what those ways were',<sup>48</sup> creating a risk of caricaturing the traditional narrative and dismissing it prematurely.<sup>49</sup>

Discussions of labour law's traditional narrative, including the one above, certainly tend to emphasise 'bargaining power' and not concern themselves with the values the original proponents of the traditional narrative saw as underpinning labour law. On closer examination however, a range of values which could justify labour law are referred to in the writings of early scholars such as the Webbs and Kahn-Freund. Although these ideas are often not explored in depth, we therefore have the option of *revisiting* the original underpinnings of the traditional narrative, rather than searching for new theories with which to realign or reinvigorate labour law's foundations.<sup>50</sup> The Webbs and Kahn-Freund saw the labour law as

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<sup>48</sup> R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014) 2–3.

<sup>49</sup> R. Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 57.

<sup>50</sup> See for example, R. Dukes, *The Labour Constitution* (n 48).

being necessary to secure workers' freedom, dignity, and wellbeing; ideas that are strongly reminiscent of some proposed 'new' foundations for labour law.

### *Industrial democracy*

The first concept underpinning the views of these early scholars is industrial democracy. At its simplest, industrial democracy requires that workers must be able to participate in management decision-making.<sup>51</sup> Industrial democracy is most clearly seen as foundational in the Webbs' work,<sup>52</sup> but is also referred to by Kahn-Freund.<sup>53</sup> However, the existence of industrial democracy itself calls for justification however, and therefore defers rather than resolves the problem of the normative gap. If labour law is justified because it is necessary to achieve industrial democracy, this raises the question of why industrial democracy is needed.

For Kahn-Freund, industrial democracy and, by extension, labour law is justified because there is a right to democracy in the workplace. Kahn-Freund sees the right to industrial democracy as requiring representative democracy rather than direct participation in rule-making by workers. In both political and industrial arenas 'those who obey the rules have a right (and a moral duty) to select those who represent them in making the rules'.<sup>54</sup> However, Kahn-Freund does not spell out how this 'right' to industrial democracy can be justified, or

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<sup>51</sup> P. Ackers, 'Collective Bargaining as Industrial Democracy: Hugh Clegg and the Political Foundations of British Industrial Relations Pluralism' (2007) 45 *British Journal of Industrial Relations* 77; O. Kahn-Freund, 'Industrial Democracy' (1977) 6 *ILJ* 65; A. Bogg (n 44).

<sup>52</sup> S. Webb and B. Webb (n 19).

<sup>53</sup> O. Kahn-Freund (n 1) 12.

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

what its content is. While it may be possible that workers have a right to participate in workplace decision-making, a substantive argument is needed to establish its existence.<sup>55</sup>

The primary justification for industrial democracy in the Webbs' pioneering work is that it is required for the same reasons as political democracy. They criticise those who cannot see the 'inconsistency between democracy and unrestrained capitalist enterprise' and say that the existence of uncontrolled power wielded by employers is 'a far more genuine loss of liberty, and a far keener sense of personal subjection' for workers than 'the far-off, impalpable rule of the king'.<sup>56</sup> For the Webbs therefore, industrial democracy is required because it protects workers' freedom against the unrestrained power of employers that otherwise exists due to their superior bargaining power.<sup>57</sup> This goes some way to filling the normative gap, but still requires some further explanation of the meaning and value of freedom, why it is threatened by unequal bargaining power, and why the creation of labour law is demanded as a countervailing force.

### *Freedom*

The relationship between freedom and labour law is not straightforward. The idea of freedom, in the classic liberal sense of negative freedom from interference,<sup>58</sup> appears antithetical to labour law because it sees any legal regulation of the employment relationship as infringing

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<sup>55</sup> For an example of how this might be done see Chapter 7, Section 3.2.

<sup>56</sup> S. Webb and B. Webb (n 19) 841.

<sup>57</sup> *ibid* 847.

<sup>58</sup> J.S. Mill, *On Liberty* (Penguin 1987); I. Berlin, *Two Concepts of Liberty* (Clarendon 1958).

on the freedom of both workers and employers. However, the Webbs adopt a different understanding of freedom than mere negative liberty, defining it as 'such conditions of existence in the community as do, in practice, result in the utmost possible development of faculty in the individual human being'.<sup>59</sup>

Industrial democracy is therefore justified and required because all other means of production have the 'fatal defect' that they 'necessarily involve a restriction in the opportunity for development of faculty among the great mass of the population'.<sup>60</sup> This argument bears a striking resemblance to the idea of 'freedom as capabilities' which has been suggested as a possible normative foundation for labour law.<sup>61</sup> The Webbs, like Sen,<sup>62</sup> see freedom as being about the conditions which allow the fullest development of people's faculties, or capabilities.

A positive conception of freedom is also present in Kahn-Freund's theory of labour law. Kahn-Freund regarded intervening in the bargaining process between employers and employees as a means of increasing workers' freedom, because setting mandatory terms or allowing for the collectivisation of labour law limits the duty of obedience that workers are subject to. Protective legislation that denies legal effect to certain contract terms also broadens workers' freedom, because even if they make contracts containing such terms they are free not to keep them.<sup>63</sup>

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<sup>59</sup> S. Webb and B. Webb (n 19) 847.

<sup>60</sup> *ibid* 484.

<sup>61</sup> B. Langille, *The Capability Approach to Labour Law* (n 40).

<sup>62</sup> A. Sen, *Development as Freedom* (OUP 1999).

<sup>63</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (n 9) 26.



## *Dignity and welfare*

In addition to democracy and freedom, Kahn-Freund mentions two other ideas which underpin his belief that labour law is justified and required as a counteracting force to unequal bargaining power. The first of these is dignity. Determining the limits of employers' ability to unilaterally control the workplace via the managerial prerogative is said to pose 'a dilemma between respect for the needs of management and respect for the freedom and for the dignity of the individual'.<sup>64</sup> The protection of dignity is also said to underpin the aim of improving terms and conditions of work via collective bargaining, with the point being to secure terms and conditions 'compatible with the physical integrity and moral dignity of the individual'.<sup>65</sup> Kahn-Freund does not flesh out the idea of 'moral dignity' in any philosophical depth, so it remains unclear what it means, and whether the concept can provide persuasive normative foundations for labour law. However, it remains open to modern labour lawyers to do this philosophical work, and to develop an argument that justifies labour law by reference to the threat employers' superior bargaining power poses to workers' dignity.

The final justificatory concept present in the original labour law literature is the welfare of individual workers and wider society. The Webbs believed that inequality of bargaining power meant 'free competition' between employers would lead to the 'worst possible conditions' for workers.<sup>66</sup> Kahn-Freund also discusses 'social welfare' and increasing workers' standard of living as goals of labour law.<sup>67</sup> In addition to benefitting individual workers,

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<sup>64</sup> *ibid.*

<sup>65</sup> *ibid* 69.

<sup>66</sup> S. Webb and B. Webb (n 19) 560–1.

<sup>67</sup> O. Kahn-Freund (n 1) 2.

Kahn-Freund says that the 'welfare of the nation' as a whole depends on balancing the collective forces of management and labour.<sup>68</sup> The Webbs similarly see labour law as justified in part by the benefit it brings to the economy and national welfare, arguing that industrial democracy results in businesses being more productive and efficient.<sup>69</sup>

These references to democracy, freedom, dignity, and welfare in the work of Kahn-Freund and the Webbs are not sufficiently developed to provide normative foundations for labour law. But they demonstrate that, even though the idea of inequality of bargaining power by itself is normatively inert, the 'traditional analysis had within it ... statements of value'.<sup>70</sup> Rather than reaching for entirely new foundational perspectives with which to realign or reinvigorate labour law's foundations, scholars therefore have the option of returning to and developing the values and ideas found in these earlier works. This makes all the more sense once it is recognised that there are strong links between these ideas and modern foundational perspectives. For example, it has already been pointed out that the concept of freedom used by the Webbs to justify labour law has affinities with the capability approach. Similarly, Kahn-Freund's ideas that there is a moral right to industrial democracy and that labour law is necessary to secure the 'moral dignity' of workers has strong echoes in modern suggestions that the concepts of dignity and human rights can provide foundations for labour law.<sup>71</sup>

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<sup>68</sup> *ibid* 1.

<sup>69</sup> S. Webb and B. Webb (n 19) pt III.

<sup>70</sup> B. Wedderburn (n 2) 37; R. Dukes, *The Labour Constitution* (n 48); R. Dukes, 'Wedderburn and the Theory of Labour Law: Building on Kahn-Freund' 44 *ILJ* 357.

<sup>71</sup> M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); J. Atkinson (n 45).

#### **4. Inadequacy of the Traditional Narrative**

It has so far been argued that a normative gap exists in labour law's traditional justificatory narrative, and that this must be filled by reinvigorating or realigning the foundations of labour law. In this section however, it is suggested that even a reinvigorated traditional narrative, which justifies labour law as a necessary response to unequal bargaining power, cannot provide an adequate justificatory framework for the discipline. Although it provides valid insights, a view of labour law framed solely in terms of equalising bargaining power cannot provide an adequate explanatory or justificatory framework for the discipline. Given this, we should reject the binary choice of either realigning or reinvigorating labour law's foundations and aim to develop a pluralistic approach to labour law which takes insights and inspiration from a broad range of ideas.

There have been many criticisms made of the traditional narrative, and there is not space for more than a brief survey of some of these here. Critiques fall into two broad types of claim. First, that the traditional narrative is no longer descriptively accurate if it ever was, and second, that a justification of labour law based in unequal bargaining power cannot capture the full range of normative concerns that are at stake. These arguments show that although viewing labour law as a countervailing force to superior bargaining power is useful in some contexts it cannot provide a complete theory of labour law, and that we therefore need to supplement the traditional narrative with new perspectives.

##### ***4.1 Descriptive inaccuracy***

The first set of arguments against the traditional narrative are motivated by the concern that it is no longer a descriptively accurate account of labour law, due to the significant changes which have taken place in labour markets, government policy, and the composition of the workforce over the last fifty years.

The traditional narrative assumes the predominance of standard and full-time employment relationships arranged around a Fordist model of production, where the major problem to be solved is the inequality of bargaining power between employer and employee.<sup>72</sup> This is no longer the case for many workers, and the traditional narrative struggles to account for the existence of these new working arrangements. Full-time long-term employment relationships are increasingly being supplanted by 'atypical' or 'precarious' working arrangements.<sup>73</sup> This includes agency workers, those on 'casual', 'zero-hour' or fixed-term contracts, as well as workers who appear self-employed but are heavily dependent on one firm. Technological developments continue to create new categories of atypical work, which must now include workers who provide on-demand services through apps such as Uber and Deliveroo.<sup>74</sup> Even where workers are in standard employment relationships, globalisation and the growth of smaller enterprises means that workers will often be part of complex supply chains, where the entity dictating working conditions and exercising superior bargaining power over workers may not be their employer.

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<sup>72</sup> M. D'Antona, 'Labour Law at Century's End: An Identity Crisis' in J. Conaghan, R. Fischl and K. Klare (eds), *Labour law in an era of globalization: transformative practices and possibilities* (OUP 2004).

<sup>73</sup> R. Gumbrell-McCormick, 'European Trade Unions and "Atypical" Workers' (2011) 42 *Industrial Relations Journal* 293.

<sup>74</sup> J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP 2018).

These groups of atypical workers face new and different problems to those of full-time employees that cannot be properly understood or overcome using the idea of equalising power. Agency workers for example, are in a triangular relationship involving the agency company and the company they are placed with, making it difficult to determine which company is the employer, if in fact either is.<sup>75</sup> This does not fit well with the traditional analysis of labour law as a mediating force in the two-way relationship between employer and employee. Workers on casual or zero-hours contracts might well view their lack of security as the main problem that labour law should be attempting to overcome, rather than inequality of bargaining power.

Another problem with the descriptive accuracy of the traditional narrative is that it wrongly portrays workers as a homogenous group with unitary interests. This misses an important dimension of labour law, namely the resolution of intra-worker conflicts.<sup>76</sup> It was always a simplification to view workers as having uniform interests but this is even less accurate now, given the diversification of the workforce and the rise of other identities in place of class.<sup>77</sup> The traditional narrative glosses over tensions and conflicts of interests that exist between different groups of workers, such as young and older workers, those already in work and those seeking employment, full time employees and 'atypical' workers.<sup>78</sup> These tensions have

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<sup>75</sup> *Tilson v Alstom Transport* [2010] EWCA Civ 1308.

<sup>76</sup> G. Mundlak (n 4); A.C.L. Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 269.

<sup>77</sup> C. Dustmann and others, '*Labour Market Performance of Immigrants in the UK Labour Market*' (2003) Home Office Online Report (05/03); A. Heath, J. Curtice and G. Elgenius, 'Individualization and the Decline of Class Identity' in M. Wetherell (ed), *Identity in the 21st Century: New Trends in Changing Times* (Palgrave Macmillan 2009).

<sup>78</sup> A.C.L. Davies (n 76).

always existed but have historically not received much attention from labour lawyers, possibly out of fear of drawing attention away from the idea of combatting unequal bargaining power. The traditional narrative cannot explain why labour law should be concerned with resolving these intra-worker conflicts, or provide guidance on this important aspect of labour law.

Finally, the traditional narrative is descriptively outdated because it no longer reflects how labour law is understood by government and policymakers. Until the latter part of the 20<sup>th</sup> Century there was a broad consensus that labour law was justified by the need to counteract the superior bargaining power of employers. This is no longer the case. Labour law's protective aims have been side-lined by policymakers in favour of new approaches, such as macro-economic goals relating to inflation,<sup>79</sup> or regulating for competitiveness or flexibility.<sup>80</sup>

As Wedderburn points out, reforms introduced in the 1980s were inconsistent with labour law's 'traditional analysis', and the 'shared assumptions' underpinning the traditional narrative were lost.<sup>81</sup> Labour regulation has largely continued on this trajectory, and it is difficult to view recent reforms or policy proposals as consistent with the aim of combatting

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<sup>79</sup> P. Davies and M. Freedland, 'Labour Law and the Public Interest - Collective Bargaining and Economic Policy' in B. Wedderburn and W.T. Murphy (eds), *Labour Law and the Community* (London 1982).

<sup>80</sup> P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Clarendon 1993); P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (OUP 2007).

<sup>81</sup> B. Wedderburn (n 2) 17–34.

the unequal bargaining power faced by employees.<sup>82</sup> The traditional narrative is therefore no longer a good descriptive account labour law developments over the past 50 years.<sup>83</sup>

#### *4.2 Normative inadequacy*

Not only is the traditional narrative's focus on bargaining between employers and employees descriptively inaccurate, it is too narrow an account of the discipline in both its personal and regulatory scope. Tying the justification of labour law to the idea of unequal bargaining power fails to properly capture all the normative concerns that are at stake in labour law and overlooks some important reasons we have for providing legal protections in the workplace that are unrelated to bargaining power.

The traditional narrative is normatively inadequate because it is too narrowly focussed on the employer-employee relationship and prevents consideration of which additional groups should have the benefit of labour law protections. Some labour lawyers argue that the scope of labour law protections should be broadened to include new forms of work such as reproductive and domestic labour,<sup>84</sup> and the framework of unequal bargaining power is

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<sup>82</sup> Such as increasing the qualification period for unfair dismissal to two years, the Government's 'red tape challenge', the introduction of employment tribunal fees, and the Trade Union Act 2016.

<sup>83</sup> H. Collins, 'The Productive Disintegration of Labour Law' (1997) 26 *ILJ* 295; N. Whiteside, 'State Policy and Employment Regulation in Britain: An Historical Perspective' (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations* 379.

<sup>84</sup> J. Fudge, S. McCrystal and K. Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012); N. Zatz, 'The Impossibility of "Work Law"' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); J. Conaghan, 'Gender and the Labour of Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

clearly inadequate for this purpose. On this view, the fact that someone is *performing work* should bring them within the protective scope of labour law, not the existence of an unequal bargaining relationship between employer and employee. Even if one does not support the extension of labour law protections to non-market work, the traditional narrative's focus on equalising bargaining power between employers and employees cannot help answer the question of whether dependent contractors, freelancers, or those providing work without contracts such as volunteers should be included in labour law's protections.<sup>85</sup> The traditional narrative does not provide us with the tools to resolve these pressing issues currently facing labour law.

The traditional narrative is also too narrow in its regulatory scope. A focus on unequal bargaining power between employers and employees restricts the domain of labour law to measures which aim to ameliorate this inequality. This is problematic for those who argue that labour law should be broadly conceived as 'labour market regulation'.<sup>86</sup> If labour law is the law of the labour market it must also include regulatory issues that impact the supply and demand of labour, such as aspects of the law relating to immigration, trade, and skills.<sup>87</sup> It seems likely that broadening labour law to encompass labour market regulation will involve

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<sup>85</sup> B. Langille, 'Labour Law's Theory of Justice' (n 3) 105–110.

<sup>86</sup> P. Davies and M. Freedland, *Towards a Flexible Labour Market* (n 80); C. Arup and others (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press 2006); H. Collins, 'Regulating the Employment Relationship for Competitiveness' (n 39).

<sup>87</sup> J. Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011).



a shift from seeing it as an area with the distinct ‘vocation’ of combatting unequal bargaining power to one with ‘a shifting balance of purposes’.<sup>88</sup>

Another way of illustrating the traditional narrative’s narrow regulatory scope is by distinguishing between the different sites of conflict that exist between labour and capital; these being the spheres of exchange, production, and politics.<sup>89</sup> The idea of combatting unequal bargaining power only captures the first site of conflict, whereas labour law should also be concerned with the regulation of the workplace beyond this initial sphere of exchange. The issue of subordination in the workplace provides an example of this. Collins makes the point that worker subordination is not caused solely by unequal bargaining power, but is the result of institutional and organisational factors in capitalist production. Subordination is a necessary consequence of capitalist systems of production that require workers to be given direction and instruction by the owners of capital, and is further embedded in modern economies by the large-scale and bureaucratic nature of corporations.<sup>90</sup> It would therefore exist in capitalist modes of production even if there were equal bargaining power between employers and employees, so a different foundational theory is needed for laws aimed at regulating and ameliorating subordination.

In addition to restricting the relational and regulatory scope of labour law, the traditional narrative fails to capture the full range of normative concerns which are at stake in the legal regulation of work. For example, agency and casual workers, freelancers, volunteers, interns, and those providing domestic care work all have multiple sources of vulnerability in addition

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<sup>88</sup> H. Collins, ‘Labour Law as a Vocation’ (n 15) 472.

<sup>89</sup> E. Wright, *Understanding Class* (Verso 2015) 185–230.

<sup>90</sup> H. Collins, ‘Labour Law as a Vocation’ (n 15).

to inequality of bargaining power that are largely ignored under the traditional narrative. It is not possible to reduce the many diverse issues that labour law now deals with, such as bullying at work,<sup>91</sup> or the treatment of migrant and domestic workers,<sup>92</sup> to the question of combatting unequal bargaining power. Finally, the traditional narrative obscures the fact that labour law can be justified for reasons unconnected to bargaining power. If we care about securing the dignity, freedom or rights of workers it is not clear why these must be funnelled through the notion of unequal bargaining power.

The traditional narrative continues to provide insights about the inherent conflicts which exist between the employment relationship, and a reinvigorated theory of labour law based in combatting inequality of bargaining power may be capable of justifying some core labour law protections. But this analysis of labour law can no longer, and likely never could, provide an adequate account of the discipline.

### ***4.3 The need for pluralistic foundations***

Although a theoretical account of labour law based solely on the idea of unequal bargaining power is descriptively and normatively inadequate, the traditional narrative contains important insights and so should not be abandoned entirely. It reminds us that the notion of ‘freedom of contract’ should be treated with caution when we are discussing the relationship

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<sup>91</sup> L. Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (OUP 2015).

<sup>92</sup> C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

between an individual worker and an employer,<sup>93</sup> and that the outcome of these contracts cannot be regarded as *prima facie* just.<sup>94</sup> In addition, although the idea of unequal bargaining power itself is normatively inert, it is possible to give it a normative edge by identifying reasons for thinking its existence is problematic in employment relationships. This might include the negative impacts it has on workers' freedom, dignity, and wellbeing. A theory of labour law which entirely ignores inequality of bargaining power will therefore be just as incomplete as one which based solely upon it.

Rather than choosing between realigning labour law's normative foundations or reinvigorating the traditional narrative with new ideas, or revisiting original justificatory concepts, the best way forward is to reject a unitary view of labour law's foundations and aim to construct a pluralistic justificatory framework, made up of multiple overlapping and interweaving strands. This approach recognises the insights that can be provided by a reinvigorated traditional narrative, but also embraces new theoretical perspectives. A complete understanding of labour law's normativity may therefore encompass a diverse range of ideas, such as dignity, exploitation, emancipation, social and distributive justice, positive freedom understood as non-domination or capabilities, and human rights.<sup>95</sup>

The various theoretical frameworks used to justify and explain labour law are often wrongly considered or presented as competing with one another, but they are not mutually exclusive.

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<sup>93</sup> O. Kahn-Freund (n 1) 12–3; O. Kahn-Freund, *Labour Relations: Heritage and Adjustment* (OUP 1979) 69.

<sup>94</sup> R. Dukes, 'Identifying the Purposes of Labor Law: Discussion of Guy Davidov's A Purposive Approach to Labour Law' (2017) 16 *Jerusalem Review of Legal Studies* 52, 62.

<sup>95</sup> For discussion of these various perspectives see H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018); G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); G. Davidov (n 47) 55–68.

In a pluralistic theory of labour law's foundations tensions will inevitably exist between the different ideas and values, and so these various justificatory strands should not be assumed to be perfectly compatible.<sup>96</sup> Instead, they should be regarded as overlapping and interlinked ways of understanding the discipline on a theoretical level, which have the potential to be mutually supportive.

## **5. Conclusion**

This chapter has demonstrated that the traditional justificatory narrative of labour law as a countervailing force to the superior bargaining power of employers lacks the normative content needed to justify the discipline. The mere existence of inevitable conflicts and inequality of power between employers and employees does not in itself justify the existence of labour law. Some normative values or argumentation must be inserted into this narrative in order to establish that labour law protections are needed as an equalising force.

The normative gap in the traditional narrative initially appears to leave us with a choice between reinvigorating or realigning labour law's justificatory foundations. In recent years a range of theoretical frameworks have been suggested for each of these purposes by labour lawyers, most of which are drawn from political philosophy. In addition, it is also possible to develop an understanding of labour law's normative foundations by returning to and elaborating more fully the ideas underpinning the work of early labour law scholars.

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<sup>96</sup> J. Atkinson, 'A Purposive Approach to Labour Law' (2017) 46 *ILJ* 303, 305.

However, even if the traditional narrative was developed more fully by reference to normative values and ideas, a justificatory theory of labour law focussed on counteracting unequal bargaining power between employers and employees is inadequate. It is neither a good descriptive fit, nor a complete normative framework for understanding the discipline. Instead of choosing between reinvigorating or realigning the normative foundations of labour law we should aim to do both. This involves attempting to develop a pluralistic justificatory theory of labour law, which draws on and incorporates the insights provided by a wide range of theoretical perspectives.

The remainder of the thesis embarks upon one small part of this research agenda by focussing on the contribution that human rights might make to this pluralistic vision of labour law's foundations; considering the relevance and normative implications of human rights for labour law, and demonstrating how they can provide a normative benchmark against which to assess existing labour law.

## Chapter 3: Human Rights and Labour Law

### 1. Introduction

Human rights, understood as rights we have simply in virtue of being human, have become an 'ethical lingua franca',<sup>1</sup> and now influence almost every area of law. Labour law is no exception to this. Despite initially running on 'parallel tracks',<sup>2</sup> there are increasing links and overlaps between human rights and labour law as well as a growing body of scholarship that examines the relationship between the two.<sup>3</sup> This chapter introduces the idea of human rights

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<sup>1</sup> J. Tasioulas, 'The Moral Reality of Human Rights' in T. Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) 75; J. Raz, 'Human Rights Without Foundations' in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (OUP 2010).

<sup>2</sup> V.A. Leary, 'The Paradox of Workers' Rights as Human Rights' in L. Compa and S. Diamond (eds), *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press 2003).

<sup>3</sup> L. Compa and S. Diamond, *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press 1996); B. Hepple, 'Human Rights and Employment Law' (2012) 198 *Amicus Curiae* 19; K. Ewing, 'The Human Rights Act and Labour Law' (1998) 27 *ILJ* 275; V.A. Leary (n 2); P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005); H. Collins, 'Theories of Rights as Justifications for Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); K. Kolben, 'Labor Rights as Human Rights' (2009) 50 *Va. J. Int'l L.* 449; J.A. Gross and L. Compa (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (Cornell University Press 2009); C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010); V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 *Eur. Lab. LJ* 151; E. Albin, 'Introduction: Precarious Work and Human Rights' [2012] *Comp. Lab. L. & Pol'y J.* 1; J. Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37 *Dalhousie LJ* 601; K. Ewing and J. Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *ILJ* 2; V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *HRLR* 529; A. Bogg and K. Ewing, 'The Implications of the RMT Case' (2014) 43 *ILJ* 221; V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014); K. Ewing and J. Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 *ILJ*

as a possible foundation for labour law, and provides an overview of the debates surrounding the relationship between the two fields. The discussion sets the scene for the following chapters' examination of the relationship between human rights and labour law in the English legal system.

Section 2 begins by setting out why human rights are a plausible and potentially important justificatory strand in labour law's foundations. This includes the historical and ideological links that exist between two, and the benefits that might flow from grounding labour law in human rights. The alignment of labour law and human rights has had a mixed reception, and the relationship between the two has historically been characterised by disengagement rather than harmony and mutual reinforcement. Section 3 considers the labour law literature on the relevance and influence of human rights on the discipline, and the divide between those who support adopting a human rights perspective on labour law and those who are more pessimistic about the impact and influence of human rights. Overall, this chapter demonstrates that while there are undoubtedly potential benefits that human rights could bring as a foundational perspective for labour law, there are also possible pitfalls and drawbacks of adopting a human rights perspective on the discipline.

Before introducing human rights as a potential foundational perspective for labour law, it is worth distinguishing two different dimensions of the relationship between labour law and human rights. These different dimensions can be labelled 'the protection of civil liberties at

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391; J. Atkinson, 'Human Rights as Foundations for Labour Law' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

work’, and ‘human rights as a foundational perspective for labour law’.<sup>4</sup> The first way that human rights may be relevant for labour law concerns the protection of workers’ civil liberties against infringements by employers, and views this as a central and important aim of labour law. Scholarship that examines this dimension of the relationship between labour law and human rights considers the protection of civil liberties in the workplace, such as freedom of expression, religion and belief, and the right to private life.<sup>5</sup>

The second dimension to the relationship between human rights and labour law views them as more deeply linked. Human rights are regarded as a foundational perspective for labour law. On this perspective core labour law norms and protections are themselves matters of human rights, and labour law exists to specify and implement the demands of human rights in concrete terms.<sup>6</sup> The difference between the two perspectives can be illustrated by the questions each ask about unfair dismissal; the ‘civil liberties at work’ dimension is concerned with whether the law of unfair dismissal adequately protects workers’ rights to expression or

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<sup>4</sup> This distinction and labelling is adopted from H. Collins and V. Mantouvalou, ‘Human Rights and the Contract for Employment’ in M. Freedland and others (eds), *The Contract of Employment* (OUP 2016)..

<sup>5</sup> See for example, H. Collins, ‘The Protection of Civil Liberties in the Workplace’ (2006) 69 MLR 619; V. Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’ (2008) 71 MLR 912; V. Mantouvalou and H. Collins, ‘Private Life and Dismissal: *Pay v UK*’ (2009) 38 ILJ 133; H. Collins and V. Mantouvalou, ‘*Redfearn v UK*: Political Association and Dismissal’ (2013) 76 MLR 909; J. Atkinson, ‘Workplace Monitoring and the Right to Private Life at Work’ 81 MLR 688; P. Collins, ‘The Inadequate Protection of Human Rights in Unfair Dismissal Law’ (2018) 47 ILJ 504; L. Vickers, *Freedom of Speech and Employment* (OUP 2002); L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd edn, Hart 2016).

<sup>6</sup> See for example V. Mantouvalou, ‘Are Labour Rights Human Rights’ (n 3); P. Gilabert, ‘Labor Human Rights and Human Dignity’ (2016) 42 Philosophy & Social Criticism 171; J. Atkinson (n 3); M. Risse, ‘A Right to Work? A Right to Leisure? Labor Rights as Human Rights’ (2009) 3 Law & Ethics of Human Rights 1; H. Collins, ‘Theories of Rights’ (n 3).



privacy, whereas the ‘human rights as a foundational perspective’ dimension asks whether human rights justify and demand legal protections against unfair dismissal.

Although the distinction between the protection of civil liberties at work and human rights as a foundational perspective for labour law is a useful organising framework, no firm dividing line exists between them.<sup>7</sup> The dimensions can overlap in circumstances where the protection of civil liberties at work requires the introduction of core labour law norms. Health and safety law may be needed to protect the right to life for example, and protection of trade union members may be required by the right to free association. These are instances involving both the protection of civil liberties at work *and* human rights as foundations for core labour law norms. Despite this, the distinction is generally a useful one to keep in mind when thinking about labour law and human rights.

The primary concern of this chapter is to introduce human rights as a potential foundational perspective for labour law, and to survey the current labour law literature discussing the relationship between the two fields.

## **2. Human Rights as Potential Foundations for Labour Law**

Arthurs identifies human rights as one of three potential new ideas ‘waiting in the wings’ to replace labour law’s old paradigm, rooted in tackling inequality of bargaining power, which he views as having fallen into ‘deep discredit’.<sup>8</sup> The idea that human rights can provide

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<sup>7</sup> J. Atkinson (n 3) 126.

<sup>8</sup> The others being capabilities theory and reinvigorating the idea of mobilising workers, H. Arthurs, ‘Labour Law After Labour’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 23.

foundations for labour law is encapsulated in the rallying cry that ‘labour rights are human rights’; if labour rights are human rights then, by definition, labour law can be grounded in and justified by human rights.

Aligning labour law with human rights in this way is ‘tempting’ given the challenges to justifications of labour law based in welfare maximisation and redistribution arguments,<sup>9</sup> and the decline in the twin institutions of trade unions and the welfare state.<sup>10</sup> As a result, ‘in recent years many labour activists and lawyers, though by no means all, have been drawn towards the articulation of the interests of workers and organised labour through the language of rights’.<sup>11</sup> Human rights appear to be a plausible and potentially important strand in labour law’s justificatory foundations because they share common underpinning values, numerous links exist between labour law and the practice of human rights, and there are a range of benefits which might flow from adopting a human rights perspective on labour law.

### *2.1 Links between human rights and labour law*

One reason why human rights appear to be a plausible foundational idea for labour law is the seemingly ‘shared moral goals of human rights and labor entitlements’.<sup>12</sup> Intuitively, both labour law and human rights are aimed at improving the human condition, and the values underpinning human rights are similar to those which have been suggested as providing

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<sup>9</sup> H. Collins, ‘Theories of Rights’ (n 3) 139.

<sup>10</sup> E. Albin (n 3) 10.

<sup>11</sup> H. Collins, ‘Theories of Rights’ (n 3) 139–140.

<sup>12</sup> E. Albin (n 3) 10.

labour law's normativity. Weiss points out that the vision of labour law originally espoused by Sinzheimer was 'based on the assumption that the employee is not to be treated as an object but as a bearer of fundamental rights'.<sup>13</sup> Similarly, the demand that workers' human rights be respected is 'another way of expressing the slogan that "labour is not a commodity"' because it demands the recognition of workers' humanity and agency,<sup>14</sup> which is the antithesis of treating them as a commodity. Finally, Mantouvalou has argued that the values of dignity, freedom and redistribution underpin and are central to both labour law and human rights.<sup>15</sup>

There are further synergies between human rights and other more recently suggested foundational perspectives on labour law. Human dignity for example, is often seen as central to human rights, and has also been suggested as a potential underpinning of labour law by Freedland and Kountouris.<sup>16</sup> There are also close links between human rights and the idea of capabilities, which some labour lawyers support as a justificatory framework for labour law,<sup>17</sup> as both human rights and capabilities make use of the idea of positive freedom and 'identify

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<sup>13</sup> M. Weiss, 'Re-Inventing Labour Law?' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 50.

<sup>14</sup> H. Collins and V. Mantouvalou (n 4) 208.

<sup>15</sup> V. Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 *Comp. Lab. L. & Pol'y J.* 133.

<sup>16</sup> M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) ch 9; C. McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart)..

<sup>17</sup> B. Langille, 'Labour Law's Theory of Justice' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); S. Deakin and F. Wilkinson, *The Law of the Labour Market Industrialization, Employment, and Legal Evolution* (OUP 2005); B. Langille (ed), *The Capability Approach to Labour Law* (OUP 2019); Cf. A. Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

important areas of well-being that people should be free to pursue'.<sup>18</sup> In addition, Nussbaum suggests that capabilities play an important role in identifying and justifying human rights.<sup>19</sup> These links with other suggested foundational perspectives further supports the idea that human rights might play a useful role in a pluralistic approach to labour law's foundations.

The numerous links that exist between labour law and human rights in law and practice also make human rights appear a plausible foundational perspective for the discipline. Many international human rights documents contain rights related to labour law.<sup>20</sup> The Universal Declaration of Human Rights (UDHR) which, although not binding, is the foundational document of international human rights law, declares several core labour law norms to be human rights. In addition to the Article 4 right to freedom from slavery and forced labour, Article 23 sets out rights 'to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment', to 'equal pay for equal work', to 'fair and just remuneration', and 'to form and to join trade unions for the protection of his [sic] interests'. Article 24 of the UDHR adds the right to 'reasonable limitation of working hours and periodic holiday with pay'.

Subsequent human rights treaties have also included rights related to labour law, although these rights have tended to be divided between documents relating to civil and political rights, and those containing social and economic rights. The rights to freedom from forced labour and freedom of association are included in the International Covenant on Civil and Political

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<sup>18</sup> V. Mantouvalou, 'Work, Human Rights, and Human Capabilities' in B. Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 203.

<sup>19</sup> M. Nussbaum, 'Human Rights and Human Capabilities' (2007) 20 Harv. Hum. Rts. J. 21.

<sup>20</sup> For discussion see V. Mantouvalou, 'Are Labour Rights Human Rights' (n 3) 152–6.

Rights (ICCPR) for example,<sup>21</sup> whereas the right to work and to strike, to decent working conditions and just remuneration, and to limits on working time and paid holiday are found in the International Covenant of Economic, Social and Cultural Rights (ICESCR).<sup>22</sup> Labour law norms are also split between civil and social rights documents by the Council of Europe's human rights regime, the regional human rights framework most relevant to the UK.<sup>23</sup> The European Convention of Human Rights (ECHR), which is largely concerned with civil and political rights, contains a more limited array of rights that are directly relevant for labour law than the European Social Charter (ESC), which deals with social rights.<sup>24</sup> While the ECHR contains rights to freedom from slavery and forced labour,<sup>25</sup> and the freedom to form and join trade unions, the ESC contains rights to work, to just conditions of work, to protection against unemployment, and rights to organise and go on strike.<sup>26</sup>

This division of labour law norms between civil and social rights documents matters because social rights have less strict monitoring and enforcement mechanisms and are associated with duties of progressive rather than immediate realisation. As a result, O'Conneide says that states do not 'treat the conclusions of [social rights] monitoring bodies ... with anything like the same degree of seriousness that attaches to determinations of the European Court of

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<sup>21</sup> ICCPR, Articles 8 and 22.

<sup>22</sup> ICESCR, Articles 7 and 8.

<sup>23</sup> Other regional human rights documents that contain rights related to labour law include African Charter on Human and Peoples' Rights (1981), Article 15; Arab Charter on Human Rights (1981), Article 34; Association of Southeast Asian Nations Human Rights Declaration (2012), Article 27; Social Charter of the Americas (1961), Article 8.

<sup>24</sup> This division has been somewhat overcome by the ECtHR's adoption of an 'integrated' approach to interpretation, see V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights' (n 3).

<sup>25</sup> ECHR Articles 4 and 11.

<sup>26</sup> European Social Charter (Revised) (1996), Articles 1–9.

Human Rights (ECtHR) or the UN Human Rights Committee (HRC) relating to the classic “core” of civil and political rights’.<sup>27</sup> One recent exception to the division of labour law protections between civil and social human rights documents is the Charter of Fundamental Rights of the EU (CFREU), which contains both civil and social rights, including a wide array of rights relevant to labour law.<sup>28</sup>

Despite largely classing them as social rights, international human rights law regards ‘labor rights as human rights that merit international legal protection’,<sup>29</sup> meaning that international human rights documents appear to offer ‘a solid grounding for the principal elements of a labour law system’.<sup>30</sup>

However, Collins argues that the classification of labour rights as human rights in international human rights documents is a historical accident, arising from the fact that labour law norms were originally included in the Treaty of Versailles to protect workers from the effects of international competition, and were then carried over into human rights in the process of drafting the UDHR.<sup>31</sup> Collins says this supports the view that human rights cannot provide foundations for labour law.<sup>32</sup> But viewing the alignment of labour law and human rights as purely accidental understates the depth of links that exist between them.

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<sup>27</sup> C. O’Cinneide, ‘The Constitutionalisation of Social and Economic Rights’ in K. Klare, L.A. Williams and H.A. García (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2014) 259.

<sup>28</sup> See CFREU Chapter IV, ‘Solidarity’.

<sup>29</sup> P. Macklem, *The Sovereignty of Human Rights* (OUP 2015) 84.

<sup>30</sup> H. Collins, ‘Theories of Rights’ (n 3) 141.

<sup>31</sup> *ibid* 143.

<sup>32</sup> *ibid*.

For instance, the idea that workers have natural rights or entitlements predates the human rights movement. It has long been emphasised in the natural law doctrine of the Catholic church, as well as being present in the works on natural rights and social contract theory which are the precursors to the modern idea of human rights.<sup>33</sup> Viewing the alignment of labour law and human rights as merely a historical accident also downplays the centrality of labour law to the development of international human rights law, which grew out of the same concerns for social justice and dignity that lay behind the establishment of the International Labour Office (ILO). Indeed, labour standards 'provided early inspiration for the development of international human rights law',<sup>34</sup> and the 'international human rights movement may be said to have begun with the founding of the ILO'.<sup>35</sup> The inclusion of labour law issues in human rights documents should therefore not be written off as coincidental.

A further demonstration of the ties between labour law and human rights is the ILO's framing of labour standards in terms of human rights. The ILO adopted the language of universal rights even prior to the UDHR, stating in the 1945 Declaration of Philadelphia that everyone has a universal 'right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.<sup>36</sup> Macklem is therefore right to say that the declaration had a conception of 'labour rights as human rights' at its heart, and 'set the stage' for their inclusion in international human rights documents.<sup>37</sup>

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<sup>33</sup> C. Fenwick and T. Novitz, *Human Rights at Work* (n 3) 6–10.

<sup>34</sup> J.M. Diller, 'Social Justice, Rights, and Labour' in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 316–8.

<sup>35</sup> V.A. Leary (n 2) 25.

<sup>36</sup> Preamble to ILO Declaration of Philadelphia 1945, II (a).

<sup>37</sup> P. Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 70.

Perhaps the most obvious example of ILO standards being framed as human rights is the 1998 Declaration of Fundamental Principles and Rights at Work, which sets out rights to freedom of association, and freedom from forced labour, child labour, and discrimination. But other ILO standards also concern 'basic human rights, including income maintenance and security, the protection of ageing workers and equality of treatment for migrant workers'.<sup>38</sup> Furthermore, Valticos argues that all ILO labour standards should in fact be seen as giving concrete form to more abstract human rights standards, and that ILO labour standards therefore 'constitute a special category of human rights'.<sup>39</sup> On this view, the ILO provides a bridge for the idea of labour rights as human rights from 'principle to practice'.<sup>40</sup>

In addition to the presence of labour law norms in international human rights documents, human rights appear to be a plausible candidate to provide a foundational framework for labour law because human rights arguments are *already* commonly used to advance the cause of workers and labour law. Despite the historical detachment between the human rights and labour movements discussed in Section 3 of this chapter, human rights rhetoric is used in campaigns by trade unions,<sup>41</sup> and trade unions often frame the issues of collective bargaining and going on strike as matters of human rights.<sup>42</sup> Similarly, human rights organisations have

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<sup>38</sup> ILO, 'Resolution Concerning the International Covenants on Human Rights and the Measures Which the International Labor Organization Should Adopt in Regard Thereto' (1967) 50 Official Bulletin 40, 49–50.

<sup>39</sup> N. Valticos, 'International Labour Standards and Human Rights: Approaching the Year 200' (2000) 137 Int'l Lab. Rev. 135, 137.

<sup>40</sup> C.W. Jenks, *Social Justice in the Law of Nations: The ILO Impact after Fifty Years* (OUP 1970) 79.

<sup>41</sup> For examples and discussion see J.A. Gross and L. Compa (n 3); L. Compa, 'Labor's New Opening to International Human Rights Standards' (2008) 11 WorkingUSA 99; K. Kolben (n 3).

<sup>42</sup> See for example the TUC response to the consultation on the Trade Union Bill, <<https://www.tuc.org.uk/sites/default/files/Picketing%20and%20protest%20consultation%20-%20TUC%20Response.pdf>> accessed 6 August 2019.



been active in recent campaigns to improve conditions for workers,<sup>43</sup> and in opposing restrictive reforms to trade union legislation.<sup>44</sup> In addition to their inclusion in international human rights law, labour law norms such as rights to work, to decent conditions, and to join trade unions, are also found in the constitutional frameworks of many states.<sup>45</sup> Finally, human rights arguments are frequently raised in litigation aimed at protecting workers in both international and domestic courts.<sup>46</sup> Although the results of these campaigns and court cases have been mixed, they have helped to forge a close association between labour law and human rights in the eyes of the public,<sup>47</sup> and those involved in the labour and human rights movements.

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<sup>43</sup> See for example the work of Amnesty International UK, <<https://www.amnesty.org.uk/tags/workers-rights>> accessed 6 August 2019, and 'rightsinfo.org', <<https://rightsinfo.org/category/rights-at-work>> accessed 6 August 2019.

<sup>44</sup> For example, Liberty's campaign work against the Trade Union Act 2016, <<https://www.libertyhumanrights.org.uk/campaigning/trade-union-act-2016>> accessed 6 August 2019.

<sup>45</sup> 138 contain the right to work, 87 have anti-child labour provisions, 155 protect the right to join a trade union and 101 the right to strike, 87 contain rights to rest and leisure, 101 contain the right to equal pay, and 92 contain the right to a safe work environment. See the Constitute Project, <<https://www.constituteproject.org>> accessed 6 August 2019.

<sup>46</sup> See Chapter 4. For discussion see K. Ewing, 'The Implications of the ASLEF Case' (2007) 36 ILJ 425; H. Collins and V. Mantouvalou (n 5); H. Collins and V. Mantouvalou (n 4); V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights' (n 3); V. Mantouvalou, 'The Protection of the Right to Work Through the European Convention on Human Rights' (2014) 16 Cambridge Yearbook of European Legal Studies 313; K. Ewing and J. Hendy, 'Implications of Demir' (n 3); H. Collins, 'Progress towards the Right to Work in the United Kingdom' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>47</sup> Several labour rights feature prominently in a 2016 YouGov poll of the most important human rights, see <<https://yougov.co.uk/topics/politics/articles-reports/2016/03/30/which-rights-matter-most>> accessed 23 November 2019.

## *2.2 Potential benefits*

Human rights are regarded as a potentially important foundational perspective for labour law because of the benefits that are expected to flow from justifying labour law via human rights. Most significantly, the normative force and universal nature of human rights appears to make them well equipped to fill the normative gap in labour law's foundations. Other potential benefits include the prospect of widening the personal scope and regulatory domain of labour law. A human rights perspective may also be helpful in supporting the development of transnational labour law and improving scrutiny of waivers of labour law protections by workers.

Human rights appear to have the potential to fill the normative gap in labour law's traditional narrative and offer firm justificatory foundations for the discipline. The normative weight and salience of human rights, and the priority usually given to their legal protection, means they seem to offer a secure justification of labour law against political and ideological attacks. Actions that infringe human rights are illegitimate, so claiming that labour law protections are a matter of human rights rather than simply the outcome of political struggle, transforms workers 'from beggar...to chooser ('it is mine by right')'.<sup>48</sup> Human rights are 'stringent entitlements', so one consequence of aligning labour law with human rights is to make the justification of labour law 'immune from arguments of economic efficiency'.<sup>49</sup> Although legal protections of human rights are not always absolute, they 'usually have a special status, higher

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<sup>48</sup> J. Griffin, *On Human Rights* (OUP 2008) 92.

<sup>49</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 3) 171.

than ordinary legislation, and constitute standards against which state and private action are assessed'.<sup>50</sup>

As Collins says, human rights tend 'to exclude from consideration or at least override any other policies or principles, except, probably, appeals to other rights. If labour law could be justified on the basis of fundamental rights possessing this special weight, its foundations would be much more secure'.<sup>51</sup> Grounding labour law protections in human rights appears an attractive proposition because it has the potential 'to elevate their moral appeal'<sup>52</sup> and thus strike an unanswerable blow in the battle to justify labour law.

Collins and Mantouvalou identify two further potential benefits of using human rights to justify labour law, flowing from the universal and inalienable nature of human rights. The inalienable nature of human rights means that if labour law protections are matters of human rights then it should be impossible, or at least difficult, for workers to waive these protections. The law should therefore be cautious about allowing workers to contract out of their labour law protections and subject any attempted waivers to close scrutiny. The universal nature of human rights also means that grounding labour law in human rights offers the possibility of extending the scope of protections to new and atypical categories of workers, in sharp contrast to the traditional narrative's focus on the employment relationship. If labour law protections 'are perceived to be founded on fundamental rights, any exclusions from these rights would receive strict scrutiny and require justification'.<sup>53</sup> For example, if human rights provide the

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<sup>50</sup> V. Mantouvalou and P. Eeckhout, 'Accession of the EU to the ECHR: The Permeative Power of Human Rights' in C. Costello, A. Bogg and A.C.L. Davies (eds), *Research Handbook in EU Labour Law* (Edward Elgar 2016) 174.

<sup>51</sup> H. Collins, 'Theories of Rights' (n 3) 139.

<sup>52</sup> J. Fudge, 'Labour Rights as Human Rights' (n 3) 609.

<sup>53</sup> H. Collins and V. Mantouvalou (n 4) 199.

justificatory basis for labour law protections, then excluding groups such as migrant workers from the scope of these protections would be suspect.<sup>54</sup> The universality of human rights offers a response to the breakdown of the labour market paradigms which the traditional narrative was premised on.<sup>55</sup> This is why '[i]nvoking human rights in the field of labor scholarship is common in situations where more traditional labor regulation is ill-suited to addressing workers' experience in the workplace and dealing with market conditions'.<sup>56</sup>

There are at least two additional benefits of grounding labour law in human rights that flow from their universal nature. First, the ease with which they can be applied in the context of modern globalised labour markets. As human rights are held equally by all, adopting them as a justificatory framework for labour law could also allow us to 'construct transnational regimes of labour law'.<sup>57</sup> Second, adopting human rights as the foundations for labour law broadens the domain of labour law and the tools that can be used to regulate work and the workplace. While human rights are often associated with abstract legal rights embedded in international or constitutional frameworks, they can be pursued by a wide range of legal and policy mechanisms.<sup>58</sup> Human rights are therefore an appealing foundational perspective for those who want to reconceive labour law in broad terms as labour market regulation,<sup>59</sup> but do not want to depend solely on economic or market-orientated justifications of the discipline.

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<sup>54</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 3) 171.

<sup>55</sup> J. Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights' (2007) 29 *Comp. Lab. L. & Pol'y J.* 29, 31.

<sup>56</sup> E. Albin (n 3) 2.

<sup>57</sup> H. Arthurs (n 8) 23.

<sup>58</sup> A. Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315.

<sup>59</sup> C. Arup and others (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press 2006); J. Howe,

In sum, the view that human rights are a potentially important foundational idea for labour law is motivated by the belief that '[w]orkers might benefit considerably if labour law were embedded in a framework of rights that is fundamental, not merely statutory or contractual; universal, not merely class-based and parochial; and principled, not merely pecuniary'.<sup>60</sup>

### **3. The Troubled Relationship between Labour Law and Human Rights**

Given the preceding discussion of human rights as plausible and potentially important foundations for labour law it may come as no surprise that 'labor law is increasingly moving towards a human rights paradigm'.<sup>61</sup> The relationship between labour law and human rights is complex however, and the alignment of the two has been resisted and criticised by some labour lawyers. For reasons explored below, labour law and human rights have tended to run on 'parallel tracks' despite the links that exist between them.<sup>62</sup> Furthermore, although they now come into contact more frequently, human rights have had mixed results in protecting workers in practice, leaving labour lawyers with an understandable scepticism about the suitability of approaching labour law issues through the prism of human rights. This section discusses the limited interaction between human rights and labour law, and outlines some of

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'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011).

<sup>60</sup> H. Arthurs (n 8) 23.

<sup>61</sup> E. Albin (n 3) 2.

<sup>62</sup> V.A. Leary (n 2); G. Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet' (2012) 34 *Comp. Lab. L. & Pol'y J.* 217.

the criticisms made by labour lawyers of adopting a human rights perspective on the discipline.

### *3.1 Parallel tracks*

Despite the shared moral ambitions and overlaps between labour law and human rights there has historically been little engagement between the two movements, with Leary describing them as running on 'parallel tracks'.<sup>63</sup> As Novitz and Fenwick say, 'workers' rights are rarely considered within the remit of mainstream human rights mechanisms. It appears that they are considered more properly the province of the ILO'.<sup>64</sup> As a result of this, Gross and Compa felt able to describe labour law and human rights as a new field of research as recently as 2009.<sup>65</sup>

As Leary has pointed out, historically 'the international human rights movement devotes little attention to the rights of workers' and 'trade unions and labor leaders rarely enlist the support of human rights groups for the defense of workers' rights', meaning '[r]epresentatives of the two movements have little contact with each other'.<sup>66</sup> In part this is because the human rights movement focusses on civil rather than social rights and regards labour rights as less important or urgent; the concept of human rights has been narrowed 'to exclude social rights,

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<sup>63</sup> V.A. Leary (n 2).

<sup>64</sup> C. Fenwick and T. Novitz, 'The Application of Human Rights Discourse to Labour Relations: From Theory to Practice' in C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010) 27.

<sup>65</sup> J.A. Gross and L. Compa (n 3) 1.

<sup>66</sup> V.A. Leary (n 2) 22.

including workers rights'.<sup>67</sup> The 'complexity and specificity of state action required' to secure workers' rights has also created doubt over whether they should be regarded as human rights.<sup>68</sup>

In addition to the priority given to civil and political rights by human rights organisations, the lack of engagement between the two movements also flows from differences in their character, incentives and dominant ideologies. Leary points out that trade unions' focus on local and economic issues contrasts with the internationalism of the human rights movement,<sup>69</sup> and Kolben views the human rights movement as incompatible with labour law because of its elitism and legalistic approach.<sup>70</sup> Mundlak identifies the different motivations and incentives of trade unions and human rights organisations, including that unions must try to satisfy their members whilst compromising enough to maintain an ongoing relationship with employers, whereas human rights organisations do not derive their legitimacy from their members and so 'can dismiss the weight of managerial property rights at little cost to their mission'.<sup>71</sup>

Another important difference is that human rights organisations are much more willing to resort to litigation and rely on the courts, whereas labour lawyers have traditionally been sceptical of the power of law and the willingness of the judiciary to improve conditions for workers. Finally, some labour lawyers are sceptical of the ideological underpinnings of rights-

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<sup>67</sup> *ibid* 42.

<sup>68</sup> P. Macklem (n 37) 84.

<sup>69</sup> V.A. Leary (n 2) 26–7.

<sup>70</sup> K. Kolben (n 3) 484.

<sup>71</sup> G. Mundlak (n 62) 217.

talk, thinking it ‘tends to foster a libertarian dialogue, where capital’s liberty of movement and employers’ “rights to manage” are tacitly affirmed rather than challenged’.<sup>72</sup>

As Arthurs says, ‘labour rights and human rights have historically developed in parallel, because of their different (though related) intellectual and ideological origins and because states, international bodies, social actors and scholars have been unable or unwilling to integrate them into a single discourse.’<sup>73</sup> Labour law and human rights therefore often appear ‘akin to distant cousins who share a common heritage but rarely explore the extent to which they share similar values and aspirations’.<sup>74</sup> This is changing however, and there are increasing interactions between the fields of labour law and human rights in both the legal and political spheres.

In the political sphere, both trade unions and human rights organisations have run campaigns that align human rights with labour law issues. Gross and Compa give examples of human rights organisations that have ‘taken up labor’s cause’, including Human Rights Watch, Amnesty International, and Oxfam.<sup>75</sup> Kolben also gives several examples of human rights organisations which have campaigned and litigated on issues related to labour law.<sup>76</sup> In the UK context, while there has been a historical lack of engagement between labour law and

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<sup>72</sup> J. McCartin, ‘Democratizing the Demand for Workers’ Rights: Toward a Reframing of Labor’s Argument’ (2005) 52 *Dissent* 61.

<sup>73</sup> H. Arthurs (n 8) 23.

<sup>74</sup> P. Macklem (n 37) 61.

<sup>75</sup> J.A. Gross and L. Compa (n 3) 3; L. Compa, ‘Solidarity and Human Rights: A Response to Youngdahl’ (2009) 18 *New Labor Forum* 38, 42.

<sup>76</sup> K. Kolben (n 3) 455–61.



human rights there is also some shared history between the two movements,<sup>77</sup> and both trade unions and human rights organisations have run campaigns on labour law issues framed in terms of human rights, most notably in relation to the Trade Union Act 2016.<sup>78</sup>

Human rights arguments are also increasingly raised in litigation aimed at benefiting workers. The case law of the ECtHR, and the influence of human rights on English labour law is considered in the following chapter. For now it is sufficient to note that the ECtHR has recognised that the Article 11 right to freedom of association confers a right to bargain collectively and go on strike.<sup>79</sup> English courts have, albeit reluctantly, also recognised that these areas of domestic labour law are underpinned by human rights owing to the incorporation of Convention rights into English law by the Human Rights Act 1998 (HRA).<sup>80</sup> Furthermore, the ECtHR has developed a body of jurisprudence on positive obligations imposed by the ECHR, under which states are required to protect rights such as the right to private and family life and freedom of religion from interferences by private actors, including

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<sup>77</sup> The barrister sent by the TUC to defend Spanish seafarers went on to found Amnesty International, and the case was cited as one of the organizations original causes <[www.tuc.org.uk/research-analysis/reports/trade-unions-and-human-rights](http://www.tuc.org.uk/research-analysis/reports/trade-unions-and-human-rights)> accessed 23 November 2019.

<sup>78</sup> See <<https://www.libertyhumanrights.org.uk/campaigning/trade-union-act-2016>> accessed 6 August 2019; The Guardian, 16 September 2016, 'Shami Chakrabarti: trade union and human rights reforms are 'spiteful'' <<https://www.theguardian.com/uk-news/2015/sep/16/shami-chakrabarti-tuc-trade-union-human-rights-reforms-spiteful>> (accessed 6 August 2019); Amnesty International UK have a full time staff member working on trade union issues, and say that trade unions rights are 'at the heart of what we do', see <<https://www.amnesty.org.uk/trade-unions-and-human-rights>> accessed 6 August 2019.

<sup>79</sup> *Demir and Baykara v Turkey* [2008] ECHR 1345; *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251; *Danilenkov v Russia* [2009] ECHR 1243; *Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK* [2007] ECHR 184.

<sup>80</sup> *RMT v Serco* [2011] EWCA 226; *Pharmacists' Defence Association Union (PDAU) v Boots Management Services Ltd* [2017] IRLR 355; *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092.

protecting workers' rights from interference by employers.<sup>81</sup> The Inter-American human rights system and Canadian 'Charter' of rights have also been used to protect workers with some success.<sup>82</sup> Although the results of adopting a human rights approach to labour law have been mixed from a worker-protective perspective, there are increasing convergences between the two fields, in both the law and practice of human rights. The analogy of parallel tracks may therefore no longer be appropriate, clearing the way for human rights as a foundational perspective on labour law.

### *3.2 Potential problems*

The increasing convergence of labour law and human rights might be thought to reflect the view expressed by Albin that 'the promotion of labor rights via human rights is generally welcome'.<sup>83</sup> In fact however, there remains a large degree of scepticism among labour lawyers about the impact and influence of human rights on labour law. In addition to the historical lack of engagement between the two fields, there are several 'potential areas of concern, where a human rights perspective might be expected to fall short as the framework for adequate regulation of employment relations'.<sup>84</sup>

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<sup>81</sup> *Redfearn v UK* [2012] ECHR 1878; *Barbulescu v Romania* [2017] IRLR 1032; See generally A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004).

<sup>82</sup> I. Gonzalez, *The Social Rights Jurisprudence in the Inter-American Court of Human Rights: Shadow and Light in International Human Rights* (Edward Elgar 2018) ch 5; J. Fudge and H. Jensen, 'The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27 *King's Law Journal* 89.

<sup>83</sup> E. Albin (n 3) 12.

<sup>84</sup> H. Collins and V. Mantouvalou (n 4) 195–6.

The most common criticism of aligning labour law with human rights is that the individualism of human rights will lead to the neglect of the collective and class-based aspects of labour law.<sup>85</sup> Youngdahl says human rights replaces solidarity with individualism, and undermines the ability to act collectively in resisting power.<sup>86</sup> McCrudden similarly thinks that grounding labour law in human rights risks losing labour law's 'crown jewels, by sacrificing labour law's collectivist and solidarity-based roots for a much thinner set of individualist foundations'.<sup>87</sup> This worry arises because, although human rights protect the right to freedom of association, labour lawyers see freedom of association as a right specifically 'designated to mediate the conflict between labor and capital', in contrast with the more 'neutral' human rights perspective on the right.<sup>88</sup> In addition, Kumar argues that human rights cannot accommodate labour law's concerns about class subordination and conflict, because it replaces the starting point of inequality of bargaining power with the 'fiction' of equality of all human beings.<sup>89</sup>

It is not necessarily the case, however, that human rights perspectives ignore collective dimensions of labour law.<sup>90</sup> Mantouvalou points out that many traditional civil and political rights can only be exercised collectively, such as freedom of association and assembly, and

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<sup>85</sup> L. Savage, 'Labour Rights as Human Rights? A Response to Roy Adams' (2008) 12 *Just Labour* 68.

<sup>86</sup> J. Youngdahl, 'Solidarity First: Labor Rights Are Not the Same as Human Rights' (2009) 18 *New Labor Forum* 31, 34.

<sup>87</sup> C. McCrudden (n 16) 289.

<sup>88</sup> G. Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Inquiries in Law* 719, 729.

<sup>89</sup> V. Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in R. Buchanan and P. Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice*. (Hart 2016).

<sup>90</sup> For discussion of this in respect of the right to strike see K. Ewing, 'Laws Against Strikes Revisited' in C. Barnard, S. Deakin and G. Morris (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Hart 2004).

rights to family life and marriage.<sup>91</sup> It is also possible for human rights to be enforced collectively, meaning trade unions could play an important role in monitoring and enforcing workers' human rights claims,<sup>92</sup> and Aitchison uses the example of migrants' human rights to demonstrate their potential to be used effectively in collective political struggles.<sup>93</sup> There is therefore nothing 'in the nature of human rights that should make us view them as necessarily atomistic'.<sup>94</sup>

Although concerns that the individualism of human rights means they cannot justify labour law's collective elements are 'overstated',<sup>95</sup> it is true that adopting a human rights perspective on labour law will involve some change in how we perceive its nature and character. Aligning labour law with human rights would lead to 'a very different kind of labour law', which is not focussed solely on the employment relationship, and that directs workers towards courts who may be unwilling or unable to help them.<sup>96</sup> Grounding labour law in human rights also involves recognising the need to try and harmonise the rights and interests of workers and employers where possible, rather than leaving regulation of the workplace to the result of struggle between workers and employers. Human rights discourse is not blind to the conflicts that exist between workers and employers, because it acknowledges conflicts between their rights and interests. But adopting human rights as a justificatory foundation for labour law

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<sup>91</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 3) 162.

<sup>92</sup> G. Caffentzis, 'Workers Rights Are Human Rights: The Scope and Limits of a Precarious Wagesworkers Strategy' (2016) 19 WorkingUSA 25.

<sup>93</sup> G. Aitchison, 'Are Human Rights Moralistic?' (2018) 19 Human Rights Review 23.

<sup>94</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 3) 162.

<sup>95</sup> H. Collins and V. Mantouvalou (n 4) 195.

<sup>96</sup> H. Arthurs (n 8) 24.

does mean recognising the legitimate interests of employers to a greater extent than some labour lawyers may be comfortable with.

But while a human rights-based labour law would likely 'lack the historical, contextual and functional specificity of labour law as we now know it',<sup>97</sup> it may be necessary to reconceive the character or nature of labour law in this way due to the descriptive and normative inadequacy of labour law's traditional narrative. Indeed, the 'specificity' of the traditional narrative is one cause of labour law's current existential crisis.

Furthermore, the risk of human rights changing the identity of labour law or providing too narrow a justificatory basis is ameliorated under the pluralist approach to labour law's foundations advocated here. Labour law protections can be justified using human rights without reducing labour law to being solely about human rights; it can be grounded in human rights without denying its market constituting and correcting functions, or the relevance of social justice or other normative frameworks. On this approach, human rights make up only one aspect of labour law's normative foundations, and therefore do not entirely define its character and content; we do not 'have to choose between human rights and solidarity as the touchstone of effective advocacy on behalf of workers. We can call for both'.<sup>98</sup>

Objections to the individualism of human rights are partly motivated by concerns about human rights distorting the character of labour law, but the argument is also that human rights cannot provide an effective framework for securing workers' claims *because* they ignore the class and collective aspects of labour law. This concern about the instrumental benefits of

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<sup>97</sup> *ibid.*

<sup>98</sup> J.A. Gross and L. Compa (n 3) 8.

aligning labour law with human rights seems legitimate given that human rights arguments have been used to displace labour law protections in some contexts,<sup>99</sup> and that rights-based litigation has the potential undermine collective agreements.<sup>100</sup> Arthurs believes that the practical impact of rights discourse on Canadian labour law has not been positive and is therefore sceptical of attempts to frame labour law in terms of rights, saying 'at best they are feeble; at worst, they may be hurtful'.<sup>101</sup> Although collective labour law issues are recognised as matters of human rights in international and regional human rights frameworks, Fudge argues that the constitutionalisation of labour rights in EU has not led to greater protection.<sup>102</sup> As we shall see in the following chapter, human rights frameworks have also had limited practical impact on English labour law to date.

Another reason why labour lawyers have doubts about human rights as a foundational framework for the discipline is the reliance on legal rights and the courts to protect workers. Writing shortly after the introduction of the Human Rights Act 1998, which directly incorporated the ECHR into domestic law, Ewing argued that giving judges power to interpret broadly drafted rights would lead to reinforcement of common law values which

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<sup>99</sup> E. Albin (n 3) 18.

<sup>100</sup> G. Mundlak (n 62); A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 *ILJ* 126.

<sup>101</sup> H. Arthurs, 'Who's Afraid of Globalization? Reflections on the Future of Labour Law' in J.D.R. Craig and S.M. Lynk (eds), *Globalization and the Future of Labour Law* (CUP 2006).

<sup>102</sup> J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267; J. Fudge, 'Constitutionalizing Labour Rights in Europe' in K. Ewing, A. Tomkins and T. Campbell (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

have historically been opposed to interests of labour.<sup>103</sup> Novitz and Fenwick similarly argue that case studies where workers' rights are aligned with human rights 'illustrate the discomfort of some domestic courts with protection of aspects of collective bargaining (and the economic interests of workers) in human rights terms'.<sup>104</sup>

A further potential problem with adopting a human rights perspective on labour law is that it opens the door for employers to claim that labour law protections are infringing *their* human rights. Employers may be able to argue that they have human rights to property, contractual autonomy, or to establish and run a business which are infringed by the introduction of mandatory labour law protections by the state.<sup>105</sup> The underlying worry is again that human rights cannot effectively protect workers. Collins and Mantouvalou acknowledge that adopting a human rights perspective on labour law demands the balancing of competing human rights claims by workers and employers, and that this involves 'complex moral considerations', but think that there is no reason why courts are not capable of doing this effectively.<sup>106</sup> Recent decisions show that this optimism may be misplaced however, and that courts are struggling to strike an appropriate balance, at least in the eyes of labour lawyers.<sup>107</sup>

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<sup>103</sup> K. Ewing, 'The Unbalanced Constitution' in K. Ewing, A. Tomkins and T. Campbell (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

<sup>104</sup> C. Fenwick and T. Novitz, 'Application of Human Rights Discourse to Labour Relations' (n 64) 24.

<sup>105</sup> *Lochner v New York* (1905) 198 U.S. 45; N. O'Connor, 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 Eur. Lab. LJ 193.

<sup>106</sup> H. Collins and V. Mantouvalou (n 4) 8; H. Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' in H. Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 49–51.

<sup>107</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* 2007 ECR -10779; Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; A.C.L. Davies (n 100); M. Freedland and J. Prassl (eds), *Viking, Laval and Beyond* (Hart 2014); *National Union of Rail, Maritime and Transport Workers (RMT) v UK* [2014] ECHR 366; K. Arabadjieva, 'Another Disappointment in Strasbourg:

Attempts by workers to align labour law with human rights demonstrate that rights claims which impose significant costs on employers 'are less likely to receive protection through a human rights prism'.<sup>108</sup>

There is also a risk that aligning labour law with human rights has the effect of creating a two-tier system of labour law. Adopting human rights as a foundational perspective on labour law 'may implicitly denigrate the status of workers' claims where it is more difficult to phrase them in terms of human rights'.<sup>109</sup> There is a particular risk of this happening if human rights are only seen as underpinning the four labour rights included in the ILO 1998 Declaration, namely freedom of association, and rights against forced labour, child labour and discrimination.<sup>110</sup> If the influence of human rights is limited to these core norms then it would seriously detract from the utility of adopting human rights as foundations for labour law. However, this minimal approach is not reflected in the widespread inclusion of rights to decent working conditions, collective bargaining and protection from dismissal in human rights documents. Additionally, under a pluralist approach to labour law's foundations those aspects of labour law that cannot be justified using human rights may have their normative foundations in other theoretical frameworks. The fact that a labour standard or protection is not demanded as a matter of human rights does not mean that it cannot be given strong normative foundations using other theoretical frameworks.

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Unite the Union v United Kingdom' (2017) 46 ILJ 289; R. Dukes, 'The Right to Strike under UK Law: Something More than a Slogan? *NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd*' (2011) 40 ILJ 302.

<sup>108</sup> C. Fenwick and T. Novitz, 'Application of Human Rights Discourse to Labour Relations' (n 64) 25.

<sup>109</sup> *ibid* 24.

<sup>110</sup> As advocated in V.A. Leary (n 2).



Finally, if labour law is grounded in human rights there is a risk that the justification of labour law stands or falls with the idea of human rights. If labour law aligned with human rights, then those who see human rights themselves as lacking foundations will also reject the need for labour law protections. This is troubling given that the reality and normativity of human rights are rejected by some. One recent criticism of human rights is that unjustified 'rights inflation', meaning the classification of ever-increasing things as human rights, has undermined their normative force.<sup>111</sup> Paradoxically therefore, aligning labour law with human rights may contribute to undermining the normative force of human rights, which was one reason why they were regarded as providing attractive foundations in the first place. Human rights have also been criticised as an imperialist tool used in the foreign policy of more economically developed nations,<sup>112</sup> and this might give us reason to resist associating labour law with human rights.<sup>113</sup> These concerns deserve to be taken seriously. However, the risk of labour law being collateral damage in critiques on human rights are minimised under a pluralistic approach to labour law, where human rights are just one (albeit important) element of its foundations.

#### 4. Conclusion

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<sup>111</sup> D. Clément, 'Human Rights or Social Justice? The Problem of Rights Inflation' (2018) 22 *The International Journal of Human Rights* 155; M. Cranston, *What Are Human Rights?* (Basic Books 1973); P. Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 614.

<sup>112</sup> S. Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013).

<sup>113</sup> V. Kumar (n 89).

There are links between the underlying values and legal practice of labour law and human rights that make human rights a potentially plausible way of justifying the discipline. Human rights also appear to offer an important foundational perspective on labour law because they can fill the normative gap left by the traditional narrative and provide a strong justification for the discipline. The potential benefits that might flow from adopting a human rights perspective on labour law has led some labour lawyers to embrace the alignment of the two. Many labour lawyers are less enthusiastic however, as they doubt the ability of human rights to underpin labour law and are sceptical of the practical benefits that a human rights perspective might bring. For example, Novitz and Fenwick believe that human rights are unlikely to provide a justificatory framework that allows workers' to assert cost-imposing economic claims,<sup>114</sup> and that human rights more likely to be beneficial for workers on issues related to civil than social rights.<sup>115</sup> In light of this disagreement, the next chapter examines the impact and influence that human rights have so far had on English labour law.

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<sup>114</sup> C. Fenwick and T. Novitz, 'Application of Human Rights Discourse to Labour Relations' (n 64) 37.

<sup>115</sup> C. Fenwick and T. Novitz, 'Conclusion: Regulating to Protect Workers' Human Rights' in C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010) 588.

## Chapter 4: Human Rights and English Labour Law

### 1. Introduction

The previous chapter discussed the relationship between labour law and human rights, including the potential benefits of adopting human rights as foundations for the discipline and the reasons some labour lawyers oppose this. Against the backdrop of this debate, this chapter examines the influence and impact of human rights on the legal regulation of work and the workplace under current English law. It is not possible in the space available here to comprehensively map or discuss the many interactions that exist between human rights and English labour law.<sup>1</sup> Instead, the aim is to provide an overview and assessment of the current relationship between the two.

Chapter 3 also distinguished two dimensions of the relationship between human rights and labour law. The first is concerned with the protection of non-labour-related ‘civil and political’ human rights from employer interferences, including the freedoms of expression, religion, association, and the right to private life. The second takes human rights as a framework for justifying and grounding core aspects of labour law such as working time regulations, protections from dismissal and trade unions rights. Although the primary focus of this thesis

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<sup>1</sup> See R. Allen and others, *Employment Law and Human Rights* (3rd edn, OUP 2018); H. Collins, *Employment Law* (Hart 2010) chs 10–11; H. Collins, K. Ewing and A. McColgan, *Labour Law* (CUP 2019) chs 11–13.

is on human rights as a foundational perspective for labour law, this chapter also considers the protection of civil liberties in the workplace for sake of completeness.

Section 2 outlines the protection of workers' civil liberties from infringements by employers. The positive obligations imposed by the European Convention of Human Rights (ECHR) require the protection of workers' Convention rights against unjustified interferences by employers, but the incorporation of these rights by the Human Rights Act 1998 (HRA or 'the Act') has so far had little impact on domestic law in this area. Protections of civil liberties contained in EU law, whether as general principles or in the Charter of Fundamental Rights of the European Union (CFREU or 'Charter'), have similarly had limited effect. At present there is no single overarching constitutional or statutory framework in English law protecting workers' civil liberties; there is instead a patchwork quilt of constitutional, statutory and common law mechanisms.

Section 3 provides an overview of the current impact and influence of human rights as a foundational perspective for English labour law. Human rights have historically played little role in underpinning English labour law protections, but this has changed with the incorporation into domestic law of European human rights frameworks, which include protections for labour rights. As a result, some areas of English labour law must now be regarded as grounded in and underpinned by human rights. However, this survey also demonstrates that the inclusion of labour rights within European human rights law has so far had limited benefits for workers, and in some instances human rights have been used to undermine labour law.

The limited impact of human rights in protecting workers may appear to justify the doubts about aligning labour law with human rights discussed in the previous chapter. However, Section 4 sets out Mantouvalou's argument that to properly understand the relationship between labour law and human rights, we must distinguish between positivist, instrumentalist, and normative approaches.<sup>2</sup> Much of the existing analysis of labour law and human rights adopts the instrumental approach, which basis its conclusions about human rights as a foundational perspective for labour law on the success or failure of human rights arguments and mechanisms in protecting workers in practice. It is suggested, however, that this instrumental approach cannot tell us whether human rights can provide foundations for labour law. Instead, a normative philosophical approach must be adopted, under which the implications of human rights for labour law are considered and assessed on a theoretical level, rather than by reference to existing legal practice. While undoubtedly important, instrumental assessments of how best to pursue the goals of labour law are distinct from the prior question of which ideas and concepts can provide normative foundations for the discipline.

## **2. Protection of Workers' Civil Liberties**

The 'rich tapestry of rights' said to be present in the UK,<sup>3</sup> is more accurately described as a 'patchwork quilt' when it comes to the protection of civil liberties at work. The most obvious mechanism for the legal protection of civil liberties is to enshrine abstract statements of rights in a country's constitutional framework. However, ordinary legislation and common law

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<sup>2</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 Eur. Lab. LJ 151.

<sup>3</sup> HC Deb 13 Feb 2019, Vol 654 Col 368WH.

actions can also protect civil liberties, as these structures of ‘discrete legal rights’ can have the ‘cumulative effect’ of specifying and realising more abstract human rights.<sup>4</sup> English law contains a range of constitutional, statutory, and common law frameworks that help safeguard workers’ civil liberties, albeit in a piecemeal and uncoordinated manner.

## *2.1 European human rights law*

Although international human rights documents govern the ‘vertical’ relationship between individuals and the state they are also relevant for the protection of civil liberties in ‘horizontal’ relationships between private actors, because they impose positive obligations on states to protect individuals’ rights against non-state actors. These international law obligations cannot normally be directly relied upon in English courts,<sup>5</sup> but the incorporation of European human rights law into domestic law means these frameworks are an exception to this general rule.

### *European Convention of Human Rights*

Perhaps the most important source of protection for workers’ civil liberties is the ECHR, which is incorporated into English law by the HRA. The ECHR is an important source of

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<sup>4</sup> A. Bogg, ‘Only Fools and Horses: Some Sceptical Reflections on the Right to Work’ in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014) 165.

<sup>5</sup> Although they can have some influence on the interpretation of domestic legislation, *R v SoS Home Department, ex parte Brind* [1991] 1 AC 696.

human rights protection even aside from the HRA however, due to the ability for individuals to petition the European Court of Human Rights (ECtHR or 'Court') over alleged violations, and the fact that British Governments have consistently amended domestic law to comply with ECtHR judgments. Although Convention rights bind the state rather than being directly applicable to employers, the ECHR has significant implications for the protection of workers' civil liberties due to the development of positive obligations by the ECtHR.

The ECtHR has found that the Convention imposes positive duties on member states to protect Convention rights from infringement by third parties.<sup>6</sup> These obligations to protect Convention rights may require 'measures to be taken, even in the sphere of relations between individuals'.<sup>7</sup> In *Von Hannover v Germany* for example, the ECtHR found a violation of the Article 8 right to private life because German law failed to prohibit the publication of private images of individuals deemed to be public figures.<sup>8</sup>

The Court has repeatedly found that the positive obligations imposed by the ECHR require states to protect workers' Convention rights against unjustified interferences by employers. This includes in cases involving the right to freedom from slavery and forced labour,<sup>9</sup> the right

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<sup>6</sup> See A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Intersentia 2016).

<sup>7</sup> *Plattform "Arzte fur das Leben" v Austria* (1988) 13 EHRR 204 [32].

<sup>8</sup> *Von Hannover v Germany* (2005) 40 EHRR 1.

<sup>9</sup> *Siliadin v France* [2005] ECHR 545; *CN v UK* [2012] ECHR 1911.

to privacy and family life,<sup>10</sup> to a fair trial,<sup>11</sup> to freedom of expression,<sup>12</sup> religion and belief,<sup>13</sup> and association,<sup>14</sup> and to non-discrimination in the enjoyment of Convention rights.<sup>15</sup> These decisions make clear that member states must ensure protections are in place to secure workers' Convention rights against unjustified employer interferences, which must strike a fair balance between the competing rights and interests at stake. The ECtHR reviews 'whether or not the particular solution adopted can be regarded as striking a fair balance',<sup>16</sup> and 'has regularly required the State to intervene [in the employment relationship] in order to protect the human rights of employees'.<sup>17</sup>

It is not possible to discuss the ECtHR case law on the positive duty to protect workers' civil liberties fully here. A useful illustration is provided by *Barbulescu v Romania* however, where an employer read personal messages sent from an employee's work messenger account and subsequently dismissed them for breaking company rules prohibiting personal use of company computers.<sup>18</sup> The ECtHR found that the Article 8 right to private life was engaged, despite the messages being sent from the workplace, and that the Romanian authorities had breached their positive obligation to protect the right to private life. They reached this

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<sup>10</sup> *Barbulescu v Romania* [2017] IRLR 1032; *Pay v UK* [2008] ECHR 1007; *Schüth v Germany* [2011] 52 EHRR 32; *Denisov v Ukraine* Application no. 76639/11.

<sup>11</sup> *Diennet v France* (1996) 21 EHRR 554; *Le Compte v Belgium* (1982) 4 EHRR 1.

<sup>12</sup> *Vogt v Germany* (1996) 21 EHRR 20; *Kara v UK* (1999) 27 EHRR CD272; *Heinisch v Germany* (2014) 58 EHRR 31; *Palomo Sanchez v Spain* [2011] ECHR 1319.

<sup>13</sup> *Eweida v UK* [2013] ECHR 37.

<sup>14</sup> *Redfearn v UK* [2012] ECHR 1878; *Wilson v UK* [2002] IRLR 568; *Demir and Baykara v Turkey* [2008] ECHR 1345.

<sup>15</sup> *Danilenkov v Russia* [2009] ECHR 1243.

<sup>16</sup> *Hatton v UK* [2003] 37 EHRR 28, [123].

<sup>17</sup> L. Lavrysen (n 6) 88.

<sup>18</sup> *Barbulescu v Romania* (n 10).



conclusion because the domestic court had not adequately scrutinised whether the employers' monitoring was proportionate when attempting to strike the balance between the employee and employers competing rights and interests.<sup>19</sup>

The Convention does not generally prescribe 'any given manner' for fulfilling positive obligations, and states can normally choose which legal measures to adopt to protect workers' civil liberties.<sup>20</sup> There are limits to this discretion however, and the Court has sometimes found that workers' Convention rights can only be adequately protected by the introduction of a specific legal framework. For example, in *Redfearn v UK* a bus driver dismissed for his association with the far-right British Nationalist Party was not protected by English unfair dismissal law, due to not having the required level of continuous service.<sup>21</sup> In that case the UK was given the choice of either creating an exception to the qualifying period for unfair dismissal protection, or introducing 'a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation'.<sup>22</sup> In some cases therefore, the Court will require that specific mechanisms be introduced to protect civil liberties at work.<sup>23</sup>

Whatever means the state adopts to protect workers' Convention rights, the measures must provide effective protection of Convention rights, and strike a fair balance between all the competing rights and interests.<sup>24</sup> Lavrysen argues that the Court applies a 'mere fair balance

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<sup>19</sup> For discussion see J. Atkinson, 'Workplace Monitoring and the Right to Private Life at Work' 81 MLR 688.

<sup>20</sup> *Swedish Engine Drivers' Union v Sweden* [1976] ECHR 2, [50].

<sup>21</sup> *Redfearn v UK* (n 14).

<sup>22</sup> *ibid* 57.

<sup>23</sup> See also V. Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking Part I' (2014) 3 Cambridge J. Int'l & Comp. L. 407.

<sup>24</sup> *Sindicatul 'Păstorul cel Bun' v Romania* [2013] ECHR 646, [132].

test, instead of a more structured proportionality analysis' when scrutinising the protection provided by domestic legal frameworks.<sup>25</sup> However, in recent cases involving positive obligations to protect workers' Convention rights the Court has equated striking a 'fair balance' with proportionality, and asked whether the failure to protect the right was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.<sup>26</sup>

It is true that in some cases the ECtHR has applied weak scrutiny to alleged failures to protect Convention rights at work,<sup>27</sup> in part because a wider 'margin of appreciation' is afforded to domestic authorities in positive obligations cases.<sup>28</sup> But despite some disappointments, the ECHR does not permit employers to interfere with workers' Convention rights except for 'legitimate reasons, and in a manner proportionate to the aim pursued'.<sup>29</sup> The ECHR therefore requires that English law protects workers' Convention rights against disproportionate employer interferences. If such protection is absent in domestic law, workers may take their claims to Strasbourg.

### *European Union*

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<sup>25</sup> L. Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Y. Haack and E. Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014) 76.

<sup>26</sup> *Barbulescu v Romania* (n 10); *Sindicatul 'Păstorul cel Bun' v Romania* (n 24), [150].

<sup>27</sup> See for example *Pay v UK* (n 10); V. Mantouvalou and H. Collins, 'Private Life and Dismissal: *Pay v UK*' (2009) 38 ILJ 133; *Madsen v Denmark* Application no. 58341/00 (7 November 2002); *Palomo Sanchez v Spain* (n 12)..

<sup>28</sup> *Eweida v UK* (n 13).

<sup>29</sup> V. Mantouvalou, 'The Human Rights Act and Labour Law at 20 (Forthcoming)' in A. Bogg, A. Young and J. Rowbottom (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart 2020).

Another important source of human rights protections in English law, at least at the time of writing, is EU law. The main instrument is the Charter of Fundamental Rights of the EU, which has had the same legal status as the EU treaties since 2009,<sup>30</sup> although some fundamental rights are also protected as general principles of EU law.<sup>31</sup> The Charter contains many traditional civil rights, such as to private and family life, freedom of thought and belief, and of assembly and association,<sup>32</sup> and where these rights overlap with the ECHR they have the same 'meaning and scope' as under the Convention.<sup>33</sup>

Human rights protections in EU law may have horizontal effect, meaning they can be relied on in legal claims between private individuals, and so are potentially relevant in legal disputes between employers and employees. For example, the right to an effective remedy and fair trial, in Article 47 of the Charter, has been used by the English Court of Appeal to disapply domestic legislation that would have denied a worker access to protections contained in EU law.<sup>34</sup> The extent to which EU human rights law can bolster workers' civil liberties is limited by the fact that these protections only apply within the scope of EU law.<sup>35</sup> Within this context however, they can provide stronger remedies than the ECHR and HRA, as the courts are able to disapply domestic legislation.<sup>36</sup>

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<sup>30</sup> TEU, Article 6(3).

<sup>31</sup> TEU, Article 6.

<sup>32</sup> CFREU, Articles 2-12. The labour rights contained in the CFREU are discussed in the following sub-section.

<sup>33</sup> CFREU, Article 52(3).

<sup>34</sup> *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

<sup>35</sup> *Küçükdeveci v Swedex GmbH & Co* [2010] IRLR 346 (ECJ).

<sup>36</sup> As in *Google v Vidal-Hall* [2015] EWCA Civ 311.

The Charter's impact on the protection of civil liberties at work is still emerging and remains uncertain.<sup>37</sup> This is partly because it is not clear when a legal dispute falls within the scope of EU law, but it is also due to uncertainty over which articles can have direct horizontal effect and which are merely 'principles', relevant only for interpreting legislation implementing EU law.<sup>38</sup> The picture is further complicated by the uncertain status of these protections post-Brexit. The Charter is explicitly excluded from the category of 'retained' EU law under the European Union (Withdrawal) Act 2018 ('EUWA'),<sup>39</sup> and so will not be automatically carried over into domestic law when the UK leaves the EU. However, fundamental rights which are recognised as 'general principles' of EU law prior to 'exit day' will continue to have some force, albeit only within the scope of retained provisions of EU law.<sup>40</sup> More work is needed to fully understand the implications of EU fundamental rights for workers' civil liberties, both at present and post-Brexit.

## *2.2 Domestic human rights law*

The Human Rights Act 1998 is the most significant domestic framework for protecting human rights, and has 'dramatically extended the legal protection afforded to human rights' under

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<sup>37</sup> For discussion see F. Dorssemont and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019); E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019).

<sup>38</sup> CFREU, Article 52. See N. Busby, 'The EU Charter of Fundamental Rights' in C. Costello, A. Bogg and A.C.L. Davies (eds), *Research Handbook in EU Labour Law* (Edward Elgar 2016).

<sup>39</sup> EUWA 2018, s 5(4).

<sup>40</sup> EUWA 2018, s 6.

English law.<sup>41</sup> While not directly applicable to private-sector employers, the HRA has the potential to significantly impact on the protection of workers' civil liberties due to the indirect horizontal effect created by ss 3 and 6 of the Act. It is yet to fulfil this potential however, and its influence on workers' civil liberties remains marginal. Although at the early stages of development, common law constitutional rights and principles may also be capable of providing some protection to workers' civil liberties.

### *HRA and horizontal effect*

The HRA incorporates Convention rights into domestic law,<sup>42</sup> and was intended to 'bring rights home'<sup>43</sup> by making the rights protections provided at Strasbourg available in domestic courts.<sup>44</sup> Section 2 of the Act requires domestic courts and tribunals to 'take into account' ECtHR jurisprudence when determining questions relating to these rights,<sup>45</sup> which English courts have interpreted as requiring them to 'follow any clear and constant jurisprudence' of the ECtHR.<sup>46</sup> Despite recent acknowledgments that domestic courts can depart from the ECtHR position in some circumstances,<sup>47</sup> the courts generally apply the 'mirror principle',

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<sup>41</sup> M. Elliott and R. Thomas, *Public Law* (2nd edn, OUP 2014) 687.

<sup>42</sup> Including Articles 2-12, and Articles 1-3 of the First Protocol, HRA 1998 sch 1.

<sup>43</sup> Home Office, *'Rights Brought Home: The Human Rights Bill'* (1997) Cm 3782.

<sup>44</sup> *R v SoS for Foreign and Commonwealth Affairs, ex parte Quark Fishing Ltd* [2005] UKHL 57, Lord Nicholls at [34].

<sup>45</sup> HRA 1998, s 2.

<sup>46</sup> *R (Alconbury) v SoS for Environment, Transport and the Regions* [2001] UKHL 23, Lord Slynn at [26].

<sup>47</sup> *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; *Ambrose v Harris* [2011] UKSC 43; *R v Horncastle & Others* [2009] UKSC 14.

under which they must 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'<sup>48</sup>

The HRA's main mechanisms for protecting human rights are contained in sections 3, 4, and 6. The HRA's impact on legislation is governed by ss 3 and 4. Section 3(1) requires that, '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. This interpretive obligation 'is a very strong and far reaching one';<sup>49</sup> in order to render legislation compatible with Convention rights, s 3 entitles courts to depart from the natural meaning of the statutory wording,<sup>50</sup> to construe legislation in manner different to that intended by Parliament,<sup>51</sup> and even to read words in or out of the statutory text.<sup>52</sup> This creates the potential for indirect horizontal effect of Convention rights, as courts must ensure they interpret and apply legislation, including labour law legislation, in a manner compatible with the ECHR.

There are, however, limits to the interpretations that are 'possible' under s 3. Legislation must not be given a meaning that is expressly contradicted by the provisions and words read into a statute must be consistent with the 'fundamental features' of the legislation.<sup>53</sup> The courts must also not cross the line from interpretation to judicial legislation; they cannot 'attempt to rewrite the legislation',<sup>54</sup> or adopt interpretations which have wide ranging policy

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<sup>48</sup> *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, Lord Bingham at [20].

<sup>49</sup> *Attorney-General's Reference (No 4 of 2002)* [2004] UKHL 43, Lord Bingham at [28].

<sup>50</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>51</sup> *R v A (No 2)* [2001] UKHL 25.

<sup>52</sup> *R (GC) v Commissioner of Police of the Met* [2011] UKSC 21; *Principle Reporter v K* [2010] UKSC 56.

<sup>53</sup> *R v A (No 2)* (n 51); *R (Anderson) v SoS Home Department* [2002] UKHL 46; *Re S (care order)* [2002] UKHL 10..

<sup>54</sup> *R (Wright) v SoS for Health* [2009] UKHL 3, Hale at [39].

implications.<sup>55</sup> Despite these limits, and the ongoing debate regarding its proper application,<sup>56</sup> s 3 of the HRA is a powerful mechanism for protecting human rights.<sup>57</sup>

In those ‘exceptional’ cases where legislation cannot be interpreted in line with Convention rights,<sup>58</sup> s 4 of the HRA gives courts the power to issue a declaration of incompatibility. Declarations do ‘not affect the validity, continuing operation or enforcement’ of legislation,<sup>59</sup> and the Government has no legal obligation to bring the law into line with the Convention.<sup>60</sup> However, declarations of incompatibility have generally led to the law being amended,<sup>61</sup> supporting Ewing’s view that declarations of incompatibility amount to ‘a de facto judicial power to procure the amendment of legislation’.<sup>62</sup>

Section 6 of the HRA may also help protect workers’ civil liberties from interferences by employers. Under s 6, it is unlawful for public authorities ‘to act in a way which is incompatible with a Convention right’.<sup>63</sup> Claims can be brought against public authorities by

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<sup>55</sup> *Bellinger v Bellinger* [2003] UKHL 21; *AS (Somalia) v SoS Home Department* [2010] UKSC 49.

<sup>56</sup> T.R.S. Allan, ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective’ (2006) 59 *Current Legal Problems* 27; A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2008); A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009); G. Phillipson and A. Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 *MLR* 878.

<sup>57</sup> A. Kavanagh, ‘What’s so Weak about “Weak Form Review”?’ (2015) 13 *I-CON* 1008.

<sup>58</sup> *R v A (No 2)* (n 51), Lord Steyn at [44]; *Attorney-General’s Reference (No.4 of 2002)* (n 49), Lord Bingham at [28].

<sup>59</sup> HRA 1998, s 4(6)(a).

<sup>60</sup> Although they can fast-track amendments to legislation using HRA 1998 s 10.

<sup>61</sup> It has been suggested that there is an emerging constitutional convention that they do so, A. Kavanagh (n 56) 289; J. King, ‘Parliament’s Role Following Declarations of Incompatibility’ in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

<sup>62</sup> K. Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 *MLR* 79, 92.

<sup>63</sup> HRA 1998, s 6.

victims of non-Convention compliant acts,<sup>64</sup> and courts have a broad discretion to determine the appropriate remedy.<sup>65</sup> Courts and tribunals are expressly included within the Act's definition of 'public authority',<sup>66</sup> meaning that they act unlawfully if their judgments are inconsistent with Convention rights. Courts must therefore decide cases in a manner which respects workers' rights, even when applying and developing the common law. This raises the possibility of the common law being radically reshaped to protect workers' Convention rights.

However, the extent to which s 6 requires the courts to re-assess and reshape the common law when adjudicating cases between private individuals is disputed. There are many models of indirect horizontal effect potentially created by s 6,<sup>67</sup> with some scholars advocating 'strong' forms that require the courts to create new common law actions to protect Convention rights,<sup>68</sup> and others supporting more moderate forms that only require courts to adapt existing actions,<sup>69</sup> or develop the law incrementally in line with Convention rights.<sup>70</sup> The stronger the model of indirect horizontal effect under s 6, the greater the HRA's potential to protect workers' civil liberties.

The HRA clearly has the potential to help protect workers' civil liberties. Those employed in the public sector can bring claims directly under the Act in response to infringements of their

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<sup>64</sup> *ibid*, s 7.

<sup>65</sup> *ibid*, s 8.

<sup>66</sup> *ibid*, s 3(a).

<sup>67</sup> A. Young, 'Mapping Horizontal Effect' in D. Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).

<sup>68</sup> W. Wade, 'Horizons of Horizontality' (2000) 116 LQR 217.

<sup>69</sup> M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] Public Law 423.

<sup>70</sup> G. Phillipson and A. Williams (n 56).



Convention rights by their public authority employers, whereas those in the private sector must rely on the indirect horizontal effects created by the HRA.<sup>71</sup> Under ss 3 and 6 domestic courts must interpret and apply labour law legislation and the common law in a manner compatible with the ECtHR's jurisprudence, including on the state's positive obligations to protect Convention rights. So far as possible therefore, English law must be applied in a way that does not permit disproportionate interferences with workers' Convention rights by employers. Where this is not possible, s 4 can likely be used to secure an amendment to the law.

#### *HRA and workers' civil liberties*

To date, the courts have been 'very conservative in their approach to the horizontal application of the Human Rights Act',<sup>72</sup> and the HRA has had only marginal impact on the protection of workers' civil liberties from employer interferences. The most significant influence has been on the protection of workers' civil liberties under the law of unfair dismissal, but even here its impact has been limited.

In *X v Y*, the Court of Appeal accepted that the HRA requires employment law legislation to be interpreted in line with the Convention, including in disputes between private parties, and suggested that a different approach to assessing the fairness of dismissals should therefore be applied where Convention rights are at stake.<sup>73</sup> In normal cases, tribunals assess the fairness

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<sup>71</sup> See G. Morris, 'The Human Rights Act and the Public/Private Divide in Employment Law' (1998) 27 ILJ 293.

<sup>72</sup> B. Dickson, *Human Rights and the United Kingdom Supreme Court* (OUP 2013) 86.

<sup>73</sup> *X v Y* (2004) ICR 1634.

of dismissals by asking if they fall within the band of responses open to a reasonable employer.<sup>74</sup> This band of reasonable responses ('BoRR') test for unfair dismissal has been widely criticised by scholars,<sup>75</sup> but continues to be applied.<sup>76</sup> In *X v Y*, Mummery J stated that dismissals that violate Convention rights would normally fall outside the band of reasonable responses, and therefore be found unfair, but accepted that in some circumstances the BoRR test will not adequately protect Convention rights. This recognition is welcome, given that the BoRR test undoubtedly provides lesser scrutiny than required by the ECHR.<sup>77</sup> Given this, Mummery J suggested that when human rights are implicated in dismissal cases tribunals should ask themselves was 'the interference with the employee's Convention rights by dismissal justified?'<sup>78</sup> Under this approach 'a dismissal that unjustifiably breaches Convention rights cannot be fair'.<sup>79</sup>

Although the approach suggested in *X v Y* appears to bring the law of unfair dismissal into line with the state's positive obligation to protect employees' Convention rights from employers this development has been undermined by subsequent cases, where human rights

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<sup>74</sup> *Iceland Frozen Foods v Jones* [1983] ICR 17 (EAT).

<sup>75</sup> H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 37–40; A.C.L. Davies, 'Judicial Self Restraint in Labour Law' 38 ILJ 278; A. Freer, 'The Range of Reasonable Responses Test - From Guidelines to Statute' (1998) 27 ILJ 335; H. Collins, K. Ewing and A. McColgan, *Labour Law* (CUP 2012) 823–33.

<sup>76</sup> *HSBC v Madden* [2000] ICR 1283; *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16.

<sup>77</sup> H. Collins and V. Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909.

<sup>78</sup> *X v Y* (n 73), [64]. Note however, that a dismissal which infringes a Convention right may still be found fair if there is another reason for the dismissal unrelated to the infringement, see discussion in J. Atkinson (n 19) 697–700.

<sup>79</sup> H. Oliver, 'Employment Law' in D. Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 356.

issues have been ignored or Convention rights wrongly found not to be at stake.<sup>80</sup> Human rights considerations were absent in *Gosden* for example, where the dismissal of an employee for sending an offensive email between private email accounts was found to be fair, with the tribunal entirely missing the horizontal effect created by the HRA and finding that Convention rights were inapplicable because the employer was not a public authority.<sup>81</sup>

There have also been attempts to backtrack from the recognition in *X v Y* that the BoRR test does not provide sufficiently strict scrutiny of dismissals that interfere with Convention rights.<sup>82</sup> The most striking example is *Turner v East Midlands Trains*, where Elias J stated that ‘the band of reasonable responses test provides a sufficiently robust, flexible and objective analysis of all aspects of the decision to dismiss to ensure compliance with Article 8’ because a ‘heightened standard’ could be adopted in cases where the consequences for the employee are particularly grave.<sup>83</sup> He went on to comment that the BoRR test might even provide stronger protection to employees’ human rights than found in Strasbourg, because of the ‘light touch’ approach to rights protection in the employment context taken by the ECtHR.<sup>84</sup>

A further illustration of the limited effect of the HRA in this context is the lack of any domestic challenges to the qualifying conditions placed on unfair dismissal protections in cases involving Convention rights. The reasoning in *Redfearn v UK*, that dismissals interfering with Article 11 must not be subject to a qualifying period, is ‘equally applicable to all Convention

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<sup>80</sup> See for example, *X v Y* (n 73); *Pay v UK* (n 10); *Atkinson v Community Gateway Association* [2014] IRLR 834; *GM Packaging Ltd v Haslem* (2014) UKEAT/0259/13/LA, [33].

<sup>81</sup> *Gosden v Lifeline Project Ltd* ET/2802731/09.

<sup>82</sup> *Leach v OFCOM* [2012] EWCA Civ 959.

<sup>83</sup> *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [52]-[56].

<sup>84</sup> *ibid*; citing *Palomo Sanchez v Spain* (n 12).

rights that create positive obligations'.<sup>85</sup> However, there are yet to be domestic challenges to the qualification period for dismissals that interfere with other Convention rights. Similarly, the reasoning in *Redfearn* applies equally to the restriction of unfair dismissal protection to 'employees' rather than workers, meaning it must be justified as proportionate, but there is yet to be any domestic challenge to this restriction.<sup>86</sup>

Finally, the HRA's lack of impact in protecting workers' civil liberties is demonstrated by the fact that courts have not undertaken assessments of whether statutory frameworks relating to the protection of Convention rights at work are consistent with the positive obligations imposed by the ECHR.<sup>87</sup> Despite the potential for the HRA to secure workers civil liberties, there has been 'remarkable continuity' with previous case law.<sup>88</sup>

### *Common law constitutional protections*

There may be some scope for common law constitutional principles and rights to protect workers' civil liberties in future. Under the principle of legality for example, courts must interpret legislation in a manner consistent with common law fundamental rights unless there are 'clear and specific' statutory words indicating otherwise.<sup>89</sup> Although it is yet to influence

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<sup>85</sup> H. Collins and V. Mantouvalou (n 77) 915.

<sup>86</sup> For a recent sign of movement in this direction, see *Gilham v Ministry of Justice* [2019] UKSC 44.

<sup>87</sup> Statutes that need to be scrutinised in this way include the Equality Act 2010, the Public Interest Disclosure Act 1998, and the Data Protection Act 2018 among others.

<sup>88</sup> A. Sanders, 'The Law of Unfair Dismissal and Behaviour Outside Work' (2014) 34 *Legal Studies* 328.

<sup>89</sup> *R v Secretary of State for the Home Dept, ex p Pierson* [1998] A.C. 539, 587; *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 A.C. 115.

the interpretation of employment law legislation, the principle of legality could therefore protect workers' civil liberties in a similar manner to the obligation under s 3 of the HRA.<sup>90</sup>

In recent decisions domestic courts have emphasised the role of the common law in protecting fundamental rights.<sup>91</sup> Cases have so far recognised common law rights to life,<sup>92</sup> freedom of expression,<sup>93</sup> access to the courts and a fair trial,<sup>94</sup> and respect for human dignity.<sup>95</sup> Common law constitutional rights can certainly help protect workers' civil liberties against 'vertical' infringements by the state,<sup>96</sup> but they may also be capable of applying 'horizontally' and therefore protect workers from infringements by employers.<sup>97</sup> The implications of common law constitutional rights in the employment sphere are under-researched at present, but may well prove to be significant.<sup>98</sup>

### *2.3 General legislative and private law protections*

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<sup>90</sup> R. French, 'The Principle of Legality and Legislative Intention' (2019) 40 Statute Law Review 40; P. Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40 Statute Law Review 53.

<sup>91</sup> *A v BBC* [2014] UKSC 25; *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591; P. Sales (n 90); P. Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 Cambridge Law Journal 86.

<sup>92</sup> *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51.

<sup>93</sup> *R v SoS Home Department, ex parte Brind* (n 5); *R v. Secretary of State for the Home Dept, ex p Simms* (n 89).

<sup>94</sup> *Bernard v State of Trinidad and Tobago* [2007] UKPC 34; *R v Shayler* [2003] 1 AC 247..

<sup>95</sup> *R (Osborn) v Parole Board* [2014] AC 1115.

<sup>96</sup> *R (Unison) v Lord Chancellor* [2017] UKSC 51.

<sup>97</sup> See for example *Rhodes v OPO* [2015] UKSC 32.

<sup>98</sup> A. Bogg, 'The Common Law Constitution at Work: *R (on the Application of Unison) v Lord Chancellor*' (2018) 81 MLR 509.

While not generally thought of as human rights protections, there are a range of mechanisms in general legislation and private law that protect workers' civil liberties. These statutory and common law mechanisms protect aspect of workers' rights to life, bodily integrity, and private life among others. The role of these frameworks in protecting human rights is often overlooked in human rights scholarship, even by those who recognise the 'plethora' of human rights protections that exist in English law.<sup>99</sup> Rather than a comprehensive survey, this section provides some illustrative examples of statutory and common law mechanisms that safeguard workers' civil liberties from employers.

Many legislative and common law frameworks that protect workers' civil liberties from infringement by employers are generally applicable, rather than focussed specifically on the workplace. The protections provided to the right to life are a good example; workers' right to life is 'protected first and foremost by laws prohibiting murder and other forms of homicide' as well as the generally applicable law of tort,<sup>100</sup> rather than any workplace-specific legal framework. Other civil liberties are similarly protected from horizontal interferences by a range of generally applicable mechanisms,<sup>101</sup> and these provide important protections to workers.

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<sup>99</sup> For example, A. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 212–3.

<sup>100</sup> P. Yowell, 'From Universal to Legislated Rights' in P. Yowell, F. Urbina and G. Webber (eds), *Legislated Rights* (CUP 2018) 121.

<sup>101</sup> The right to privacy for example, is protected by the Investigatory Powers Act 2016, Data Protection Act 2018, and the tort of misuse of private information in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

## *Legislation*

In addition to generally applicable legislation protecting civil liberties, some statutory frameworks are specifically concerned with the protection of civil liberties at work. No comprehensive statutory framework exists in English law to protect workers' civil liberties, and piecemeal protection is instead provided by a variety of statutes.

The most significant of these is that of unfair dismissal, contained in the Employment Rights Act 1996, although even this fails to provide comprehensive protection for workers' civil liberties.<sup>102</sup> Other statutory frameworks that protect workers' civil liberties include the Health and Safety Act 1974, which protects workers' rights to life and health; the Public Interest Disclosures Act 1998, which protects whistle-blowers' freedom of expression; and the protections of freedom of association contained in the Trade Union Relations (Consolidation) Act 1992 ('TULRCA'). The law on unlawful deductions from wages is another workplace-specific mechanism that protects civil rights, in this case the right to property.<sup>103</sup> Although not usually seen as doing so, statutory mechanisms such as these specify and protect human rights in a manner tailored to the employment context.

## *Private law*

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<sup>102</sup> H. Collins, *Justice in Dismissal* (n 75) ch 6; V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912; P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 ILJ 504.

<sup>103</sup> Employment Rights Act 1996, s 13.

Labour lawyers have good grounds for scepticism about the ability of the common law to further workers' interests,<sup>104</sup> but both private law and human rights are 'concerned with the protection of certain fundamental values',<sup>105</sup> and there are some indications that contract and tort law both have the potential to protect aspects of workers' civil liberties

Contract law initially seems an unlikely source of protection for workers' civil liberties. Employees' lack of bargaining power means they will generally be unable to bargain for express contractual terms protecting their civil liberties and may often have to sign contracts permitting rights infringements by employers. The starting point at common law is that such terms are valid, as people are entitled to contract to work on any terms they want, including 'in a manner which violated what some would regard as human rights'.<sup>106</sup>

Despite this, the courts can use contract law rules to help safeguard to civil liberties at work. First, civil liberties can be protected through contractual interpretation by courts adopting narrow interpretations of express terms that interfere with workers' civil liberties, thereby minimising their detrimental effect.<sup>107</sup> Second, implied contractual terms may provide some protection for workers' civil liberties. For example, the implied term for employers to provide a safe working environment provides some protection for the right to life for example,<sup>108</sup> and

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<sup>104</sup> A.C.L. Davies (n 75); K. Ewing, 'The Sense of Measure: Old Wine in New Bottles, or New Wine in Old Bottles, or New Wine in New Bottles' (2010) 19 *Social & Legal Studies* 231.

<sup>105</sup> C. O'Connell, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 *Hibernian Law Journal* 77, 77.

<sup>106</sup> K. Ewing, 'The Unbalanced Constitution' in K. Ewing, A. Tomkins and T. Campbell (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 105.

<sup>107</sup> As in, *Smith v Trafford Housing Trust* [2012] EWHC 3221, at [66]-[72].

<sup>108</sup> *Waltons & Morse v Dorrington* [1997] IRLR 488.



employers' implied duties relating to wages protects employees' right to property.<sup>109</sup> The implied term of mutual trust and confidence has the greatest potential for protecting civil liberties at work; by prohibiting 'harsh and oppressive' treatment by employers,<sup>110</sup> it safeguards aspects of workers' rights to private and family life,<sup>111</sup> expression,<sup>112</sup> and association.<sup>113</sup> However, the protection provided by the term is undermined by employers' ability to argue they had a 'reasonable and proper cause' for their conduct.<sup>114</sup>

Workers' civil liberties are also partially protected by tort law. An employer who restricts a worker's freedom of movement, discloses private information about them, or infringes upon their right to bodily security may be liable for the torts of wrongful imprisonment, misuse of private information, and trespass against the person respectively.<sup>115</sup> The non-delegable duty of care owed by employers to their employees also provides some workplace-specific protection to the rights to life and bodily security; employers must provide a safe workplace and adequate protective equipment,<sup>116</sup> and may have more demanding duties in respect of employees' life and health than those normally found in tort law.<sup>117</sup>

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<sup>109</sup> *Beveridge v KLM UK* [2000] IRLR 765.

<sup>110</sup> *Malik v BCCI* [1998] AC 20, Lord Nicholls at [38].

<sup>111</sup> *UB (Ross Youngs) Ltd v Elsworthy* [1993] UKEAT 264/91; *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308.

<sup>112</sup> *Governors of Exeter School v Wright* EAT/354/99; *Smith v Trafford Housing Trust* (n 107).

<sup>113</sup> *Stevens v University of Birmingham* [2015] EWHC 2300; *Leeds Dental Team Ltd v Rose* [2014] ICR 94.

<sup>114</sup> For discussion see J. Atkinson, 'Implied Terms and Human Rights in the Contract of Employment (Forthcoming)' [2019] ILJ.

<sup>115</sup> *Wilson v Pringle* [1986] 2 All ER 440; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; *Campbell* (n 101).

<sup>116</sup> *Pearce v Round Oak Steel Works Ltd* [1969] 1 W.L.R. 595; *McGhee v NCB* [1973] 1 W.L.R. 1.

<sup>117</sup> *Hatton v UK* (n 16).

## **2.4 Conclusion**

The protection of civil liberties in the workplace ‘subtly challenges the exercise of an employers’ traditional power of command and control’.<sup>118</sup> Despite lacking any overarching or comprehensive framework protecting workers’ civil liberties, English law contains a range of mechanisms that function to protect civil liberties against infringements by employers. European and domestic human rights law, as well as normal legislative and private law frameworks, come together to form a ‘patchwork quilt’ of workplace civil liberties protections. It has only been possible to provide a brief overview of these mechanisms here. Although not the focus of this thesis, assessing the adequacy and effectiveness of this body of law should be an important concern for labour lawyers.

## **3. Human Rights as a Foundational Perspective**

English law has not traditionally regarded labour law norms as grounded in human rights or protected them via human rights mechanisms. This has changed with the incorporation of European human rights frameworks that protect labour rights as human rights. These have introduced human rights as a foundational perspective for some domestic labour law, and some areas of domestic labour law must now be regarded as grounded in human rights. However, the results of justifying and protecting labour law norms via human rights

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<sup>118</sup> H. Collins and V. Mantouvalou, ‘Human Rights and the Contract for Employment’ in M. Freedland and others (eds), *The Contract of Employment* (OUP 2016) 202.

mechanisms are mixed, and in many cases this approach has failed to lead to better protection for workers.

### *3.1 English labour law*

The inclusion of many core labour law norms in human rights documents means that international human rights law appears to provide ‘a solid grounding for the principal elements of a labour law system’.<sup>119</sup> Although these provisions have little impact on English law unless incorporated by Parliament, domestic labour law could nevertheless be viewed as articulating and implementing these human rights in more concrete terms. With minor exceptions however, there is a marked absence of human rights arguments and mechanisms being used to justify or ground English labour law.

#### *The absence of human rights as a foundational perspective*

It may well be correct that a ‘human rights perspective would appear to endorse a pattern of employment law that is very similar to that which has emerged in recent decades’.<sup>120</sup> But even if English labour law is consistent with human rights as a foundational perspective, human rights arguments and legal frameworks have had little impact on its development.

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<sup>119</sup> H. Collins, ‘Theories of Rights as Justifications for Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 141.

<sup>120</sup> H. Collins and V. Mantouvalou (n 118) 195.

The absence of human rights as a foundational perspective for either 'labour law or for the individual employment relation' is a 'distinctive' feature of UK employment law.<sup>121</sup> This contrasts with jurisdictions whose constitutions provide 'guarantees for remuneration, leisure and occupational health and safety, while prohibiting child labour and even addressing matters of profit-sharing and co-management'.<sup>122</sup> Rights to join trade unions, bargain collectively, and go on strike are included in many constitutions,<sup>123</sup> something 'unthinkable in British conventional wisdom'.<sup>124</sup> English labour law is underpinned by the idea of combatting unequal bargaining power through industrial pluralism, 'rather than any ideology of social rights'.<sup>125</sup>

Human rights played little part in the introduction of mandatory statutory employment rights in English law; they were not used as the justification for introducing protections relating to working conditions and pay, or redundancy and unfair dismissal. Nor are these protections underpinned by human rights mechanisms or frameworks in English law. Instead, the statutory 'floor of rights' was intended to set minimum conditions upon which collective bargaining could build, as well as to counteract inequality of bargaining power for workers who could not bargain collectively for themselves.<sup>126</sup> Furthermore, while equal pay and

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<sup>121</sup> *ibid* 189.

<sup>122</sup> G. Mundlak, 'The Right to Work: Linking Human Rights and Employment Policy' (2007) 146 *Int'l Lab. Rev.* 189, 193.

<sup>123</sup> 101 national constitutions contain the right to strike, and 26 contain the right to collectively bargain, 'Constitute Project' <<https://www.constituteproject.org/>> accessed 25 November 2019.

<sup>124</sup> B. Wedderburn, 'Labour Law 2008: 40 Years On' (2007) 36 *ILJ* 397, 406.

<sup>125</sup> B. Hepple, *Labour Laws and Global Trade* (Hart 2005) 259. As evidenced by the minimal discussion of, and lack of index entry for, either 'human rights' or the ECHR in P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Clarendon 1993).

<sup>126</sup> B. Wedderburn, *The Worker and the Law* (3rd ed, Penguin 1986) 6.

discrimination protections ‘introduced the notion of fundamental human rights in the employment relationship’,<sup>127</sup> this was due to the influence of EU law.

Neither have human rights played a significant role in the development of English law relating to trade unions, collective bargaining, or industrial action. Far from protecting workers’ rights to join trade unions and act collectively as human rights, the common law imposes contract and tort law liability on workers and trade unions who participate in industrial action.<sup>128</sup> The English courts’ dismissive attitude towards collective labour rights is epitomised by the statement that ‘[i]n this country, the right to strike has never been much more than a slogan or a legal metaphor’.<sup>129</sup>

### *The limited impact of human rights*

Despite the general absence of human rights, there are some instances where English labour law has been influenced by values ‘that today might be articulated in the language of [human] rights’.<sup>130</sup> For example, something resembling a common law right to work has been developed via the law on restrictive covenants,<sup>131</sup> so that contract terms restricting an

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<sup>127</sup> B. Hepple, ‘Four Approaches to Modernisation of Individual Employment Rights’ in R. Blanpain and M. Weiss (eds), *Changing Industrial Relations and Modernisation of Labour Law: Liber Amicorum in Honour of Professor Marco Biagi* (Kluwer 2003) 183.

<sup>128</sup> *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *Secretary of State v ASLEF (No 2)* [1972] 2 QB 455.

<sup>129</sup> *Metrobus v Unite The Union* [2009] EWCA Civ 829, Kay LJ at [118]; R. Dukes, ‘The Right to Strike under UK Law: Not Much More than a Slogan? *Metrobus v Unite the Union* [2009] EWCA Civ 829’ (2010) 39 ILJ 82.

<sup>130</sup> H. Collins and V. Mantouvalou (n 118) 190.

<sup>131</sup> H. Collins, ‘Progress towards the Right to Work in the United Kingdom’ in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

individual's right to work will be void as a restraint on trade unless they can be justified as reasonable.<sup>132</sup> In addition, a term may sometimes be implied into employment contracts providing employees with a right to be provided with work,<sup>133</sup> and the implied term of trust and confidence partially protects the right to work as it may be breached if an employee is suspended without proper cause.<sup>134</sup> The ideas of rights to property and liberty have also had some influence on the common law of the employment contract.<sup>135</sup> Overall however, human rights have had notably little impact and influence as a foundational perspective for English labour law.

### ***3.2 European Convention of Human Rights***

The ECHR primarily protects civil and political rights, and we have already seen that the positive obligations imposed by the ECHR require the protection of these rights against employer infringements. However, the Convention does contain two labour rights; the right to freedom from slavery and forced labour in Article 4, and the right to form and join trade unions as part of the Article 11 right to freedom of association. The ECtHR has interpreted these provisions in a way that encompasses rights to non-exploitation at work and rights to bargain collectively and go on strike. In addition, the Court has protected elements of the right to work under the Article 8 right to private and family life. The HRA's incorporation of this

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<sup>132</sup> For recent discussion see *Tillman v Egon Zehnder Ltd* [2019] UKSC 32.

<sup>133</sup> *Carmichael v National Power* [1998] ICR 1167; *Christie v Johnston Carmichael* [2010] IRLR 1016.

<sup>134</sup> *London Borough of Lambeth v Agoreyo* [2019] EWCA Civ 322.

<sup>135</sup> *H. Collins and V. Mantouvalou* (n 118) 192.

jurisprudence into English law means that human rights provide foundations for aspects of domestic labour law.

The protection of labour rights under the ECHR has largely been achieved by the ECtHR's adoption of an 'integrated approach' to interpreting the Convention,<sup>136</sup> whereby other human rights and international law documents, including those relating to economic and social rights, are relied upon to guide the content and application of Convention rights.<sup>137</sup> The ECtHR was previously reluctant to consider issues related to social rights but now accepts that it 'can and must take into account elements of international law other than the Convention',<sup>138</sup> and has drawn upon ILO and UN documents and jurisprudence to bring labour rights within the protective scope of the ECHR. This, in combination with the ECtHR's jurisprudence on positive obligations, has led to 'a profound reorientation ... of Convention rights in the context of the workplace and employment relations'.<sup>139</sup>

### *Non-exploitation*

The Article 4 right to freedom from slavery and forced labour has been found to require legal protections for individuals against extreme labour exploitation. Article 4(1) and (2) state that 'no one shall be held in slavery or servitude' or 'be required to perform forced or compulsory labour', subject to the limited exceptions set out in Art.4(3). In *Siliadin v France*, the ECtHR

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<sup>136</sup> V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRLR 529.

<sup>137</sup> *ibid*; H. Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 MLR 619.

<sup>138</sup> *Demir* (n 14), [85].

<sup>139</sup> H. Collins, 'Civil Liberties in the Workplace' (n 137) 627.

found that the exploitation of a migrant domestic worker amounted to servitude and forced labour, and that there has been a failure to protect her Article 4 rights.<sup>140</sup> The case involved a girl brought from Togo to France, who had her passport taken from her, and was working 15 hours every day as a domestic labourer with little to no pay. The ECtHR found that these conditions amounted to servitude and forced labour, and that 'States have positive obligations ... to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice'.<sup>141</sup> The absence of any such protection under domestic law meant there was breach of Article 4. In reaching this result the Court adopted an integrated approach to interpreting the ECHR and was guided by the definition of forced labour in ILO Convention 29.<sup>142</sup>

In *CN v UK*, another case involving migrant workers performing domestic labour under exploitative conditions, the UK was found to have breached the positive obligation to protect Article 4 due to the lack of domestic criminal law protections specifically targeting labour exploitation that amounts to modern slavery and servitude.<sup>143</sup> The Modern Slavery Act 2015 was introduced following this decision, making it an offence to hold a person 'in slavery or servitude' or requiring them to perform 'forced or compulsory labour', with these terms 'to be construed in accordance with Article 4' of the ECHR.<sup>144</sup> A 'right to non-exploitative work can,

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<sup>140</sup> *Siliadin v France* (n 9).

<sup>141</sup> *ibid*, [89].

<sup>142</sup> *ibid*, [116]; V. Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers' (2006) 35 *ILJ* 395.

<sup>143</sup> *CN v UK* (n 9), [76]-[77].

<sup>144</sup> Modern Slavery Act 2015, s 1.



therefore, be said to be present in case law of the ECtHR,<sup>145</sup> and is now also reflected in English law.

### *Access to work*

Despite not being expressly included in the Convention, and the fact that the ECHR 'does not impose duties on the state to promote full employment',<sup>146</sup> the ECtHR has nevertheless protected workers' right to seek employment and access work, which are key elements of the right to work.

The ECtHR has recognised that barriers to accessing work may violate the Article 8 right to private life, because it is 'in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'.<sup>147</sup> In *Sidabras v Lithuania* for example, a ban on former KGB officers working in many public and private sectors jobs was found to violate Articles 8 and 14.<sup>148</sup> The ECtHR again adopted an integrated approach to interpretation, saying it 'attaches particular weight' to the right to work contained in the European Social Charter and the interpretation of that right by the European Committee of Social Rights.<sup>149</sup>

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<sup>145</sup> V. Mantouvalou, 'The Protection of the Right to Work Through the European Convention on Human Rights' (2014) 16 Cambridge Yearbook of European Legal Studies 313, 328.

<sup>146</sup> *ibid* 331.

<sup>147</sup> *Niemietz v Germany* [1992] ECHR 80, [29].

<sup>148</sup> *Sidabras v Lithuania* [2004] ECHR 395.

<sup>149</sup> *ibid*, [47].

Not every denial of access to work will breach the ECHR, but Article 8 ‘will be violated where the state imposes wide-ranging limitations on the types of occupation which an individual may seek’.<sup>150</sup> Following this, English law rules governing access to work must be recognised as being underpinned by human rights, with the HRA requiring any restrictions be interpreted and applied in line with ECHR jurisprudence.

### *Collective labour rights: development*

The text of Article 11(1) provides that ‘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’. However, after a slow start, the ECtHR has interpreted Article 11 to include collective labour rights, including for workers and trade unions to be consulted by employers, to bargain collectively, and go on strike. The incorporation of the Convention by the HRA means these rights must also now be recognised as underpinning the regulation of collective bargaining and industrial action under English labour law.

The ECtHR was initially reluctant to protect labour rights as part of the right to freedom of association, finding that Article 11 ‘does not secure any particular treatment of trade unions, or their members’ other than the freedom to form and join trade unions.<sup>151</sup> States were given discretion over the means made available to trade unions to protect their members’ interests, and Article 11 was found to not confer any specific entitlements to consultation,<sup>152</sup> collective

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<sup>150</sup> R. O’Connell, ‘The Right to Work in the ECHR’ (2012) 2 E.H.R.L.R. 176, 182.

<sup>151</sup> *Swedish Engine Drivers’ Union v Sweden* (n 20), [39].

<sup>152</sup> *National Union of Belgian Police v Belgium* [1970] ECHR 1.

bargaining,<sup>153</sup> or industrial action.<sup>154</sup> Indeed, rather than being used to protect collective labour rights the first major impact of Article 11 on English labour law was to contribute to the end of the closed shop, following the ECtHR's protection of the negative freedom *not* to associate with trade unions.<sup>155</sup> The failure of Article 11 to protect the right for members of the UK security services to join a trade union was another cause for disappointment.<sup>156</sup> It is therefore unsurprising that Labour lawyers were critical of the ECHR,<sup>157</sup> with Wedderburn describing Art.11 ECHR as a 'false prospectus' for labour law.<sup>158</sup>

The ECtHR's approach has shifted since this early case law however, and the Court 'has in recent years been receptive to workers' claims'.<sup>159</sup> This change began in *Wilson v UK*, where the Court found that permitting employers to give financial incentives for workers to give up their right to union representation breached the positive obligations to protect workers' freedom of association.<sup>160</sup> In *Wilson* the ECtHR adopted an integrated approach to interpreting

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<sup>153</sup> *Wilson v UK* (n 14).

<sup>154</sup> *Young v UK* [1982] 4 EHRR 38; *Swedish Engine Drivers' Union v Sweden* (n 20); *Sigurjonsson v Iceland* [1993] 16 EHRR 462.

<sup>155</sup> *Young v UK* (n 154); *Sørensen and Rasmussen v Denmark* [2008] 46 EHRR 29; for discussion see V. Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention on Human Rights' in C. Fenwick, T. Novitz and C. Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010).

<sup>156</sup> *CCSU v UK* [1988] 10 EHRR CD269. See G. Morris, 'Freedom of Association and the Interests of the State' in K. Ewing, C. Gearty and B. Hepple (eds), *Human Rights and Labour Law* (Mansell 1994).

<sup>157</sup> K. Ewing, 'Freedom of Association and Trade Union Rights' in D. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (First Edition edition, Clarendon Press 1995); T. Novitz, *International and European Protection of the Right to Strike* (OUP 2003).

<sup>158</sup> B. Wedderburn, 'Freedom of Association or Right to Organise?' (1987) 18 *Industrial Relations Journal* 244, 251.

<sup>159</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 2) 158.

<sup>160</sup> *Wilson v UK* (n 14). Another significant milestone was the protection of trade union autonomy under Article 11 in *Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK* [2007] ECHR 184.

Article 11 for the first time, referring to the ILO Convention on Freedom of Association and the European Social Charter, as well as reports of the relevant committees. Revising his earlier criticism of Article 11 as ‘disappointing’,<sup>161</sup> Ewing described *Wilson* as a decision that would go ‘a long way to restore confidence in Article 11’.<sup>162</sup>

The watershed moment for the ECHR’s protection of collective labour rights came in *Demir and Baykara v Turkey*, which found that Article 11 contains a human right to bargain collectively.<sup>163</sup> The case involved the annulment of collective agreements concluded by a civil service trade union, following the Turkish courts’ decision that the union should not have been recognised as entitled to conclude these agreements in the first place. The ECtHR found that the right to bargain collectively had ‘become one of the essential elements’ of Article 11,<sup>164</sup> and that the annulment of the collective agreement violated this essential element of Article 11. In reaching this decision, the Court relied heavily upon a range of social rights documents, including ILO Conventions 98 and 151 on the right to organise, and statements of the right to bargain collectively contained in ESC Article 6 and CFREU Article 28. In the Court’s view, earlier case law rejecting the inclusion of collective labour rights in Article 11 needed to be reversed to ‘take account of the perceptible evolution in such matters, in both international law and domestic legal systems’.<sup>165</sup>

The ECtHR has subsequently gone on to find that Article 11 also contains rights to strike and to participate in trade union activities. In *Enerji Yapi-Yol Sen v Turkey* the Court found that

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<sup>161</sup> K. Ewing, ‘The Human Rights Act and Labour Law’ (1998) 27 ILJ 275, 279.

<sup>162</sup> K. Ewing, ‘The Implications of *Wilson* and *Palmer*’ (2003) 32 ILJ 1, 5.

<sup>163</sup> *Demir* (n 14). See K. Ewing and J. Hendy, ‘The Dramatic Implications of *Demir* and *Baykara*’ (2010) 39 ILJ 2.

<sup>164</sup> *Demir* (n 14), [154].

<sup>165</sup> *ibid*, [153].

strike action 'constitutes an important aspect' of Article 11,<sup>166</sup> and was violated by a prohibition of public sector employees striking because this restriction could not be justified by reference to a 'compelling social need'.<sup>167</sup> Although the ECtHR declined to determine whether the right to strike was an 'essential element' of freedom of association, Ewing and Hendy argue this is implicit in their reasoning; because if the right to bargain collectively is an essential element of Article 11 then industrial action must also be an essential element, at least 'insofar as it is exercised in furtherance of collective bargaining'.<sup>168</sup> Several recent cases have followed *Enerji* in finding that restrictions on the ability to take strike action violate Article 11.<sup>169</sup> The ECtHR has also found that Article 11 imposes a positive obligation on states to protect workers from being penalised or discriminated against for participating in trade union activities or industrial action.<sup>170</sup>

### *Collective labour rights: limited impact*

This more favourable treatment of labour rights under the ECHR led to labour lawyers adopting a more positive view of the Convention. Ewing and Hendy for instance, welcomed the 'epoch making' decision in *Demir* as establishing the priority of human rights over economic concerns.<sup>171</sup> This seems somewhat premature in retrospect however, as progress in

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<sup>166</sup> *Enerji Yapı-Yol Sen v Turkey* [2009] ECHR 2251, [24].

<sup>167</sup> *ibid*, [32].

<sup>168</sup> K. Ewing and J. Hendy (n 163) 14.

<sup>169</sup> *Hrvatski Lijecnicki Sindikat v Croatia* [2014] ECHR 1337; *Ognevenko v Russia* [2012] ECHR 1266.

<sup>170</sup> *Danilenkov v Russia* (n 15); *Saime Özcan v Turkey* Application no. 22943/04 (15 September 2009); *Kaya and Seyhan v Turkey* Application no. 30946/04 (15 September 2009).

<sup>171</sup> K. Ewing and J. Hendy (n 163) 47–48.

protecting labour rights under Article 11 appears to have ground to a halt in Strasbourg, at least in cases involving the UK. Furthermore, domestic courts have been reluctant to acknowledge collective labour rights as human rights as required by the HRA, or to work through the legal implications of English trade union law being underpinned by Article 11.

A series of recent challenges to the regulation of collective bargaining and industrial action under English law demonstrate that the recognition of collective labour rights as human rights has not necessarily led to the strong protection of these rights by the ECtHR. In *UNITE v UK* for example, the abolition of the agricultural wage board was found not to violate the right to collective bargaining contained in Article 11, largely due to the wide margin of appreciation afforded to the UK authorities.<sup>172</sup> The Court distinguished *Demir* on the basis that in this case workers and unions were not prevented from seeking to bargain collectively via other means. It remains to be seen whether Ewing and Hendy are right that this decision 'renders the right to collective bargaining proclaimed as an essential element of art.11 in *Demir and Baykara*, without substance'.<sup>173</sup> However, it certainly demonstrates the uphill battle UK trade unions face when attempting to protect this right at Strasbourg.

The limited practical benefits of the recognition of collective labour rights as human rights by the ECtHR for UK workers and unions is also illustrated by *RMT v UK*, where it was argued that the total ban on secondary strike action under English law violated Article 11.<sup>174</sup> Although the ECtHR affirmed that the right to strike, including to take secondary action, was 'clearly'

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<sup>172</sup> *Unite the Union v UK* [2016] ECHR 1150.

<sup>173</sup> K. Ewing and J. Hendy, 'Article 11(3) of the European Convention on Human Rights' [2017] EHRLR 356, 373.

<sup>174</sup> *National Union of Rail, Maritime and Transport Workers (RMT) v UK* [2014] ECHR 366.

protected under Article 11,<sup>175</sup> they went on to find that there was no violation as the ban on secondary action fell within the UK's margin of appreciation. The Court thought that the interference with the right to strike was justified under Article 11(2), because the ban did not strike at the 'core' of Article 11 and was not 'manifestly without reasonable foundation'.<sup>176</sup> The Court also appeared to step back from the integrated approach to interpreting Article 11, as it did not view the ILO and ESC jurisprudence on secondary strikes as decisive.<sup>177</sup> Bogg and Ewing trenchantly criticise this decision, calling it a 'poorly reasoned and barely consistent judgment, by what looks like a weak, bullied and timid court',<sup>178</sup> and rightly say that there is 'no point creating rights if the Court is not prepared to defend them'.<sup>179</sup>

Although the ECtHR has adopted a cautious approach to scrutinising the protection of collective labour rights by English law in recent cases, it has continued to protect collective labour rights strongly in cases not involving the UK.<sup>180</sup> This has led some scholars to attribute the Court's light touch scrutiny of English law to political rather than legal considerations.<sup>181</sup> This seems plausible given the procedural chicanery the ECtHR has used to find challenges to English trade union law inadmissible; including misapplying the rules on time limitations,<sup>182</sup> on claims submitted to multiple international procedures,<sup>183</sup> and adopting a

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<sup>175</sup> *ibid*, [83].

<sup>176</sup> *ibid*, [99].

<sup>177</sup> *ibid*, [98].

<sup>178</sup> A. Bogg and K. Ewing, 'The Implications of the RMT Case' (2014) 43 *ILJ* 221, 251.

<sup>179</sup> *ibid* 223.

<sup>180</sup> *Danilenkov v Russia* (n 15); *Kaya and Seyhan v Turkey* (n 170); *Veniamin Tymoshenko v Ukraine* [2014] ECHR 1016; *Hrvatski Lijecnicki Sindikat v Croatia* (n 169).

<sup>181</sup> K. Ewing and J. Hendy (n 173) 363; A. Bogg and K. Ewing (n 178).

<sup>182</sup> *Roffey v UK* [2012] ECHR 1157.

<sup>183</sup> *Prison Officers' Association v UK* Application no. 59253/11 (21 May 2011).

distorted view on what amounts to an interference with a Convention right.<sup>184</sup> If the Court continues to sacrifice ‘justice to politics’<sup>185</sup> when scrutinising English labour law, the protection of collective bargaining and industrial action as human rights under the ECHR is unlikely to result in tangible benefits for UK workers and trade unions.

The incorporation of Convention rights and jurisprudence into English law by the HRA means that the ECtHR’s recognition of collective bargaining and industrial action as human rights must be carried over into English law. As a result, English labour law regulating trade unions, collective bargaining, and industrial action must now be recognised as underpinned by human rights. However, domestic courts have been reluctant to acknowledge collective labour rights as human rights, or work through the legal implications of this status.

In *Metrobus v Unite* for example, which was decided after *Demir* and *Enerji*, the Court of Appeal found that the extensive restrictions and conditions placed upon lawful industrial action by the Trade Union and Labour Relations (Consolidation) Act 1992 did not amount to an interference with Article 11.<sup>186</sup> The court thought it ‘would not be prudent’ to follow *Enerji* in recognising that Article 11 encompassed a right to strike,<sup>187</sup> and Maurice Kay LJ emphasised that ‘the right to strike has never been much more than a slogan or a legal metaphor’ in the UK.<sup>188</sup> Even at the time this was, with respect, untenable given the ECtHR jurisprudence, and is certainly so after the affirmation in *RMT v UK* that the right to strike is protected under

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<sup>184</sup> *RMT v UK* (n 174) 11; for discussion of these see K. Ewing and J. Hendy (n 173).

<sup>185</sup> K. Ewing and J. Hendy (n 173) 375.

<sup>186</sup> *Metrobus v Unite The Union* (n 129); R. Dukes (n 129).

<sup>187</sup> *Metrobus v Unite The Union* (n 129), [35].

<sup>188</sup> *ibid*, [118].



Article 11. The Strasbourg jurisprudence means a right to strike must be recognised as ‘emerging improbably from the Human Rights Act’.<sup>189</sup>

In other cases domestic courts *have* recognised the relevance of human rights for collective labour law however, and are beginning to recognise the legal significance and implications of English law on collective bargaining and industrial action being grounded in human rights. In *RMT v Serco* for example, although the Court of Appeal was bound by the decision in *Metrobus* regarding the compatibility of pre-strike ballot requirements with Article 11, Elias LJ acknowledged that the ‘right to strike is conferred as an element of the right to freedom of association conferred by Article 11(1) of the European Convention of Human Rights which in turn is given effect by the Human Rights Act’.<sup>190</sup> The protection of industrial action was also recognised in *SoS for Education v National Union of Teachers*, with the High Court accepting that granting an interim injunction against industrial action would constitute an interference with Article 11, although this did not significantly influence their decision to grant an injunction because of the ‘strong possibility that the existing law would be held to be justified within article 11(2)’.<sup>191</sup>

The right to collective bargaining was recognised as an ‘essential element’ of Article 11 in *Netjets Management Ltd*, and the High Court accepted that the HRA therefore required the statutory recognition framework for collective bargaining contained in TULRCA be construed in line with this right to bargain collectively.<sup>192</sup> Collective bargaining was similarly recognised

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<sup>189</sup> A. Bogg and K. Ewing (n 178) 222.

<sup>190</sup> *RMT v Serco* [2011] EWCA 226.

<sup>191</sup> *SoS for Education v NUT* [2016] EWHC 812 (QB), [76].

<sup>192</sup> *Netjets Management Limited v CAC* [2012] EWHC 2685 (Admin), [41].

as a human right protected under Article 11 by the Court of Appeal in *PDAU v Boots*, where Elias LJ stated that he would have been willing to use HRA s 3 to ensure TULRCA was interpreted consistently with this right had he thought it necessary.<sup>193</sup>

In most cases to date, the recognition that collective labour rights are human rights protected by the ECHR and HRA has not substantively improved the position of UK workers or trade unions.<sup>194</sup> This may be changing however, as demonstrated by the Court of Appeal's recent protection of collective consultation rights as part of Article 11,<sup>195</sup> and the Supreme Courts' increased willingness to entertain human rights arguments in labour law cases.<sup>196</sup> At the least, Article 11 must now be recognised as underpinning English law on collective bargaining and industrial action, meaning the state has a positive obligation to secure these rights, and that any restrictions or interferences with their enjoyment or exercise must be justified.

### ***3.3 European Union***

A range of labour law norms are protected under EU human rights law, but these protections have not had a significant effect on domestic labour law, and the benefits of labour rights being classed as human rights have for the most part been limited. Equal pay and discrimination law are the main exceptions to this, and the status of annual leave and working

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<sup>193</sup> *Pharmacists' Defence Association Union (PDAU) v Boots Management Services Ltd* [2017] IRLR 355.

<sup>194</sup> See for example *R (IWGB) v CAC* [2018] EWHC 3342 (Admin); J. Atkinson and H. Dhorajiwala, 'IWGB v RooFoods: Status, Rights and Substitution' (2019) 48 ILJ 278.

<sup>195</sup> *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092; P. Collins and P. Fradley, 'Policing the Boundaries of Articles 8 and 11 ECHR' (2019) 48 ILJ 225.

<sup>196</sup> *R (Unison) v Lord Chancellor* (n 96); *Gilham v Ministry of Justice* (n 86).

time protections as human rights under EU law has also had some benefits. However, the classification of collective labour rights as human rights has not led to strong protection of these rights, and in recent cases EU human rights frameworks have undermined rather than enhanced labour law protections.

### *Protection of labour rights by EU human rights law*

Core labour law norms are protected as fundamental rights in EU law, both as general principles of EU law and under the Charter of Fundamental Rights of the European Union (CFREU). Labour rights recognised as general principles of EU law include the principle of equality between women and men and the right to annual leave.<sup>197</sup> Labour rights enshrined in the Charter of Fundamental Rights of the EU include rights to work (Article 15), to non-discrimination (Article 21) and equal pay (Article 23), to information and consultation (Article 27), to collective bargaining and industrial action (Article 28), to protection from dismissal (Article 30), and to fair and just working conditions (Article 31).

However, the impact and influence on domestic labour law of labour rights being included within the EU's framework of human rights protections has been limited for three main reasons. First, the CFREU only applies when EU institutions and Member States are implementing Union law and does not create or modify any powers under the Treaties.<sup>198</sup> This narrow scope of application is compounded by Court of Justice's (CJEU) reluctance to engage

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<sup>197</sup> TFEU art 157; Case C-684/16 *Max-Planck-Gesellschaft v Shimizu* C:2018:874.

<sup>198</sup> Art 51.

with the Charter provisions most relevant to labour law;<sup>199</sup> '[i]n many cases ... the CJEU either finds that the Charter is inapplicable as the case is outside the scope of EU law, or it simply ignores the fundamental rights aspect altogether'.<sup>200</sup>

Second, the impact of Charter rights on English labour law is limited by the uncertain status of the labour law norms it contains. A distinction between 'rights' and 'principles' is made by CFREU Article 52(5), and if the Charter's labour law norms are 'principles' they can only impact on the interpretation of implementing legislation rather than give rise to direct legal claims. But the Charter gives little guidance over which provisions are rights or principles, and 'the CJEU case-law has not as yet managed to bring greater clarity'.<sup>201</sup> Although the UK Government has asserted that the CFREU's social rights are principles not rights,<sup>202</sup> continued uncertainty on this issue is 'the greatest barrier to its use as an engine for change and further progression in relation to labour rights'.<sup>203</sup>

Finally, there is also uncertainty over the *effect* of the Charter's labour law norms. As the Charter has the same legal status as EU treaties, its provisions may be relied upon in domestic labour law litigation between private parties, within the scope of its application. The horizontal effect of the Charter's social rights provisions remains unclear however, as 'the

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<sup>199</sup> A. Koukiadaki, 'Application (Article 51) and Limitations (Article 52(1))' in F. Dorssemont and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 112–3.

<sup>200</sup> N. O'Connor, 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 *Eur. Lab. LJ* 193. See also the omission of any mention of Article 31 in Case C-282/10 *Dominguez* [2012] ECR I-00000.

<sup>201</sup> V. Mantouvalou and P. Eeckhout, 'Accession of the EU to the ECHR: The Permeative Power of Human Rights' in C. Costello, A. Bogg and A.C.L. Davies (eds), *Research Handbook in EU Labour Law* (Edward Elgar 2016) 186.

<sup>202</sup> Constitution Committee, 'European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution' (2007-08) HL 84, [60]-[61].

<sup>203</sup> N. Busby (n 38) 160.

approach adopted by the CJEU oscillates between explicitly acknowledging and denying the existence of such effects'.<sup>204</sup> Protocol 30 to the Charter further muddies this picture, as it states that the Charter merely 'reaffirms' existing rights and principles and 'does not extend' courts' ability to find that legislation or administrative actions breach these rights or principles.<sup>205</sup> As a result, the status and effect of labour law norms under the Charter remains unclear.

A final limiting factor on the influence of EU human rights protections for English labour law is the looming impact of Brexit. The relevance of those labour rights contained in the CFREU for English law will ultimately depend on the nature of the eventual relationship with the EU, which is unclear at present. In the short term however, the Charter rights will cease to have any effect in English law on 'exit day', unless they have been recognised as general principles of EU law prior to this.<sup>206</sup>

### *Impact on English labour law*

Discrimination and equal pay law are the clearest examples of English labour law being influenced by the protection of labour rights as human rights in EU law. Despite initially being introduced into EU law 'as an economic necessity to ensure fair competition',<sup>207</sup> equal pay and

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<sup>204</sup> A. Koukiadaki (n 199); *Küçükdeveci* (n 35); E. Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *European Constitutional Law Review* 332.

<sup>205</sup> Treaty on the Functioning of the EU, Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (2008).

<sup>206</sup> European Union (Withdrawal) Act 2018, ss 5-6.

<sup>207</sup> B. Hepple, *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell 2005) 14.

non-discrimination have subsequently been recognised as fundamental rights, both as general principles of EU law and in the CFREU.<sup>208</sup> These rights are directly effective in actions between private parties,<sup>209</sup> and have significantly influenced English labour law.

One significant and consistent impact has been broadening the scope of discrimination protections. This includes extending sex discrimination to cover gender reassignment,<sup>210</sup> and pregnancy discrimination,<sup>211</sup> adopting an expansive definition of ‘pay’ for equal pay claims,<sup>212</sup> developing the concept of associative discrimination,<sup>213</sup> and introducing protections against discrimination on grounds of age or belief.<sup>214</sup> The protection of equality rights as human rights under EU law has also increased the remedies available for domestic equal pay and discrimination claims.<sup>215</sup> As a result, English equality law must be regarded as largely grounded in EU human rights law.<sup>216</sup>

Another area of domestic labour law underpinned by EU human rights frameworks is the regulation of working time and the right to annual leave. The law on annual leave was introduced under the EU’s health and safety competency,<sup>217</sup> but has since been recognised as

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<sup>208</sup> Now TFEU Article 157; CFREU Article 21; Case C-43/75 *Defrenne* [1976] ECR 455.

<sup>209</sup> *ibid.*

<sup>210</sup> *P v S and Cornwall County Council* [1996] ICR 795. This led to amendment of the Sex Discrimination Act 1975.

<sup>211</sup> *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen* [1992] ICR 325; *Webb v EMO* [1995] ICR 1021. Now reflected in the Equality Act 2010.

<sup>212</sup> *Barber v Guardian Royal Exchange Assurance Group* [1990] IRLR 240. Leading to reform to the Pensions Act 1995.

<sup>213</sup> *Attridge LLP v Coleman* [2010] ICR 242. Leading to reform to the Disability Discrimination Act 1995.

<sup>214</sup> EU Council Directive 2000/78/EC of 27 November 2000.

<sup>215</sup> *Marshall (No2)* [1993] ICR 893.

<sup>216</sup> For full discussion see C. Barnard, *EU Employment Law* (4th edn, OUP 2012) chs 6–10.

<sup>217</sup> EEC art 118a, now TFEU art 153.

a fundamental social right; both as a general principle of EU law,<sup>218</sup> and in CFREU Article 31(2) which ‘definitively confirmed’ its status as a human right.<sup>219</sup> Bogg argues that Article 31 has ‘had an early and bold impact on the interpretation of the right to paid annual leave’.<sup>220</sup> The status of annual leave as a ‘particularly important’ general principle of EU law was emphasised in *Robinson-Steele v RD Retail Services* for example, where ‘rolled up’ holiday pay was found to be incompatible with treating annual leave as a fundamental right.<sup>221</sup> This contrasted with the UK Court of Appeal’s position.<sup>222</sup> The status of annual leave as a human right was also influential in the CJEU’s decision that a worker who is sick when on leave is entitled to take annual leave at another time,<sup>223</sup> and that the level of holiday pay must reflect the pay normally received by the worker.<sup>224</sup>

Although the ‘presence of Article 31 has been less evident in other areas of working time regulation’ than in respect of annual leave,<sup>225</sup> this may now be changing. The CJEU recently emphasised that working time protections are fundamental rights in *CCOO v Deutsche Bank SAE*, and found that employers must track the time worked by individuals because this was the only way to ensure workers enjoyed their fundamental rights.<sup>226</sup> The recognition of annual

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<sup>218</sup> Case C-173/99 *BECTU* [2001] ECR I-4881.

<sup>219</sup> Case C-520/06 *Stringer and Others* [2008] C:2008:38.

<sup>220</sup> A. Bogg, ‘Fair and Just Working Conditions’ in S. Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 835.

<sup>221</sup> Case C-131/04 *Robinson-Steele v PD Retail Services* [2006] IRLR 386.

<sup>222</sup> *Marshall's Clay v Caulfield* [2004] ICR 1502.

<sup>223</sup> Case C-78/11 *Asociación Nacional de Grandes Empresas de Distribución v Federación De Asociaciones Sindicales* [2012] IRLR 779. Cf N. O’Connor (n 200) 207..

<sup>224</sup> Case C-539/12 *Lock v British Gas Trading Ltd* [2014] ICR 813.

<sup>225</sup> A. Bogg, ‘Fair and Just Working Conditions’ (n 220) 848.

<sup>226</sup> Case C-55/18 *CCOO v Deutsche Bank SAE* (Judgment of 14 May 2019), [60].

leave and working time protections as matters of human rights by EU law means that English law on working time must similarly be regarded as underpinned by human rights.

### *Weak protection of labour rights*

Equality and working time law aside, the classification of labour rights as human rights under EU law has not led to strong domestic protection of these rights.<sup>227</sup> This is perhaps best demonstrated by the treatment of collective labour rights by the CJEU in the infamous *Viking* and *Laval* line of cases. Additionally, in recent cases the CJEU has used the Charter to undermine labour law protections.

The cases of *Viking* and *Laval* both involved a clash of EU economic freedoms with the right to strike, which is protected as a human right under EU law.<sup>228</sup> *Viking* concerned a challenge to the legality of a Finnish trade union's threat to take industrial action over the employers' decision to 're-flag' a Finnish vessel in Estonia, on the grounds that this amounted to a restriction of the freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the European Union (TFEU).<sup>229</sup> In *Laval* industrial action by a Swedish trade

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<sup>227</sup> See, for example, the finding that CFREU Article 30 does not confer a right for individuals not to be dismissed for unjustified reasons, Case C-117/14 *Poclava* [2015] IRLR 453.

<sup>228</sup> For discussion of these cases see A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 *ILJ* 126; M. Freedland and J. Prassl (eds), *Viking, Laval and Beyond* (Hart 2014); C. Barnard, 'The Calm after the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in Viking and Laval' in C. Costello, A. Bogg and A.C.L. Davies (eds), *Research Handbook in EU Labour Law* (Edward Elgar 2016).

<sup>229</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* 2007 ECR -10779.



union, undertaken in response to a Latvian employer's refusal to provide workers posted to Sweden with terms of employment equivalent to those contained in Swedish collective agreements, was challenged on the grounds that it violated the free movement of services protected in Article 56 TFEU.<sup>230</sup>

In deciding these cases, the CJEU recognised for the first time that the right to strike is a 'fundamental right which forms an integral part of the general principles of Community law',<sup>231</sup> as well as being protected by Article 28 of the Charter. However, the Court also found that this right was subject to limits by both domestic and EU law, including the economic freedoms in TFEU Articles 49 and 56. Consequently, because the industrial action in these cases interfered with freedom of movement and establishment, they had to be justified as proportionate to be lawful. While the CJEU stated the question of proportionality was for domestic authorities to determine the court set out the approach that should be taken which included asking whether any less restrictive means of resolving the dispute were available, and indicated that, applying this approach, industrial action was unlikely to be justifiable in either *Viking* or *Laval*. The CJEU has subsequently adopted a similar approach to the right to collective bargaining; recognising it as a fundamental right while also finding that it must be read subject to the EU's economic freedoms.<sup>232</sup>

Following *Viking* and *Laval* strikes must be a 'last resort' when they clash with EU market freedoms, despite the status of industrial action as a fundamental right.<sup>233</sup> By 'starting from

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<sup>230</sup> Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>231</sup> *Viking* (n 229), [43]-[44].

<sup>232</sup> Case C-271/08 *Commission v Germany (Occupational Pensions)* [2010] ECR I-7091.

<sup>233</sup> C. Barnard, 'Right of Collective Bargaining and Action' in S. Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 788.

the premise of the illegality of the strike action', the CJEU's approach 'inevitably led to a finding that the economic right to freedom of establishment and free movement of services prevailed over the right to strike'.<sup>234</sup> The decisions represent a 'supersession of European labour law (and, to a varying extent, of domestic labour law) by EU internal market law'.<sup>235</sup> Their impact on English labour law has been to make it substantially more difficult for workers to take lawful industrial action over transnational issues. In addition to the usual requirements for lawful industrial action, a strike must be a proportionate means of achieving an overriding public interest. The fallout from this line of cases is ongoing, but it is clear the classification of collective labour rights as human rights under EU law 'has not had the result that labour lawyers would have expected'.<sup>236</sup>

More worrying still is the recent use of EU human rights law, specifically the Article 16 Charter right to conduct a business, to 'justify the abrogation of employees' rights'.<sup>237</sup> In *Alemo-Herron v Parkwood Leisure Ltd*, the CJEU found that employers cannot be bound by changes to collective agreements following transfers of undertakings if they have no opportunity to participate in the bargaining process, because this would infringe their freedom to conduct a business.<sup>238</sup> In effect, the employers' right to conduct a business was used to undermine the

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<sup>234</sup> *ibid* 790.

<sup>235</sup> M. Freedland and J. Prassl, 'Viking, Laval and Beyond: An Introduction' in M. Freedland and J. Prassl (eds), *Viking, Laval and Beyond* (Hart 2014) 17.

<sup>236</sup> A. Bogg, C. Costello and A.C.L. Davies, 'The Role of the Court of Justice in Labour Law' in C. Costello, A. Bogg and A.C.L. Davies (eds), *Research Handbook in EU Labour Law* (Edward Elgar 2016) 134.

<sup>237</sup> J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd*' (2013) 42 *ILJ* 434, 441.

<sup>238</sup> Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* [2013] C:2013:521, [33].

right to collective bargaining protected by Article 28 of the Charter.<sup>239</sup> This raises ‘the prospect of a perfect storm of judicial balancing, whereby the right to take collective action is routinely balanced against the employer’s freedom to conduct a business’.<sup>240</sup>

The Charter right to conduct a business also poses a threat to other aspects of labour law. For example, in *AGET Iraklis* the CJEU found that a Greek law requiring state authorisation for redundancies was a disproportionate limitation on the right to conduct a business, and the domestic labour law protections therefore had to be disapplied.<sup>241</sup> Furthermore, in *Achbita* the CJEU accepted that an employer banning religious clothing in the workplace to project an image of neutrality was a legitimate exercise of their freedom to conduct a business, that potentially permitted ‘a derogation from the prohibition on discrimination’.<sup>242</sup> If applied more widely, this reasoning has the potential to undermine any labour law protections that fall within the scope of the Charter’s application, because these protections will limit employers’ freedom to conduct a business and so be unlawful unless the CJEU find them proportionate.

### ***3.4 Conclusion***

The classification and protection of labour law norms as matters of human rights under the ECHR and in EU means that grounding labour law protections in human rights is no longer an alien approach to English labour law, but it is yet to become the dominant perspective. In

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<sup>239</sup> For criticism see N. O’Connor (n 200); J. Prassl (n 237) 441.

<sup>240</sup> A. Bogg, C. Costello and A.C.L. Davies (n 236) 133.

<sup>241</sup> Case C-201/15 *AGET Iraklis* [2016] C:2016:972, [66]-[69].

<sup>242</sup> Case C-157/15 *Achbita v G4S Secure Solutions NV* [2018] ICR 102, [134].

part this is due to labour lawyers' doubts about the effectiveness of human rights mechanisms to protect workers.

However, the reluctance to embrace human rights as a foundational perspective on labour law is also partly the result of concerns about the legitimacy of using human rights arguments to justify and underpin labour law. To understand the relationship between labour law and human rights more deeply, we need to distinguish between the different approaches that might be taken to examining the interactions between the two fields.

#### **4. The Need for a Normative Approach**

It seems from the above discussion of the relationship between human rights and English labour law that the pessimism and scepticism of some labour lawyers about aligning labour law and human rights is at least partly justified. However, this does not mean that we should write human rights off as a foundational perspective for the discipline.

This section introduces Mantouvalou's distinction between the three approaches that can be taken to examining the relationship between labour law and human rights.<sup>243</sup> It then argues that a philosophical and normative perspective must be adopted if we are to properly understand the relationship between human rights and labour law, and the implications of the former on the latter. Under this approach we should not assess human rights as foundations for labour law based on the success or failure of human rights law in protecting workers.

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<sup>243</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 2).

#### *4.1 Approaches to labour law and human rights*

Mantouvalou sets out three distinct approaches to examining the claim that 'labour rights are human rights'; positivist, instrumental, and normative.<sup>244</sup> These different approaches can also be used when examining the relationship between human rights and labour law more broadly. The positivist approach asks what the relationship between human rights and labour law is as a matter of positive law. This includes the links and interactions between the two under international human rights law, but also in domestic constitutional frameworks, legislation, and common law. For the positivist, if labour law protections are classed as matters of human rights by the legal system then they are human rights.<sup>245</sup>

The instrumental approach asks to what extent human rights mechanisms can be used to provide foundations for labour law protections in practice, and 'looks at the consequences of using strategies, such as litigation or civil society action, which promote labour rights as human rights'.<sup>246</sup> Given that one of the main motivations for couching labour law in terms of human rights is to ensure better protection for workers it is no surprise that this is the approach most commonly taken by labour law scholars. An example of the instrumental approach is provided by Alston's edited collection on *Labor Rights as Human Rights*, which looks at the 'actual or potential role' of international organisations 'in promoting a concept of labour rights as human rights and then providing the institutional support to make such a

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<sup>244</sup> *ibid.*

<sup>245</sup> *ibid* 151.

<sup>246</sup> *ibid.*

vision effective'.<sup>247</sup> Mantouvalou explains that this 'human rights instrumentalism' is rooted in the Marxist tradition, which adopts and endorses whatever means are 'useful for the promotion of the interests of the working class'.<sup>248</sup> Under the instrumental approach, human rights are endorsed as providing a foundational perspective for labour law if human rights frameworks and mechanisms can be used to effectively protect workers.

Finally, the normative approach asks how we should understand the relationship between labour law and human on a theoretical or philosophical level. Rather than looking to the law, the normative approach 'examines what a human right is, and assesses, given this definition' the relationship between labour law and human rights.<sup>249</sup> It therefore seeks to determine as a matter of 'moral truth' whether human rights can provide a foundational perspective for labour law.<sup>250</sup> It is important to note however, that what is most distinct about this approach is not that it is normative, but that it is *theoretical* and *philosophical*. It is concerned with whether labour law can coherently and legitimately be viewed as a matter of human rights on the philosophical level. For this reason, it is perhaps better described as the 'normative philosophical' approach to labour law and human rights.

The normative philosophical perspective rejects the positivist analysis that labour law 'became' a matter of human rights when they were included in human rights law and documents.<sup>251</sup> It

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<sup>247</sup> P. Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art' in P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 20.

<sup>248</sup> V. Mantouvalou, 'The Human Rights Act and Labour Law at 20 (Forthcoming)' (n 29).

<sup>249</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (n 2) 152.

<sup>250</sup> *ibid* 163.

<sup>251</sup> As stated in P. Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 62.

also rejects the instrumentalist view that the relationship between labour law and human rights should be understood by examining how labour law norms fare ‘under the rubric, or within the framework, of human rights’.<sup>252</sup> Under the normative philosophical approach, ‘the fact that the law and the judiciary may sometimes not be protective of labour rights as human rights should not be seen as a reason to reject the character of certain labour rights as human rights’.<sup>253</sup> The positive and instrumental approaches skip over the important philosophical question that lies at the heart of the normative approach; whether it is legitimate to see human rights as providing foundations for labour law.

#### *4.2 The need for a normative philosophical approach*

The lack of attention paid to the normative philosophical approach to labour law and human rights reflects the ‘scant’ philosophical literature on the foundations of labour law that existed until only recently.<sup>254</sup> However, a normative philosophical approach is needed to properly address the question of whether human rights can provide a foundational perspective for labour law, and to help us understand the relationship between the two. Only a normative philosophical approach can answer questions such as whether labour law norms genuinely are matters of human rights, what the implications of human rights are for regulation of work,

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<sup>252</sup> P. Alston (n 247) 3.

<sup>253</sup> V. Mantouvalou, ‘Are Labour Rights Human Rights’ (n 2) 163.

<sup>254</sup> H. Spector, ‘Philosophical Foundations of Labor Law’ (2005) 33 Florida State University Law Review 1119, 1121.

what legal protections for workers they justify, and what the content and scope of these should be.

Neither the positivist nor instrumentalist approaches can be used to determine whether human rights can provide sound normative foundations for labour law protections. As Mantouvalou says, the positivist approach tells us ‘which labour rights ... the drafters of a particular human rights document deem important and which of these rights survived political negotiations’.<sup>255</sup> But this does not tell us anything about whether human rights arguments can be used justify labour law. There is little reason to think that classifying labour rights as human rights in positive law means they are human rights as a matter of moral truth. Indeed, the politicised nature of treaty-formation process and law-making process, and the necessity of compromises to reach consensus, suggests that human rights law may be an unreliable guide to human rights on the philosophical level.

The instrumental approach endorses the alignment of labour law and human rights if human rights are an effective vehicle for securing labour law protections. But the effectiveness of human rights mechanisms in furthering the cause of labour law does not tell us whether it is legitimate to adopt human rights as a foundational perspective for labour law. If human rights frameworks can successfully be used to protect workers and justify labour law protections, it does not follow that these things genuinely deserve to be regarded as matters of human rights. Conversely, the failure of human rights mechanisms to secure and justify labour law protections should not cause us to give up on labour law as a justificatory framework for labour law. This point becomes clear when we distinguish between human rights law and practice,

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<sup>255</sup> V. Mantouvalou, ‘Are Labour Rights Human Rights’ (n 2) 155.



and human rights as a moral and philosophical idea. It may well be that the current *law and practice* of human rights falls short of what is normatively demanded by human rights as *moral norms*. The failure of existing human rights mechanisms to protect workers should not cause us to write them off as philosophical foundations. We do not think that the lack of real-world frameworks implementing ‘non-domination law’ or ‘capabilities law’ prevents these ideas from providing normative foundations for labour law; why should this be the case for human rights?

Rather than using positivist or instrumental approaches to examine the relationship between labour law and human rights, and the potential for human rights to provide foundations for the discipline, we must adopt a normative philosophical approach. If the motivation for aligning labour law with human rights is to ‘elevate their moral appeal’,<sup>256</sup> then we must put forward some moral argumentation as to why they deserve to be regarded as matters of human rights. We shall see in the following chapter there are doubts about the philosophical legitimacy of classifying labour law as a matter of human rights, and these must be responded to with philosophical, rather than positivist or instrumental, arguments. As Collins says, we must be able to ‘seriously maintain’ that labour rights genuinely are matters of human rights if we are to invoke human rights ‘in good faith’ as justificatory foundations for labour law.<sup>257</sup>

In addition, only by examining the implications of human rights for labour law on the normative philosophical level can we know what a human rights-based labour law would look like. Determining which areas of labour law can legitimately be justified using human rights and the content and scope of the labour law protections justified by human rights are

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<sup>256</sup> J. Fudge, ‘Labour Rights as Human Rights: Turning Slogans into Legal Claims’ (2014) 37 *Dalhousie LJ* 601, 609.

<sup>257</sup> H. Collins, ‘Theories of Rights’ (n 119) 144.

distinct and prior questions to whether human rights arguments can be useful for labour lawyers in practice. We also need to understand the normative implications of human rights regarding the regulation of work and the workplace if we are to assess the extent to which current legal frameworks embody and live up to these normative demands.<sup>258</sup> Finally, we need to use the normative philosophical approach to understand what a human rights-based labour law would involve before we can determine whether human rights provide adequate and attractive normative foundations for labour law.

While labour lawyers may therefore be right to doubt the ability of existing human rights frameworks to provide secure *legal* foundations for labour law, the question of whether human rights can provide sound *normative* foundations for labour law cannot be answered simply by examining the relationship between human rights and labour law in practice. If there is to be 'a shift in the normative and conceptual grammar' of labour law towards human rights,<sup>259</sup> then this must be given a sound philosophical underpinning.

## 5. Conclusion

There are many interactions between human rights and English labour law. Both dimensions of the relationship between the two – the protection of civil liberties at work, and human rights as a foundational perspective – are present in English law to some extent. No comprehensive framework exists to protect workers' civil liberties from employer infringements; rather, there

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<sup>258</sup> V. Mantouvalou, 'The Human Rights Act and Labour Law at 20 (Forthcoming)' (n 29) 20.

<sup>259</sup> J. Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights' (2007) 29 *Comp. Lab. L. & Pol'y J.* 29, 40.

is a patchwork quilt of constitutional, statutory and common law mechanisms which safeguard these rights. While scrutinising and assessing these protections of workers' civil liberties is not the focus of this thesis, this is undoubtedly be an important research agenda for labour law scholarship.

The influence of European human rights law has introduced human rights as a foundational perspective on English labour law, as both EU law and the ECHR include some labour rights within their protections of human rights. Following this, domestic labour law protections relating to extreme labour exploitation, access to work, collective labour rights, equal pay and non-discrimination, and working time regulations are all now underpinned by human rights to a greater or lesser extent. Despite this however, the impact of human rights frameworks on domestic labour law has generally been quite limited, and the classification of labour rights as human rights has not always led to strong protection of these rights.

The limited effectiveness of existing human rights frameworks in securing protection for workers should not give us reason to abandon human rights as a foundational perspective however, as assessments of the *instrumental* benefits of using human rights mechanisms as justifications for labour law cannot tell us whether human rights can provide *normative* foundations for the discipline. Human rights may still be an important justificatory strand in labour law's foundations despite the current shortcomings of human rights mechanisms in strongly protecting labour rights. To determine whether human rights can ground and justify labour law we need to adopt a normative philosophical approach.

## **Chapter 5: Human Rights as Normative Foundations of Labour Law**

### **1. Introduction**

Chapter 4 concluded by arguing that a normative philosophical approach must be adopted to determine whether human rights can provide a foundational perspective for labour law. The following three chapters take up this challenge. They consider whether labour law can legitimately be grounded in human rights at a theoretical and philosophical level and aim to determine what the normative implications of human rights are for the regulation of work and the workplace, including whether human rights justify and require the introduction of core labour law protections.

This chapter begins by introducing the current debate on whether human rights can provide normative foundations for labour law, and the philosophical objections to classing labour law as a matter of human rights. It argues that a greater focus on specific theories of human rights is required if we are to make progress in this debate. This is necessary both to answer the critiques of human rights as foundations, and to properly understand the implications of human rights for labour law. Section 3 then gives an overview of some prominent theories of human rights and maps out the place of labour law norms within each. This discussion demonstrates that the potential for human rights to provide foundations for labour law varies considerably depending on the philosophical conception of human rights adopted. This insight, combined with the absence of any consensus over the proper philosophical

understanding of human rights, means that we face a choice as to which conception of human rights to adopt as the basis for the analysis undertaken in the remainder of this thesis.

## **2. The Current Debate on Human rights as Normative Foundations**

It was argued in previous chapters that human rights are a plausible and potentially important justificatory strand in labour laws' foundations. However, we have also seen that the relationship between labour law and human rights is not straightforward, and that many labour lawyers continue to resist the influence of human rights. It is unsurprising therefore, that the claim that human rights can provide normative foundations for labour law is fiercely contested. This section sets out the arguments made *against* adopting human rights as a foundational perspective on labour law. While persuasive responses have been made to some of these objections, it is suggested that a greater focus on specific philosophical conceptions of human rights is necessary to properly rebut these critiques and to determine whether human rights can provide a coherent justificatory framework for labour law.

### ***2.1 Objections to human rights as foundations***

There are many arguments made against using human rights to justify or provide foundations for labour law. Some of these are not relevant to the current discussion. Arguments that human rights law or arguments fail to protect workers for example,<sup>1</sup> are relevant for

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<sup>1</sup> H. Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 *Social & Legal Studies* 403; J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of

*instrumentalist* debates about the practical benefits of human rights mechanisms. But they should be kept separate from the *normative philosophical* question of whether human rights can provide a coherent foundational perspective on the discipline. Similarly, claims that the human rights and labour movements are incapable of working together effectively due to differences in their strategies or incentives,<sup>2</sup> are not relevant to the philosophical legitimacy of grounding labour law in human rights.

Another set of objections not considered here are those rooted in scepticism of the moral reality of human rights. This includes arguments based in moral relativism more generally, as well as those rooted in cultural relativism which claim that human rights represent Western parochial values.<sup>3</sup> While it is important to address these concerns, it is not possible to do so here, and the following analysis therefore assumes rather than defends the possibility of objective and universal moral norms.<sup>4</sup>

The objections to human rights providing a foundational perspective for labour law that we *are* concerned with here are those that accept the reality of human rights but claim it is

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Association, Collective Bargaining, and Strikes' (2015) 68 Current Legal Problems 267; K. Ewing and J. Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 ILJ 391.

<sup>2</sup> V.A. Leary, 'The Paradox of Workers' Rights as Human Rights' in L. Compa and S. Diamond (eds), *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press 2003); K. Kolben, 'Labor Rights as Human Rights' (2009) 50 Va. J. Int'l L. 449; G. Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet' (2012) 34 Comp. Lab. L. & Pol'y J. 217.

<sup>3</sup> R. Rorty, 'Human Rights, Rationality and Sentimentality', *Truth and Progress: Philosophical Papers Volume 3* (CUP 1998); A. Pagden, 'Human Rights, Natural Rights, And Europe's Imperial Legacy' (2003) 31 Political Theory 171.

<sup>4</sup> J. Tasioulas, 'The Moral Reality of Human Rights' in T. Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007); J. Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400.

philosophically illegitimate to ground labour law in human rights. These arguments share the same basic structure; of attempting to identify salient differences between human rights and labour law norms, and then claiming that these differences mean human rights cannot provide foundations for labour law.

Some of the critiques of human rights as foundations for labour law are drawn from the philosophical literature doubting the status of social rights as human rights. One example is the argument that labour law cannot be justified by reference to human rights because human rights must have determinate content, meaning solely negative duties of non-interference.<sup>5</sup> Given that positive action by the state is required to introduce and enforce labour law protections, such as decent working conditions or entitlements to paid holiday, these norms are arguably too indeterminate to be human rights.

Another argument translated from the social rights literature is that human rights are timeless and universal norms which do not vary over time or between societies, while labour law standards only make sense in advanced industrial economies and their content varies with socio-economic conditions.<sup>6</sup> Raz believes it is absurd to think that many supposed human rights, such as the right to primary education, were held by cave dwellers, so argues these cannot be timeless human rights.<sup>7</sup> Collins applies this logic to labour rights, saying that

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<sup>5</sup> O. O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427.

<sup>6</sup> G. Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Inquiries in Law* 719, 729.

<sup>7</sup> J. Raz, 'Human Rights Without Foundations' in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (OUP 2010) 328.

'human rights are often conceived as timeless fundamental needs, whereas it seems possible that labour rights may evolve according to the system of production'.<sup>8</sup>

A further supposed incompatibility between labour law and human rights drawn from the social rights literature is the argument that labour law protections are better viewed as policy goals rather than matters of rights, due to issues with either their enforceability or feasibility. Some theorists believe that for something to be the object of a rights claim there must necessarily be an effective mechanism for enforcing the claim.<sup>9</sup> If this is correct then labour law cannot be a matter of universal human rights, because labour law protections are absent or lack effective enforcement mechanisms in many states. The principle that 'ought implies can', combined with the universality of human rights, might also be thought to prevent labour law from being a matter of human rights, as the infeasibility of realising labour law norms in some societies could mean they cannot be universal rights, and are instead better seen as aspirations or policy goals.<sup>10</sup>

Away from the social rights literature, other more context-specific objections to grounding labour law in human rights have been made by labour lawyers who have considered the issue from a normative philosophical perspective. For instance, labour law is said to lack the moral urgency supposedly characteristic of human rights. The right to paid holiday is frequently cited as something insufficiently important to be a human right.<sup>11</sup> Collins similarly argues that human rights to dignity and freedom from torture seem to be 'different kinds of rights' than

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<sup>8</sup> H. Collins, 'Theories of Rights as Justifications for Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 142–3.

<sup>9</sup> R. Geuss, *History and Illusion in Politics* (CUP 2001) 144.

<sup>10</sup> M. Cranston, *What Are Human Rights?* (Basic Books 1973) 37.

<sup>11</sup> See for example *ibid* 66–7; J. Griffin, *On Human Rights* (OUP 2008) 186.



those to just remuneration and paid holiday, because while ‘the former present an urgent and weighty moral claim ... the latter do not seem to present such a compelling moral imperative.’<sup>12</sup>

Another supposed difference between human rights and labour law, identified by Mundlak, is said to be that human rights protect human dignity, whereas labour law is simply about equalising bargaining power.<sup>13</sup> In addition, Mundlak argues that labour law is ‘strongly rooted in the private sphere’ whereas human rights are ‘conceived as rights that govern the relationship between the state and the individual’,<sup>14</sup> and Kolben agrees that human rights are concerned with regulating state power so do not provide the tools to regulate the private sphere of employment.<sup>15</sup>

Human rights are also said to be incompatible with labour law on a theoretical level because human rights are individualistic and substantive standards, while labour law norms are collective and process-oriented.<sup>16</sup> For example, Youngdahl argues that labour rights are about collective action and solidarity, while human rights are about individualistic protections of

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<sup>12</sup> H. Collins (n 8) 142.

<sup>13</sup> G. Mundlak (n 2).

<sup>14</sup> G. Mundlak (n 6) 730.

<sup>15</sup> K. Kolben (n 2) 470.

<sup>16</sup> G. Mundlak (n 6) 222.

liberty and autonomy.<sup>17</sup> Others worry that aligning labour law with human rights risks losing the ‘crown jewels’ of collectivism,<sup>18</sup> or misses the importance of class struggle for labour law.<sup>19</sup>

The final disjunction between human rights and labour law identified by labour law scholars is that human rights are held by all ‘simply in virtue of their humanity’, whereas labour law protections apply to ‘only those in paid employment or in employment-like relationships’,<sup>20</sup> and are conditional upon this status. There therefore appears to be ‘a gap between the coverage of labor rights and the much broader coverage of citizenship and human rights’.<sup>21</sup>

The core idea running through these arguments is that human rights cannot provide a foundational perspective on labour law because human rights have necessary characteristics not shared by labour law norms.

While it is not necessary to consider each objection here, persuasive responses have been advanced to some of them. For example, Mantouvalou rejects the ‘moral urgency’ critique by arguing that not all labour law norms are less important than some generally accepted human rights. She points out that degrading treatment at work and dismissal for private acts are issues of high moral importance, and that not every human right has the moral urgency of

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<sup>17</sup> J. Youngdahl, ‘Solidarity First: Labor Rights Are Not the Same as Human Rights’ (2009) 18 *New Labor Forum* 31.

<sup>18</sup> C. McCrudden, ‘Labour Law as Human Rights Law: A Critique of the Use of “Dignity” by Freedland and Kountouris’ in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart) 289.

<sup>19</sup> V. Kumar, ‘Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess’ in R. Buchanan and P. Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice*. (Hart 2016).

<sup>20</sup> H. Collins (n 8) 142.

<sup>21</sup> G. Mundlak (n 6) 730.

torture, citing the example of the freedom to deny the Holocaust as part of the human right to expression.<sup>22</sup>

Other supposed differences between labour law and human rights norms are also demonstrably inaccurate. The objection that labour law is incompatible with human rights because it is concerned with procedural rights to collective action rather than substantive individual entitlements for example. It is simply not true that labour law, at least as understood here, is only concerned with procedural norms and collective action; it also encompasses individual and substantive entitlements to health and safety protections, minimum wages, limits on working time, and protections from dismissal. Furthermore, many human rights can only be exercised collectively,<sup>23</sup> so human rights are not necessarily incompatible with collective labour law norms. The argument that human rights are about dignity whereas labour law is concerned with equalising bargaining power is equally unconvincing. For one, the normative gap in the traditional narrative is the reason we must search for new normative foundations, so it is illegitimate to rely on this traditional narrative to block the development of new normative foundations for the discipline. Moreover, this argument ignores the a strong dignitarian thread running through labour law, encapsulated in the idea that labour is not a commodity.<sup>24</sup>

Where objections to human rights as foundations for labour law are drawn from broader criticisms of social rights then convincing counter-arguments can also be found in the

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<sup>22</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 Eur. Lab. LJ 151, 165.

<sup>23</sup> *ibid* 162. For example, the human rights to marry, to family life, and to associate with others.

<sup>24</sup> Declaration of Philadelphia 1944, I(a); P. O'Higgins, 'Labour Is Not a Commodity: An Irish Contribution to International Labour Law' (1997) 26 ILJ 225; S. Bolton, *Dimensions of Dignity at Work* (Routledge 2007).

literature on social rights. For example, Fredman and others have convincingly argued it is wrong to think that human rights only impose duties of non-interference,<sup>25</sup> and positive human rights obligations are now widely accepted in human rights law.<sup>26</sup> The fact that positive state action is required to introduce and enforce labour law protections therefore does not bar human rights from providing a foundational perspective on the discipline. The claim that labour law protections cannot be matters of human rights because they are too indeterminate has similarly been addressed in the social rights literature. While the content of positive human rights duties may not be obvious in the context of work it is possible to translate these duties into determinate or concrete standards,<sup>27</sup> as Mantouvalou demonstrates in her study of domestic workers' right to freedom from forced labour.<sup>28</sup> That arguments which draw on rejections of social rights as human rights are unpersuasive is no surprise given the emerging philosophical consensus that 'social rights are very much a species of human rights'.<sup>29</sup>

## ***2.2 The need to focus on specific theories of rights***

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<sup>25</sup> S. Fredman, *Human Rights Transformed* (OUP 2008); C. Gearty and V. Mantouvalou, *Debating Social Rights* (Hart 2010); C. Fabre, *Social Rights Under the Constitution* (OUP 2000); E. Ashford, 'The Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights' (2006) 19 *Canadian Journal of Law & Jurisprudence* 217.

<sup>26</sup> See A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Intersentia 2016).

<sup>27</sup> E. Ashford (n 25).

<sup>28</sup> V. Mantouvalou (n 22) 169.

<sup>29</sup> J. King, *Judging Social Rights* (CUP 2012) 22.

Although convincing responses can be made to many of the philosophical objections to human rights as a foundational perspective on labour law, greater clarity is needed regarding the conception of human rights that is being relied upon when rebutting these claims.

For example, one possible response to the 'moral urgency' objection is simply to argue that moral urgency is not a necessary characteristic of human rights. Risse does precisely this when considering the case for labour rights as human rights; he concedes that labour rights are not of 'paramount importance' but goes on to argue that this does not prevent labour rights from being human rights because there is no reason to restrict human rights 'to those of greatest urgency'.<sup>30</sup> However, we can only make this argument if we have a clear idea of the *nature* and *essential characteristics* of human rights. While moral urgency is a feature of some theories of human rights it is not essential in others. We therefore need to be clear about which philosophical conception of human rights our arguments are based in.

The claim that human rights cannot justify labour law because they are concerned with the 'vertical' state-citizen relationship rather than 'horizontal' work relations must also be assessed against a specific conception of human rights; some theories see human rights as only binding on states or institutions, whereas others see them as also applying in interpersonal relationships. A focus on a specific philosophical conception of human rights is similarly required to determine whether they are too individualistic to justify collective labour law norms, or whether the universality of human rights prevents them from providing foundations for variable and sometimes indeterminate labour standards.

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<sup>30</sup> M. Risse, 'A Right to Work? A Right to Leisure? Labor Rights as Human Rights' (2009) 3 *Law & Ethics of Human Rights* 1, 20.

Clarity over what is meant by ‘human rights’ is therefore needed to assess the validity of objections to grounding labour law in human rights. However, the current literature on human rights as normative foundations for labour law often lacks this necessary focus on specific conceptions of human rights, creating a risk that those involved are talking past each other.<sup>31</sup> A greater focus on philosophical theories of human rights, which illuminate their nature and essential characteristics, is therefore necessary if we are to break the current impasse regarding human rights as foundations for labour law. Perhaps more importantly, a theoretical conception of human rights is also necessary to determine *which* areas of labour law can be justified by reference to human rights, if any, and the substantive *content* of the legal protections demanded by human rights in the domain of labour law.

The need to identify the specific conception of human rights being relied upon to examine the relationship between labour law and human rights on a normative philosophical level is complicated by the lack of any consensus over the best theoretical understanding of human rights. Rather than one generally accepted theory, there are multiple philosophical conceptions of human rights. Given this, the following section introduces the human rights theory landscape, and considers the prospects of some prominent philosophical conceptions of human rights for providing foundations for labour law. In doing so, it demonstrates that the implications of human rights for labour law will vary between different theories of human rights.

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<sup>31</sup> For example, Collins refers to both Griffin’s personhood theory and to political conceptions of human rights, making it unclear what philosophical conception of human rights his arguments are aimed at, see H. Collins (n 8) 144.

### 3. Theories of Human Rights and Labour Law

Whether human rights can provide normative foundations for labour law, and the implications of human rights for the discipline, must be determined by reference to a philosophical conception of human rights. In order to provide a foundational perspective on labour law, a conception of human rights must justify and require the introduction of core labour law protections. A theory that demands the protection of civil rights such as privacy and expression in the workplace will certainly be relevant for labour law, but it cannot provide a foundational perspective for the discipline unless it also justifies labour law norms such as decent working conditions, protection from dismissal, or rights to bargain collectively and go on strike. The remainder of this chapter provides an introduction to philosophical thinking about human rights and maps the place of labour law under some prominent theories.

The nature, justification, and content of human rights, as opposed to ‘natural rights’, were topics largely ignored by philosophers until recently. While there is now a voluminous body of literature in this area,<sup>32</sup> there remains no consensus as to the best philosophical understanding of human rights. Almost everything about human rights remains contested, from their nature, grounding, and content, through to their very existence. Despite this, there is some degree of consensus among philosophers of human rights that they are individual

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<sup>32</sup> For an overview see R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015); G. Ernst and J. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012); A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

entitlements, which all people hold equally, and that are distinct from other norms in some important way.

In addition to being consistent with this broad definition of human rights, a philosophical conception must make the term 'human right' sufficiently determinate to be useful. This involves making the existence conditions of human rights clear, setting out the grounds for deciding their content, and indicating how conflicts between rights can be resolved.<sup>33</sup> A theory of human rights 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.<sup>34</sup> Finally, a theory should have some degree of 'fit' with current uses and understandings of human rights in morality and practice.<sup>35</sup> It is difficult to define precisely the level of fit required by this last desiderata: a theory should not just aim to replicate those rights found in international human rights documents,<sup>36</sup> but if it does not adequately justify and explain key human rights, such as freedom of expression or freedom from torture, this is a strong indication that the label of human rights is being misapplied.

This section maps out the place of labour law norms within some key philosophical conceptions of human rights, focussing on the two most prominent types of theory known as the political and naturalistic approaches.<sup>37</sup> Political theories view human rights as norms that

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<sup>33</sup> J. Griffin, 'Replies' in R. Crisp (ed), *Griffin on Human Rights* (OUP 2014) 225.

<sup>34</sup> A. Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315, 318–19.

<sup>35</sup> J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1, 17.

<sup>36</sup> G. Letsas, 'Dworkin on Human Rights' (2015) 6 *Jurisprudence* 327, 330.

<sup>37</sup> For discussion see, S.M. Liao and A. Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 *Journal of Moral Philosophy* 327.



have a particular political function in the domestic or international arena.<sup>38</sup> In contrast, naturalistic theories view human rights as the modern equivalents of natural rights with no inherent political function, and define them as moral rights held in virtue of humanity.<sup>39</sup> As we shall see however, substantial differences exist between theories within each of these broad approaches.

### ***3.1 Political theories***

Political 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 that seeks to develop the most attractive theory that fits and explains the existing use and practice of human rights.<sup>40</sup> Political human rights theorists have proposed that human rights have various roles, at both the international and domestic level; including standards for determining the internal legitimacy of a regime,<sup>41</sup> or protecting human interests that are matters of ‘common concern’ in the international arena.<sup>42</sup> What then is the place of labour law norms within some leading political theories of human rights?

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<sup>38</sup> Political theories are also known as ‘practical’ or ‘functional’, C. Beitz, *The Idea of Human Rights* (OUP 2009); J. Griffin, *On Human Rights* (n 11) 27.

<sup>39</sup> Naturalistic theories are also sometimes known as ‘orthodox’ or ‘traditional’ theories of human rights, J. Raz (n 7); J. Tasioulas, ‘Taking Rights out of Human Rights’ (2010) 120 *Ethics* 647.

<sup>40</sup> See R. Dworkin, *Law’s Empire* (Hart 1998).

<sup>41</sup> R. Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 322–44.

<sup>42</sup> C. Beitz, *The Idea of Human Rights* (n 38); C. Beitz, ‘From Practice to Theory’ (2013) 20 *Constellations* 27.

The most influential strand of political theories sees human rights as those rights whose violation justifies intervention with a sovereign state. On this approach, human rights are individual entitlements which delineate the boundaries of state sovereignty. John Rawls, the original proponent of this view, believed 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'.<sup>43</sup> For Rawls, 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, as well as acts of civil disobedience by citizens. This view of the function of human rights appears to equate the conditions for internal authority with the boundaries of sovereignty, which is problematic because not every state action that oversteps its legitimate authority is necessarily a justified reason for foreign intervention.<sup>44</sup> Ultimately however, Rawls views the critical benchmark for something qualifying as a human right as being that its violation is a valid trigger for military intervention.<sup>45</sup> States that fail to introduce policies and legislation adequately protecting and securing human rights therefore leave themselves open to justified military coercion.

The philosophical conception of human rights supported by Rawls has little prospect of providing foundations for labour law. The question of what counts as a matter of human rights 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

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<sup>43</sup> J. Rawls, *The Law of Peoples* (2nd edn, Harvard University Press 1999) 79.

<sup>44</sup> J. Raz (n 7) 330–1.

<sup>45</sup> J. Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 *Philosophy Compass* 938, 942.

would agree upon as conditions for cooperation behind the veil of ignorance.<sup>46</sup> This leads to an extremely minimalist list of human rights, that excludes many commonly accepted civil and political rights, such as freedom of expression and association, as well as all socio-economic rights aside from a right to subsistence.<sup>47</sup> For labour law norms to be included within this theory of human rights, a state's failure to introduce and enforce labour law protections would have to leave them open to justified military coercion. With the exception of freedom from slavery and forced labour, labour law norms do not meet this criterion. Failure to regulate for decent working conditions, or to allow workers to bargain collectively and go on strike, do not plausibly meet the threshold of being justified grounds for military intervention. The vast majority of labour law norms therefore have no place in this theory of human rights.

There are in any case 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.<sup>48</sup> Second, although human rights are sometimes used as justifications for military action, Rawls affords this role much greater significance than it has in everyday practice and usage of human rights, and ignores the broad range of other functions played by human rights.<sup>49</sup> Finally, the method of justifying human rights via public reason and the hypothetical original position has been criticised for making their content

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<sup>46</sup> J. Rawls (n 43) 60.

<sup>47</sup> *ibid* 65.

<sup>48</sup> R. Dworkin (n 41); Cf G. Letsas (n 36).

<sup>49</sup> C. Beitz, 'Rawls's Law of Peoples' (2000) 110 *Ethics* 669, 687; J. Griffin, 'Human Rights and the Autonomy of International Law' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 343.

extremely difficult, if not impossible, to determine.<sup>50</sup> Given these drawbacks, it is no surprise that Rawls' theory has not been widely adopted.

Raz develops a political conception of human rights that builds on Rawls' idea that human rights are norms whose violation justifies interference with an otherwise sovereign state.<sup>51</sup> However, he departs from Rawls in three main 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'.<sup>52</sup> This significantly lowers the threshold for something being a human right, resulting 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 must be justified using ordinary moral reasoning rather than by public reason in the international original position.

For Raz, therefore, human rights are the sub-set of moral rights whose violation justifies external interference with a sovereign state. There are three 'layers of argument' for determining what counts as a human right under this theory; human rights must be moral rights, that impose duties on government, and there must not be state immunity from interference regarding violations of the rights.<sup>53</sup> Despite being sceptical that exposure to 'excessively and unnecessarily heavy, degrading, dirty and boring work' is a human rights

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<sup>50</sup> J. Griffin, 'Human Rights and the Autonomy of International Law' (n 49) 343.

<sup>51</sup> J. Raz (n 7) 328.

<sup>52</sup> *ibid* fn 21.

<sup>53</sup> *ibid* 336.

violation,<sup>54</sup> the theoretical framework proposed by Raz can be used to justify some key labour law norms as human rights.

Determining the implications of Raz's conception of human rights for labour law requires us to unpack each of his three layers of argument, although this can be done only briefly here. The first layer, that human rights be moral rights, requires a theory of what moral rights are and how they are justified. 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.<sup>55</sup> Without considering the matter fully, it seems probable that some key labour law norms can be justified as moral rights under Raz's interest-based approach.<sup>56</sup> For example, Raz argues a right to education is generated by our interest in being 'equipped with whatever knowledge and skills are required for him to be able to have a rewarding life',<sup>57</sup> and this would include a right to be provided with the training needed to participate in the labour market. The significant roles that work plays in our lives, and the extent to which work is necessary to further our interests in self-development and self-realisation can justify a moral right to work,<sup>58</sup> and this plausibly encompasses a right to working conditions adequate to further the interests underpinning the right to work.<sup>59</sup> A right to non-discriminatory access to work might be grounded in our interests in dignity, social

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<sup>54</sup> *ibid* 321.

<sup>55</sup> J. Raz, *The Morality of Freedom* (OUP 1988) ch 7. Other theories of moral rights could also be used.

<sup>56</sup> See Chapter 7 for further discussion.

<sup>57</sup> J. Raz (n 7) 336.

<sup>58</sup> H. Collins, 'Is There a Human Right to Work?' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>59</sup> P. Gilibert, 'Labor Human Rights and Human Dignity' (2016) 42 *Philosophy & Social Criticism* 171.

inclusion, and self-respect.<sup>60</sup> Moral rights to collective labour law norms such as to form trade unions and go on strike might be justified as part of a broader right to freedom of association, or through a combination of the rights to association, expression and freedom from forced labour.<sup>61</sup> While there is not space to discuss these rights in detail at this stage, it seems likely that several core labour law norms will pass the first stage of Raz's theory.

The second 'layer' requires that human rights generate duties for governments, with the question being whether the state should be the guarantor of these rights.<sup>62</sup> In the labour law context it is employers rather than the state who are more obviously responsible for working conditions. However, given the bureaucratic power of modern states and the extent to which they are involved in establishing and regulating labour markets, it is appropriate that the state should guarantee workers' moral rights. The labour market is constituted by state-created legal rules, meaning the state necessarily has a major role in determining whether worker's moral rights are realised. Long years of experience tells us that unregulated labour markets result in the 'worst possible conditions' for workers,<sup>63</sup> and will lead to widespread violations of workers' moral rights. As such, it is reasonable to think that Government has a duty to ensure the law does not permit or encourage the violation of workers' moral rights.

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<sup>60</sup> A. Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 7, 25.

<sup>61</sup> A. Bogg and C. Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014); A. Bogg and C. Estlund, 'The Right to Strike and Contestatory Citizenship' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>62</sup> J. Raz (n 7) 336.

<sup>63</sup> S. Webb and B. Webb, *Industrial Democracy* (Longmans 1902) 560–1.

The final stage of argumentation required for labour law to be grounded in Raz's theory of human rights is that there must not be 'immunity from interference' regarding workers' rights.<sup>64</sup> 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.'<sup>65</sup> The question therefore, is whether the violation of workers' moral rights is a justified ground for by external actors taking measures against a state that would normally be ruled out by sovereignty.

Answering this in full requires a more detailed theory of the immunity normally provided by sovereignty than can be discussed here. But even without such a theory, we can see that some, but not all, labour law norms are likely to provide justified grounds for intervention and therefore count as human rights. Failing to introduce or enforce workplace safety standards, allowing or encouraging widespread discrimination in the workplace, or banning trade unions and their activities are all justified reasons for publicly condemning a state. Condemnation by the ILO and other UN bodies for violations of international labour standards 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 regarded as impermissible interferences with sovereignty. In some instances, violations of workers' moral rights will also be justified grounds for imposing trade sanctions or withdrawing financial support or foreign aid from a country.<sup>66</sup>

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<sup>64</sup> J. Raz (n 7) 336.

<sup>65</sup> *ibid* 332.

<sup>66</sup> C. Dombia-Henry and E. Gravel, 'Free Trade Agreements and Labour Rights: Recent Developments' (2006) 145 *Int'l Lab. Rev.* 185; L. Putte and J. Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 263.

In contrast, violation of some labour law norms are clearly insufficient to justify intervention with a sovereign state. Failing to guarantee an employees' right to a written copy of their terms and conditions, if such a moral right exists, is one example.<sup>67</sup> Except in extreme cases violations of other core labour law norms such as working time regulations, minimum wages, protection from dismissal and the facilitation of collective bargaining may also not be sufficient to justify intervention with a sovereign state. Determining which areas of labour law have foundations in Raz's theory, and the broader implication of human rights for labour law under this conception, requires more thorough consideration than carried out above. However, the preceding paragraphs indicate that at least some areas of labour law can feasibly be justified using this conception of human rights.

There are, however, several potential drawbacks with grounding labour law in Raz's theory of human rights, and in political theories more generally. First, Laio and Etinson point out that political theories often offer only formal conceptions of human rights, meaning that they provide a framework for understanding what human rights are but do not supply substantive arguments about what counts as a human right or the content of these rights.<sup>68</sup> It is true that political theories are often incomplete, and so require further philosophical work to establish the substantive content of human rights. Political theories of human rights do not avoid the need to use substantive moral reasoning when identifying and specifying human rights.<sup>69</sup> Raz's theory is an example of this, as it depends on substantive theories of moral rights and state sovereignty to provide a complete understanding of human rights. The philosophical

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<sup>67</sup> Employment Rights Act 1996, s 1.

<sup>68</sup> S.M. Liao and A. Etinson (n 37) 346–51.

<sup>69</sup> L. Valentini, 'In What Sense Are Human Rights Political? A Preliminary Exploration' (2012) 60 *Political Studies* 180, 187.



work needed to flesh out incomplete political theories of human rights is not impossible, so they should not necessarily be ruled out as providing foundations for labour law. But there is a risk that political theories leave unanswered the question of their implications for labour law.

Secondly, it is questionable whether any political theory can adequately capture the variety of roles that human rights play at interpersonal, domestic, and international levels. Certainly, focussing on international human rights law as the paradigm of human rights usage seems overly narrow, as does viewing them as triggers for intervention in the international arena.<sup>70</sup> Finally, Waldron argues that viewing human rights as norms which justify intervention with foreign states undermines the important individualistic nature of human rights, because violations of a single person's human rights (for example to association or privacy) are unlikely to be sufficient to justify such intervention.<sup>71</sup>

### ***3.2 Naturalistic theories***

In contrast to political theories, naturalistic theories see human rights as moral norms with no inherent political function. Although the intellectual history of human rights is the subject of ongoing debate,<sup>72</sup> naturalistic theorists reject the idea that human rights should be understood as a post-war phenomenon, and that international legal human rights should therefore be the

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<sup>70</sup> J. Griffin, 'Human Rights and the Autonomy of International Law' (n 49) 344.

<sup>71</sup> J. Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach' in A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

<sup>72</sup> C. McCrudden, 'Human Rights Histories' (2015) 35 OJLS 179.

focal point of a theory of human rights. Instead naturalistic theories are situated in the same tradition as natural rights scholars such as Grotius and Locke,<sup>73</sup> although they are generally secular rather than grounded in appeals to religious authority. Although naturalistic theories are less explicitly focused on the practice of human rights than political theories, they do also aim to fit the contemporary idea and culture of human rights. The three key features of naturalistic conceptions are to see human rights as moral rights, held 'simply in virtue of their humanity', and justified using ordinary moral reasoning.<sup>74</sup>

Perhaps the most fully developed naturalistic theory of human rights is proposed by Griffin, who views them as protections of 'personhood'. Personhood here means humanity's distinctive capacity for normative agency; the ability to choose and pursue one's own conception of the good life.<sup>75</sup> According to Griffin we have human rights to the conditions of normative agency, but what rights does this entail? 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.<sup>76</sup> The human 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 disapproval.<sup>77</sup> The right to minimum

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<sup>73</sup> J. Griffin, *On Human Rights* (n 11) 10–11.

<sup>74</sup> J. Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (n 45) 938.

<sup>75</sup> J. Griffin, *On Human Rights* (n 11) 33.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid* 160–4.

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.<sup>78</sup>

The three abstract human rights to autonomy, liberty, and minimum provision provide an umbrella framework within which the existence of more determinate human rights can be justified and established. For example, the abstract right to autonomy includes more determinate rights to life, health, free expression and assembly and to a level of education which allows one to make autonomous choices.<sup>79</sup> The scope and content of these rights is influenced by 'practicalities', which are empirical considerations about society and humanity.<sup>80</sup> In addition, there are context-dependent derived human rights which 'arise from applying a basic human right to a particular time and place'.<sup>81</sup> The 'human right to a free press' is an example of this; the right cannot exist in societies where the printing press has not been invented, but where it has, the right is a central element of the more abstract human right to freedom of expression.<sup>82</sup> Griffin uses this framework to generate most, although not all, rights that commonly feature in human rights documents.<sup>83</sup>

What implications, if any, does Griffin's theory have for labour law? The initial prospects of this conception of human rights providing a foundational perspective for the discipline do not look good. Griffin himself rejects a human right to work or to decent conditions of work,

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<sup>78</sup> *ibid* 183.

<sup>79</sup> *ibid* 33.

<sup>80</sup> *ibid* 37–9.

<sup>81</sup> *ibid* 327.

<sup>82</sup> *ibid* 50.

<sup>83</sup> J. Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights' (2001) 101 *Proceedings of the Aristotelian Society* 1.

arguing that these are matters of justice rather than human rights,<sup>84</sup> and also does not recognise a human right against discrimination or to equal pay for equal work.<sup>85</sup> It is not that Griffin thinks that discrimination is morally permissible, or that fairness does not demand equal pay; just that are not matters of human rights because they do not impact a person's normative agency.

Despite this, Griffin's theory of human rights may provide normative foundations for several key aspects of labour law. For instance, although Griffin rejects the right to work as a human right, this right, in the sense of a right not to be blocked from working and to the promotion of employment opportunities, can be justified under his theory. The right to work is a derived human right coming under the more basic right to adequate options to live in a 'productive, interesting, enjoyable way',<sup>86</sup> because in most modern societies work plays a significant role in making our lives productive and interesting. Indeed, 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',<sup>87</sup> and comes close to recognising the right to work as a derived human right when he says that the right to adequate options and the right to work can be 'reconciled' by seeing them as 'formulated at different levels of abstraction'.<sup>88</sup> Given this, it is unclear why he continues to class the right to work as an 'unacceptable' human right.

The abstract human rights to autonomy and liberty contained in Griffin's theory can also be used to justify other areas of labour law. The abstract right to autonomy encompasses rights

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<sup>84</sup> J. Griffin, *On Human Rights* (n 11) 207–9.

<sup>85</sup> *ibid* 42.

<sup>86</sup> *ibid* 208.

<sup>87</sup> *ibid*.

<sup>88</sup> *ibid*.

to the capacities needed to pursue a worthwhile life, and it is arguable that some labour law norms 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. Labour law norms that remove barriers to accessing the workplace might be required as part of this: parental leave or flexible working rights for example, or duties of affirmative action or reasonable adjustment. This is reminiscent of the idea of 'freedom as capabilities' which has been suggested as providing foundations for labour law.<sup>89</sup>

The abstract right to liberty protects the ability to pursue one's own conception of a worthwhile life, and this must include the ability of workers to pursue decent working conditions. When this right is coupled with the human right to associate freely, which is an essential element of the right to autonomy,<sup>90</sup> Griffin's theory can be seen to provide foundations for rights to form trade unions and campaign for better working conditions. This includes a right for workers to seek to bargain collectively with employers. Although a right to strike might not appear to be necessary for normative agency, a human right to strike might nevertheless be justified as required for workers to have any realistic chance of success in their pursuit of decent working conditions as part of their vision of a worthwhile life.<sup>91</sup> The human right to liberty only protects the *pursuit* of a worthwhile life however, rather than its achievement, so does not entitle workers to succeed in their pursuit of decent working conditions. Similarly, while trade unions must be able to campaign and attempt to bargain

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<sup>89</sup> B. Langille (ed), *The Capability Approach to Labour Law* (OUP 2019).

<sup>90</sup> J. Griffin, *On Human Rights* (n 11) 159.

<sup>91</sup> P. Gilabert (n 59).

collectively, this conception of human rights does not require employers to listen, or engage in collective bargaining, as this is not required for workers' normative agency.<sup>92</sup>

In addition, some minimum labour law protections and standards are demanded by Griffin's theory of human rights. As human rights protect the conditions for normative agency, 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',<sup>93</sup> and several areas of labour law safeguard workers' personhood. Workplace health and safety regulations are one example of this; a minimum level of health is needed for normative agency, and unsafe working conditions pose a threat to this in the same way as unsafe roads and poor sewage systems, both of which Griffin believes violate the human right to health.<sup>94</sup> Personhood also requires restrictions on working time, as without leisure time to contemplate and pursue their vision of a worthwhile life people will be incapable of being autonomous self-deciders, and have no realistic prospect of achieving their aims.

Some protections against discrimination and dismissal can also be justified within Griffin's conception of human rights. Although there are no general human rights to non-discrimination and equal pay under this theory, discriminatory treatment is a human rights violation when it impacts normative agency. Because being discriminated against for being a member of a scorned or belittled group would likely undermine one's autonomy, workplace discrimination on the basis of sex, disability, race, religion or other such characteristics will

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<sup>92</sup> J. Griffin, *On Human Rights* (n 11) 247–55.

<sup>93</sup> *ibid* 47.

<sup>94</sup> *ibid* 215.

breach human rights.<sup>95</sup> Protection against dismissals that threaten the enjoyment of workers' human rights, such as those to privacy, expression, or association, would also likely be required under Griffin's theory. Because if employers are permitted to dismiss people on these grounds workers' would not be able to securely exercise or enjoy their rights, thus undermining their normative autonomy.

Based on this cursory review, it therefore seems likely that several aspects of labour law will be included within Griffin's naturalistic conception of human rights. However, there are criticisms of his account which should make us think twice about its ability to provide sound foundations for labour law. First, the reliance on normative agency as the sole value grounding human rights leads to strained interpretations of some paradigm rights which seem to be also underpinned by other values, such as the right to freedom from torture.<sup>96</sup> Second, Griffin's theory denies human rights to people without the capacity for normative agency, such as young children or the severely disabled, which some view as problematic or inconsistent with the supposedly universal nature of human rights.<sup>97</sup> Finally, it is not clear in what sense human rights are 'rights' under Griffin's theory.<sup>98</sup> Although Griffin has defended his theory against some of these critiques,<sup>99</sup> it might still be thought to be an insufficiently persuasive or attractive view of human rights to provide a foundational perspective for labour law.

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<sup>95</sup> *ibid* 42.

<sup>96</sup> J.W. Nickel, *Making Sense of Human Rights* (2nd ed., Wiley 2007) 54; J. Tasioulas, 'Towards a Philosophy of Human Rights' (n 35).

<sup>97</sup> J. Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10 *European Journal of Philosophy* 79, 93.

<sup>98</sup> J. Raz (n 7); J. Tasioulas, 'Taking Rights out of Human Rights' (n 39).

<sup>99</sup> For example, see J. Griffin, 'Replies' (n 33).

An alternative naturalistic conception of human rights that aims to avoid the problems with Griffin's theory is developed by Tasioulas. He takes human rights to be *all* moral rights held 'simply in virtue of humanity', and adopts a 'Razian' interest-based view of moral rights,<sup>100</sup> under which a right exists 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'.<sup>101</sup> Human rights are merely the sub-set of moral rights held 'simply in virtue of humanity', in the sense that they are generated by 'basic interests', which include our 'interests in health, physical security, autonomy, understanding, friendship, achievement, play, etc.'<sup>102</sup> The interests capable of grounding human rights are open ended, with each right likely to be generated by a range of basic interests.<sup>103</sup>

According to Tasioulas, a human right exists when, for all persons within a given historical context: the object of the supposed right serves their basic interests, these interests are *pro tanto* sufficiently important to justify duties for others to respect or protect it and, these duties represent feasible claims given human nature and historical context.<sup>104</sup> Following this, human rights need not be strictly timeless, as they can be justified within particular historical contexts, and their content depends on assessments of feasibility and burdensomeness.<sup>105</sup>

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<sup>100</sup> See Raz (n 45).

<sup>101</sup> J. Tasioulas, 'On the Foundations of Human Rights' in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 50.

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

<sup>103</sup> *ibid* 51.

<sup>104</sup> *ibid* 50–51.

<sup>105</sup> J. Tasioulas, 'On the Nature of Human Rights' in G. Ernst and J. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (2011) 35–6.



There appears to be considerable scope for labour law norms to be included within this understanding of human rights. Given Tasioulas adopts a Razian interest-based account of moral rights, his theory could provide foundations for those labour rights already discussed in respect of Raz's theory of human rights, including a right to work in decent conditions, and for workers to act collectively. The most direct way for Tasioulas' theory to provide foundations for labour law would be by justifying a human right to decent working conditions. Many universal interests are furthered by decent working conditions, including those in having a decent standard of living, health, autonomy, being treated equitably and with dignity, and not being exploited. If these interests are sufficient to generate *pro tanto* duties, a human right to decent working conditions might be established under Tasioulas' theory, which could include core labour law norms such as prohibition on non-exploitative rates of pay, protection from dismissal, safe working conditions and limits on working time.

Although Tasioulas' broad conception of human rights might justify the inclusion of key labour rights within the domain of human rights, it could be criticised for offering an account that has little relevance to the contemporary idea or practice of human rights,<sup>106</sup> or even of changing the subject altogether. His understanding of human rights certainly seems out of step with how they work in international law, where they apply primarily to governments and are restricted to particularly important rights. Many rights included in Tasioulas' conception do not have either of these features; for example, the human rights to participate in family decisions,<sup>107</sup> or to not be betrayed.<sup>108</sup>

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<sup>106</sup> See C. Beitz, *The Idea of Human Rights* (n 38).

<sup>107</sup> J. Tasioulas, 'Towards a Philosophy of Human Rights' (n 35) 2.

<sup>108</sup> *ibid* 23.

Another significant barrier to Tasioulas' theory providing a foundational perspective for labour law is one that also applies to naturalistic theories more generally; namely that because they view human rights in moral terms, these theories do not necessarily view them as having implications for the *law*. Under the naturalistic approach, human rights need not be demands for the creation of legal protections, what Feinberg calls 'ideal moral rights',<sup>109</sup> or entrenchment in constitutional frameworks. Instead they are purely moral rights. Naturalistic theories might therefore provide *moral* justification for labour standards and worker protections without actually providing foundations for labour *law*. This is not necessarily an insurmountable bar to naturalistic theories providing a foundational perspective on labour law, but it does mean that some further argument is needed to establish the legal implications of workers' moral human rights.

#### **4. Conclusion**

Although a focus on specific philosophical conceptions of human rights is necessary to determine whether they can provide foundations for labour law there is no consensus regarding the best philosophical understanding of human rights. As such, there is no generally accepted theory of human rights waiting to be adopted by labour lawyers as foundations for the discipline. Political theories of human rights will often need to be supplemented by additional moral reasoning or substantive theories of human rights, and their focus on the role human rights play in international law and relations seems overly narrow. Naturalistic theories are likely to require further argumentation to bridge the gap

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<sup>109</sup> J. Feinberg, *Social Philosophy* (Englewood 1973) 85.

from moral human rights to legal rights and protections, and they may be accused of being irrelevant to the practice of human rights.

Given the fundamental disagreements that exist over the nature of human rights, it might be questioned whether they can provide a suitable foundational perspective for labour law. Can such a contested idea provide a sufficiently stable and persuasive basis on which to defend the discipline? Some argue that attempts to philosophise human rights should be abandoned as dead-ends,<sup>110</sup> and even that the 'chief virtue' of human rights is that they avoid having to substantiate foundational moral claims.<sup>111</sup> In which case looking to human rights to fill the normative gap left by labour law's traditional narrative might be a case of 'out of the frying pan and into the fire'. In addition, the preceding discussion indicates that human rights may offer only a partial justification for labour law, which could lead to a two-tier system of labour law with areas that cannot be grounded in human rights being regarded as unimportant or unjustified.

While these doubts must be taken seriously, they should not prevent us from further consideration of a human rights as foundation for labour law. The disputed nature of human rights does not rule them out as a justification of labour law, because the same contestation exists for other suggested foundational ideas such as equality, dignity, non-exploitation, capabilities, democracy, and justice. If labour law must be grounded in a non-contested idea or value then the search for foundations will be fruitless. The fact the human rights may justify some but not all areas of labour law should also not cause us to abandon human rights as a

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<sup>110</sup> M. Koskenniemi, 'Rights, History, Critique' in A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

<sup>111</sup> R. Sloane, 'Human Rights for Hedgehogs: Global Value Pluaralism, International Law, and Some Reservations of the Fox' (2010) 90 Boston U. L.R. 975, 976.

foundational perspective. It has already been argued that we should adopt a pluralistic approach to labour law's foundations. Therefore, the fact that some elements of labour law cannot be grounded in human rights does not mean that they cannot be strongly justified in other ways. Even if human rights cannot provide foundations for every aspect of labour law, they may still be an important strand in a pluralistic approach to labour law's foundations.

However, the contested terrain of human rights theory *does* mean that a choice must be made regarding which conception of human rights to adopt as the basis for examining the relationship between labour law and human rights in more depth. A theory must be set out in enough detail to allow us to identify its concrete implications in the sphere of labour law. To a large extent therefore, conclusions about the relationship between labour law and human rights, and the demands of human rights regarding the legal regulation of work, will be contingent on the philosophical conception of human rights adopted. This does not undermine the enterprise; it merely means that we must be clear about the limits of any claims being made, and aware that alternate understandings of human rights may lead to different conclusions.

## Chapter 6: A Theory of Human Rights

### 1. Introduction

It has so far been argued that a *normative philosophical* approach must be adopted to properly understand the relationship between human rights and labour law, and that a focus on a *specific conception* of human rights is needed, both to evaluate the objections to aligning labour law with human rights and to determine the positive implications of human rights for the discipline. A focus on a specific philosophical theory of human rights is important because the extent to which human rights can provide normative foundations for labour will vary between different theoretical understandings of human rights.

This chapter sets out a detailed account of human rights, which forms the basis of this thesis' analysis of the relationship between labour law and human rights. In doing so, it also evaluates the philosophical objections to grounding labour law in human rights and demonstrates that these are unpersuasive. By rebutting the *negative* philosophical case against human rights as a foundational perspective for labour law this chapter clears the path for Chapter 7's examination of the *positive* implications of human rights for labour law.

This chapter begins, in Section 2, by discussing the choice of which conception of human rights to adopt, and argues there is no single 'correct' theoretical understanding of human rights, so we must identify the most coherent and convincing theory of the type best suited to answering the questions we are concerned with. The remainder of the chapter then sets out a

philosophical conception of human rights which takes them to be moral rights, grounded in universal basic interests, and that make up conditions for a minimally decent human life. This 'modified interest-based theory' of human rights combines and builds upon several existing philosophical conceptions of human rights,<sup>1</sup> but does not simply replicate any single theory. Sections 3 and 4 of the chapter discuss each constitutive element of human rights, and identifies their key characteristics and content under this theory. Throughout this discussion, where relevant, the philosophical objections to grounding labour law in human rights are shown not to hold under this theory, meaning it is conceptually possible for it to provide foundations for labour law norms.

Finally, in Section 5, the chapter concludes by considering the relationship between human rights and the law under the conception of human rights set out here. Although the theory views them as moral norms, it is suggested that there are nevertheless good reasons for thinking that legal protections and frameworks will often be required to fully implement them. It follows that despite being primarily moral standards, they may have significant implications for labour law.

## 2. Choosing a Theory

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<sup>1</sup> Including J. Raz, *The Morality of Freedom* (OUP 1988); J. Griffin, *On Human Rights* (OUP 2008); C. Fabre, *Social Rights Under the Constitution* (OUP 2000); S. Fredman, *Human Rights Transformed* (OUP 2008); J. Tasioulas, 'On the Foundations of Human Rights' in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015); J.W. Nickel, *Making Sense of Human Rights* (2nd ed., Wiley 2007); S.M. Liao, *The Right to Be Loved* (OUP 2015).

When examining the relationship between labour law and human rights on the normative philosophical level, we must choose which theory of human rights to adopt for this purpose. Intuitively, it might seem we should seek to identify the best or 'correct' philosophical theory of human rights. This would be a mistake. It is not possible to identify a single correct theory of human rights, because philosophers are addressing different concepts, or broad ideas, of human rights rather than simply offering competing theories of the same basic idea. Instead of seeking to identify the correct theory of human rights therefore, we must identify the most relevant and appropriate type of human rights theory to use to examine the relationship between labour law and human rights, and then set out a coherent theory of this type.

Human rights are studied by a range of different disciplines, which have different understandings of the underlying concept that the 'human rights' label applies to. Disciplinary perspectives on human rights include historical, sociological, developmental studies, political science, legal, and philosophical. Etinson points out that the idea of human rights has 'many lives', because they purport to be objective moral standards, as well as being actual positive standards reflected in legal and political practice.<sup>2</sup> As a result, there is 'no single answer' to the question 'what are human rights?'<sup>3</sup>

Even within the philosophical literature on human rights, scholars often address different basic ideas of what human rights are rather than offering alternate conceptions of the same concept.<sup>4</sup> For example, Etinson distinguishes between interpretive theories of human rights, which aim to give justificatory accounts of existing human rights practice, and more

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<sup>2</sup> A. Etinson, 'Introduction' in A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 5–6.

<sup>3</sup> M. Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (CUP 2006) 232.

<sup>4</sup> On the concept/conception distinction see R. Dworkin, *Law's Empire* (Harvard University Press 1986) 71, 94.

normative theories of how human rights should be understood.<sup>5</sup> Nickel also points out that naturalistic theories which see human rights as moral norms have different aims and focuses than political theories that seek to understand the role human rights play in current practice.<sup>6</sup> The debate between political and naturalistic theories, is ‘as much a debate about how to theorize human rights—and to what end—as it is about human rights themselves’.<sup>7</sup> Furthermore, different concepts of human rights may be addressed by theorists *within* each of the political and naturalistic approaches. Naturalistic theories for instance, might define the concept of human rights as encompassing all those moral rights held universally by all. Or, alternately, as only those urgent requirements of political morality that are owed to all people. These represent different ideas of human rights, rather than different conceptions of the same basic idea. Similarly, political theories might focus either on the role human rights play in international relations, domestic politics, or in social and political movements.

The fact that scholars frequently address different underlying *concepts* of human rights rather than advocating competing *conceptions* means they often end up talking past each other.<sup>8</sup> More significantly, it indicates that there is no single ‘correct’ theory of human rights and that some apparently conflicting theories of rights may not be mutually exclusive.<sup>9</sup> Waldron’s observation on the debate between ‘interest’ and ‘will’ theories of rights applies equally in this context; namely, that it is a mistake to think that the phrase human rights ‘must have a single

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<sup>5</sup> A. Etinson (n 2) 3.

<sup>6</sup> J.W. Nickel, ‘Assigning Functions to Human Rights’ in A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

<sup>7</sup> A. Etinson (n 2) 5.

<sup>8</sup> A. Buchanan, ‘The Egalitarianism of Human Rights’ in R. Crisp (ed), *Griffin on Human Rights* (OUP 2014) 80.

<sup>9</sup> There will, of course, still be conflict between theories which address the same concept of human rights, with some being more coherent and persuasive than others.



correct meaning', and the 'more sensible approach' is to view scholars as identifying quite different types of consideration.<sup>10</sup>

Some scholars, who can be described as concept imperialists or human rights monists, might claim that there is only one basic idea, or concept, that deserves the label of 'human rights'.<sup>11</sup>

There is no need to take this position, however, and it seems more plausible that there are multiple concepts or basic ideas to which the human rights label can be applied. Hessler therefore seems correct that 'there will likely be no single best approach to the philosophy of human rights because the philosophy of human rights is not a single, monolithic enterprise, but rather includes a plurality of approaches that serve different purposes'.<sup>12</sup>

There is increasing recognition that human rights 'mean different things to different people',<sup>13</sup> and there is not necessarily a single correct theoretical understanding of human rights.<sup>14</sup>

However, the plurality of human rights theory does not mean that there is no point in thinking philosophically about human rights. It simply means that we must be clear about which concept of 'human rights' we are referring to when using the term. Theories of human rights

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<sup>10</sup> J. Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503.

<sup>11</sup> G. Letsas, 'Philosophical Foundations of the Covenants: Is There a Unitary Concept of Human Rights?', *ESIL Symposium* (2016).

<sup>12</sup> K. Hessler, 'Theory, Politics, and Practice: Methodological Pluralism in the Philosophy of Human Rights' in R. Malik and J. Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (CUP 2018) 24.

<sup>13</sup> S. Besson, 'Justifications' in D. Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2017) 27.

<sup>14</sup> G. Letsas, 'Philosophical Foundations of the Covenants: Is There a Unitary Concept of Human Rights?' (n 11); M. Lattimer, 'Two Concepts of Human Rights' (2018) 40 *Human Rights Quarterly* 406; A. Sangiovanni, 'Beyond the Political–Orthodox Divide' in A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

that address different basic concepts are best viewed as offering a choice of ‘conceptual lenses’ through which to analyse particular issues.<sup>15</sup>

If there is no single correct philosophical theory of human rights, there is also no ‘correct’ understanding of the relationship between human rights and labour law. However, a specific theory must still be adopted as the basis for exploring human rights as a foundational perspective for labour law. The task of choosing a theory therefore becomes that of identifying the *concept* of human rights that is most relevant and appropriate for answering the questions we are interested in, and setting out a persuasive *conception* of that type.

Following this, the broad idea of human rights focussed on here is that of human rights as pre-legal moral rights, of the type addressed by ‘naturalistic’ theories. This basic idea is chosen because it is the most pertinent to the issues under consideration. This thesis does not consider the place of labour law norms in international law or relations. Rather, the aim is to explore normative questions about the relationship between human rights and domestic labour law: whether grounding labour law in human rights is philosophically legitimate, which aspects of labour law can be justified using human rights arguments, and whether English labour law measures up to the normative demands made by human rights. Theories which view human rights primarily as moral norms held in virtue of humanity are best placed to help us answer these questions.

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<sup>15</sup> Thomas makes this point in respect of ‘interest’ and ‘will’ theories of rights, J. Thomas, *Public Rights, Private Relations* (OUP 2015) ch 3.

### 3. A Theory of Human rights

A complete theory of human rights should specify their nature, existence conditions, how they can be justified and defended, as well as how their content is determined and conflicts between rights, or with other values, can be resolved.<sup>16</sup> A theory must also have some degree of fit with the existing use and understanding of human rights.<sup>17</sup> Finally, to be useful in examining human rights as a foundational perspective for labour law, a theory of human rights must be detailed enough to allow us to assess its normative implications for labour law.

The conception of human rights set out below aims to clarify these key issues about their nature, justification, and content. It views human rights as *moral rights*, grounded in *universal interests*, which make up conditions of a *decent human life*. This 'modified interest-based' theory of human rights draws upon a range of existing philosophical work relating to rights and human rights, but is not a wholesale reproduction any existing theory. It is not possible to fully explicate or defend this conception of human rights here, so some degree of stipulation is necessary. However, the contours and key characteristics of human rights are sketched in enough detail to determine its normative implications for labour law.

In the process of detailing this conception of human rights this section also, where relevant, revisits the philosophical objections raised against human rights as a foundational perspective for labour law, and demonstrates that these arguments simply do not apply to the theory of human rights advanced here. As discussed in Chapter 5, the philosophical case against human

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<sup>16</sup> J. Griffin, 'Replies' in R. Crisp (ed), *Griffin on Human Rights* (OUP 2014) 225; A. Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315, 318–9.

<sup>17</sup> J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1, 17.

rights as a foundational perspective for labour law is made up of arguments that attempt to identify some important disjuncture between human rights and labour law norms. Some of these originate in the literature on social rights, namely:

1. Labour law norms are too *indeterminate* (in their content and duty-bearers) to be matters of human rights, because they require positive action rather than imposing purely 'negative' duties.<sup>18</sup>
2. Human rights must be *claimable* in practice, whereas labour rights and standards are not enforceable in many states and cannot feasibly be realised in every society.<sup>19</sup>
3. Human rights are *universally applicable* standards, whereas labour law norms vary over time and between different societies depending on socio-economic conditions.<sup>20</sup>

Other objections are more specific to the labour law context. These claim that labour law is incompatible with human rights because:

4. Labour law regulates *horizontal* relationships between individuals, whereas human rights govern the vertical relationship between states and individuals.<sup>21</sup>

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<sup>18</sup> O. O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427.

<sup>19</sup> M. Cranston, *What Are Human Rights?* (Basic Books 1973) 37; R. Geuss, *History and Illusion in Politics* (CUP 2001) 144.

<sup>20</sup> G. Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Inquiries in Law* 719, 729; H. Collins, 'Theories of Rights as Justifications for Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 142–3.

<sup>21</sup> G. Mundlak (n 20) 730; K. Kolben, 'Labor Rights as Human Rights' (2009) 50 *Va. J. Int'l L.* 449, 470.

5. Labour law is focussed on *procedural* and *collective* rights, in contrast to the substantive content and individualistic nature of human rights.<sup>22</sup>
6. Labour law aims to counteract workers' unequal *bargaining power*, whereas human rights aim to secure human dignity.<sup>23</sup>
7. Labour rights and standards lack the *moral urgency* be a matter of human rights.<sup>24</sup>
8. Labour rights and standards are *conditional* norms that only apply to those in work, whereas human rights are held universally by all.<sup>25</sup>

Several of these critiques can be dismissed even prior to discussing our theory of human rights, because they misrepresent the nature or characteristics of labour law itself. It is not true for example, at least on the view of the discipline taken here, to say that labour law is solely concerned with process-oriented collective rights; labour law also confers individual workers with substantive rights to certain kinds of treatment at work. The objection that labour law is concerned with unequal bargaining power rather than human dignity is also illegitimate, particularly under a pluralistic approach to labour law's foundations, because relying on labour law's traditional narrative in this way short-circuits any examination of new normative foundations.

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<sup>22</sup> G. Mundlak (n 20) 222; J. Youngdahl, 'Solidarity First: Labor Rights Are Not the Same as Human Rights' (2009) 18 *New Labor Forum* 31, 31; C. McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart) 289.

<sup>23</sup> G. Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet' (2012) 34 *Comp. Lab. L. & Pol'y J.* 217.

<sup>24</sup> H. Collins (n 20) 142.

<sup>25</sup> *ibid*; G. Mundlak (n 20) 730.

In order to assess the remaining objections to human rights as normative foundations for labour law we must consider them within the context of the specific theory of human rights set out below.

### ***3.1 Human rights as moral rights***

The starting point for the theory of human rights adopted here is that human rights are *rights* rather than policy goals, in the sense that they are individual entitlements that impose directed duties on other actors. The duties corresponding to rights are owed to the right holders, who are wronged if they are not fulfilled. This contrasts with ‘imperfect’ duties which are not owed to specific individuals (e.g. duties of charity).<sup>26</sup> More specifically, human rights are *moral rights* rather than legal or any other form of institutionalised rights.

#### *Nature of moral rights*

Moral rights are justified using moral reasoning and have no inherent political or institutional function. While moral rights may have legal implications, or be enshrined in international and domestic law, they are not inherently or primarily demands for legalisation. It may be inappropriate for example, for some moral rights such as those relating to family or intimate relationships, or arising from gratuitous promises, to be enshrined in law. Moral rights are therefore not necessarily what Feinberg calls ‘ideal moral rights’; meaning rights which give

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<sup>26</sup> J. Tasioulas, ‘Taking Rights out of Human Rights’ (2010) 120 *Ethics* 647, 657.

their holders 'a claim against political legislators to convert their "moral right" into a positive legal one'.<sup>27</sup>

The theory proposed here follows Tasioulas in adopting a Razian interest-based understanding of human rights as moral rights.<sup>28</sup> A moral right exists 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'.<sup>29</sup> These duties make up the content of the right. Moral rights are not grounded solely in interests however, but also in the notion of human status or dignity. It is only because persons have special moral status that their interests are capable of generating duties for others to act, or forbear from acting; interests are only capable of generating rights because they are underpinned by human status, and the 'status of individuals is to be honoured primarily by respecting, protecting and advancing their interests'.<sup>30</sup> This view avoids Nagel's criticism of interest-based theories of rights, that rights can only have their distinctive resistance to trade-offs if they are grounded in the moral status we have as humans.<sup>31</sup>

Although rights are generated by interests, the two must not be equated. Rights are 'intermediate conclusions in arguments from ultimate values to duties'.<sup>32</sup> Interests are aspects

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<sup>27</sup> J. Feinberg, *Social Philosophy* (Englewood 1973) 84–5.

<sup>28</sup> J. Raz, *The Morality of Freedom* (n 1) ch 7. This contrasts with the 'will' (or 'choice') theory of rights, see H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (OUP 1982) 162; M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights: Philosophical Enquiries* (OUP 2000).

<sup>29</sup> J. Tasioulas, 'On the Foundations of Human Rights' (n 1) 50.

<sup>30</sup> J. Tasioulas, 'Towards a Philosophy of Human Rights' (n 17) 9.

<sup>31</sup> T. Nagel, 'Personal Rights and Public Space' (1995) 24 *Philosophy & Public Affairs* 83.

<sup>32</sup> J. Raz, *The Morality of Freedom* (n 1) 188.

of a person's wellbeing,<sup>33</sup> meaning that they contribute to the pursuit of a goal they have good reason to value, or to some other goal they would pursue had they thought rationally.<sup>34</sup> Not all interests generate duties, and there is a threshold that must be met for an interest to generate a right.<sup>35</sup> The way that this threshold operates is hard to define precisely; there is no simple process for determining when the 'Rubicon from interests to duties' is crossed.<sup>36</sup> Demonstrating this threshold is met will involve arguing that the interest has the 'required importance' and priority to generate duties, and that there are no 'conflicting reasons' preventing it from doing so.<sup>37</sup>

There will no doubt be some disagreements over this threshold. For example, our interest in not being talked about behind our backs may or may not be thought sufficiently morally significant to generate duties for others to refrain from gossiping. For most rights however, and certainly most human rights, it will be clear that the interests at stake generate duties for others. Our interests in life, health, bodily integrity, and privacy for example, are all sufficiently important to generate duties.

Once it has been established that a person's interests generate duties for others to act or refrain from acting in certain ways relating to X, we can conclude they have a right to X in some form. This is the case notwithstanding that the content of the right, i.e. the duties owed and duty-

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<sup>33</sup> J. Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (OUP 1988) 235–6; T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press 1998).

<sup>34</sup> C. Fabre, *Social Rights Under the Constitution* (n 1) 18.

<sup>35</sup> Without going into the metaphysics of how interests are capable of generating rights, one plausible view is that it follows from the special status persons have as a result of their capacity for normative agency, see *ibid.*

<sup>36</sup> J. Tasioulas, 'Human Dignity and the Foundations of Human Rights' in C. McCrudden (ed), *Understanding Human Dignity* (OUP 2014) 298–301.

<sup>37</sup> J. Raz, *The Morality of Freedom* (n 1) 181–3.



bearers, has not been (or cannot be) fully specified. Contrary to the view of O'Neill,<sup>38</sup> rights are logically prior to duties,<sup>39</sup> so 'one may know of the existence of a right and of the reasons for it without knowing who is bound by duties based on it or what precisely are these duties'.<sup>40</sup>

It is true that the full justification and specification of a right will involve determining the 'claim against' (the content of the right) as well as establishing the 'claim to'.<sup>41</sup> Often however, 'the implications of a right ... and the duties it grounds ... cannot in principle be wholly determined in advance'.<sup>42</sup> Identifying the content and allocation of duties is therefore a separate exercise from determining whether a right exists in the first place. Following this, the fact that labour rights and standards are sometimes *indeterminate* in their content does not prevent them from being matters of human rights, as it may be possible to establish labour law norms as human rights prior to their content being fully specified.

This understanding of moral rights rejects the claim that it is meaningless to speak of rights where no effective mechanism exists for enforcing duties.<sup>43</sup> This would undermine the possibility of moral rights existing independently of institutionalised means of enforcement, and be 'lethal to the whole idea of a natural or human right'.<sup>44</sup> Instead, human rights are pre-legal and pre-institutional moral rights that exist even in the absence of any frameworks that

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<sup>38</sup> O. O'Neill (n 18).

<sup>39</sup> J. Waldron, 'Duty-Bearers for Positive Rights' (2014) NYU School of Law, Public Law Research Paper No. 14-58.

<sup>40</sup> J. Raz, *The Morality of Freedom* (n 1) 184–5.

<sup>41</sup> J. Feinberg (n 27) 63–4.

<sup>42</sup> J. Raz, *The Morality of Freedom* (n 1) 185.

<sup>43</sup> R. Geuss (n 19); C. Douzinas, 'The Poverty of (Rights) Jurisprudence' in C. Gearty and C. Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012).

<sup>44</sup> R. Geuss (n 19) 146.

allow them to be enforced or claimed in practice. They are normative standards, which can be used to assess and critique existing laws, policies, institutions, and practices.

The nature of human rights as pre-institutional moral rights is why it makes sense to speak of workers' having rights to freedom of association and from forced labour even in repressive states where they are not able to exercise them in practice; they have moral rights to these things that are being denied and violated. Given this, the argument that human rights cannot provide foundations for labour law because labour law norms are not universally *claimable* in practice is misplaced.

### *Content of moral rights*

While we can conclude that a right exists without its content being fully specified or being practically claimable, a complete theory of rights should specify how the content of rights is to be determined. The duties corresponding to human rights are discussed in more detail in Section 4, at this stage it suffices to make some more general comments about determining the content of moral rights.

A moral right imposes duties to secure the enjoyment of the underlying interest, and this can include 'positive' duties to act as well as 'negative' obligations of forbearance. The fact that *positive* action may be required to secure labour rights and standards is therefore not necessarily a barrier to them being matters of human rights.

There are, however, several important limits on the duties correlating to rights. Given that 'ought implies can', the duties imposed by rights must be feasible and not too burdensome.<sup>45</sup> Although rights can generate positive duties for others to act, the duties imposed must actually help secure the object of the right,<sup>46</sup> and may be overridden by conflicting considerations such as other rights and normative values.<sup>47</sup> As a result of these limits, '[m]any rights ground duties which fall short of securing their object'.<sup>48</sup> It also follows that the duties corresponding to any given right will vary with circumstances, depending on 'social, economic, political and legal factors',<sup>49</sup> and this 'dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function'.<sup>50</sup>

Although the duties corresponding to moral rights must be *feasible* this does not prevent labour law from being grounded in human rights. Some scholars reject human rights as possible foundations for labour law on the grounds they cannot feasibly be realised in some states due to cost reasons, and therefore cannot be matters of universal human rights. For example, Cranston argues that it is 'utterly impossible' to realise the right to paid holidays in some parts of the world, and it is therefore 'vain and idle' to claim that it is a human right.<sup>51</sup>

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<sup>45</sup> J.W. Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15 *Human Rights Quarterly* 77; J.W. Nickel, *Making Sense of Human Rights* (n 1) 80.

<sup>46</sup> J. Tasioulas, 'Towards a Philosophy of Human Rights' (n 17) 15.

<sup>47</sup> J. Raz, *The Morality of Freedom* (n 1) 183–4.

<sup>48</sup> *ibid* 170.

<sup>49</sup> H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996) 161.

<sup>50</sup> J. Raz, *The Morality of Freedom* (n 1) 171.

<sup>51</sup> H. Shue (n 49) 161.

Nickel similarly believes that we should give up on the right to work as a human right in part because it is not feasible in most countries.<sup>52</sup>

One response to the feasibility objection is to challenge it in its own terms. A right to paid holiday might appear unrealistic in some societies, but there is increasing evidence of the positive effects of labour rights on productivity and economic growth.<sup>53</sup> Furthermore, even if labour law norms have some associated costs, it in no way follows that these are significant enough to make their realisation infeasible. Any claims of infeasibility should be closely scrutinised, and there is certainly insufficient evidence to conclude that decent workplace standards are infeasible in advanced developed economies such as the UK.

However, even if it is genuinely infeasible to secure labour law norms immediately in some societies, this does not prevent them from being justified via human rights. Under the conception of moral rights adopted here, issues of practical feasibility, rather than logical impossibility, only affect the content of duties generated by a right rather than the existence of the right itself.<sup>54</sup> If it is not possible to immediately realise a right in full then it may generate duties to take concrete steps towards the rights' realisation. In the case of labour law therefore, if human rights demand workplace standards that cannot *feasibly* be fulfilled in current conditions there may still be obligations to work towards the creation of institutions and

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<sup>52</sup> J.W. Nickel, 'Giving Up on the Human Right to Work' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>53</sup> S. Deakin, 'The Contribution of Labour Law to Economic and Human Development' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); OECD, 'The Role of Collective Bargaining Systems for Good Labour Market Performance', *OECD Employment Outlook 2018* (2018). See generally, A.C.L. Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009).

<sup>54</sup> J. Tasioulas, 'On the Foundations of Human Rights' (n 1) 58–60.

frameworks that enable their realisation. Human rights are moral claims about the treatment people are owed; the fact that it is not possible to fully meet these demands in current conditions does not change that fact that people deserve the treatment.<sup>55</sup>

As with the duties generated by human rights, the allocation of duties to duty-bearers is also fact dependent. In the first instance, duties will be held by those agents who pose threats to the enjoyment or realisation of rights, such as those who are in positions of control or responsibility over the fulfilment of rights. Although moral rights may be held against state actors and institutions, they are primarily claims that individuals act or refrain from acting in certain ways and not, as Mill believed, demands for the state to secure the right 'either by the force of law or by that of education and experience'.<sup>56</sup>

Given that human rights are moral rights of this kind, the *horizontal* nature of labour law protections does not prevent human rights from providing foundations for the discipline. As moral rights, human rights impose obligations on individuals and non-state actors as well as on the state. The normative implications of human rights are therefore not limited to the vertical relationship between state and individuals; they may also make demands in respect of *horizontal* relationships, including those between employer and employee. Furthermore, human rights may have indirect horizontal effects on the employment relationship, by imposing duties on the state to introduce labour law protections or regulate the labour market in certain ways.

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<sup>55</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 Eur. Lab. LJ 151, 167.

<sup>56</sup> J.S. Mill, 'Utilitarianism' in J. Robson (ed), *Collected Works of John Stuart Mill* (Toronto University Press 1965), ch V [24].

Finally, it is important to know the strength of duties corresponding to moral rights, and how to resolve conflicts between rights, as well as with other normative considerations. Although the theory of rights adopted here sees them as preemptory reasons for action with high moral force,<sup>57</sup> they are not absolute 'trumps' or 'side-constraints'.<sup>58</sup> The duties corresponding to moral rights, including human rights, may be overridden or limited in some circumstances, such as when necessary to protect the rights of others; rights are 'resistant to trade-offs, but not completely so'.<sup>59</sup> The key insight is that rights cannot be subject to utilitarian cost-benefit analysis.

Determining when the *pro tanto* duties corresponding to moral rights give way to other considerations requires moral reasoning, with all relevant factors being taken into account. If conflicting normative considerations prevent *any* duties justifiably being imposed on others, then no right exists; but if conflicting considerations only override some, but not all, the duties corresponding to a moral right then it still exists, albeit its content has been limited.<sup>60</sup>

### *Characteristics of human rights as moral rights*

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<sup>57</sup> J. Donnelly, 'Human Rights as Natural Rights' [1982] *Human Rights Quarterly* 391.

<sup>58</sup> R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); R. Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

<sup>59</sup> J. Griffin, *On Human Rights* (n 1) 76.

<sup>60</sup> J. Raz, *The Morality of Freedom* (n 1) 183–4.

There is not space here to fully defend and explicate the interest-based conception of moral rights that forms the basis of the theory of human rights adopted here.<sup>61</sup> Instead, this sub-section highlights some key characteristics of rights under this theory. First, rights are ‘dynamic’ in that each right generates multiple duties rather than corresponding to duties in a strict one-to-one relationship,<sup>62</sup> and their content is context-dependent rather than being static across time and place.<sup>63</sup> The duties corresponding to rights will be more extensive in contexts where the economy or scientific knowledge is more developed for example, because it will be feasible and reasonable to require more extensive steps be taken in this context.

Second, in addition to having multiple corresponding duties, individual rights will often be grounded in multiple interests. A right to time off work for example, might be grounded in our interest in health because working all hours of the day is damaging to these interests, but also in our interests in private and family life, because we need time away from work for these interests to be fulfilled. Third, rights can impose positive duties to act as well as negative duties of non-interference, subject to the limits of feasibility and reasonableness.

Finally, in addition to justifying moral rights directly by reference to the interests that underpin them, they can also be justified indirectly as ‘derived’ rights, meaning rights ‘grounded in another right’.<sup>64</sup> Derived human rights are discussed more fully in the following sub-section. Briefly however, rights can be ‘derived’ from other already established moral

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<sup>61</sup> See, M. Kramer, N. Simmonds and H. Steiner (n 28); M. McBride (ed), *New Essays on the Nature of Rights* (Hart 2017); A. Cochrane, ‘From Human Rights to Sentient Rights’ (2013) 16 *Critical Review of International Social and Political Philosophy* 655; C. Fabre, *Social Rights Under the Constitution* (n 1).

<sup>62</sup> J. Raz, *The Morality of Freedom* (n 1) 184–5; J. Waldron, ‘Duty-Bearers for Positive Rights’ (n 39).

<sup>63</sup> J. Raz, *The Morality of Freedom* (n 1) 171.

<sup>64</sup> *ibid* 168.

rights in two ways. First, by arguing that they are specific instantiations of more general moral rights; Raz gives the example of a 'right to walk on my hands' as being 'one instance of the general right to personal liberty'.<sup>65</sup> Second, derived rights can be justified using 'linkage' arguments, which demonstrate that they are prerequisites for the enjoyment of another, already justified, moral right.<sup>66</sup> It is often possible to justify a single moral right both by reference to its underlying interests and as a derived right.

### ***3.2 Human rights as a sub-set of moral rights***

Although human rights are moral rights in the sense discussed above, not every moral right is a human right. Rather, human rights are the sub-set of moral rights, (1) held simply in virtue of humanity, and (2) that make up the conditions of a decent human life. This sub-section discusses these two characteristics of human rights, and explores some key features of human rights under this theory.

#### *Simply in virtue of humanity*

It is a core element of the idea of human rights that they are universal, at least in some sense. For naturalistic theories this is often equated with human rights being held simply in virtue of humanity. However, it is not immediately clear what it means for a right to be held 'simply

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<sup>65</sup> *ibid* 169.

<sup>66</sup> J.W. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 *Human Rights Quarterly* 984.



in virtue of humanity'. Given that moral rights are grounded in human status as well as interests, *all* moral rights can be regarded as held in virtue of the right holders' humanity to some extent. But this is not what is meant by human rights being held 'simply in virtue of humanity'.

One possible interpretation of the 'simply in virtue of humanity' requirement is that human rights are those rights held in all times and by all people.<sup>67</sup> This view would limit human rights to those rights that can exist in a state of nature. Alternately, 'simply in virtue of humanity' might be taken to require that human rights must be grounded in some distinctive characteristic of humanity itself.<sup>68</sup> Neither of these interpretations are adopted here however. Instead, rights are taken to be held 'simply in virtue of humanity' when they are grounded in universal human interests, sometimes known as our 'basic' interests,<sup>69</sup> rather than generated by contingent interests arising out of specific relationships or transactions, or interests that only generate duties because of contingent events.<sup>70</sup>

This approach to human rights follows Nickel and Tasioulas in adopting an open-ended pluralist view of the interests which can ground human rights,<sup>71</sup> and rests upon a 'objective list' theory of the good.<sup>72</sup> It has similarities with other theories that ground human rights in

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<sup>67</sup> M. Cranston (n 19); J. Raz, 'Human Rights Without Foundations' in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (OUP 2010).

<sup>68</sup> J. Griffin, *On Human Rights* (n 1).

<sup>69</sup> J. Tasioulas, 'On the Foundations of Human Rights' (n 1).

<sup>70</sup> Human rights are therefore akin to Hart's notion of 'general' rights, rather than 'special' rights which 'arise out of special transactions between individuals or out of some special relationship in which they stand to each other', H.L.A. Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 183.

<sup>71</sup> J.W. Nickel, *Making Sense of Human Rights* (n 1); J. Tasioulas, 'On the Foundations of Human Rights' (n 1).

<sup>72</sup> In contrast to hedonistic or preference fulfillment theories, D. Parfit, *Reasons and Persons* (OUP 1984).

objective universal goods, such as Nussbaum's idea of core capabilities,<sup>73</sup> and Millers' basic needs theory of human rights.<sup>74</sup> However, it is distinct from these other approaches in that the interests capable of grounding human rights are not restricted to core capabilities or basic needs; instead, *any* universal human interest can potentially generate human rights. There is no need to identify an exhaustive list of such interests, but they plausibly include our interests in health, physical security and the avoidance of pain, autonomy, liberty, understanding, the development of meaningful relationships and personal achievement, among others.<sup>75</sup>

While human rights must be grounded in universal interests, this does not mean that every human right is timeless and absolutely universal. This is because human rights operate at two distinct levels; that of 'basic' or 'abstract' human rights, and 'derived' human rights.<sup>76</sup> Basic human rights are timeless and universal rights, articulated at a high level of abstraction and justified solely by reference to universal interests. Derived human rights are derivative of, and justified by reference to, these more basic rights and may vary over time and between societies. The conception of human rights adopted here therefore has a similar structure to that developed by Griffin;<sup>77</sup> of an umbrella framework of 'basic' human rights under which

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<sup>73</sup> M. Nussbaum, 'Human Rights and Human Capabilities' (2007) 20 *Harv. Hum. Rts. J.* 21; M. Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' in T. Brooks (ed), *Justice and the Capability Approach*.

<sup>74</sup> D. Miller, 'Grounding Human Rights' (2012) 15 *Critical Review of International Social and Political Philosophy* 407.

<sup>75</sup> D. Parfit (n 72); J. Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011); M. Nussbaum, *Creating Capabilities* (Harvard University Press 2011).

<sup>76</sup> Several scholars make this distinction, including J. Griffin, *On Human Rights* (n 1) 50; J.W. Nickel, *Making Sense of Human Rights* (n 1); S.M. Liao and A. Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 *Journal of Moral Philosophy* 327; C. Wellman, *The Moral Dimensions of Human Rights* (OUP 2010) 25; P. Gilibert, *Human Dignity and Human Rights* (OUP 2018).

<sup>77</sup> J. Griffin, *On Human Rights* (n 1).

more specific derived human rights can be identified. Many of the rights found in international human rights documents are derived rather than basic human rights.<sup>78</sup>

Derived human rights can be justified in two ways. Some derived rights are simply context-specific instantiations of more basic human rights, so represent concrete applications of these rights in certain circumstances or societal conditions.<sup>79</sup> This category of derived human rights exist due to the dynamic nature of moral rights, which means the content of individual human rights varies with societal conditions. For example, while the right to education is a basic human right Raz correctly points out that it is ridiculous to think that cavemen had a human right to be taught to read and write.<sup>80</sup> The right to formal education of this kind is a derived human right, justified by considering what the basic right to education demands in the context of modern societies. Similarly, in the labour law context, the right to form and join a trade union is a derived human right because it is a context-specific manifestation of what is required by the basic human right to associate freely in modern societies.

Derived human rights can also be justified using 'linkage' arguments, which claim that these rights are necessary for more basic human rights to be exercised or realised.<sup>81</sup> A derived human right to the provision of healthcare services may be justified via linkage arguments for

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<sup>78</sup> S.M. Liao and A. Etinson (n 76) 15.

<sup>79</sup> Wellman labels this the 'subsumption' approach to justifying derived human rights, C. Wellman (n 76) 48–9.

<sup>80</sup> J. Raz, 'Human Rights in the Emerging World Order' in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 224–5.

<sup>81</sup> H. Shue (n 49); J.W. Nickel, *Making Sense of Human Rights* (n 1); P. Gilibert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel' (2010) 32 *Human Rights Quarterly* 425.

example, as this is essential to protect and fulfil the right to life.<sup>82</sup> Similar reasoning might also be used to justify safety protections in the workplace, because these are needed to secure workers' right to life. An individual human right may be justifiable *both* directly, by reference to their underlying values, and indirectly as a derived human right.

It follows from the distinction between basic and derived human rights that while everyone has the same *basic* human rights, they may have somewhat different *derived* human rights. The human right to reproductive freedom provides an example of this. Although this is a basic human right grounded in our autonomy interests,<sup>83</sup> it only plausibly confers an entitlement to IVF treatment in societies which are sufficiently technologically and economically advanced to make this reasonable and feasible. A 'human right to IVF treatment' may therefore exist as a derived human right in some societies but not in others. This example also demonstrates that derived human rights may also be held by sub-sets of humanity rather than universally by all, as only those people capable of childbearing would have a human right to IVF treatment. Following this, rights held only by certain groups such as women, children, asylum-seekers, disabled people, prisoners, and minority groups are therefore not necessarily excluded from being human rights; they must simply be justified as derived, rather than basic, human rights.

The existence of derived human rights means that the *variable* and *conditional* nature of labour law norms does not preclude them being grounded in human rights. Some labour rights or standards may not be justifiable as basic human rights because they only make sense in certain

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<sup>82</sup>J.W. Nickel, 'Can a Right to Health Care Be Justified by Linkage Arguments?' (2016) 37 *Theoretical Medicine and Bioethics* 293.

<sup>83</sup>C. Fabre, *Whose Body Is It Anyway? Justice and the Integrity of the Person* (OUP 2006).

social and economic contexts, such as industrialised economies with capitalist labour markets. But this does not prevent them from potentially being derived human rights. Similarly, the existence of derived human rights that can be held by sub-groups of people means that labour law norms are not necessarily excluded from the domain of human rights if they are conditional on certain types of work relationship.

There is another possible response to the conditionality objection however, that does not rely on the existence of derived human rights, which is to push back on the idea that labour rights are held only by those in work. While this might be the most intuitive understanding of labour rights to decent working conditions, or to bargain collectively and go on strike, these entitlements could also be held by individuals who are not in work. For example, it is possible that a human right to decent working conditions might be held by all members of a society, irrespective of whether they are in work or not. The duties corresponding to such a right would of course vary between right-holders who are in work and those who are not. The duties generated prior to the right-holder entering work might be limited to not preventing them from exercising their right to work in decent conditions, with additional duties to provide the right-holder with workplace protections and standards being owed once they actually enter work. This is analogous to how other human rights function; everyone has the human rights to a fair trial and adequate healthcare for example, even prior to them being tried in court or falling ill.

Although derived human rights can be held by sub-groups of individuals, there is a point at which duties become so conditional that it ceases to make sense to label them as human rights. The question of how to individuate and specify rights is a difficult one. For instance, while the abstract human right to liberty includes a derived right to breakdance, in most contexts it is

not useful to treat this as a free-standing human right to breakdance. Similarly, in the labour law context, there may be a human right to decent working conditions that requires a worker be provided with certain type of safety equipment, but it makes little sense to say that there is a human right to be provided with that *specific type* of equipment. This may be required by human rights, but it is not something which should be labelled a human right itself.

To deserve the label of being a human right, a derived human right must be broad enough to apply to a class of people that is not too remote from the situation of most individuals within a particular time-period or social context,<sup>84</sup> and the duties must not be dependent on or specified using proper names.<sup>85</sup> Following this, labour rights and standards may be derived human rights even if they are conditional, because it makes sense to talk about them held by workers as a general class.

### *Conditions of a decent life*

The second important restriction on the category of moral rights made up of human rights is that human rights are those rights which are conditions of a decent human life. The theory of human rights set out here therefore departs from Tasioulas' view that *all* moral rights generated by universal basic interests are human rights.

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<sup>84</sup> J. Tasioulas, 'On the Nature of Human Rights' in G. Ernst and J. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (2011) 39.

<sup>85</sup> *ibid* 38.

The necessity of imposing this limit on what can count as a human right might be questioned. As Raz says, 'why [human rights] must be important is not clear'.<sup>86</sup> However, some restriction of this kind *is* required to meet the desiderata of fidelity to the public idea of human rights.<sup>87</sup> The generally accepted idea of human rights is that they form basic standards of some sort; some degree of minimalism is 'an important distinguishing feature of human rights'.<sup>88</sup> Without a restriction of this kind there is therefore a risk of being accused of changing the subject. Tasioulas rejects any qualification on the category of human rights other than that they must be grounded in universal interests, arguing that human rights are distinctive and important norms precisely *because* they are universal in this way.<sup>89</sup> Whilst plausible, fidelity to the common usage and understanding of human rights nevertheless requires that they be restricted to a sub-set of universal moral rights. It might be that this generally accepted public idea of human rights is less attractive than Tasioulas' view. In which case we should attempt to change the public perception of what human rights are. However, this is not the appropriate place to attempt this, so for present purposes the desideratum of fidelity requires that human rights not be equated with all moral rights generated by universal interests.

But fidelity to the public idea of human rights does not require that they be viewed in a strictly minimalist way. The common usage and understanding of human rights does not restrict them to the essentials of what is required for survival, or for the barest human existence. Many things that go beyond these minimal thresholds are recognised as human rights in international human rights documents, court decisions, political and activist campaigns, as

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<sup>86</sup> J. Raz, 'Human Rights Without Foundations' (n 67) 323.

<sup>87</sup> A. Buchanan (n 8).

<sup>88</sup> J. King, *Judging Social Rights* (CUP 2012) 20.

<sup>89</sup> J. Tasioulas, 'On the Foundations of Human Rights' (n 1) 63.

well as in the media and academic literature. For example, it is perfectly possible to have a minimally decent life without the right to run for or hold public office, or while facing acts of discrimination, yet these are widely recognised as human rights violations.<sup>90</sup>

Following this, I propose that human rights are best conceived as protecting the conditions of a decent human life.<sup>91</sup> That is, a life that is adequately flourishing and not lacking in a way which it means it is not a decent life. One need not exercise every human right to have a decent human life; it is perfectly possible, for instance, to live a flourishing life without exercising one's right to marry, have a family, or practice a religion. What matters is that one has the right to do these things if one chooses, because denial of these opportunities would then prevent one from living a decent human life. This idea that human rights protect the conditions for a decent human life is 'more consonant' with the practice and public idea of human rights than the threshold of a *minimally* good life.<sup>92</sup>

It is impossible to set out here a complete vision of what is needed to meet the threshold of a decent human life. However, it clearly takes us beyond the minimal conditions of survival, as it is possible to subsist in conditions which fall far short of being a decent human life. At the same time, a decent human life does not demand the full conditions of justice, or that people live an excellent or fully flourishing life; while it is great to have free university education, or

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<sup>90</sup> *ibid*; A. Johns, 'The Case for Political Candidacy as a Fundamental Human Right' (2016) 16 H.R.L.R. 29; R. O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Legal Studies* 211.

<sup>91</sup> S.M. Liao, 'Human Rights as Fundamental Conditions for a Good Life' in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

<sup>92</sup> A. Buchanan (n 8) n 47.



to own a yacht, these go beyond the conditions and choices needed for a decent human life and so cannot be the object of human rights.

Although the threshold of what makes up the conditions of a decent life 'will vary with environmental and social circumstances',<sup>93</sup> some key elements can be stated in general terms. One central plank of a decent human life is a degree of autonomy.<sup>94</sup> People must be able to 'frame, revise and pursue a conception of the good',<sup>95</sup> with some realistic opportunity of achieving it; they must be able to exercise a degree of choice and control over the direction of their lives through taking 'successive decisions'.<sup>96</sup> The most persuasive understandings of a decent life involve the ability to pursue an adequate range of valuable activities, as well as secure access to negative freedom.<sup>97</sup> These activities can be identified through a combination of normative and empirical analysis.<sup>98</sup> Other conditions of a decent human life include the ability to participate in the communal life of a society, and having adequate social and material conditions for self-respect.<sup>99</sup> Part of what this requires is that people must be able 'to engage, with some dignity, socially with family and peers'.<sup>100</sup> While a fully egalitarian society is not necessary for a decent life 'some regard to the relative well-being of groups' is needed.<sup>101</sup>

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<sup>93</sup> J. King (n 88) 29.

<sup>94</sup> N. Hassoun, 'Human Rights and the Minimally Good Life' (2013) 90 *Res Philosophica* 413.

<sup>95</sup> C. Fabre, *Social Rights Under the Constitution* (n 1) 9–12.

<sup>96</sup> J. Raz, *The Morality of Freedom* (n 1) 369.

<sup>97</sup> S.M. Liao (n 1); T. Khaitan, *A Theory of Discrimination Law* (OUP 2015); M. Nussbaum, *Creating Capabilities* (n 75).

<sup>98</sup> S.M. Liao (n 1) 42 footnote 13.

<sup>99</sup> J. King (n 88) 29; C. Fabre, *Social Rights Under the Constitution* (n 1) ch 1; T. Khaitan (n 97) ch 4.

<sup>100</sup> J. King (n 88) 32–3.

<sup>101</sup> T. Khaitan (n 97) 95.

On this view, human rights are rights that relate to the conditions needed to live a decent version of the distinctive form of life we have as humans. The fact that some labour law norms are not of the utmost *morally urgency* does therefore not prevent them from being human rights. The relevant question is not whether labour law protections and standards are morally urgent, but whether they are moral rights that are constitutive of a decent human life. If one believes, with Buchanan, that it is 'pretty obvious' that holidays with pay are not needed for a decent human life then this aspect of labour law cannot be grounded in our theory of human rights.<sup>102</sup> However, if rights to decent working conditions and to voice at work are regarded as central to a decent life as a person then they may qualify as human rights.

### ***3.3 Conclusion***

It should be evident from the preceding sub-sections that the objections to human rights as a justificatory strand in labour law's foundations are unpersuasive when applied to the modified interest-based theory of human rights proposed here. However, it is worth recapping the reasons for this.

The fact that labour law norms are not universally *claimable* due to issues with their enforceability and feasibility does not prevent them from being matters of human rights, because human rights are moral rights that set normative standards, and their existence is not contingent on the presence of effective enforcement mechanisms or the possibility of immediate realisation. Similarly, that positive action is required to realise labour rights and

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<sup>102</sup> A. Buchanan, *Justice, Legitimacy, and Self-Determination* (OUP 2003) 129.

standards does not make them too *indeterminate* to be grounded in human rights, because moral rights can generate positive duties and the content and allocation of these duties need not be fully specified for a right to exist.

In addition, human rights are not prevented from grounding labour law by the *non-universal* and *conditional* nature of labour law norms. Although the content of labour rights and standards depends on socio-economic conditions, and will therefore vary over time and between societies, this is not incompatible with them being grounded in human rights. The dynamic nature of moral rights means the concrete duties corresponding to human rights will also vary with circumstances. The variable and conditional nature of labour law norms does make them more likely to be justified as 'derived' human rights, rather than timeless 'basic' human rights held by all. However, it is also possible that some labour rights could be justified as basic human rights held by all rather than just by those in work, with different duties owed to right-holders who are in work and those who are not.

Finally, although human rights protect the conditions of a decent human life, this does not mean they are limited to a few rights which are of the highest normative priority. The theory of human rights adopted here does not take a minimalist view of their domain. The lack of *moral urgency* of (some) labour law norms therefore does not prevent them from being grounded in human rights; what matters is whether these labour rights and standards are required for workers to live a decent human life.

#### **4. Content of Human Rights**

In addition to specifying the nature of human rights and how they can be justified, a complete theory of human rights must provide the necessary tools for identifying the content of human rights, i.e. what duties are generated and for whom. A conception of human rights should also clarify how conflicts between rights, and with other values, are to be resolved. These questions have been comparatively neglected by the philosophical literature on human rights,<sup>103</sup> but are vitally important if we are to understand their normative implications for the real world, including in the context of labour law. The dynamic nature of moral rights means that the precise demands made by human rights are contingent on the social context and circumstances in which it is being implemented. Only a limited amount can therefore be said in the abstract.<sup>104</sup> There are however, several general principles which guide the specification and allocation of duties imposed by human rights.

#### ***4.1 Duties to respect, protect and fulfil***

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<sup>103</sup> There has recently been increased interest however, see J.W. Nickel, 'How Human Rights Generate Duties to Protect and Provide' (n 45); J. Waldron, 'Duty-Bearers for Positive Rights' (n 39); S. Besson, 'The Allocation of Anti-Poverty Rights Duties — Our Rights, but Whose Duties?' in K. Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (CUP 2013); S. Besson, 'The Bearers of Human Rights Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244; A. Reeves, 'Responsibility Allocation and Human Rights' (2017) 20 *Ethical Theory and Moral Practice* 627; S. Collins, 'When Does "Can" Imply "Ought"?' (2018) 26 *International Journal of Philosophical Studies* 354; E. Ashford, 'Responsibility for Violations of the Human Right to Subsistence' in D. Meyers (ed), *Poverty, Agency, and Human Rights* (OUP 2014).

<sup>104</sup> J. Tasioulas, 'Towards a Philosophy of Human Rights' (n 17) 17.

The starting point for understanding the content of human rights is that they generate duties to respect, protect and secure the underlying interest.<sup>105</sup> Human rights do not only impose negative duties of non-interference. On the contrary, the interests underpinning human rights generate duties that enable individuals to enjoy and exercise their rights in practice.<sup>106</sup> In general therefore, we can say that human rights generate duties for others to respect, protect and realise human rights. This typology was pioneered by Shue,<sup>107</sup> and is now widely accepted in the academic literature and practice of human rights.<sup>108</sup> However, these duties are subject to several limits. The obligations to respect, protect and fulfil human rights must be possible, feasible, and reasonable.<sup>109</sup> As Nickel puts it, human rights duties must be ‘neither excessive nor severely unfair’.<sup>110</sup> In addition, they must not prevent the duty bearer from pursuing other rights and values, or undermine the value of the right for the right holder.<sup>111</sup>

The duty to respect human rights requires actors refrain from interfering ‘directly or indirectly with the enjoyment’ of others’ human rights.<sup>112</sup> This class of duty is sometimes regarded as the simplest type of duty generated by human rights, because the duty of non-interference is ‘said to be determinate, immediately realizable, and resource free’.<sup>113</sup> However, Fredman rightly argues that the differences between positive and negative duties should not be

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<sup>105</sup> H. Shue (n 49); J.W. Nickel, ‘How Human Rights Generate Duties to Protect and Provide’ (n 45); J.W. Nickel, *Making Sense of Human Rights* (n 1) 37–44.

<sup>106</sup> S. Fredman (n 1); M. Nussbaum, ‘Capabilities, Entitlements, Rights: Supplementation and Critique’ (n 73).

<sup>107</sup> H. Shue (n 49) 52.

<sup>108</sup> I. Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5 H.R.L.R. 81; S. Fredman (n 1) 69–83.

<sup>109</sup> J. Tasioulas, ‘On the Foundations of Human Rights’ (n 1) 56–60.

<sup>110</sup> J.W. Nickel, *Making Sense of Human Rights* (n 1) 70.

<sup>111</sup> J. Tasioulas, ‘On the Foundations of Human Rights’ (n 1) 58–60.

<sup>112</sup> S. Fredman (n 1) 69.

<sup>113</sup> *ibid* 70.

'overdrawn', as the outer limits of the duty to respect is indeterminate in a similar manner to positive duties; in both cases other moral rights and values need to be taken into account when identifying the extent of the duties.<sup>114</sup>

The second duty, to protect human rights, is an obligation to take steps to prevent unjustified interferences with human rights being carried out by third parties. It requires reasonable preventative measures be taken against standard and predictable threats to human rights,<sup>115</sup> and demands the creation and maintenance of institutions that do not strongly incentivise rights violations as well as mechanisms for redress following violations.<sup>116</sup> This may involve the introduction of non-coercive social and educational policies as well as legal protections. There will often be various possible ways of satisfying this protective duty, with duty bearers having a degree of choice between alternative protective measures.

Determining the protection required for any specific human right involves mediating potential conflicts with other rights and values; '[i]n protecting A's rights against invasion by B, it is necessary always to keep in mind that B has rights too'.<sup>117</sup> Protecting the right to private life, for example, necessarily requires consideration of how far to restrict others' freedom of expression; how far should employers' freedom to communicate information relating to employees be restricted in order to protect workers' private lives? Conversely, how far can an employees' freedom of expression be restricted in order to protect employers' rights and interests?

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<sup>114</sup> *ibid.*

<sup>115</sup> H. Shue (n 49) 55.

<sup>116</sup> *ibid* 59–60.

<sup>117</sup> S. Fredman (n 1) 73.

The duty to protect human rights can also be understood as the enforcement of third-party actors' duties to respect human rights.<sup>118</sup> For example, a state might have a positive obligation to introduce a legal prohibition on forced labour, as part of their duty to protect this human right from being infringed.<sup>119</sup> But this legal prohibition also enforces the negative duty of individuals to not violate workers' right to freedom from forced labour.

The final category of duty, the duty to fulfil human rights, impose positive obligations to establish and maintain frameworks which 'secure to all the ability to exercise their rights'.<sup>120</sup> In his insightful discussion of the duty to fulfil human rights, King persuasively argues that the duty will normally require the creation of framework legislation and social and executive institutions capable of securing rights,<sup>121</sup> as well as the introduction of strategies and targets for their realisation and mechanisms for monitoring progress.<sup>122</sup> There will often be multiple means of fulfilling a human right, and duty-bearers can choose between the various actions and institutional arrangements that are consistent with fulfilling the right.<sup>123</sup> For reasons discussed below, the duty to fulfil will largely fall on the state. However, the duty also includes obligations for non-state actors to support and work towards the establishment of institutions and legal frameworks which realise and fulfil human rights for all.<sup>124</sup>

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<sup>118</sup> H. Shue (n 49) 55.

<sup>119</sup> *Siliadin v France* [2005] ECHR 545.

<sup>120</sup> S. Fredman (n 1) 77.

<sup>121</sup> J. King (n 88) 35–9.

<sup>122</sup> *ibid*; S. Fredman (n 1) 81.

<sup>123</sup> J. Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 102.

<sup>124</sup> J.W. Nickel, 'How Human Rights Generate Duties to Protect and Provide' (n 45).

As with all human rights duties, the positive duty to fulfil human rights is subject to the proviso that duties must be feasible and not excessively burdensome. In some societies, resource scarcity will make it infeasible or impossible to immediately fulfil some human rights. For instance, the duty to fulfil a human right to decent working conditions will not require the immediate introduction of labour law protections if the costs of these are so high that they lead to widespread unemployment and destitution. As Fredman says, 'realization may be delayed by factual impediments such as the lack of resources, or the existence of competing principles which must justifiably be given relative priority at any particular time'.<sup>125</sup>

However, the infeasibility of fulfilling a human right immediately does not undermine the rights' existence, or normative force. Nor does it mean there are no duties to fulfil the right. Rather than a duty to fulfil the right immediately there will be duties of 'progressive realisation',<sup>126</sup> meaning to take immediate steps that will lead to the eventual realisation of the right. Even in conditions of extreme resource scarcity there remains a duty 'to take action towards achieving the goal so far as current circumstances permit, striving to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.<sup>127</sup> If there is a human right to paid holidays for example, but it is genuinely not possible for this to be implemented immediately, there will be duties to work towards the creation of economic and labour market conditions which allow the right to be realised. Duties of progressive

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<sup>125</sup> S. Fredman (n 1) 80.

<sup>126</sup> E. Ashford, 'The Nature of Violations of the Human Right to Subsistence' in A. Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

<sup>127</sup> S. Fredman (n 1) 81.



realisation do not merely represent policy goals, and impose concrete obligations 'of conduct and of result'.<sup>128</sup>

Although resource constraints may sometimes prevent human rights from generating duties of immediate realisation it is important that we subject any claims of insufficient resources to strict scrutiny.<sup>129</sup> Responsibility for realising human rights should not be avoided easily. Furthermore, claims of resource scarcity are unlikely to be convincing in relation to labour rights and standards. The creation and enforcement of labour law protections may have some costs for the state, but these are insignificant compared to the resources required to fulfil the human rights to bodily security, health, or education. Furthermore, there is mounting evidence that labour law protections can have economic and efficiency benefits, rather than imposing costs.<sup>130</sup>

This tripartite framework of duties to respect, protect, and fulfil applies to all human rights including 'civil and political' human rights. Positive action and resources are needed to protect and realise the rights to freedom of belief, privacy, and bodily security for example, in the same way as is necessary for rights to education and an adequate standard of living. In line with the most persuasive philosophical thinking on human rights, the conception of

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<sup>128</sup> J. King (n 88) 36.

<sup>129</sup> S. Fredman (n 1) 81–3.

<sup>130</sup> C. Estlund and M. Wachter, *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar 2012); A.C.L. Davies (n 53); S. Deakin and F. Wilkinson, 'Right vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *ILJ* 289; H. Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 30 *ILJ* 17; S. Deakin and P. Sarkar, 'Assessing the Long-run Economic Impact of Labour Law Systems' (2008) 39 *Industrial Relations Journal* 453.

human rights set out here does not recognise any qualitative distinction between 'social' and 'civil and political' rights.<sup>131</sup>

Although all human rights generate clusters of both positive and negative duties, it may be more difficult to determine the content of the positive duties to protect and realise human rights. There will frequently be a range of actions that could be taken to fulfil duties to protect and realise human rights, so their content will be indeterminate to some degree. This includes identifying the demands made by human rights in respect of regulating the workplace and labour market. However, we often do know the content of positive duties, and the process of specifying positive rather than negative duties is a difference in degree rather than in kind.<sup>132</sup> Identifying the positive content of human rights may be difficult, but it is not impossible.<sup>133</sup> In addition, where the positive content of human rights has been specified in a given community through law or other institutional arrangements, this has the effect of making the content of human rights determinate and extinguishing the availability of other options for fulfilling human rights. Finally, specifying the positive content of human rights, including in the domain of labour law, is a recent enterprise compared to enquiries into the negative content of rights. It will therefore take time for research and philosophical thought to reach a similar level of sophistication.

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<sup>131</sup> S. Fredman (n 1); M. Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (n 73); J. Griffin, *On Human Rights* (n 1); J.W. Nickel, *Making Sense of Human Rights* (n 1); C. Gearty and V. Mantouvalou, *Debating Social Rights* (Hart 2010).

<sup>132</sup> J. Tasioulas, 'The Moral Reality of Human Rights' in T. Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007).

<sup>133</sup> See J. King (n 88) 28–41.

## *4.2 Allocating duties*

It should be clear from the above discussion that specifying the content of human rights is intimately linked to the question of how duties are allocated. The content and allocation of duties must be worked out in tandem because the availability and capacity of relevant agents will impact upon both who is a duty bearer and the concrete content of their duties.

Anyone who represents a threat to the enjoyment of a right, and can affect its exercise and realisation, is a potential duty-bearer. Because anyone can potentially interfere with or frustrate the human rights of others, the duty to respect human rights applies universally; binding states and international institutions, but also individuals, corporations and other organisations. The same basic principle, that all those in the position to protect and realise the right are potential duty-bearers, applies to positive duties as to negative, but the allocation of positive duties will often be more complicated.

The allocation of duties to protect and fulfil human rights is simplest where there are agents in a relationship with the right holder that justifies the imposition of these duties. Such relationships might arise where an agent is in a position of power or control over whether the right is realised, or they are responsible for the creation of threats or obstacles to the realisation of a human right. Following this, states will generally be the primary bearer of positive human rights duties. The level of control that modern states have over the legal, economic, and institutional frameworks that determine the enjoyment and realisation of human rights make them responsible for human rights 'from cradle to grave'.<sup>134</sup>

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<sup>134</sup> *ibid* 39.

Those not in a position of responsibility or control over the realisation of a human right may nevertheless be bearers of positive duties. The proximity and capacity of an agent to influence the protection and fulfilment of human rights will be relevant to the question of duty allocation. Wenar argues that responsibility should fall upon those actors best placed to bear the duties,<sup>135</sup> but capacity is not the only relevant consideration; the allocation must also be morally justifiable.<sup>136</sup>

While the state will bear the most extensive positive human rights duties, individuals and other non-state actors who are responsible for, or even merely complicit in, violations of human rights may also have positive duties to help protect and fulfil human rights.<sup>137</sup> This includes duties to support and advocate for laws, policies, and institutions that will realise human rights, and to oppose those that violate rights.<sup>138</sup> Individuals may also have a positive duty to consider and take into account the human rights of others when deciding how to act.<sup>139</sup> The effect of this is that, to some extent, everyone has positive duties to contribute to the realisation of human rights.<sup>140</sup>

In some circumstances the positive duties of individuals and other non-state actors may be more extensive. The right to life, for instance, plausibly imposes a positive duty on individuals to assist in saving someone's life where it is reasonable and feasible for them to do so. A child's

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<sup>135</sup> L. Wenar, 'Responsibility and Severe Poverty' in T. Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007).

<sup>136</sup> A. Reeves (n 103).

<sup>137</sup> E. Ashford, 'Responsibility for Violations of the Human Right to Subsistence' (n 103).

<sup>138</sup> J. Waldron, 'Duty-Bearers for Positive Rights' (n 39); J.W. Nickel, 'How Human Rights Generate Duties to Protect and Provide' (n 45); C. Fabre, 'The Dignity of Rights' (2000) 20 OJLS 271. Fabre, (2000) OJLS

<sup>139</sup> A. Sen (n 16).

<sup>140</sup> M. Capriati, 'The Universal Scope of Positive Duties Correlative to Human Rights' (2018) 30 *Utilitas* 355.

right to life will impose positive duties on nearby individuals to save them from drowning in a puddle.<sup>141</sup> Translating this to the labour law context, a workers' right to life might similarly generate positive duties for employers to take reasonable and feasible steps to ensure safe workplaces.

Under the conception of human rights adopted here therefore, it is a mistake to think that human rights are not applicable in private relationships or cannot be interfered with by non-state actors. This is an interpersonal approach to human rights that, like Ashford, 'takes fundamental responsibility for human rights violations to lie directly with individual agents'.<sup>142</sup> This contrasts with the view that human rights apply only against states.<sup>143</sup> King believes that viewing the state as the primary duty bearer for human rights is 'implied in the contemporary philosophical idea of human rights',<sup>144</sup> but many theories of human rights include non-state actors as duty-bearers.<sup>145</sup> Indeed, if the notion of human rights can be traced back to the idea of natural rights it is a departure from this basic concept to limit duty-bearers to states because the original idea of natural rights viewed them as rights held generally against all.<sup>146</sup>

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<sup>141</sup> In contrast to English law, some civil law jurisdictions enshrine this positive duty to protect the right to life in law, M. Vranken, 'Duty to Rescue in Civil Law and Common Law: *Les Extremes Se Touchent*' (1998) 47 *International & Comparative Law Quarterly* 934.

<sup>142</sup> E. Ashford, 'Severe Poverty as a Systemic Human Rights Violation' in G. Brock (ed), *Cosmopolitanism versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (OUP 2013) 99.

<sup>143</sup> T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd edn, Polity 2008); G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *MLR* 878..

<sup>144</sup> J. King (n 88) 39.

<sup>145</sup> J. Griffin, *Well-Being* (n 33); J. Tasioulas, 'Towards a Philosophy of Human Rights' (n 17); J. Raz, 'Human Rights in the Emerging World Order' (n 80); J.W. Nickel, *Making Sense of Human Rights* (n 1); J. Thomas (n 15).

<sup>146</sup> A. Buchanan (n 8); M. Cranston (n 19).

While human rights *law* typically sees human rights as only binding on states, there is no good reason for arbitrarily restricting *moral* human rights in this way. If our universal interests generate a right that imposes duties on both individuals and the state, why should only those duties borne by the state be regarded as corresponding to a human right? One reason offered for adopting a state-centric view of human rights is that this is required by our intuitions about human rights. Pogge argues that if someone's car is stolen by a private individual then we do not class this as a violation of the human right to property, but that we would do so if the car were appropriated by the state.<sup>147</sup> Valentini likewise claims that it is counter-intuitive to view someone being assaulted on the way home as a violation of their human right to physical integrity.<sup>148</sup> However, mine and others intuitions go the other way. It is as much an interference with the human right to privacy for an employer to read their workers' private correspondence as it is for prison officers to read inmates mail for example, and 'it is a mistake to think that the right to privacy against state interference is more fundamental than the right to privacy against employer interference'.<sup>149</sup>

### ***4.3 Resolving conflicts***

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<sup>147</sup> T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (1st edn, Polity Press 2002) 57.

<sup>148</sup> L. Valentini, 'In What Sense Are Human Rights Political? A Preliminary Exploration' (2012) 60 *Political Studies* 180.

<sup>149</sup> V. Mantouvalou (n 55) 165; V. Mantouvalou, 'The Human Rights Act and Labour Law at 20 (Forthcoming)' in A. Bogg, A. Young and J. Rowbottom (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart 2020).

Moral rights, including human rights, are not absolute, and it may be possible to justify a failure to comply with *pro tanto* duties to respect, protect or fulfil human rights where these conflict with other rights or values. Human rights may conflict with each other or with other moral considerations, in the sense that in some circumstances a choice must be made between an action which would realise one right at the expense of another. This is clearest where limited resources mean that a choice must be made between which rights can be fulfilled; a state may have to choose whether to build a school or hospital, and thereby prioritise the realisation of either the right to education or the rights to life and health. Additionally, there will be circumstances where A's exercise of a human right interferes with B's enjoyment of their human rights; such as where one persons' freedom of expression interferes with another's' right to private life, by revealing personal information about them.<sup>150</sup>

The resolution of conflicts between human rights, and the question of when conflicting considerations override human rights duties, will depend on the circumstances,<sup>151</sup> and must be determined by a range of factors. These include whether the core or periphery of the competing rights and values are at stake, the extent of any interferences on either side, and whether multiple human rights are at stake.<sup>152</sup> Rights conflicts must be resolved through a process of all-things-considered moral reasoning which assesses which should take priority in the circumstances.

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<sup>150</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>151</sup> J. Feinberg (n 27) 76–7.

<sup>152</sup> E. Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the ECHR' [2005] Human Rights Quarterly 294.

While it is not possible to consider the moral reasoning involved in resolving conflicts between rights fully here, it is worth commenting on ‘proportionality’ analysis as a possible framework for dealing with such conflicts. When deciding whether apparent rights violations are justified, domestic and international courts often apply a multi-staged proportionality test.<sup>153</sup> Under this approach, a failure to respect or secure human rights will be justified if it is a proportionate means of achieving a legitimate aim. While there is no definitive formulation of proportionality analysis,<sup>154</sup> the stages can broadly be stated as requiring: (1) that a legitimate reason for the failure to comply with a human rights duty be identified which is important enough to potentially justify the failure, (2) that there be a rational connection between this reason and the failure, (3) that the rights interference is necessary to achieve the aim, in that there is no alternate means of doing so that would constitute a lesser interference with human rights, and finally (4) the interference is proportionate in the strict sense that it does not unduly burden or disadvantage the right-holder.<sup>155</sup>

At the fourth and final stage of proportionality analysis, the right in question is sometimes said to be ‘weighed’ or ‘balanced’ against the benefits secured by the action. However, the language of balancing does not adequately capture what is required. There should not simply be a consequentialist cost-benefit analysis of the failure to respect, protect, or realise the

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<sup>153</sup> A. Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Colum. J. Transnat’l L.* 72.

<sup>154</sup> See G. Huscroft, B. Miller and G. Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014); G. Letsas, ‘Rescuing Proportionality’ in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015); K. Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709.

<sup>155</sup> *Campbell* (n 150); *Bank Mellat* [2013] UKSC 39; *Handyside v UK* [1976] EHR 737; *R v Oakes* [1986] 1 S.C.R. 103.



right.<sup>156</sup> Instead, a moral evaluation must be undertaken to determine whether the *pro tanto* duties generated by a human right can justifiably be put aside in the circumstances.<sup>157</sup> This will involve considering the plurality of values and principles that are at stake, and determining whether there are sufficient moral reasons to justify the failure to comply with the duties generated by the right.<sup>158</sup> When applied in a manner which allows for this moral reasoning, proportionality analysis provides a useful framework for resolving conflicts of rights.<sup>159</sup>

It is important to remember, however, that conflict of rights do not undermine the moral force or reality of human rights. The right to freedom of expression for example, might not generate duties to respect or protect certain types of speech, such as libel or hate speech, but the right nevertheless continues to exist. That the duties corresponding to a human right are overridden by conflicting normative concerns does not detract from the rights existence as long as it continues to generate some other duties.<sup>160</sup> Furthermore, rights retain a special place in moral theory even when their *pro tanto* duties give way to other considerations, because even a justified failure to secure someone's right amounts to that person being wronged, and is a reason for regret.

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<sup>156</sup> M. Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (n 73) 34.

<sup>157</sup> K. Möller (n 154); G. Letsas, 'The Scope and Balancing of Rights' in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR* (CUP 2013).

<sup>158</sup> For a defence of proportionality as moral reasoning in the context of discrimination law see, S. Goosey, 'A Pluralist Theory of Age Discrimination' (PhD Thesis, Queen Mary University of London, 2017) 64–8.

<sup>159</sup> It is a further question whether it is legitimate for courts to determine questions using moral reasoning of this type.

<sup>160</sup> J. Raz, *The Morality of Freedom* (n 1) 183–4.

## 5. Human Rights and the law

Before exploring the normative implications of the modified interest-based theory of human rights set out above for labour law, it is necessary to first clarify the relationship between these moral human rights norms and the law. This is important because, as noted in Chapter 5, naturalistic conceptions of human rights may not require them to be reflected in law. The relationship between law and morality is a deeply contested jurisprudential topic, encompassing several related questions.<sup>161</sup> The focus here however, is on the narrower question of the implications of human rights for the law under the theory set out above. It is argued that although human rights are not inherent demands for legalisation, there are reasons for thinking that legal protections and enabling frameworks will often be required in order to fulfil them in modern societies.

### 5.1 *No inherent legal or political functions*

The starting point for this discussion is that moral rights exist independently from any institutional recognition, and can often be realised without being translated into legal rights, meaning rights enforceable in courts. It may be inappropriate for some moral rights to undergo a process of 'legalisation', such as rights relating to private or other matters that lie outside the institutional competence of the courts. Translating some moral rights into law might also undermine their significance or value to the right-holder, and thus be self-defeating. It is not inherent in this understanding of moral rights that they represent 'a claim

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<sup>161</sup> For an overview see B. Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2019) chs 5, 15–16.

against political legislators to convert their “moral right” into a positive legal one’.<sup>162</sup> Conversely, legal rights may be introduced for a range of reasons and need not reflect or enforce pre-institutional moral rights.

Under the theory set out in this chapter, human rights are a sub-set of moral rights. There is therefore nothing inherent in their nature that demands that they be enshrined in law at either the domestic or international level, and they have no in-built political role or function. As argued below, human rights principles often *will* require the introduction of legal frameworks, but this is not a matter of conceptual necessity. As with other moral rights, legislation may not be necessary or appropriate to secure human rights in some circumstances, and courts may not provide an adequate forum for resolving certain types of disputes about human rights. Furthermore, in some instances legal intervention will be a necessary but not sufficient condition for the protection and realisation of human rights, and other things such as educational programmes and social acceptance of the right may also be required.<sup>163</sup> On this view human rights are not ‘precursors’ or ‘ideal grounds’ for legislation, and ‘legislation, and judicial enforcement’ are not the only means of implementing human rights.<sup>164</sup>

Although human rights are moral norms with no inherent legal or political function, this does not mean that they have no normative implications for law or political practice. Some human rights may need to be implemented through legislation, and it may be that a state which fails to secure some human rights is incapable of exercising legitimate authority, or leaves itself

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<sup>162</sup> J. Feinberg (n 27) 84–5; J. Feinberg, *Problems at the Roots of Law: Essays in Legal and Political Theory* (OUP 2003) 37–57.

<sup>163</sup> M. Freeman, ‘Putting Law in Its Place’ in S. Meckled-García and B. Cali (eds), *The legalization of human rights: multidisciplinary perspectives on human rights and human rights law* (Routledge 2006).

<sup>164</sup> A. Sen, ‘Human Rights and the Limits of Law’ (2005) 27 *Cardozo Law Review* 2913, 2916.

open to justified intervention by outside actors. But, as Tasioulas points out, 'it is perfectly compatible...that human rights are commonly and even justifiably invoked as standards that perform various other functions ... even though these additional functions are not integral to the concept of a human right'.<sup>165</sup>

## ***5.2 Legal protection of human rights***

Although it is not part of what makes something a human right that they have any legal or political implications, there are nevertheless two good reasons to think that human rights will frequently demand the introduction of legal protections and supportive frameworks in modern societies.

The first is that the positive duties to protect and fulfil human rights imposed on the state will typically require the creation of legal and institutional mechanisms capable of protecting and realising human rights. It is a feature of modern states that they act and govern through law rather than exclusively through executive action or ministerial discretion. Given this, the main means available to the state for protecting human rights is the introduction and enforcement of laws prohibiting human rights infringements by third parties. Such legal protections of human rights might be unnecessary in a society of populated by angels, but in the real world it will often only be possible for people to securely enjoy their human rights if they are

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<sup>165</sup> J. Tasioulas, 'Philosophizing the Real World of Human Rights: A Reply to Samuel Moyn' in A. Etinson (ed), *Human Rights: Moral or Political* (2018) 92.

enshrined in law.<sup>166</sup> The state's positive duty to fulfil human rights will likewise often require it to establish legal rights and policy frameworks that enable and empower people to exercise and enjoy their rights.

Following this, the state's duties to protect and fulfil human rights will frequently require the introduction of 'framework legislation' that 'allocates duties and rights, establishes the basic scheme, and specifies the various elements of the system of protection in the level of detail required in order to address the broad subject-matter'.<sup>167</sup> The right to education for instance, demands the state establish and maintain a system of legal rules and institutions, as these will be necessary for any adequately functioning school system. A human right to bargain collectively, if one exists, might similarly demand the creation of a legal framework supportive of trade union action.

One important point to note is that the legal rules implementing human rights are not limited to what is traditionally understood as 'human rights law', namely abstract statements of rights held against the state, often enshrined in domestic constitutional frameworks or international treaties. Rather, 'human rights law is to be found in all areas of positive law. The law of tort, of contract, of property, of crime ... all seek to respect and to specify the human rights of each and all in community'.<sup>168</sup> These areas of law often represent the implementation or '*determination*' of human rights in concrete legal rules.<sup>169</sup>

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<sup>166</sup> M. Freeman (n 163); J. Waldron, *The Dignity of Legislation* (CUP 1999) 85–7; J. Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (CUP 2002) 132–4.

<sup>167</sup> J. King (n 88) 41.

<sup>168</sup> G. Webber, 'Rights and Persons' in P. Yowell, F. Urbina and G. Webber (eds), *Legislated Rights* (CUP 2018) 28.

<sup>169</sup> J. Finnis (n 75) 284–91; A. Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

The process of protecting and fulfilling human rights through legal rules may sometimes be clear and uncontroversial, especially in respect of core aspects of human rights. Often however, there will be room for reasonable disagreement about what is needed to implement human rights, with no clear single answer to the question of what is demanded by human rights principles. In these circumstances, decisions about the demands of human rights are best taken via a process of democratic deliberation and enacted by a democratically accountable legislature.<sup>170</sup> However, democratic legislatures do not have an unlimited area of discretion when determining the content of human rights,<sup>171</sup> and legislation can (and should) still be scrutinised against the moral benchmark set by human rights.

The role of the courts in scrutinising and striking down legislation and executive acts that they view as culpable failures to secure human rights is an important and controversial issue. There is a longstanding debate between those in favour and those opposed to judicial enforcement of abstract human rights norms,<sup>172</sup> with the respective positions commonly known as 'legal' and 'political' constitutionalism.<sup>173</sup> We need not wade into this debate here however, as for present purposes it is enough to say that both legislation and the common law must be consistent with the normative demands made by human rights, and that any failure to secure human rights must be justifiable. It is possible to scrutinise domestic legal frameworks,

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<sup>170</sup> A. Sen (n 16).

<sup>171</sup> See T. Hickman, 'Negotiable Rights, What Rights' (2012) 75 Mod. L. Rev. 437.

<sup>172</sup> See R. Dworkin, 'The Forum of Principle' (1981) 56 NYUL Rev. 469; C. Fabre, 'The Dignity of Rights' (n 138); J. Waldron, 'The Core of the Case against Judicial Review' (2005) 115 Yale Law Journal 1346; J. Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18; R. Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press 2009).

<sup>173</sup> G. Gee and G. Webber, 'What Is a Political Constitution?' (2010) 30 OJLS 273; T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013).

including labour law, from a human rights perspective without making any further claims about whether the courts should have the power to strike down legislation which falls short of this standard.<sup>174</sup>

The second reason why human rights will often require the introduction of legal protections and supportive frameworks emerges once human rights are situated within a broader theory of justice and the state. Waldron's argument that the demands of socio-economic rights are best understood when contextualised within a broader theory of justice applies equally to all human rights.<sup>175</sup> Under liberal theories of the state there is widespread acceptance that the state should strive to provide the 'prerequisites of a good life',<sup>176</sup> and has duties to promote people's wellbeing and welfare.<sup>177</sup> When combined with a conception of human rights as protecting the conditions of a decent human life, this duty of justice encompasses a requirement to protect and promote human rights. On this view, 'one key purpose of the state is to secure to people their most central entitlements'.<sup>178</sup> Justice demands that human rights be securely protected, because the mere possibility of rights infringement may be incompatible with a decent human life,<sup>179</sup> which will often involve the enactment of legal protections.<sup>180</sup>

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<sup>174</sup> My own view is broadly in line with that in J. King (n 88). Namely, in favour of rights constitutionalism, including justiciable social and labour rights, as long as this is coupled with appropriate respect and deference to democratically accountable decision-makers in light of the institutional limits of the courts.

<sup>175</sup> J. Waldron, 'Socioeconomic Rights and Theories of Justice' (2011) 48 San Diego L. Rev. 773.

<sup>176</sup> T. Khaitan (n 97) 96.

<sup>177</sup> J. Raz, *The Morality of Freedom* (n 1). For discussion of these duties as possible foundations for labour law see A. Bogg (n 169).

<sup>178</sup> M. Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (n 73).

<sup>179</sup> T. Khaitan (n 97) 96.

<sup>180</sup> Gilabert reaches a similar conclusion via a dignitarian theory of the state, under which society should 'respond appropriately to the valuable features of human beings that give rise to their dignity ... including human rights

That the positive duties imposed on the state by human rights and broader principles of justice will often require the creation of legal protections and enabling mechanisms might be thought to go against the liberal principle that legal coercion should not be used to enforce morality.<sup>181</sup> However, the violation of human rights constitutes harm,<sup>182</sup> and using the coercive power of law to protect people from being harmed by others is generally accepted as legitimate.<sup>183</sup> The legal protection of workers human rights against third party infringements, including protecting workers' human rights from unjustified employer interferences, therefore does not fall foul of this principle.

## 6. Conclusion

Any thorough philosophical exploration of the relevance and implications of human rights for labour law must adopt a specific theory of human rights as the basis for its analysis. This chapter set out in some detail a conception of human rights that is relevant and appropriate for examining human rights as potential normative foundations for labour law. This modified

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and requirements of social justice', P. Gilabert, 'Dignity at Work' in V. Mantouvalou, H. Collins and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>181</sup> H.L.A. Hart, *Law, Liberty, and Morality* (Stanford University 1963); J. Stanton-Ife, 'The Limits of Law' in E. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016, Metaphysics Research Lab, Stanford University 2016) <<https://plato.stanford.edu/archives/win2016/entries/law-limits/>> accessed 29 November 2019; J.S. Mill, *On Liberty* (Penguin 1987).

<sup>182</sup> S. Fredman (n 1) 29.

<sup>183</sup> This is also why those who view contract law as the legal enforcement of promissory morality do not fall foul of the harm principle; breaches of promissory obligations are said to be harms which justify the coercive intervention of law. For discussion see, B. Bix, 'Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried' (2011) 45 *Suffolk UL Rev.* 719.



interest-based theory of human rights takes them to be the sub-set of moral rights grounded in universal human interests which make up conditions of a decent human life.

Important features of the account of human rights advanced in this chapter include the plural interests that underpin human rights, their dynamic nature, the distinction between abstract and derived human rights, and that human rights generate both positive and negative duties for both the state and non-state actors. Although this vision of human rights depicts them as inherently moral rather than legal or political norms, human rights will nevertheless frequently demand the introduction of protective legislation or enabling frameworks by the state.

While I believe this theory represents a plausible and coherent understanding of human rights, others may disagree. The intention of this chapter has not been to argue that this theory represents the single best or correct understanding of human rights. The aim is instead to set out a theory of human rights in enough detail to allow a proper understanding and assessment of the relationship between human rights and labour law at the normative philosophical level, in more depth than has been done previously. It remains open to those who reject this conception of human rights to offer an alternate theory and work through its implications for labour law.

In the process of setting out and discussing this conception of human rights, this chapter also argued that the supposed philosophical incompatibilities between labour law and human rights do not hold under this theory. Given this, there are no barriers to aligning labour law and human rights on the normative and philosophical level. However, determining the positive implications of human rights for labour law, including which areas of labour law can

be grounded in human rights, requires us to ‘move beyond merely conceptual considerations and take steps within a substantive conception of human rights’.<sup>184</sup> The following chapter begins to take these steps.

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<sup>184</sup> P. Gilabert, ‘Labor Human Rights and Human Dignity’ (2016) 42 *Philosophy & Social Criticism* 171, 177.

## Chapter 7: Implications of Human Rights for Labour Law

### 1. Introduction

The previous chapter set out a philosophical account of human rights, the ‘modified interest-based theory’, and demonstrated it has the potential to provide foundations for labour law. This chapter begins to work through the implications of this conception of human rights for labour law, considering its normative demands regarding the legal regulation of work. As the obligations imposed by human rights vary with social and economic context,<sup>1</sup> this chapter examines these issues within the setting of a developed capitalist economy and labour market such as currently exists in the UK. This chapter deepens our understanding of both dimensions of the relationship between human rights and labour law distinguished earlier in this thesis, namely the protection of civil liberties at work, and human rights as a foundational perspective.

Two significant implications for labour law emerge from the theory of human rights set out in Chapter 6. First, that the protection of human rights must extend to the workplace, and this requires the creation of legal protection of workers’ human rights against unjustified interferences by employers. Section 2 of the chapter argues that legal protections of workers’ human rights from infringements by employers are demanded by the state’s duties to respect, protect, and fulfil human rights, as well as by the direct human rights duties employers owe

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<sup>1</sup> See Chapter 6, Section 3.1.

to workers. The conception of human rights set out in chapter 6 therefore provides a philosophical grounding for the first dimension of the relationship between labour law and human rights; the protection of civil liberties in the workplace.

The second important implication, discussed in Section 3, is that human rights justify and demand the existence of some core aspects of labour law. While not possible to work through all the normative implications of human rights for the legal regulation of work, it is argued that they require the establishment of legal frameworks and institutions that secure decent working conditions and voice at work. Human rights to work in decent conditions and to exercise voice at work can be justified as derived human rights within the modified interest-based theory adopted here, meaning they are human rights justified by reference to other more basic human rights established by this theoretical framework.<sup>2</sup> This theory of human rights therefore provides a philosophical underpinning for the second dimension of the relationship between labour law and human rights; human rights as a foundational perspective for labour law.

To some extent this chapter is an exercise in idealistic theorising, in that it uses a philosophical conception of human rights as a normative guide to what legal protections *should* exist in the workplace, rather than offering a descriptive or interpretive theory of existing protections. However, it is not a matter of ‘ideal theory’ in the Rawlsian sense of ignoring existing non-ideal conditions when identifying the implications of normative theory.<sup>3</sup> On the contrary,

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<sup>2</sup> For discussion of derived human rights see Chapter 6, Section 3.2; J.W. Nickel, ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights’ (2008) 30 *Human Rights Quarterly* 984.

<sup>3</sup> J. Rawls, *A Theory of Justice* (1st edn, Harvard University Press 2009) 245–6; A.J. Simmons, ‘Ideal and Nonideal Theory’ (2010) 38 *Philosophy & Public Affairs* 5.

considerations of reasonableness and feasibility, taking into account existing social and economic conditions, are centrally important to determining the concrete demands of human rights in the sphere of labour law.

## **2. The Need to Protect Human Rights at Work**

The first important implication of the modified interest-based theory of human rights for labour law is that it justifies and requires the legal protection of workers' human rights against infringements by employers. This section argues that in societies with capitalist labour markets and modes of production, legal protections against dismissals, and other detrimental treatment by employers that infringes workers' human rights are required. In addition, employers should not have the legal authority to limit the enjoyment or exercise of workers' human rights, in or outside of work, unless such restrictions can be justified. Finally, as basic human rights are held equally by all, any exclusions of individuals or categories of workers from the scope of these human rights protections will be illegitimate unless they can be justified.

Legal protection of human rights at work are required both as the result of employers' direct duties to respect workers' human rights, and the states' duties to respect, protect and fulfil human rights in all areas of life. This conception of human rights therefore provides a

philosophical grounding for the view that people 'ought not to be expected to leave their human rights at the workplace door'.<sup>4</sup>

## *2.1 Employer human rights duties*

Employers have duties to respect the human rights of their workers according to the theory of human rights adopted here, as well as some limited duties to protect and fulfil these rights. The following sub-section discuss employers as duty-bearers for workers' human rights and the content of employers' duties, before arguing that their duty to respect workers' human rights should be enshrined in law.

### *Employers as duty-bearers*

The modified interest-based theory of human rights set out in Chapter 6 views them as generating duties for everyone 'in a position to effect the right'.<sup>5</sup> Employers therefore owe human rights duties to workers, because their position of power and control allows them to

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<sup>4</sup> K. Ewing, 'Human Rights in the Workplace' in P. Cane and J. Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008).

<sup>5</sup> D. Luban, 'Just War and Human Rights' (1980) 9 *Philosophy & Public Affairs* 160, 209. See Chapter 6.

affect workers' exercise and enjoyment of their human rights,<sup>6</sup> and because they pose a serious threat to workers' human rights.<sup>7</sup>

Employers can, and often do, issue commands restricting how workers can exercise their human rights, both during working hours and away from work.<sup>8</sup> In English law these commands will generally be backed by the legal authority of the employment contract, and the express or implicit threat of dismissal or disciplinary action. Employers also frequently dismiss, discriminate, or otherwise impose detriments on workers because of how the workers choose to exercise their human rights.<sup>9</sup> Indeed, Collins rightly points out that the relationship of subordination embedded in the contract of employment is necessarily in tension with workers' human rights.<sup>10</sup> The position of authority and control occupied by employers means they are duty-bearers in respect of workers' human rights.

Employers owing direct human rights duties towards workers may initially appear controversial, but it follows directly from the interpersonal nature of human rights. Under the conception of human rights adopted here, they generate duties on everyone in a position to affect their enjoyment and realisation, and this clearly includes employers. Hazenberg objects

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<sup>6</sup> S. Fredman, 'Equality Law: Labour Law or Autonomous Field' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

<sup>7</sup> D. Bilchitz, 'Corporations and Fundamental Rights: What Is the Nature of Their Obligations, If Any?' in C. Luetge (ed), *Handbook of the Philosophical Foundations of Business Ethics* (Springer 2013).

<sup>8</sup> As in *Eweida v UK* [2013] ECHR 37; *Barbulescu v Romania* [2017] IRLR 1032; *Crisp v Apple Retail (UK)* ET/1500258/2011 (unreported); *Stevens v University of Birmingham* [2015] EWHC 2300.

<sup>9</sup> H. Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 MLR 619; H. Collins and V. Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909; P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 ILJ 504.

<sup>10</sup> H. Collins, 'Is the Contract of Employment Illiberal' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

to companies being duty-bearers for human rights due to the costs this imposes on them.<sup>11</sup> But while cost considerations will limit the extent of duties that it is reasonable to impose on employers, they do not bar employers from having any human rights duties whatsoever.

Although the status of employers as human rights duty-bearers goes against how human rights are generally understood in law,<sup>12</sup> it is a common feature of philosophical accounts of human rights that they do not only bind states.<sup>13</sup> Even some scholars who view human rights as primarily held against states are willing to concede that employers may have human rights obligations. Pogge for example, whose institutional theory sees human rights as addressing 'those who occupy positions of authority within a society (or other comparable social system),' concedes that duty-bearers of human rights 'probably' include the leaders of corporations.<sup>14</sup>

### *Content of employers' duties*

Employers have duties not to violate the human rights of their workers in the organisation and operation of their business 'because every agent, corporate or private' has duties not to violate human rights.<sup>15</sup> But what is required by employers' human rights duties?

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<sup>11</sup> J. Hazenberg, 'Transnational Corporations and Human Rights Duties: Perfect and Imperfect' (2016) 17 *Human Rights Review* 479.

<sup>12</sup> Although see the UN Guiding Principles on Business and Human Rights (2011).

<sup>13</sup> J. Griffin, *On Human Rights* (OUP 2008); J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1.

<sup>14</sup> T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (1st edn, Polity Press 2002) 57–8.

<sup>15</sup> T. Sorell, 'Business and Human Rights' in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Springer 2004).



Employers have a negative duty to respect workers' human rights, which imposes an obligation on them not to issue commands or exercise their managerial prerogative in ways that infringe workers' human rights. This includes not dismissing, discriminating or otherwise imposing detriments on workers based on how they choose to exercise their human right to expression, association, and private life, among others.<sup>16</sup> Employers' obligation to operate their business in a manner that respects human rights also demands they not introduce rules or practices that prevent workers from exercising or realising their human rights, either in or outside the workplace.<sup>17</sup> Finally, it requires employers undertake some due diligence and monitoring activities to ensure they are not inadvertently infringing human rights.<sup>18</sup>

There are limits to employers' duty to respect human rights. The obligations imposed must be reasonable and feasible, and employers may be able to demonstrate that some interferences or restrictions on workers' human rights are justified. For example, an employer who dismisses an employee for membership of a political party appears to breach their duty to respect the right to freedom of association.<sup>19</sup> However, if the political party is racist or hostile towards a minority group, and the worker is employed by a charity or other organisation that specifically caters to that group, the dismissal might be justifiable on the basis that the employees' party membership is incompatible with them being able to carry out their duties.<sup>20</sup>

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<sup>16</sup> As in, *Denisov v Ukraine* Application no. 76639/11; *Fernandez Martinez v Spain* [2014] ECHR 615; *Redfearn v UK* [2012] ECHR 1878; *Pay v UK* [2008] ECHR 1007; *Vogt v Germany* (1996) 21 EHRR 20; *Copsey v WWB Devon Clays Limited* (2005) IRLR 811.

<sup>17</sup> As reflected by the UN Guiding Principles on Business and Human Rights (2011), Principle 11.

<sup>18</sup> *ibid*, Principle 15(b).

<sup>19</sup> *Redfearn v UK* (n 16).

<sup>20</sup> *H. Collins and V. Mantouvalou* (n 9).

In other cases, interferences with workers' human rights might be justified by reference to employers' property or reputational interests in their business.<sup>21</sup> Employers' duty to respect workers' human rights is not easily overridden, but significant reputational damage or economic harm may be legitimate grounds for limiting workers' exercise of their human rights.

The imposition of positive human rights duties on employers is more novel than a negative duty to respect human rights. However, it is reasonable and feasible for employers to have some limited duties to protect and fulfil workers' human rights given the relationship that exists between them.<sup>22</sup> Employers' obligation to protect their workers' human rights might include a requirement to introduce workplace rules and policies that help safeguard workers' human rights from infringements by customers, clients, or colleagues.<sup>23</sup> Employers may also be required to take positive steps to protect human rights in the workplace, such as providing them with equipment that protects their rights to life or health,<sup>24</sup> or introducing adequate (physical and cyber) security systems to secure their rights to property and privacy in the workplace.<sup>25</sup>

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<sup>21</sup> As found in *Pay v UK* (n 16).

<sup>22</sup> In addition to employers position of control and authority, workers' dependency on employers also helps justify the imposition of positive duties, see J. Thomas, 'Our Rights, but Whose Duties? Re-Conceptualizing Rights in the Era of Globalization' in T. Kahana and A. Scolnicov (eds), *Boundaries of State, Boundaries of Rights* (CUP 2016).

<sup>23</sup> As previously reflected in employers' duty to protect workers from harassment by third parties, Equality Act 2010 s 40.

<sup>24</sup> Health and Safety at Work etc. Act 1974.

<sup>25</sup> Data Protection Act 2018.

It is less clear whether employers have duties to fulfil workers' human rights, as this will often be costly and require employers to sacrifice their own interests and commitments, and therefore be overly demanding. Nevertheless, employers plausibly have some limited duties to help realise workers' human rights. For instance, by accommodating religious dress in the workplace,<sup>26</sup> ensuring that working conditions and shift patterns allow people to exercise their rights to private and family life,<sup>27</sup> or providing opportunities for workers to express themselves and associate with others at work.<sup>28</sup> More broadly, employers also have a duty to help fulfil workers' human rights by working towards and supporting institutions and legal frameworks that secure these rights.<sup>29</sup>

Employers' human rights duties may sometimes give way to other moral considerations or values, including the human rights of other workers and the employer themselves. They also cannot be overly costly or burdensome. The key point however, is that employers' have duties to respect workers' human rights as well as to protect and help fulfil them in some circumstances.

### *Legalisation of duties*

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<sup>26</sup> *Eweida v UK* (n 8); K. Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation* (Hart 2017).

<sup>27</sup> *Schüth v Germany* [2011] 52 EHRR 32; *Markin v Russia* [2013] 56 EHRR 8; *Barbulescu v Romania* (n 8).

<sup>28</sup> Trade Union and Labour Relations (Consolidation) Act 1992, s 168-170.

<sup>29</sup> S. Wood, 'The Case for Leverage-Based Corporate Human Rights Responsibility' (2012) 22 *Business Ethics Quarterly* 63.

Human rights duties do not necessarily need to be translated into corresponding legal duties.<sup>30</sup> In the case of employers' duties to respect workers' human rights however, this is both necessary and appropriate. The incentives employers have to sacrifice workers' human rights in pursuit of economic goals means that legal intervention is necessary to ensure employers abide by their duties. For example, it makes economic sense for an employer to ban workers from wearing headscarf's or religious jewellery if they think this will appeal to customers.<sup>31</sup> History and experience both tell us that without legal protections, employers will infringe workers' human rights with 'unfortunate regularity',<sup>32</sup> and legalisation of employers' duty to respect workers' human rights is necessary given the 'inherent conflict between civil liberties and the relation of subordination in employment'.<sup>33</sup>

Legal enforcement of human rights duties is inappropriate where their subject matter is not suitable for enforcement by the courts,<sup>34</sup> or legalisation will not be effective in securing the right.<sup>35</sup> Neither of these issues arise with workplace human rights protections however. Employers' duties are not of an intimate nature or otherwise unsuitable for determination by the courts. Nor does translating them into law undermine their value to workers. Quite the opposite in fact, as without legal enforcement many employers would likely ignore their duties.

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<sup>30</sup> See Chapter 6, Section 5. A. Sen, 'Human Rights and the Limits of Law' (2005) 27 *Cardozo Law Review* 2913.

<sup>31</sup> Case C-157/15 *Achbita v G4S Secure Solutions NV* [2018] ICR 102.

<sup>32</sup> P. Collins (n 9).

<sup>33</sup> H. Collins, 'Is the Contract of Employment Illiberal' (n 10).

<sup>34</sup> Tasioulas gives the example of the human right to have a say in family decisions, J. Tasioulas (n 13) 2.

<sup>35</sup> L. Fuller, *The Morality of Law* (Yale University Press 1969).

It is also unconvincing to claim that legal protections of workers' human rights against employer infringements are unnecessary because workers consent to such treatment when contracting with their employer.<sup>36</sup> This argument ignores the fact that employment and other contracts for work are 'incomplete by design',<sup>37</sup> making it unclear what workers are agreeing to at the outset. In addition, most people need a job to achieve a reasonable standard of living, so the 'consent' involved in entering an employment relationship is more akin to submission than an informed waiver of rights.<sup>38</sup> If workers need a job to live a decent life, and every employer has the power to infringe their human rights, it is difficult to see how their decision to enter a specific working relationship can be viewed as valid consent to human rights infringements by employers. In such circumstances the ability to choose one's employer amounts to little more than the ability to 'choose your Leviathan'.<sup>39</sup> Workers may genuinely consent to interferences with their human rights interferences in some cases, but they cannot be assumed to do so every time they contract for work.

Employers' duty to respect workers' human rights must be translated into law if workers are to be able to securely enjoy their human rights. Legal protections are required against dismissals and discrimination that infringe workers' human rights,<sup>40</sup> and employers should

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<sup>36</sup> See G. Morris, 'Fundamental Rights: Exclusion by Agreement?' (2001) 30 ILJ 49.

<sup>37</sup> H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer 2000)..

<sup>38</sup> P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (3rd ed., Stevens 1983) 18; H. Collins, 'Is the Contract of Employment Illiberal' (n 10).

<sup>39</sup> E. Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (S. Macedo ed, Princeton University Press 2017) 60.

<sup>40</sup> As recognised in *Redfearn v UK* (n 16). For discussion of English law on this issue see H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992); V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912; P. Collins (n 9).

not have the legal authority to impose restrictions on workers' human rights unless such interferences can be justified.<sup>41</sup> Although less clear cut, there may also be a need for some positive human rights duties of employers to be enshrined in law; such as requirements to conduct human rights due diligence, or introduce workplace policies that reduce the risk of human rights violations.<sup>42</sup>

## *2.2 State human rights duties*

The state has duties to respect, protect and fulfil workers' human rights under the theory of human rights set out in Chapter 6.<sup>43</sup> These duties demand that the legal rules established and enforced by the state do not infringe workers' human rights or create incentives for others to do so, as well as requiring the introduction of legal frameworks that effectively safeguard workers' human rights against employers.

### *Duty to respect*

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<sup>41</sup> G. Demeyere, 'Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate' (2010) 36 Queen's Law Journal 299.

<sup>42</sup> S. Cossart, J. Chaplier and T. Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 Business and Human Rights Journal 317. Work is ongoing on an international business and human rights treaty.

<sup>43</sup> See Chapter 6, Section 4.1.

The state has a duty to respect the human rights of everyone affected by its actions, which includes those working within its jurisdiction.<sup>44</sup> The state violates this duty if it takes executive, administrative or legislative action that unjustifiably interferes with workers' human rights.<sup>45</sup> In addition, the state is responsible for creating, maintaining, and enforcing the legal rules that constitute the labour market and regulate the workplace, so must ensure these rules do not infringe upon workers' human rights.

The state's duty to respect human rights also requires they not induce breaches of workers' human rights by third parties, such as employers. The legal frameworks created and enforced by the state, the private law rules of contract and tort, must therefore not encourage or incentivise such violations. The state therefore breaches its duty to respect human rights if either labour market regulations or the general rules of private law empower employers to infringe workers' human rights. A legal system that entitles employers to impose binding contractual terms on workers that infringe their human rights is not one that respects human rights, as the effect of this is to put the coercive power and resources of the state at the disposal of employers to enable them to violate workers' human rights.<sup>46</sup>

### *Duty to protect*

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<sup>44</sup> Duties are also owed to workers in other jurisdictions, but these are not considered here. See Y. Dahan, H. Lerner and F. Milman-Sivan, *Global Justice and International Labour Rights* (CUP 2016).

<sup>45</sup> As in *Smith and Grady v UK* (1999) 29 EHRR 493; *Veraart v Netherlands* (2006) ECHR 1018; *R (Unison) v Lord Chancellor* [2017] UKSC 51; *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

<sup>46</sup> J. Gardner, 'What Is Tort Law for? Part 2. The Place of Distributive Justice' in J. Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2013).

Human rights impose a positive duty on the state to protect individuals' human rights from interferences by third parties.<sup>47</sup> This requires the state to take reasonable and feasible steps to ensure human rights are secured in all spheres of life, including at work. The state must therefore introduce and enforce legal frameworks prohibiting unjustified interferences with workers' human rights by employers.

The imposition of positive duties on the state to protect workers' human rights follows from the modern state's bureaucratic power and wide ranging responsibilities, as well as the level of control they have over whether workers' human rights are secured and can be enjoyed.<sup>48</sup> The states' role in creating and enforcing the rules that constitute the labour market means they have significant influence over, and responsibility for, protecting human rights at work, and are well placed to minimise the negative impact these rules have on workers' human rights.

Employers pose a significant and consistent threat to workers' human rights, so the state's duty to protect requires them to establish legal frameworks that safeguard these rights against employer infringements.<sup>49</sup> This includes creating legal protections against dismissals, discrimination, or other detrimental treatment that unjustifiably interferes with workers' human rights.<sup>50</sup> Additionally, because the state owes a duty to protect the human rights of *everyone* within its jurisdiction the starting point must be that legal protections of human rights apply to *all* holders of those rights, rather than sub-groups of people. The boundary rules

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<sup>47</sup> See Chapter 6, Section 4.1.

<sup>48</sup> See Chapter 6, Section 4.2.

<sup>49</sup> H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996).

<sup>50</sup> As recognised in *Redfearn v UK* (n 16).



determining the protective scope of workplace human rights protections must therefore be justified, because excluding workers from these protections represents a prima facie failure to protect their human rights.<sup>51</sup>

Legal protections, rather than soft law or other policies, are necessary to protect workers' human rights from employers. The inherent tension between employers' authority and workers' human rights means the state will not be able to secure workers' human rights via non-coercive frameworks.<sup>52</sup> While legal protections are undoubtedly necessary however, they may not be enough to protect workers' human rights. The state may also need to introduce further measures such as 'naming and shaming' employers who fail to respect human rights,<sup>53</sup> delivering information and educational programmes about human rights at work,<sup>54</sup> or providing support for trade unions and other organisations that help protect workers' human rights.<sup>55</sup>

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<sup>51</sup> As recognised in *Markin v Russia* (n 27); *Gilham v Ministry of Justice* [2019] UKSC 44; *Pharmacists' Defence Association Union (PDAU) v Boots Management Services Ltd* [2017] IRLR 355.

<sup>52</sup> H. Collins, 'Is the Contract of Employment Illiberal' (n 10); G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61.

<sup>53</sup> As under the National Minimum Wage Naming Scheme. The Government is considering extending this to the Modern Slavery Act 2015, see L. Patchett, 'Government Will Name and Shame Suppliers Breaching Slavery Law' *Supply Management* <<https://www.cips.org/supply-management/news/2019/may/government-will-name-and-shame-suppliers-breaching-slavery-law/>> accessed 6 November 2019.

<sup>54</sup> On human rights education see, M. Bajaj, 'Human Rights Education: Ideology, Location, and Approaches' (2011) 33 *Human Rights Quarterly* 481.

<sup>55</sup> S. Gleeson, 'From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers' (2009) 43 *Law & Society Review* 669; T. Colling, 'What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights' (2006) 35 *ILJ* 140. See Section 3.2 below.

### *Duty to fulfil*

The state's duty to fulfil workers' human rights means it may be required to provide certain resources, or create legal and social conditions, that enable workers to effectively exercise and enjoy their rights. It is difficult to specify in the abstract what this duty demands. However, it will likely involve establishing and funding a government agency that monitors infringements and helps workers enforce legal protections of their human rights.<sup>56</sup> There may also be an obligation to ensure workers have the financial support and advice needed to enforce legal protections of their human rights.<sup>57</sup> Finally, the state must help fulfil workers' human rights by creating a societal culture and expectations that is supportive of these rights.<sup>58</sup>

### **3. Foundations for Labour Law**

In addition to demanding the creation of legal protections for workers' non-labour-related human rights from employer infringements, the second normative implication of the modified interest-based theory of human rights for labour law is that human rights can provide foundations for some core aspects of labour law. This section argues that rights to work in decent conditions and to exercise voice at work can both be justified as human rights under

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<sup>56</sup> Along the lines of the Equality and Human Rights Commission in the UK.

<sup>57</sup> The UK may therefore be breaching this obligation, as legal aid is not available for employment tribunal claims. The UK Government does, however, provide funding to the 'Citizens Advice' charity, which gives advice on legal issues relating to rights at work.

<sup>58</sup> One aim of the Human Rights Act 1998 was to create a human rights culture, Home Office, '*Rights Brought Home: The Human Rights Bill*' (1997) Cm 3782.

this theoretical framework, and that human rights therefore demand legislation be introduced to ensure that everyone can access work with decent conditions and that workers are able to exercise voice and make their views heard. First however, it is worth briefly revisiting the different ways that human rights can be established.

A human right may be justified *directly* by demonstrating it is (1) a moral right, (2) grounded in universal human interests, (3) that is a condition of a decent human life.<sup>59</sup> Alternately, human rights may be justified *indirectly* as derived human rights, so-called because they are ‘derived’ from more basic human rights.<sup>60</sup> Some derived human rights are in fact simply context-specific instantiations of basic human rights, identified by asking what is demanded by these basic human rights in particular circumstances.<sup>61</sup> The derived human right to freedom of the press for example, is a more concrete and context-specific manifestation of the right to expression.<sup>62</sup> Derived human rights can also be justified using ‘linkage’ arguments, which demonstrate that they are a prerequisite for the exercise or realisation of another, already established, human right.<sup>63</sup> Individual human rights will often be justifiable both directly and as derived human rights, and relying exclusively on either approach may therefore obscure important aspects of a right.<sup>64</sup>

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<sup>59</sup> See Chapter 6, Section 3.

<sup>60</sup> J.W. Nickel, ‘Rethinking Indivisibility’ (n 2); C. Wellman, *The Moral Dimensions of Human Rights* (OUP 2010) ch 3.

<sup>61</sup> C. Wellman (n 60) 48–9.

<sup>62</sup> J. Griffin (n 13) 38.

<sup>63</sup> J.W. Nickel, ‘Rethinking Indivisibility’ (n 2); J.W. Nickel, ‘Can a Right to Health Care Be Justified by Linkage Arguments?’ (2016) 37 *Theoretical Medicine and Bioethics* 293.

<sup>64</sup> J.W. Nickel, *Making Sense of Human Rights* (2nd ed., Wiley 2007) 53.

### *3.1 Human rights and decent working conditions*

The legal regulation of working conditions and the imposition of minimum standards has become an increasingly important aspect of labour law with the decline in trade union power and collective bargaining coverage.<sup>65</sup> Legal rights to safe workplaces, limits on working time and paid holidays, parental leave and work-life balance protections, a minimum wage, and prohibitions on discrimination and unfair dismissal are all now core labour law protections.<sup>66</sup> These protections can also be found in international and domestic human rights documents, sometimes grouped together as part of a human right to decent working conditions.<sup>67</sup> If we are to understand the relationship between human rights and labour law on the normative philosophical level it is crucial to understand whether, and how, these protections of decent working conditions can be justified as human rights.

This sub-section argues that the modified interest-based theory of human rights adopted here provides normative foundations for several core labour law norms relating to decent working conditions. It begins by showing that some legal protections of working conditions can be derived from more basic non-labour related human rights, either as context-specific

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<sup>65</sup> T. Colling (n 55).

<sup>66</sup> As reflected in H. Collins, K. Ewing and A. McColgan, *Labour Law* (CUP 2012); S. Deakin and G. Morris, *Labour Law* (Hart 2012).

<sup>67</sup> Universal Declaration of Human Rights Articles 23-24; UN Committee on Economic and Social Rights General Comment No 23; International Covenant of Economic, Social and Cultural Rights Articles 7-8; European Social Charter Articles 2-3, 8, and 24-26; CFREU Articles 30-31. See also the ILO's 'Decent Work Agenda', discussed in A. Sen, 'Work and Rights Special Issue: Social Policy and Social Protection' (2000) 139 *International Labour Review* 119.

manifestations of these rights, or as prerequisites for their realisation. In addition to this piecemeal justification of decent working conditions, it is also argued that a human right to work in decent conditions can be established under this theory. Decent working conditions form part of the human right to work, which must be a right to work *in decent conditions*. Following this, human rights demand the introduction of legal frameworks that protect and realise the right for everyone to access work in decent conditions, and so can provide normative foundations for those aspects of labour law aimed at regulating for decent work.

#### *Derived human rights and working conditions*

It was argued above that the state must protect workers' human rights from unjustified interferences by employers, and that this requires legal protections be introduced against dismissal and discrimination based on how workers exercise their human rights. Some additional protections of decent working conditions can also be derived from non-labour-related human rights. This includes prohibitions on extreme labour exploitation, health and safety law, protections against employer surveillance, and limits on working time. It is not possible here to fully work through the normative implications of every basic human right for working conditions. Instead, the rights to life and health, and to privacy, are used as illustrative examples of the demands made by non-labour-related human rights in this context.

It is important to note that not every human right will demand the introduction of workplace-specific legal protections. The human right to bodily security undoubtedly requires that

workers be protected from corporal punishment by employers for example,<sup>68</sup> but the generally applicable protections contained in criminal and tort law mean that specific worker-protective legislation is not necessary.<sup>69</sup>

However, some human rights *do* require the introduction of workplace-specific legal frameworks. The right to freedom from slavery and forced labour is an obvious example.<sup>70</sup> Working conditions that are so indecent that they amount to servitude or forced labour infringe this human right,<sup>71</sup> and the state's duty to protect and realise workers' right to be free from forced labour demands the creation of legal protections against working conditions that are so exploitative that they amount to unfree work.<sup>72</sup> Freedom of association is another abstract non-labour-related human right that requires the introduction of context-specific protections for workers,<sup>73</sup> because workers' rights to associate and act collectively, including through trade unions, are not adequately protected by other generally applicable legal rules.<sup>74</sup>

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<sup>68</sup> *A v UK* Application no. 100/1997/884/1096 (23 September 1998)

<sup>69</sup> Offences Against the Person Act 1861; *Stephens v Myers* (1830) 172 ER 735; *Collins v Wilcock* [1984] 3 All ER 374.

<sup>70</sup> This human right is underpinned by our universal interests in autonomy and liberty, and clearly makes up a condition of a decent human life. It is enshrined in UDHR Article 4; ECHR Article 4; ICCPR Article 8; CFREU Article 5.

<sup>71</sup> *Siliadin v France* [2005] ECHR 545; V. Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece' (2018) 1 E.H.R.L.R. 67.

<sup>72</sup> See V. Mantouvalou, 'The Right to Non-Exploitative Work' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>73</sup> *Wilson v UK* [2002] IRLR 568.

<sup>74</sup> Quite the reverse under English law, see *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *Rookes v Barnard* [1964] AC 1129..

A derived human right to safe working conditions can be established as a context-specific manifestation of the human rights to life and health.<sup>75</sup> Mantouvalou rightly doubts that working conditions which are harmful to workers' health, such as those in Amazon warehouses which led a workers' feet to 'resemble two ragged clods of wax gone over with a cheese grater',<sup>76</sup> are compatible with workers' human rights.<sup>77</sup> The state's duty to protect workers' human rights to life and health requires it to establish legal frameworks that ensure working conditions do not endanger the lives or physical or mental health of workers. Human rights therefore provide normative foundations for health and safety law.<sup>78</sup>

The introduction of legal limits on working time is also required by the state's duty to protect workers' human rights to life and health, because overwork and lack of recovery time are damaging for workers' physical and mental wellbeing.<sup>79</sup> Death from overwork is so common in Japan that it is known by the shorthand term of 'Karoshi',<sup>80</sup> and work-related 'burnout' is

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<sup>75</sup> These rights are generated by our universal interests in being alive and in good health, as well as 'various other interests that enjoying good health can enable one to realize, such as making friends, acquiring understanding, or accomplishing something with one's life', J. Tasioulas and E. Vayena, 'The Place of Human Rights and the Common Good in Global Health Policy' (2016) 37 *Theoretical Medicine and Bioethics* 365. They are reflected in UDHR Article 3; ECHR Article 2; ICCPR Article 6.

<sup>76</sup> J. Bloodworth, *Hired: Six Months Undercover in Low-Wage Britain* (Atlantic 2018) 44.

<sup>77</sup> V. Mantouvalou, 'Work, Human Rights, and Human Capabilities' in B. Langille (ed), *The Capability Approach to Labour Law* (OUP 2019). See also ESC Article 2, which requires states to 'eliminate risks in inherently dangerous or unhealthy occupations'.

<sup>78</sup> As reflected in CFREU Article 31; ESC Article 3; UDHR Article 24; ILO Conventions No 155 and No 187; *Brincat et al v Malta* [2014] ECHR 900.

<sup>79</sup> A. Bannai and A. Tamakoshi, 'The Association between Long Working Hours and Health' (2014) 40 *Scandinavian Journal of Work, Environment & Health* 5.

<sup>80</sup> A. Kanai, "'Karoshi (Work to Death)' in Japan' (2008) 84 *Journal of Business Ethics* 209.

included in the World Health Organization's International Classification of Diseases.<sup>81</sup> The restrictions on working time needed to protect workers' rights to life and health include entitlements to rest breaks and maximum working hours, at a level which allows workers to live healthily.<sup>82</sup>

A right to legal protections against overwork can also be derived from other non-labour-related human rights using leverage arguments, because restrictions on working time are a prerequisite for people being able to exercise and realise their other human rights. For example, the human rights to freedom of association and religion, and to private and family life all require that people have enough free time to exercise them. The state's duty to fulfil these rights means they must introduce legal restrictions on working time to guarantee that people have adequate time away from work to exercise and enjoy them.

If linkage arguments can justify a derived human right to limits on working time, might they also be used to justify the related right to paid holidays? Although found in numerous human rights documents,<sup>83</sup> the idea that paid holidays are a human right is often ridiculed.<sup>84</sup> Gilabert defends a human right to paid holidays using linkage arguments, claiming that time away from work is necessary to realise our rights to participate in society and 'cultivate personal relationships'.<sup>85</sup> It is true that the state's duty to fulfil human rights requires that it take steps to ensure people can have extended periods away from work to exercise and realise their

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<sup>81</sup> 'Burn-out an "Occupational Phenomenon": International Classification of Diseases' (*World Health Organization*) <[http://www.who.int/mental\\_health/evidence/burn-out/en/](http://www.who.int/mental_health/evidence/burn-out/en/)> accessed 30 November 2019.

<sup>82</sup> As in the Working Time Regulations 1998.

<sup>83</sup> UDHR Article 24; ICESCR Article 7; ESC Article 2; CFREU Article 31; ILO Convention 132.

<sup>84</sup> M. Cranston, *What Are Human Rights?* (Basic Books 1973) 66–7; J. Griffin (n 13) 186.

<sup>85</sup> P. Gilabert, *Human Dignity and Human Rights* (OUP 2018) 248.



human rights. However, the state could achieve this in other ways than by introducing paid holidays, for example by establishing a social security system that enables people to take extended periods of leave from work.<sup>86</sup> Therefore, although a legal entitlement to paid holidays might be justified by reference to human rights, it is not necessarily *required* by it.

The state's obligations to protect and fulfil workers' human right to privacy, which is generated by our universal interests in autonomy and control over aspects of our personal and private life,<sup>87</sup> also demands certain legal regulations of working conditions. Protecting workers' privacy requires the prohibition of unjustified surveillance of workers by employers, both in and outside of the workplace.<sup>88</sup> Video surveillance,<sup>89</sup> or reading personal messages sent at work,<sup>90</sup> will violate workers' right to privacy unless the employer can justify their actions.<sup>91</sup> Restrictions on the categories of information employers are entitled to demand from workers during the hiring process and in the course of their employment are also required,<sup>92</sup> as are limits on how workers personal data is used, managed and shared.<sup>93</sup> This includes restricting employers' use of personal and behavioural data in algorithmic decision-making

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<sup>86</sup> However, Gilabert's suggested alternative of providing higher salaries to people when they are working is not adequate, *ibid* 241, fn 25. As recognised by the European Court of Justice, 'rolling up' holiday pay into wages undermines the aim that people actually be capable of taking paid leave, Case C-131/04 *Robinson-Steele v PD Retail Services* [2006] IRLR 386.

<sup>87</sup> A. Marmor, 'What Is the Right to Privacy?' (2015) 43 *Philosophy & Public Affairs* 3.

<sup>88</sup> English law may currently fall short of what is required, see J. Atkinson, 'Workplace Monitoring and the Right to Private Life at Work' 81 *MLR* 688.

<sup>89</sup> *Antović and Mirković v Montenegro* [2017] ECHR 1068.

<sup>90</sup> *Halford v UK* [1997] ECHR 32; *Copland v UK* [2007] ECHR 253; *Barbulescu v Romania* (n 8).

<sup>91</sup> As in *López Ribalda v Spain* (2019) ECHR 355.

<sup>92</sup> See for example Equality Act 2010, s.60 prohibiting questions about health and disability during recruitment.

<sup>93</sup> As reflected in CFREU Article 8; Data Protection Act 2018.

processes.<sup>94</sup> Finally, the state's duty to protect workers' privacy against unjustified interferences by employers demands legal protections against mandatory drug tests or other medical examinations.<sup>95</sup>

Although they cannot be considered here, other human rights will similarly require the introduction of legal frameworks regulating working conditions. The state's obligation to protect and fulfil workers' right to family life for instance, demands the introduction of legal protections of work/life balance such as periods of parental leave,<sup>96</sup> and rights to work flexibly or part-time without discriminatory working conditions.<sup>97</sup> Similarly, the human right to freedom of expression will require the state to create legal protections for whistle-blowers,<sup>98</sup> and introduce frameworks protecting worker voice.<sup>99</sup>

One labour law norm sometimes included within a human right to decent working conditions that is difficult to derive from non-labour-related human rights is a right to a minimum wage, or 'just remuneration'.<sup>100</sup> The most promising way of justifying a minimum or just wage as a human right is via linkage arguments, because 'decent wages ... contribute to the enjoyment

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<sup>94</sup> K. Yeung, 'Algorithmic Regulation: A Critical Interrogation' (2018) 12 Regulation & Governance 505.

<sup>95</sup> *Glass v UK* [2004] ECHR 103; *MAK v UK* [2010] ECHR 363.

<sup>96</sup> As reflected in UDHR 25; ICESCR Article 10; ESC Article 8; CFREU Article 33; ILO Maternity Protection Convention 103 (1952); EU Council Directive 92/85/EEC; EU Council Directive 2010/18/EU; Equality Act 2010.

<sup>97</sup> The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

<sup>98</sup> *Heinisch v Germany* (2014) 58 EHRR 31; *Guja v Moldova* (2011) 53 EHRR 16.

<sup>99</sup> See Section 3.2.

<sup>100</sup> Contained in UDHR, Article 23; ICESCR Article 7; ESC Article 4. For discussion see, S. Deakin and Z. Adams, 'Article 4: The Right to Fair Remuneration' in N. Bruun and others (eds), *The European Social Charter and Employment Relation* (Hart 2017).

of other human rights, such as the right to health, or the right to take part in cultural life'.<sup>101</sup> If a right to a minimum or just wage is essential for the realisation of these non-labour human rights then it must be regarded as a derived human right. However, although the state *could* choose to ensure workers can realise their human rights to health, and cultural participation by introducing a legal minimum wage, they could equally do this by establishing a generous social security system or universal basic income. As such, a legally enshrined minimum wage is not *necessarily* required by human rights.

While further work is needed to fully explore the normative implications of non-labour related human rights for working conditions,<sup>102</sup> it has been shown that a range of legal protections and minimum standards relating to working conditions can be derived from these rights.

### *Justifying a human right to work in decent conditions*

In addition to the piecemeal approach to justifying decent working conditions discussed above, an overarching human right to decent working conditions can also be established within the theory of human rights adopted here. A right to decent working conditions can be justified as part of the human right to work, as this must necessarily be a right to work *in*

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<sup>101</sup> S. Knuchel, 'Examining Workers' Rights in International Human Rights Law: The Fast-Food Workers' Movement in the United States' (2015) 33 Hofstra Labor & Employment Law Journal 1, 22.

<sup>102</sup> See, for example, L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd edn, Hart 2016); L. Vickers, *Freedom of Speech and Employment* (OUP 2002).

*decent conditions*.<sup>103</sup> Establishing this right involves demonstrating that there is a moral right to work in decent conditions, generated by universal human interests, which is a condition of a decent human life.<sup>104</sup>

The universal interests that generate the human right to work in decent conditions are our interests in subsistence and access to consumption goods, self-development and self-esteem, in developing personal relationships and participating and contributing to one's community, and in autonomy. Work, understood in the broad sense of 'intentional activity of production of goods or services that can satisfy needs or desires',<sup>105</sup> furthers these interests in central and distinctive ways, and thus generates a moral right to work. It is worth noting that, other than subsistence and accessing consumer goods, the interests that underpin the right to work in decent conditions are also furthered by non-remunerated forms of work such as volunteering, community, and domestic care work. As a result, 'remuneration is not a key requirement of the right to work'.<sup>106</sup> Although the focus here is on paid work, the human right to work in decent conditions may therefore have significant implications for the organisation and regulation of non-remunerated work.

The human right to work is generated by a plurality of universal interests.<sup>107</sup> Perhaps the most obvious is our interest in accessing the goods needed to subsist and live a decent life.

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<sup>103</sup> The following argument draws on H. Collins, 'Is There a Human Right to Work?' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014); V. Mantouvalou, 'The Right to Non-Exploitative Work' (n 72); P. Gilibert, 'Labor Human Rights and Human Dignity' (2016) 42 *Philosophy & Social Criticism* 171.

<sup>104</sup> See Chapter 6.

<sup>105</sup> P. Gilibert, *Human Dignity and Human Rights* (n 85) 237.

<sup>106</sup> H. Collins, 'Is There a Human Right to Work?' (n 103).

<sup>107</sup> Contra, *ibid*.

Certainly, this is the reason most likely to be given if one were to ask people why they work. However, our interest in accessing subsistence and consumer goods is not the most central interest generating the right to work, and it plays no part in justifying the human right to work *in decent conditions* because it may be furthered by paid work carried out in poor conditions.

Collins persuasively argues that the human right to work is generated by our universal interest in 'self-realisation'.<sup>108</sup> While this interest is hard to pin down, the central idea is that we have a universal interest in feeling that our lives have meaning, and that it is a distinctive feature of humanity that we often find this meaning through work.<sup>109</sup> Our universal interest in self-esteem also plays a critical part in generating the right to work in decent conditions,<sup>110</sup> as a person's work often forms an important part of their identity and strongly influences how they are perceived by themselves and others. As recognised by the courts, 'a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem.'<sup>111</sup>

Work also furthers our interests in developing social relationships and our capacities as a citizen,<sup>112</sup> as well as for contributing to,<sup>113</sup> and being able to participate in,<sup>114</sup> the collective life

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

<sup>109</sup> H. Collins, 'Is There a Human Right to Work?' (n 103) 33.

<sup>110</sup> J.W. Nickel, 'Is There a Human Right to Employment?' (1978) X *Philosophical Forum* 149; D. Beatty, 'Labour Is Not a Commodity' in B. Reiter and J. Swan (eds), *Studies in contract law* (Butterworths 1980) 318.

<sup>111</sup> *Johnson v Unysis Ltd* [2001] UKHL 13, Lord Hoffman at [35].

<sup>112</sup> C. Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (OUP 2003).

<sup>113</sup> For discussion of this interest as foundations for economic participation rights see, A. Greene, 'A Human Right to Livelihood' in J. Queralt and B. Vossen (eds), *Economic Liberties and Human Rights* (Routledge 2019).

<sup>114</sup> H. Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *MLR* 16; K. Brownlee, 'A Human Right against Social Deprivation' (2013) 63 *The Philosophical Quarterly* 199.

of one's community. The significant proportion of people's lives spent at work means the workplace is one of the primary sites at which they develop personal relationships; it is 'in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'.<sup>115</sup> Finally, work furthers our interests in autonomy and self-development, because the workplace provides a forum within which we can set and achieve goals for ourselves, and learn new skills and successfully apply them to tasks.<sup>116</sup>

The value of work to our universal interests is summed up by Gross' statement that '[w]ork is not merely an economic activity... Through work, men and women can express their creativity and achieve self-realization and personal fulfilment. Through work they can become integrated into the human community by contributing to and participating in the life of that community'.<sup>117</sup> The fact that work 'plays a crucial role' in furthering these important interests and 'cannot be fully substituted by other mechanisms at reasonable cost for most people' is sufficient to generate a moral right to work in decent conditions.<sup>118</sup>

However, for work to further these interests it must be work carried out in certain conditions. As Collins says, 'the right to work is limited by the underlying human interest[s] that justifies

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<sup>115</sup> *Niemietz v Germany* [1992] ECHR 80.

<sup>116</sup> P. Gilabert, *Human Dignity and Human Rights* (n 85) 244–5; A. Veltman, *Meaningful Work* (OUP 2016); R. Yeoman, *Meaningful Work and Workplace Democracy: A Philosophy of Work and a Politics of Meaningfulness* (Springer 2014).

<sup>117</sup> J.A. Gross, *A Shameful Business: The Case for Human Rights in the American Workplace* (Cornell University Press 2010) 14.

<sup>118</sup> P. Gilabert, 'Labor Human Rights and Human Dignity' (n 103) 249.

the right'.<sup>119</sup> Work without opportunities for acquiring and applying new skills does not further our interests in self-realisation, and work that is degrading, humiliating or exploitative is not capable of furthering our interest in self-esteem.<sup>120</sup> Work with these types of conditions therefore forms no part of the human right to work. Similarly, working conditions that do not allow workers to develop personal relationships with colleagues, or that provide no opportunities to develop their capacities, exercise autonomy over how and when work is completed, or enable workers to feel they are contributing to society cannot further the interests that generate the human right to work, and so form no part of the right. The right to work must be a right to work in conditions that further the interests that generate the right. In short, it must be a right to work in decent conditions.

The importance of work means the right to work in decent conditions should be regarded as a condition of a decent life, and therefore as a human right. While some people might reject work as a necessary element of a decent human life,<sup>121</sup> there 'is good reason to resist [the] characterisation of work as an activity only for fools and horses'.<sup>122</sup> Many who appear to reject the value of work are in fact only rejecting certain *types* of work and still value other forms of

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<sup>119</sup> H. Collins, 'Is There a Human Right to Work?' (n 103) 36; this reasoning is also used to justify a right to non-exploitative work in V. Mantouvalou, 'The Right to Non-Exploitative Work' (n 72).

<sup>120</sup> However, 'the category of demeaning jobs that produce no self-esteem at all is small', H. Collins, 'Is There a Human Right to Work?' (n 103) 31.

<sup>121</sup> D. Frayne, *The Refusal of Work: The Theory and Practice of Resistance to Work* (Zed Books 2015); K. Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Duke University Press 2011).

<sup>122</sup> A. Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014) 152.

work, understood in the broad sense of productive activity.<sup>123</sup> Additionally, the fact that some people do not value work does not imply there is no human right to work; just as the rejection of the value of religious belief by some atheists does not imply there is no right to freedom of religion, or the existence of monks who live lives of solitude and silence implies that there are no human rights to association or expression.

Although work is not an unalloyed basic good and some types of work are detrimental to, rather than a necessary component of, a decent human life a 'decent and secure job is one of the constituent features of a dignified life'.<sup>124</sup> Furthermore, while it is possible for some individuals to have a decent life without work this is 'not generalizable' in current societies, because it will remain essential for most people to engage in productive activity unless, or until, production becomes fully automated.<sup>125</sup> As such, the right to work in decent conditions is a human right.

### *Content of the human right to work in decent conditions*

The human right to work in decent conditions requires that everyone can access work with conditions that allow them to develop and apply their skills and capacities, to feel they are making a social contribution of some kind, to build personal relationships, to have self-esteem,

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<sup>123</sup> The song 'Work is Shit' by hip-hop artist ExP for example, expresses the artists' desire to quit their job and perform another form of work; that of creating music.

<sup>124</sup> A. Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 7, 14..

<sup>125</sup> P. Gilabert, *Human Dignity and Human Rights* (n 85) 249–51.



and to exercise some degree of autonomy. The state has duties to respect, protect, and fulfil this human right, with employers also having a duty to respect the right.

The determinate content of this right, i.e. the specific working conditions demanded and the concrete steps and actions that must be taken by the state and employers, will depend on the prevailing social and economic conditions in a given society. That said, it is possible to make some general comments about the demands made by the right to work in decent conditions. For example, working conditions are only capable of furthering the interests in self-realisation and development if workers can acquire and apply new skills. This means that on-the-job training or opportunities for professional development need to be provided,<sup>126</sup> and that workers need to have the possibility of promotion or at least to apply themselves to new challenges at work.<sup>127</sup> In addition, for work to further our interests in self-esteem and making a social contribution, workers must be treated with a degree of respect, and not as mere commodities. This will likely require the imposition of legal limits on employers' arbitrary power over workers,<sup>128</sup> including protection against harassment and discrimination,<sup>129</sup> restrictions on the grounds of lawful dismissal,<sup>130</sup> and rights for workers to be informed of

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<sup>126</sup> A right to request time off work for study or training is contained in the Employment Rights Act 1996 s 63D. A right to non-discrimination in the provision of training opportunities is contained in the Equality Act 2010 s 39. There is also an implied term in contracts of employment that employees be provided with the training needed to perform their duties in light of changes to their working practices or responsibilities, *Cresswell v Board of Inland Revenue* (1998) IRLR 288 (EAT).

<sup>127</sup> The right not to be discriminated against in hiring or promotion decisions is protected in the Equality Act 2010, s 39.

<sup>128</sup> *Malik v BCCI* [1998] AC 20; A. Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve' (2010) 32 Comp. Lab. L. & Pol'y J. 729.

<sup>129</sup> CFREU Article 31(1); ESC Article 26.

<sup>130</sup> Employment Rights Act 1996, Part X.

their working conditions and schedule.<sup>131</sup> Finally, work only furthers our universal interests in autonomy and developing personal relationships if working conditions provide some choice over how and when work is carried out and allow workers to communicate and associate freely with colleagues.<sup>132</sup>

Determining the normative implications of the human right to work in decent conditions requires consideration of the types of working conditions that further our universal interests, and what counts as reasonable and feasible duties to fall on the state and employers. There is room for reasonable disagreement over the protections and standards required for work to be decent. The work of the ILO,<sup>133</sup> human rights bodies,<sup>134</sup> academics, and policymakers,<sup>135</sup> can all be viewed as attempting to flesh out what is needed to protect and realise the right to decent work. While the concrete content of the right to work in decent conditions cannot be determined fully here, the right nevertheless provides a normative benchmark against which existing labour law protections and policies can be assessed.

The state and employers both have a duty to respect the right to work in decent conditions. This requires that they not make offers of work with non-decent conditions, or procure

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<sup>131</sup> A right to statement of working conditions is contained in Employment Rights Act s 1.

<sup>132</sup> Rights to associate freely with other workers via trade unions are protected under TULRCA 1992.

<sup>133</sup> G. MacNaughton and D. Frey, 'Decent Work for All: A Holistic Human Rights Approach' (2010) 26 Am. U. Int'l L. Rev. 441.

<sup>134</sup> See the UN Committee on Economic and Social Rights, General Comment No 23.

<sup>135</sup> The UN Sustainable Development Goals include a commitment to work towards 'decent work for all' by 2030. On the use and abuse of the idea of 'decent work' domestically see, M. Taylor, '*Good Work; The Taylor Review of Modern Working Practices*'

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf)> accessed 1 December 2019; K. Bales, A. Bogg and T. Novitz, "'Voice" and "Choice" in Modern Working Practices: Problems With the Taylor Review' (2018) 47 ILJ 46.

products or services from people working in non-decent conditions. The duty to respect also imposes an obligation to undertake reasonable and feasible due diligence activities to ensure that there are decent working conditions in a companies' supply chains.<sup>136</sup> Furthermore, the state's duty to respect requires that it not create, maintain, or support institutions and frameworks that encourage or incentivise non-decent working conditions. The legal rules which constitute and regulate the labour market and work relationships must therefore not empower employers to enforce contractual terms imposing non-decent conditions on workers.

The state's duty to protect the human right to work in decent conditions means they must introduce legislation to safeguard the right to decent working conditions from infringements by employers. Non-coercive policies and legal frameworks will not be adequate, because of the economic incentives employers have to infringe workers' right to decent conditions.<sup>137</sup> Legal prohibitions on working conditions that fall short of the standard required by the right to work in decent conditions will therefore be needed. In addition, the state's duty to fulfil the right means they have an obligation to pursue full employment, including creating opportunities for people to work in decent conditions where necessary.<sup>138</sup> The duty to fulfil requires monitoring and enforcement mechanisms be established that enable workers to enjoy their right to work in decent condition in practice. This includes rights and assistance to access

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<sup>136</sup> As recognized by the UN Guiding Principles on Business and Human Rights.

<sup>137</sup> Section 2.2 above.

<sup>138</sup> J. Burgess and W. Mitchell, 'Unemployment, Human Rights and a Full Employment Policy in Australia' (1998) 4 *Australian Journal of Human Rights* 76; See generally V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

courts and tribunals,<sup>139</sup> and protections of worker voice.<sup>140</sup> Finally, the state must take steps to fulfil the right to decent work by non-legal means, such as shaping social norms and expectations about acceptable treatment at work.<sup>141</sup>

The foregoing is a necessarily brief sketch of the content and normative implications of human rights in respect of the legal regulation of working conditions. That said, this sub-section has clarified *why* and *how* human rights are relevant to the regulation of working conditions and argued that some core labour law protections and standards relating to decent working conditions can be justified within the human rights framework adopted here.

### ***3.2 Human rights and worker voice***

The use of workers' collective voice to challenge the power of employers has historically been the central concern of labour law,<sup>142</sup> and remains a focal point today.<sup>143</sup> For British labour lawyers, the idea of worker voice is intimately linked with voice exercised through trade unions, whether in the political sphere or through collective bargaining and industrial action.<sup>144</sup> However, there are various forms that worker voice may take and mechanisms that

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<sup>139</sup> *R (Unison) v Lord Chancellor* (n 45).

<sup>140</sup> Section 3.2 above.

<sup>141</sup> A. Sen, 'Work and Rights' [2000] *International Labour Review* 119, 123.

<sup>142</sup> P. Davies and M. Freedland (n 38).

<sup>143</sup> See generally A. Bogg and T. Novitz, *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

<sup>144</sup> P. Davies and M. Freedland (n 38); B. Wedderburn, *The Worker and the Law* (3rd ed, Penguin 1986); K. Ewing, 'The Function of Trade Unions' (2005) 34 *ILJ* 1.

can be used to facilitate it.<sup>145</sup> This sub-section considers the normative implications of human rights for worker voice, and argues the theory of human rights adopted here can provide philosophical foundations for legal protections of voice at work.

Legal protections of worker voice have been defended in various ways,<sup>146</sup> including through rights-based arguments.<sup>147</sup> Despite the inclusion of rights to bargain collectively and go on strike in international human rights law however,<sup>148</sup> and the excellent scholarship that exists on these rights,<sup>149</sup> there has been comparatively little consideration of worker voice from a *normative philosophical* human rights perspective.

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<sup>145</sup> J. Howe, 'Regulatory Facilitation of Voice' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

<sup>146</sup> G. Mundlak, 'Workplace – Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism' (2014) 15 *Theoretical Inquiries in Law*; M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (OUP 2012); J. Foley and M. Polanyi, 'Workplace Democracy: Why Bother?' (2006) 27 *Economic and Industrial Democracy* 173; J. McCall, 'Employee Voice in Corporate Governance: A Defense of Strong Participation Rights' (2001) 11 *Business Ethics Quarterly* 195; C. Estlund (n 112); R. Dahl, *A Preface to Economic Democracy* (Univ of California 1985); A. Gourevitch, 'Welcome to the Dark Side: A Classical-Liberal Argument for Economic Democracy' (2014) 26 *Critical Review* 290; N. Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31 *Social Theory and Practice* 115.

<sup>147</sup> S. Bainbridge, 'Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law' (1998) 43 *Vill. L. Rev.* 741; W. Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate 2007); M. Lower, *Employee Participation in Governance: A Legal and Ethical Analysis* (CUP 2010); A. Bogg and C. Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014); P. Gilabert, 'Labor Human Rights and Human Dignity' (n 103); A. Bogg and C. Estlund, 'The Right to Strike and Contestatory Citizenship' in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>148</sup> UDHR Art.23; ESC Article 6; ICESCR Article 8; CFREU Article 27-28.

<sup>149</sup> See K. Ewing, 'The Right to Strike' (1986) 15 *ILJ* 143; M. Freedland and J. Prassl (eds), *Viking, Laval and Beyond* (Hart 2014); T. Novitz, *International and European Protection of the Right to Strike* (OUP 2003); K. Ewing, 'Myth and Reality of the Right to Strike as a "Fundamental Labour Right"' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 145; J. Fudge and H. Jensen, 'The Right to Strike:

This sub-section begins to fill this gap by setting out three paths to justifying a human right to voice at work within the theory set out in Chapter 6. First, a derived human right to voice can be justified using leverage arguments, because voice at work is essential for protecting and realising other human rights. Second, a right to worker voice can be justified as a composite derived human right made up of context-specific applications of the rights to expression, association and freedom from forced labour.<sup>150</sup> Finally, and more radically, a human right to voice in workplace governance might be derived from a human right to participate in decisions affecting important aspects of one's life. These justifications of worker voice are mutually supportive rather than alternatives, and supplement rather than supplant non-human rights justifications. Taken together they demonstrate that human rights require that worker voice be respected and protected, and that appropriate legal and institutional frameworks must be established by the state to enable workers to exercise their voice and make themselves heard.

Before going further however, it is worth clarifying what is meant by worker voice. Bogg and Estlund propose a two-dimensional taxonomy of rights to worker voice; from individualistic

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The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice' (2016) 27 *King's Law Journal* 89; P. Macklem, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in P. Alston (ed), *Labour Rights as Human Rights* (OUP 2005); K. Ewing and J. Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *ILJ* 2; J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267; A. Bogg and K. Ewing, 'A (Muted) Voice at Work - Collective Bargaining in the Supreme Court of Canada' (2011) 33 *Comp. Lab. L. & Pol'y J.* 379; A. Bogg and K. Ewing, 'The Implications of the RMT Case' (2014) 43 *ILJ* 221; T. Novitz, 'Freedom of Association: Its Emergence and the Case for Prevention of Its Decline' in J.R. Bellace and B. Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar 2019).

<sup>150</sup> A. Bogg and C. Estlund, 'Right to Contest' (n 147); A. Bogg and C. Estlund, 'The Right to Strike' (n 147).

to increasingly collective understandings of who holds the right, and from thin to thick conceptions of the rights' content.<sup>151</sup> Along the first dimension, worker voice could be exercisable by individuals, informal groups of workers, or only through organisations or institutional actors such as trade unions. Along the second dimension, the right to voice at work may only be a right to freedom from state interference when expressing oneself in the workplace. Alternately, it could encompass 'thicker' conceptions of the right to voice, that entitle workers to protection against employer retaliation for workers who exercise their voice or impose duties on employers to listen, respond, and take account of worker voice.

While this taxonomy is undoubtedly useful, it can be developed further. For example, one further issue relating to the first dimension of who holds the right to voice is the relational scope of the right. As well as determining whether the right to voice is held by individual workers or only those acting collectively, it is also important to identify *which* individuals or groups hold the right. Do only workers in certain types of relationship have a right to voice, and if so, which groups of workers? Two additional dimensions of voice can also be added to Bogg and Estlund's taxonomy. First, the *subject-matter* to which worker voice relates, meaning the categories and forms of voice protected, and second, the *level* at which workers' voice operates, in other words whether workers can exercise voice at the level of individual workplaces, across the enterprise, or at the industry or sectoral level.

Voice can be exercised at work in minimalistic ways, such as through suggestion boxes, worker surveys, and consultation meetings, but may also take more significant forms such as work councils, collective bargaining, worker representatives on company boards, and worker-

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<sup>151</sup> A. Bogg and C. Estlund, 'Right to Contest' (n 147) 143.

ownership of firms.<sup>152</sup> One important aspect of worker voice is the ability for workers to go on strike. Although strikes apply economic pressure on employers, they are primarily an exercise of worker voice, as workers withdraw their labour as a means of expressing their dissatisfaction or disagreement with the employer. This expressive dimension of industrial action is what separates striking workers from those who withdraw their labour to pursue leisure activities.<sup>153</sup> The multiple dimensions of worker voice, and various forms it can take, make it important to be precise when identifying the normative implications of human rights in this area.

#### *Leverage arguments for voice*

A derived human right to worker voice can be established via leverage arguments because it is necessary for the protection and realisation of workers' other human rights, including the right to work in decent conditions. For voice at work to be justified in this way it must make an 'indispensable' contribution to the secure enjoyment or realisation of one or more other human rights.<sup>154</sup>

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<sup>152</sup> See generally, S. Johnstone and P. Ackers (eds), *Finding a Voice at Work?: New Perspectives on Employment Relations* (OUP 2015); A. Wilkinson and others (eds), *The Oxford Handbook of Participation in Organizations* (OUP 2010).

<sup>153</sup> B. Langille, 'What Is a Strike?' (2009) 15 *Canadian Labour and Employment Law Journal* 355; A. Bogg and C. Estlund, 'The Right to Strike' (n 147).

<sup>154</sup> J.W. Nickel, 'Rethinking Indivisibility' (n 2); P. Gilibert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel' (2010) 32 *Human Rights Quarterly* 425.



There are good reasons to think that voice at work is necessary to secure workers' other human rights from employer infringements and is therefore a derived human right. Voice provides a 'process and remedy' for protecting workers' human rights against unjustified interferences by employers.<sup>155</sup> Workers must be able to exercise voice and communicate with each other to keep track of employer conduct, and monitoring of this kind is key to ensuring employers do not infringe workers' rights in the first place,<sup>156</sup> as well as being a pre-requisite for enforcing statutory protections of human rights at work.<sup>157</sup> This argument is similar to the claim that political participation is a derived human right because of its benefits for the protection of other human rights.<sup>158</sup>

Whether worker voice makes an indispensable contribution to protecting other human rights against employers depends on the existence of a causal link that is difficult to establish conclusively.<sup>159</sup> It seems plausible that this link exists, however, given the shortcomings of legal protections in securing workers' human rights. Certainly, if one agrees with Kahn-Freund that the law is ineffective in protecting workers without the existence of worker voice, then a right

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<sup>155</sup> J.W. Nickel, 'Rethinking Indivisibility' (n 2) 988.

<sup>156</sup> J. Fine and J. Gordon, 'Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations' (2010) 38 *Politics & Society* 552; D. Weil, 'Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage' (2005) 58 *ILR Review* 238.

<sup>157</sup> D. Lewis, 'Labour Market Enforcement in the 21st Century: Should Whistleblowers Have a Greater Role?' (2019) 50 *Industrial Relations Journal* 256; D. Weil and A. Pyles, 'Why Complain-Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace United States' (2005) 27 *Comp. Lab. L. & Pol'y J.* 59.

<sup>158</sup> D. Miller, 'Is There a Human Right to Democracy?' in R. Celikates, R. Kreide and T. Wesche (eds), *Transformations of Democracy: Crisis, Protest and Legitimation* (Rowman & Littlefield 2015); A. Sen, *Development as Freedom* (OUP 1999) 152; T. Christiano, 'An Instrumental Argument for a Human Right to Democracy' (2011) 39 *Philosophy & Public Affairs* 142.

<sup>159</sup> P. Gilibert, 'The Importance of Linkage Arguments' (n 154) 430.

to voice must be regarded as an essential means of protecting workers' human rights.<sup>160</sup> Even without taking such a pessimistic view of legislation however, the difficulties workers have in enforcing legal protections,<sup>161</sup> and the fact that legal protections are unlikely to ever protect human rights perfectly, make it likely that in at least some instances legal protections will be insufficient to protect workers' human rights unless accompanied by a right to voice.

The necessity of worker voice for the protection and realisation of other human rights is particularly clear in respect of the human right to work in decent conditions. Empirical evidence, and long years of experience, tell us that worker voice is linked to better working conditions.<sup>162</sup> Gilabert justifies a human right to exercise voice through trade unions, including by going on strike, by arguing that worker voice is the only 'reliable way' of ensuring the right to decent conditions 'can realistically be enjoyed'.<sup>163</sup> This seems correct, because without a right to voice that encompasses the right to temporarily withdraw their labour, worker voice can have only a limited effect in protecting and realising other human rights.

Furthermore, the right to voice at work is a necessary supplement to statutory protections of the right to decent working conditions. The nature of statutory regulations of working conditions as general standards that apply to the entire labour market, or large areas of it, makes

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<sup>160</sup> P. Davies and M. Freedland (n 38) 19–26.

<sup>161</sup> G. Davidov (n 52).

<sup>162</sup> S. Webb and B. Webb, *Industrial Democracy* (Longmans 1902); D. Blanchflower and A. Bryson, 'The Wage Impact of Trade Unions in the UK Public and Private Sectors' (2010) 77 *Economica* 92; OECD, 'The Role of Collective Bargaining Systems for Good Labour Market Performance', *OECD Employment Outlook 2018* (2018); M.D. Carr and P. Mellizo, 'The Relative Effect of Voice, Autonomy, and the Wage on Satisfaction with Work' (2013) 24 *The International Journal of Human Resource Management* 1186.

<sup>163</sup> P. Gilabert, 'Dignity at Work' in V. Mantouvalou, H. Collins and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 73.

them too blunt an instrument to ensure working conditions are decent at the level of individual workplaces. Worker voice is therefore needed to specify the content of the right to work in decent conditions at the more granular level of individual companies and workplaces.

### *A composite human right to voice*

The second route to justifying voice at work within the theoretical human rights framework adopted here is as a composite derived human right, made up of a combination of context-specific instantiations of the human rights to association, expression, and freedom from forced labour.<sup>164</sup> Individually these abstract rights cannot generate a right to worker voice in any meaningful sense of the word, but together they allow workers to exercise their voice and have their views heard.

For labour lawyers the most obvious starting point for deriving a human right to voice at work is the right to freedom of association,<sup>165</sup> because worker voice exercised individually is generally ineffective compared to when exercised collectively through trade unions.<sup>166</sup> The inclination to approach worker voice through freedom of association is reinforced by human

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<sup>164</sup> The argument in this sub-section draws upon A. Bogg and C. Estlund, 'Right to Contest' (n 147); A. Bogg and C. Estlund, 'The Right to Strike' (n 147).

<sup>165</sup> Generated by our universal interests in forming relationships and engaging socially with others and makes up a condition of a decent life. This right is contained in UDHR Article 20; ECHR Article 11; ICCPR Article 22; CFREU Article 12.

<sup>166</sup> A. Flanders and H. Clegg (eds), *The System of Industrial Relations in Great Britain: Its History, Law, and Institutions* (B Blackwell 1954); P. Davies and M. Freedland (n 38) ch 1.

rights documents,<sup>167</sup> and litigation,<sup>168</sup> which include rights for workers to exercise voice through trade unions within the right to freedom of association.

At a philosophical level however, freedom of association is simply the right to do collectively what one is entitled to do as an individual; it 'tells us nothing' about the substantive actions one is actually entitled to take collectively.<sup>169</sup> Freedom of association therefore cannot, in itself, provide normative foundations voice at work.<sup>170</sup> The right entitles workers to form and join trade unions and other organisations, and the state's duty to protect freedom of association will require legal protections be introduced against victimisation for membership of these organisations.<sup>171</sup> But the right to associate freely does not provide guidance on what action workers are entitled to take collectively in these organisations.

Although freedom of association cannot be used to derive a right to worker voice, it remains important in this context. First, if a human right for individual workers to exercise voice can be justified in another way, then freedom of association will entitle workers to exercise that right collectively. This is significant because collective exercises of the right to voice, such as those through trade unions, are more likely to be heard and acted upon by employers. Second, freedom of association provides additional grounds for protecting collective acts of voice. The

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<sup>167</sup> ECHR Article 11; ICCPR Article 22; CFREU 12; ILO Convention No 87.

<sup>168</sup> *Demir and Baykara v Turkey* [2008] ECHR 1345; *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251; K. Ewing and J. Hendy (n 149); J. Fudge (n 149).

<sup>169</sup> A. Bogg and C. Estlund, 'Right to Contest' (n 147) 148. It is not necessarily illegitimate to read rights to voice into *legal* statements of freedom of association however, as this might be justified on textual or other interpretive grounds.

<sup>170</sup> B. Langille, 'The Condescending Constitution (or, The Purpose of Freedom of Association Is Freedom of Association)' (2015) 19 Canadian Lab. & Emp. LJ 335; D. Borman, 'Contractualism and the Right to Strike' (2017) 23 Res Publica 81.

<sup>171</sup> TULRCA 1992 s 146; *Wilson v UK* (n 73).

fact that multiple human rights are at stake will make it harder to justify interferences with collective voice, and it may be possible to justify more extensive duties to respect and protect collective rather than individual voice, as these are more likely to be reasonable and feasible.

Instead of deriving a right to voice at work from freedom of association, a better approach is to justify it using a combination of basic human rights. Bogg and Estlund argue that a 'composite' right to voice at work can be established by combining context-specific manifestations of the abstract rights to association, expression and freedom from forced labour.<sup>172</sup> A similar approach is adopted here, albeit using the theoretical human rights framework set out in Chapter 6; meaning the rights to expression, association and freedom from forced labour are human rights grounded in universal interests, rather than being basic liberties justified within a framework of republicanism by reference to the political value of freedom from domination.<sup>173</sup> This human rights based approach is preferable, due to the uncertain status of rights under civic republican theories of justice which prioritise political liberty rather than being inherently rights-based,<sup>174</sup> and the absence of rights in some accounts of republicanism.<sup>175</sup> There is a danger that republican-based justifications of labour rights, including worker voice, view them simply 'as flexible policy levers to minimise overall

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<sup>172</sup> A. Bogg and C. Estlund, 'Right to Contest' (n 147); A. Bogg and C. Estlund, 'The Right to Strike' (n 147).

<sup>173</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

<sup>174</sup> D. Ivison, 'Republican Human Rights?' (2010) 9 *European Journal of Political Theory* 31.

<sup>175</sup> S. Hope, 'Republicanism and Human Rights: A Plausible Combination?' (2008) 21 *Cambridge Review of International Affairs* 367; C. Hamel, 'Are Rights Less Important for Republicans than for Liberals? Pettit versus Pettit' (2017) 16 *Contemporary Political Theory* 478.

domination',<sup>176</sup> whereas they are in fact important moral rights grounded in universal human interests.

The normative core of the composite derived human right to worker voice proposed here is provided by the right to freedom of expression.<sup>177</sup> As the protection of human rights must extend to the workplace, people must be free to express themselves without unjustified interferences by either the state or employers. A human right to voice at work can therefore be derived from the right to expression as 'a workplace-specific instantiation'<sup>178</sup> of this right. This right to voice protects expression related to working conditions and other operational and governance matters related to the workplace, but also covers political and other forms of speech. This contrasts with Bogg and Estlund's justification of worker voice, grounded in the republican 'basic liberty' of expression, which they argue only protects a narrower range of expression 'that is by its nature agonistic'.<sup>179</sup> The theory of human rights adopted here requires workers' right to expression be protected and realised in all spheres of life, and there is no reason to limit this to expression relating to working conditions or other controversial topics.<sup>180</sup>

The right to freedom of expression is an individual entitlement held equally by all, so the right to voice at work derived from it is also held by individual workers. Protections of the right to

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<sup>176</sup> A. Bogg and C. Estlund, 'The Right to Strike' (n 147) 233. Describing the account of republicanism in R. Taylor, *Exit Left: Markets and Mobility in Republican Thought* (OUP 2017).

<sup>177</sup> Generated by our universal interests in autonomy and liberty, the right to expression plainly makes up a condition of a decent human life. It is enshrined in UDHR Article 19; ICCPR Article 19; ECHR Article 10.

<sup>178</sup> A. Bogg and C. Estlund, 'Right to Contest' (n 147) 154.

<sup>179</sup> *ibid.*

<sup>180</sup> It may, of course, be more difficult to justify interferences and restrictions relating to some categories of worker voice, which might include 'agonistic' speech. See, *Ceylan v Turkey* [2000] 30 EHRR 73, [34].

voice should therefore not apply only to voice exercised through trade unions, and nor should they be restricted to certain categories of workers unless this can be justified.<sup>181</sup> However, the right to voice can be combined with the right to freedom of association to generate a human right for workers to exercise voice collectively, either through informal groups or trade unions.

It is important to note, however, that while a right to voice made up of the combination of freedom of expression and association may allow workers to make themselves heard, it does not confer any entitlement for them to have their views listened to or considered and acted upon by employers. While employers must respect workers' right to voice, and the state must take steps to protect and fulfil it, there is no duty for employers to listen or take the views of workers into account. A right to worker voice grounded in freedom of expression and association therefore risks amounting to a right to shout in vain from the side-lines.

The right to voice can be bolstered and made more effective in practice by combining it with a third right; the right to be free from slavery and forced labour.<sup>182</sup> Freedom from forced labour necessarily entails the right to leave one's job without the imposition of penalties, as without this people may find themselves in a position where they are compelled to work.<sup>183</sup> This right to quit can be used to leverage the right to worker voice derived from expression and

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<sup>181</sup> This contrasts with the current protection of worker voice in English law, which prioritise trade unions activities and only cover those with 'employee' or 'worker' status, see TULRCA 1992, s 146.

<sup>182</sup> Generated by our universal interests in liberty and avoiding being forced to work against our will, the right to freedom from forced labour is a key component of a decent human life. It is enshrined in UDHR Article 4; ICCPR Article 8; ECHR Article 4; CFREU Article 5; ESC Article 1.

<sup>183</sup> The right to quit is protected as part of ECHR Article 4; *Chowdury v Greece* Application no. 21884/15 (30 March 2017).

association, and bring it closer to a right to meaningful or effective voice,<sup>184</sup> because when workers exercise voice it is backed by the threat, implicit or explicit, that they will exercise their right to leave their job if the employer does not listen. In the case of voice exercised by individual workers this threat is unlikely to be weighty enough to provide their employer with an incentive to take their views into account. But when workers express themselves collectively and make demands of employers which are backed by the threat of mass departures, the costs and disruption that this would cause for the employer may well be large enough to force them to listen. A composite right to worker voice grounded in the abstract rights to expression, association, and freedom from forced labour therefore has the potential to provide a right to effective worker voice.

Although the right to freedom from forced labour does not entitle workers to *temporarily* cease work and *return* to the same job, i.e. a right to strike, Bogg and Estlund believe that such a right can be justified by combining freedom from forced labour with the expressive function of going on strike.<sup>185</sup> If correct, the composite right to voice defended above would encompass a right to strike. It is certainly true that temporarily withdrawing one's labour to make a substantive point is an expressive act. But to derive a right to strike, i.e. to return to work following a temporary cessation, from the human rights to freedom of expression and from forced labour there must be a right to *this specific* form of expression, which will only be the case if the right to strike is a distinctive and important form of expression for workers that cannot adequately be replaced by making other means of expression available to workers. This certainly seems to be true in developed capitalist economies. Workers are unable to

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<sup>184</sup> A. Bogg and C. Estlund, 'The Right to Strike' (n 147) 234.

<sup>185</sup> *ibid* 238–9.



adequately exercise their freedom of expression without a right to strike because alternatives such as protests, campaigns, or leaving one's job permanently do not adequately allow them to express themselves.<sup>186</sup> Following this, there is a derived human right to exercise voice by going on strike in such contexts.

In sum, this composite justification of worker voice entitles workers to make their views heard both individually and collectively, whether in or out of work, and encompasses a right to exercise voice by temporarily withdrawing one's labour. In practice, this right to voice will often enable workers to have their views listened to and acted upon by employers, including by engaging them in collective bargaining. However, it does not confer any *entitlement* for workers to have their views listened to or to co-determination in the workplace; it is simply a right for workers to make their voice heard and to be free to try and persuade employers to listen. The state has duties to respect, protect and fulfil the human right to worker voice, meaning they must not interfere with workers' freedom to exercise voice,<sup>187</sup> and must establish legal and institutional frameworks that ensure that workers can exercise voice in practice, free from retaliatory action by employers. The rights to expression and association are not absolute however, and so neither is the right to voice derived from it. It may therefore be possible for these duties to be overridden by other normative concerns. The content of the right to voice is considered in more detail below.

### *A human right to participate in workplace governance*

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<sup>186</sup> The right to quit is not an adequate form of expression because of the self-harm this inflicts on workers.

<sup>187</sup> See Chapter 8 for discussion of the (in)compatibility of the Trade Union Act 2016 with this duty.

It may also be possible to justify a more expansive human right to worker voice, that goes beyond a right for workers to make themselves heard and entitles them to participate in workplace governance and decision-making. While this possibility cannot be explored fully here, such a right might plausibly be derived from a more basic human right to participation in decisions that affect important aspects of one's life, grounded in our universal interests in self-realisation, self-determination and autonomy, and self-esteem and social recognition. The argument being that if we recognise a human right to participation in decision-making in the political sphere then this right must also apply in respect of workplace governance.<sup>188</sup>

A human right to participate in decision-making procedures that affect our vital interests might be generated by a range of universal interests. Such a right furthers our universal interests in self-realisation and the development of our 'intellectual and moral faculties', because participating in decision-making procedures provides us with a unique opportunity to form and evaluate our own conceptions of the good life, without which we will struggle to develop these important capacities.<sup>189</sup> Participation in decision making also furthers our universal interests in autonomy and self-determination, social recognition, and self-esteem. People have fundamental autonomy and self-determination interests in being authors of their own lives, and these interests are furthered by having a say in decisions that affect their fundamental interests and undermined or harmed by denials of any say in such decisions. Being involved in decision-making and the creation of rules that bind us is also important for our interest in being

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<sup>188</sup> C. Pateman, *Participation and Democratic Theory* (CUP 1970); R. Dahl (n 146); V. Mantouvalou, 'Democratic Theory and Voices at Work' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

<sup>189</sup> R. Dahl (n 146) 94–101; 205–6 J. Rawls, *A Theory of Justice* (revised, Harvard University Press 1999) 199.

‘recognised and affirmed as equals’ by others in society,<sup>190</sup> which is key for self-esteem. Although no doubt controversial, these interests arguably generate a human right to participation in decision-making, at least where those decisions have a significant impact on important aspects of our lives.<sup>191</sup>

If our universal interests *do* generate a human right to participate in decision-making this must arguably encompass a derived human right to a say in workplace governance, as well as in the political sphere. Participating in decision-making and governance at work furthers the same interests as political participation. The process of forming, articulating, and advocating for one’s views about work-related matters helps workers develop their moral power to ‘to form, revise and pursue one’s personal view of what is good or worthwhile’.<sup>192</sup> The workplace is a central, ‘perhaps essential’,<sup>193</sup> site for workers to develop the qualities of self-government and self-realisation.<sup>194</sup> Adam Smith emphasised the link between work and self-realisation, believing that a lack of opportunities for self-realisation and autonomy at work rendered people unable to form proper judgements in either their personal lives or over matters of state.<sup>195</sup>

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<sup>190</sup> T. Christiano, ‘Self-Determination and the Human Right to Democracy’ in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 464.

<sup>191</sup> A. Johns, ‘The Case for Political Candidacy as a Fundamental Human Right’ (2016) 16 H.R.L.R. 29; S. Besson, ‘The Human Right to Democracy’, *Definition and development of human rights and popular sovereignty in Europe* (Council of Europe Publ 2012).

<sup>192</sup> J. Rawls, *Political Liberalism* (Columbia University Press 1996) 19.

<sup>193</sup> S. White, ‘The Republican Case for Basic Income: A Plea for Difficulty’ (2007) 2 Basic Income Studies 5; M. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Harvard University Press 1996).

<sup>194</sup> C. Estlund (n 112); J. Winkelman, ‘A Working Democracy: Jane Addams on the Meaning of Work’ (2013) 75 *The Review of Politics* 357; K. Klare, ‘Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform’ (1988) 38 *Cath. UL Rev.* 1.

<sup>195</sup> A. Smith, *The Glasgow Edition of the Works and Correspondence of Adam Smith Vol. 2: An Inquiry into the Nature and Causes of the Wealth of Nations* (W. Todd ed, OUP 1976) 782.

This approach to justifying a human right to participate in workplace governance relies on an analogy between political and workplace participation. While contested, this seems plausible because both employers and the state exercise coercive and potentially arbitrary power over a community.<sup>196</sup> As Anderson has powerfully argued, the workplace can be seen as a system of governance akin to the state,<sup>197</sup> so it would seem that those who accept a human right to political participation must also accept this includes a right to participate in decisions at work. This reasoning can be illustrated using Besson's justification of a human right to democracy, which she grounds in our universal interest in democratic participation.<sup>198</sup> Given that Besson believes the human right to participation 'has to include all levels of decision-making that can affect people's fundamental interests whether national or international',<sup>199</sup> it must arguably apply to participation in workplace decision-making as well as in the political sphere.

One potentially significant difference between rights to participate in workplace governance and the political sphere is the need to take account of employers' interests and property rights. But while these considerations might bar workers from having a right to full workplace democracy, in the sense of rights to *equal participation* in decision-making, they do not entirely

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<sup>196</sup> R. Mayer, 'Robert Dahl and the Right to Workplace Democracy' (2001) 63 *The Review of Politics* 221; R. Dahl, 'A Right to Workplace Democracy? Response to Robert Mayer' (2001) 63 *The Review of Politics* 249; H. Landemore and I. Ferreras, 'In Defense of Workplace Democracy: Towards a Justification of the Firm–State Analogy' (2016) 44 *Political Theory* 53.

<sup>197</sup> E. Anderson (n 39).

<sup>198</sup> S. Besson (n 191).

<sup>199</sup> *ibid* 49, fn 68.

undermine the case for a human right to participate in workplace decision-making, because property rights do not imply rights to absolute control.<sup>200</sup>

### *Content of the right to voice*

Rights to voice at work can be established within the human rights framework adopted here using leverage arguments, as a composite derived right, and possibly also as a derived right to participate in workplace governance. This sub-section sketches the content and normative implications of these different human rights-based justifications of worker voice.

Although the demands made by human rights in respect of voice at work will vary with socio-economic conditions, human rights theory can nevertheless provide a normative benchmark against which to assess existing labour law frameworks and doctrines. Failures by the state to respect, protect and fulfil workers' human right to voice are *prima facie* violations of human rights and therefore grounds for criticising and reforming the law, unless these failures can be justified as necessary to secure some other human right or normative value.

The justification of worker voice based in leverage arguments establishes a human right to exercise voice in order to secure the enjoyment and realisation of workers' other human rights, including the right to work in decent conditions. This justification of a right to voice therefore only entitles workers to exercise voice about matters relating to other human rights. However, workers must be able to exercise voice on these matters in the political sphere as well as the

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<sup>200</sup> E. Anderson (n 39); J. Waldron, 'Property and Ownership' in E. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University 2016) <<https://plato.stanford.edu/archives/win2016/entries/property/>> accessed 1 December 2019.

workplace, because without this it is unlikely that legislation will be introduced that adequately protects human rights in the workplace. This justification of worker voice encompasses a right for workers to strike, but only where this is necessary for the protection or realisation of other human rights.

The composite derived human right to voice made up of context-specific instantiations of the rights to expression, association and freedom from forced labour is broader than the right justified by linkage arguments. It covers a wide range of speech, rather than only covering speech related to the protection of workers' other human rights, including but is not limited to political speech, and expressions of their views on issues such as equality and social justice. Workers have the right to express themselves on this wide range of topics individually or in association with others, both in and outside of the workplace. This composite human right to voice also encompasses a right to strike, because this is a distinctive form of worker expression that cannot be adequately substituted by other forms of expression in contemporary societies.

If it is possible to justify a derived human right to participate in workplace governance, this right's content will be both narrower and thicker than the composite derived human right to voice. Narrower because the right only entitles workers to exercise voice and have a say in workplace decisions and governance issues that impact upon their fundamental interests. It therefore includes a right to participate in decisions about working conditions, but only entitles workers to participate in wider organisational and operational decisions where their interests will be significantly affected. It is thicker in that it requires workers have some meaningful and effective say in decisions that impact their working lives. The right demands that workers have some input in setting the rules and policies that govern the workplace, and have their views considered and taken account of, rather than merely being a right to make themselves heard.

These various justifications of a human right to voice at work impose duties on the state and employers to respect worker voice, meaning they must refrain from interfering with, or creating barriers to the exercise of workers' right to voice unless doing so is justified by reference to some conflicting right or value. Given that the right to voice includes a right to strike, the restrictive rules governing industrial action under English law may well constitute a breach of the state's duty to respect worker voice.<sup>201</sup> Employers breach their duty to respect worker voice if they restrict or penalise acts of voice in the organisation and operation of their businesses, and the widespread hostility of employers towards exercises of worker voice means that this duty to respect will likely need to be enforced by law.<sup>202</sup>

The state's positive duty to protect the human right to worker voice requires it to take reasonable and feasible steps to ensure that workers can exercise their voice free from retaliation by employers. The ineffectiveness of non-coercive mechanisms for securing the right to voice against employers means that legal protections will be needed for workers against dismissal, discrimination and other detriments for choosing to exercise their right.<sup>203</sup> Finally, the state's duty to fulfil the right to voice demands the introduction of policies and legal frameworks that ensure workers have opportunities to exercise their voice in practice. This might involve imposing a legal obligation on employers to establish grievance procedures that allow workers to exercise voice, or the creation of legal and institutional mechanisms that enable workers to

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<sup>201</sup> See Chapter 8 for analysis of this in relation to the Trade Union Act 2016.

<sup>202</sup> As in TULRCA s 146.

<sup>203</sup> N. Egels-Zandén and J. Merk, 'Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights' (2014) 123 *Journal of Business Ethics* 461; *Wilson v UK* (n 73); *Redfearn v UK* (n 16).

engage in dialogue or collective bargaining with employers.<sup>204</sup> In addition, if there is a human right to participate in workplace governance then fulfilling this may require the creation of legal and institutional frameworks that mandate a degree of co-determination between workers and employers, such as work councils, mandatory collective bargaining, or worker representatives on company boards.

Whichever way the right to voice at work is justified, in some circumstances the duties to respect, protect, and fulfil the right may be overridden by other considerations. While the right to worker voice is not absolute, any failures by the state or employers to comply with their human rights duties must be justified as strictly necessary for the protection of another human rights or some other normative value.

#### **4. Conclusion**

This chapter began the task of working through the normative implications of human rights for labour law under the modified interest-based account of human rights set out in Chapter 6. This analysis demonstrated two significant implications of human rights for the legal regulation of work. First, that workers' non-labour related human rights must be protected from employer interferences. Second, that core labour law protections and workplace standards relating to working conditions and voice at work can be justified using human rights. These two implications correspond to, and provide a philosophical underpinning for, the two different dimensions human rights relationship with labour law distinguished in Chapter 3. Namely, the

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<sup>204</sup> Information and Consultation of Employees Regulations 2004.; TULRCA 1992, sch A1.



protection of civil liberties at work and human rights as a foundational perspective for labour law norms.

It was argued in Section 2 that the state must introduce legal protections for workers' human rights against unjustified interferences by employers. This follows both from the need to enforce employers' duty to respect workers' human rights, and the state's duties to respect and protect these rights. As a result, workers must be legally protected against dismissal, discrimination, or other detriments being imposed by employers based on how workers exercise their human rights. Additionally, limits must be placed on employers' legal authority to restrict workers' enjoyment of their human rights in or outside of the workplace.

Section 3 then argued that human rights can provide normative foundations for key labour law norms relating to decent working conditions and voice at work. Some protections of decent working conditions, such as health and safety protections and limits on working time, can be derived from non-labour related human rights on an individual basis. In addition, however, it is also possible to justify an overarching human right to work in decent conditions, which demands that everyone have the opportunity to work in conditions that advance their interests in self-development and self-realisation, the development of personal relationships, and autonomy and wellbeing. Although the working conditions capable of furthering these interests must be specified by reference to particular social contexts, the state will need to introduce legislation establishing minimum standards to guarantee working conditions are sufficiently decent.

The chapter concluded by arguing that a right to voice at work, including to go on strike, can also be justified as a derived human right within the conception of human rights adopted here.

This right to worker voice can be justified using leverage arguments, and as a composite right derived from the basic rights to expression, association, and freedom from forced labour. More radically, it may also be possible to establish a derived human right to participate in workplace governance, as a context-specific manifestation of a more basic human right to participate in decisions that impact one's fundamental interests. The human right to voice imposes duties on the state and employers not to create unjustified barriers to workers exercising their voice or going on strike. The state is also required to establish legal protections for worker voice against employer infringements, as well as institutions and frameworks that allow workers to actually realise their right to voice.

Now we have some idea of the normative implications of human rights in the sphere of labour law, these can be used as a benchmark against which to assess and evaluate existing legal protections and doctrines. If labour law fails to reflect or live up to the demands made by human rights, as set out in this chapter, this gives us grounds for criticising and changing the law. In addition to providing normative foundations for some key aspects of labour law, the theory of human rights developed here provides a lens through which we can scrutinise and evaluate the law, helping us identify shortcomings and potential areas for reform. The following chapter demonstrates how human rights theory can be operationalised in this way, by using the philosophical framework developed in preceding chapters to evaluate the Trade Union Act 2016.

## Chapter 8: Human Rights and the Trade Union Act 2016

### 1. Introduction

The three preceding chapters examined the relationship between labour law and human rights, and the implications of human rights for the legal regulation of work, at the normative and philosophical level. This chapter demonstrates how the theoretical framework and insights developed in those chapters can be helpful in assessing some pressing issues in English labour law.

The modified interest-based theory of human rights developed in this thesis makes at least two significant demands in the domain of labour law; that workers' non-labour related human rights be protected against employer infringements, and that there be legal and policy frameworks established to protect and realise the human rights to work in decent conditions and to voice at work. A comprehensive examination of the extent to which English labour law lives up to the moral standard set by human rights is not possible in the space available here. Instead, this chapter evaluates some recent reforms to the legal regulation of trade unions against the normative benchmark established by the human rights theory set out in Chapters 6 and 7. Specifically, it analyses the reforms to trade union political funds and industrial action ballot thresholds introduced by the Trade Union Act 2016 (TUA or '2016 Act'), and argues that these aspects of the 2016 Act violate the human right to voice at work at the *philosophical* level, and are also open to challenge under existing human rights *law*. While a similar analysis could be undertaken of other aspects of the TUA, or areas of English labour law, these are

chosen as the focus because they are the most significant reforms to English labour law for some time, are novel in several respects, and have not yet been subjected to sustained analysis from a theoretical human rights perspective.

This chapter begins by setting out the legal context of and reforms introduced by the TUA. Section 3 then uses the theory of human rights developed in the preceding chapters as a normative benchmark against which to assess the TUA's changes to trade union political funds and industrial action ballot thresholds. This analysis reveals that both sets of provisions breach the state's duty to respect workers' human rights at the normative philosophical level; the political fund reforms violating the right to exercise voice collectively in the political sphere, and the ballot thresholds the right to strike.

In light of the finding that the TUA's reforms to political funds and ballot thresholds breach workers' human rights at the normative philosophical level, Section 4 considers the potential for these provisions to be challenged under existing human rights law. The conventional wisdom among labour lawyers is that the prospects of a successful human rights challenge to the TUA are slim. However, it is suggested that the TUA reforms to political funds and ballot thresholds can and should be found incompatible with the human rights protections contained in the European Convention of Human Rights (ECHR) and Human Rights Act 1998 (HRA). Even if a successful legal challenge is thought unlikely, this chapter demonstrates that human rights can provide a powerful source of normative critique, irrespective of whether adequate legal enforcement of rights exist at present.

## **2. Background and Trade Union Act 2016**

Before evaluating the reforms introduced by the TUA, it is worth briefly setting out the broader legal context within which these reforms took place, as this is helpful for understanding the significance and impact of the 2016 Act on workers' human rights. In the UK, trade unions are the primary (although not only) vehicle through which workers are able to exercise their voice, and English law largely operates a 'single-channel' system of workplace voice.<sup>1</sup> This remains true even with the decline in trade union membership and collective bargaining coverage. Workers exercise their voice collectively through trade unions in the political sphere to ensure legislation reflects their interests, and at the workplace level through collective bargaining, dispute resolution, and helping workers enforce their legal rights.<sup>2</sup>

The legal regulation of trade unions under English law has always been contentious. Collective action by workers was initially criminalised, with striking workers regularly arrested and offered the choice of returning to work or going to prison.<sup>3</sup> Following the removal of criminal liability by Parliament, the common law remained hostile to trade unions; holding them liable in tort for taking industrial action,<sup>4</sup> allowing employees be dismissed for trade union activities provided adequate notice is given, and treating industrial action as a repudiatory breach of contract by employees.<sup>5</sup> Neither did the creation of statutory immunities for industrial action against civil liability prevent the courts from imposing new

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<sup>1</sup> R. Dukes, 'Voluntarism and the Single Channel: The Development of Single-Channel Worker Representation in the UK' (2008) 24 Int'l J. Comp. Lab. L. & Indus. Rel. 87; E. McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the "Single Channel"' (2018) 47 ILJ 76.

<sup>2</sup> K. Ewing, 'The Function of Trade Unions' (2005) 34 ILJ 1.

<sup>3</sup> D. Simon, 'Master and Servant' in J. Saville (ed), *Democracy and the Labour Movement* (Lawrence and Wishart 1954) 171.

<sup>4</sup> *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *Lumley v Gye* (1953) 118 ER 749.

<sup>5</sup> *Simmons v Hoover* [1977] QB 284.

forms of such liability,<sup>6</sup> or finding other ways of making it difficult for workers to act collectively through unions.<sup>7</sup>

In response to the antagonistic treatment of trade unions by the common law Parliament introduced legislation that removed the barriers to trade union activity established by the courts, and voluntarist collective bargaining became widespread in the 19<sup>th</sup> and early 20<sup>th</sup> Centuries.<sup>8</sup> There was 'said to be an "instinctive preference" in the UK for voluntary collective bargaining' by the 1930s,<sup>9</sup> with a broad consensus about the desirability of trade unions and collective bargaining existing until the 1970s.<sup>10</sup> The dominant view of the relationship between trade unions and legal regulation for most of the 20<sup>th</sup> Century, both descriptively and normatively, was the doctrine of 'collective laissez faire'.<sup>11</sup> Under this approach 'industrial self-government was elevated to an ideological belief common to both sides of industry. Abstention of the law was a central plank of the prevailing voluntarist ethos in industry'.<sup>12</sup> While the degree of legal abstention should not be overstated,<sup>13</sup> the role of the law in UK industrial relations during this period was largely to remove obstacles to employees and

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<sup>6</sup> *Rookes v Barnard* [1964] AC 1129; *Stratford & Son v Lindley* [1965] AC 269.

<sup>7</sup> *Metrobus v Unite The Union* [2009] EWCA Civ 829; B. Simpson, 'The Labour Injunction and Industrial Action Ballots' (2013) 42 ILJ 54.

<sup>8</sup> See P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Clarendon 1993).

<sup>9</sup> D. Brodie, *A History of British Labour Law, 1867-1945* (Hart 2003) 249.

<sup>10</sup> B. Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 ILJ 1.

<sup>11</sup> P. Davies and M. Freedland (n 8) ch 2; A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009).

<sup>12</sup> R. Lewis and B. Simpson, *Striking a Balance?: Employment Law After the 1980 Act* (Martin Robertson 1981) 9–10.

<sup>13</sup> H. Collins, 'Against Abstentionism in Labour Law' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence* (OUP 1987).

employers establishing and enforcing their own codes of conduct, and creating a robust framework within which the struggles of industrial pluralism could occur.<sup>14</sup>

Since the 1980s however, there have been extensive legal restrictions imposed on trade unions.<sup>15</sup> This includes increased regulation of trade union political funds,<sup>16</sup> ending the closed shop,<sup>17</sup> banning secondary strike action,<sup>18</sup> placing restrictions on lawful picketing,<sup>19</sup> narrowing the scope of trade union immunity for industrial action,<sup>20</sup> and imposing demanding procedural requirements on ballots for industrial action.<sup>21</sup> Davies and Freedland argue that the aim of these restrictions was to reduce the power of trade unions, and more specifically to promote individualisation, and undermine solidarity in this area.<sup>22</sup> Bogg synthesises this with Wedderburns' insight that the reforms reflected a Hayekian neoliberal

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<sup>14</sup> P. Davies and M. Freedland (n 8) ch 1; A. Bogg, *The Democratic Aspects of Trade Union Recognition* (n 11).

<sup>15</sup> See C. Cradden, *Neoliberal Industrial Relations Policy in the UK: How the Labour Movement Lost the Argument* (Springer 2014).

<sup>16</sup> Now contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), ss 71-96.

<sup>17</sup> V. Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention on Human Rights' in C. Fenwick, T. Novitz and C. Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010).

<sup>18</sup> Employment Act 1990 s 4, now contained in TULRCA s 224.

<sup>19</sup> Employment Act 1980 s 19, now contained in TULRCA s 220. See also the Public Order Act 1986; Criminal Justice and Public Order Act 1994.

<sup>20</sup> TULRCA s 244, narrows the scope of immunity for industrial action from Employment Act 1982 requirement of merely being connected to a trade dispute to requiring it be 'wholly or mainly' related.

<sup>21</sup> Initially introduced by the Trade Union Act 1984, now contained in TULRCA ss 226-231.

<sup>22</sup> P. Davies and M. Freedland (n 8) ch 9.

approach to labour relations,<sup>23</sup> explaining how the reforms under each of Davies and Freedlands' themes embody neoliberal ideological underpinnings.<sup>24</sup>

English trade unions were therefore subject to a restrictive legal regime prior to 2016. This body of law is likely problematic from a human rights perspective, and has been criticised by the ILO,<sup>25</sup> and the European Committee on Social Rights.<sup>26</sup> Instead of re-treading this ground, the analysis here focusses on some of the most significant recent changes to the legal regulation of trade unions by the Trade Union Act 2016.

The Trade Union Act 2016 was introduced by the Coalition Government following a period of relative stability in the legal regulation of trade unions.<sup>27</sup> The Act contains a 'ragbag of different measures, united only by a common theme of placing more controls on trade unions'.<sup>28</sup> Much of the Act originates in a 'research note' published by the Policy Exchange think-tank, entitled 'Modernising Industrial Relations'.<sup>29</sup> While some of the most egregious

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<sup>23</sup> B. Wedderburn (n 10).

<sup>24</sup> A. Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 ILJ 299, 304–5.

<sup>25</sup> ILO Committee of Experts, Individual Observation Concerning Convention 87 (United Kingdom) (1989); K. Ewing, *Britain and the ILO* (2nd edn, Institute of Employment Rights 1994); T. Novitz, 'Freedom of Association and "Fairness at Work" — An Assessment of the Impact and Relevance of ILO Convention No. 87 on Its Fiftieth Anniversary' (1998) 27 ILJ 169.

<sup>26</sup> European Committee of Social Rights, Conclusions XIX-3 (UK) (2010); M. Ford and T. Novitz, 'An Absence of Fairness... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44 ILJ 522, 526.

<sup>27</sup> P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (OUP 2007) 105–163.

<sup>28</sup> M. Ford and T. Novitz, 'Legislating For Control: The Trade Union Act 2016' (2016) 45 ILJ 277, 277.

<sup>29</sup> E. Holmes, A. Lilico and T. Flanagan, 'Modernising Industrial Relations' (2010) Policy Exchange Research Note <<https://conservativehome.blogs.com/files/modernising-industrial-relations-draft-090910.pdf>> accessed 2 December 2019.



reforms were dropped during the Bill's passing,<sup>30</sup> the legislation still imposed extensive new restrictions on trade unions. This includes additional informational requirements for industrial action ballots;<sup>31</sup> an increase in the notice period that must be given to employers prior to taking industrial action;<sup>32</sup> the introduction of a 6-month mandate period for industrial action ballots,<sup>33</sup> new limitations on picketing;<sup>34</sup> the creation of powers to regulate facility time and union fees check-off in the public sector;<sup>35</sup> and the extension of Certification Officer powers to investigate and penalise trade unions.<sup>36</sup> The Act also changes how trade union political funds are regulated,<sup>37</sup> and introduces thresholds that must be met by industrial action ballots for any subsequent action to benefit from the statutory immunity from civil liability.<sup>38</sup>

Many of the TUA provisions appear to be problematic from a human rights perspective. The picketing requirements may well breach workers' rights to freedom of assembly, expression and the right to private life.<sup>39</sup> The imposition of additional procedural hurdles for lawful

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<sup>30</sup> For discussion of the legislative process see, M. Ford and T. Novitz (n 28).

<sup>31</sup> TUA s 5, requiring the ballot paper contain a summary of the dispute, the type of action in contemplation, and the period(s) this is expected to take place. TUA s 6, requiring members be informed of the numbers entitled to vote, how many voted, the number of votes for/against, and the number of spoiled ballots. TUA s 7, requiring unions include details of industrial action taken in their annual returns to the Certification Officer.

<sup>32</sup> TUA s 8, requiring 14 days' notice unless the employer agrees otherwise.

<sup>33</sup> TUA s 9, introducing a 6-month limit on the mandate provided by industrial action ballots.

<sup>34</sup> TUA s 10, requiring the presence of a union-appointed 'picket supervisor'.

<sup>35</sup> TUA s 13-15.

<sup>36</sup> TUA ss 17-20.

<sup>37</sup> TUA ss 11-12.

<sup>38</sup> TUA s 2-3.

<sup>39</sup> *Sergey Kuznetsov v Russia* Application no. 10877/04 (23 October 2008); *Gillan and Quinton v UK* [2010] ECHR 28; *Kablis v Russia* [2019] ECHR 159.

industrial action may also amount to unjustifiable interference with the right to strike.<sup>40</sup> The powers to regulate facility time and check-off threaten the right to collective bargaining, because any such regulations will undermine existing collective agreements.<sup>41</sup> Finally, the Certification Officers' powers to investigate are likely violate the right to due process as well as freedom of association.<sup>42</sup> The 2016 Act therefore presents us with a wealth of opportunities to demonstrate how a normative philosophical human rights perspective can be used to assess and critique existing legal frameworks. The analysis in this chapter concentrates on the TUA's reforms to trade union political funds and the ballot thresholds for industrial action, which are likely to be among the most significant for workers' human rights in practice.

### 3. Philosophical Human Rights Analysis

This section examines the TUA's reforms to trade union political funds and ballot thresholds from a normative philosophical perspective and argues that both sets of provisions are violations of the state's duty to respect human rights. The political fund reforms breach workers' rights to association and collective expression in the political sphere, and the ballot thresholds violate their right to strike. For both sets of provisions these claims are developed by detailing the changes introduced by the TUA and why they represent *pro tanto* failures by the state to respect workers' human rights. It is then demonstrated that these rights-interferences cannot be justified by reference to conflicting considerations. As such, they are

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<sup>40</sup> Although see *National Union of Rail, Maritime and Transport Workers (RMT) v UK* [2014] ECHR 366.

<sup>41</sup> *Sanchez Navajas v Spain* Application no. 57442/00 (21 June 2001); K. Ewing and J. Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 *ILJ* 391, 396.

<sup>42</sup> K. Ewing and J. Hendy (n 41) 397–8.

incompatible with the conception of human rights adopted here and should be repealed or replaced with less rights-interfering alternatives.

The question of whether the state's failure to respect workers' human rights by introducing the TUA can be justified must be determined using all-things-considered moral reasoning. For ease of analysis however, this chapter considers the issue of justification within the structured framework of proportionality analysis, similar to that used by the European Court of Human Rights.<sup>43</sup> Although there is no canonical formulation of proportionality analysis,<sup>44</sup> it is taken here to consist of four stages.<sup>45</sup> First there must be a legitimate aim being pursued or reason for the failure to respect human rights, that potentially justifies it. This includes respecting or protecting the rights and autonomy of others, or the pursuit of other legitimate policy goals.<sup>46</sup> If there is an illegitimate reason for a failure to respect, protect, or fulfil human rights then this failure cannot be justified, as it demonstrates an attitude of disrespect towards the right-holder.<sup>47</sup> In some formulations, including in the ECtHR, this 'legitimacy' stage is

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<sup>43</sup> J. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 *International Journal of Constitutional Law* 466; S. Sottiaux and G. Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' (2008) 31 *Hastings International and Comparative Law Review* 115; A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 177–99.

<sup>44</sup> See generally G. Huscroft, B. Miller and G. Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014); S. Smet and E. Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (OUP 2017).

<sup>45</sup> R. Alexy, *A Theory of Constitutional Rights* (J. Rivers ed, OUP 2002); K. Möller, *The Global Model of Constitutional Rights* (OUP 2012); G. Letsas, 'The Scope and Balancing of Rights' in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR* (CUP 2013).

<sup>46</sup> These are often listed in rights documents as part of statements of the right. See for example, ECHR Articles 8(2), 10(2), 11(2).

<sup>47</sup> G. Letsas (n 45) 51.

treated as distinct from the following three stages of 'proportionality' analysis. However, this difference is immaterial.

Second, there must be a rational connection between the failure to protect or secure human rights and the reason or goal underlying this failure. Conflicting values or aims cannot justify failures to respect or secure human rights if they are not genuinely promoted or furthered by that failure.<sup>48</sup> Third, any failure to respect or secure human rights must be no more than necessary. While human rights duties may give way to the pursuit of conflicting goals, they will only do so if there are no other means of achieving these aims. Finally, the failure must be 'proportionate' in the sense of not being too burdensome and being all-things-considered morally justified. Human rights 'are resistant to trade-offs, but not completely so',<sup>49</sup> and it must therefore be determined whether, in the circumstances, the duties to respect, protect and fulfil have been overridden by conflicting considerations. While the language of balancing is sometimes used to describe this final stage, this metaphor is only appropriate if it is taken as referring to a balance of reasons rather than a simple cost-benefit analysis.<sup>50</sup>

### ***3.1 Political funds***

The TUA's reforms to political funds breach workers' freedom of association and right to voice, which as discussed in the previous chapter, is derived from the rights to expression and

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<sup>48</sup> As in *Smith and Grady v UK* (1999) 29 EHRR 493.

<sup>49</sup> J. Griffin, *On Human Rights* (OUP 2008) 76.

<sup>50</sup> G. Letsas (n 45).

association.<sup>51</sup> Sections 11 and 12 of the 2016 Act represent breaches of the state's duty to respect workers' rights to freedom of association and expression because they create legal barriers to collective expression by workers in the political sphere which cannot be justified by reference to conflicting rights or normative considerations.

### *The reforms to political funds*

Trade unions must establish a separate 'political fund' if they want to support political parties, campaigns, or pursue other 'political objects',<sup>52</sup> and cannot fund these activities from their general resources.<sup>53</sup> In 2018 total political fund expenditure amounted to £22.7 million,<sup>54</sup> with around half of this supporting the Labour Party.<sup>55</sup> Prior to the 2016 Act, political funds were required to be approved every 10 years by a secret ballot,<sup>56</sup> and trade union members were generally included in political funds automatically with an entitlement to opt-out without facing any disadvantage.<sup>57</sup> The TUA introduced two significant changes to the regulation of political funds.

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<sup>51</sup> Chapter 7, Section 3.2. The rights to expression and association are also protected in a range of human rights documents, Universal Declaration of Human Rights (UDHR) Articles 19-20; International Covenant on Civil and Political Rights (ICCPR) Article 19-20; European Convention on Human Rights (ECHR) Articles 10-11; Charter of Fundamental Rights of the European Union (CFREU) Articles 10, 12.

<sup>52</sup> TULRCA s 71.

<sup>53</sup> TULRCA s 82.

<sup>54</sup> Certification Officer for Trade Unions and Employers' Associations, '*Annual Report 2018–19*' (2019), Appendix 9.

<sup>55</sup> Certification Officer for Trade Unions and Employers' Associations, '*Annual Report 2015–16*' (2016) 37.

<sup>56</sup> TULRCA s 73.

<sup>57</sup> Previously TULRCA s 84.

First, TUA s 11 requires that rather than members having a right to withdraw from making political fund contributions they must actively *opt-in* to contributions,<sup>58</sup> and members must be informed of their right to withdraw on an annual basis.<sup>59</sup> The Bill initially applied the opt-in requirement to all existing union members, but was amended to only apply it to members joining after March 2018.<sup>60</sup> However, Ewing and Hendy point out that the end-result will be the same due to the churn in trade union membership, meaning the TUA will eventually succeed in reintroducing the system of ‘contracting-in’ to political funds that was abolished in 1946.<sup>61</sup> Second, s 12 creates new reporting requirements for every trade union whose annual political fund expenditure is over £2000. A unions’ annual return to the Certification Officer must now contain a detailed breakdown of political fund spending, specifying the political object pursued, the name of any individual, party or organisation that was funded, which election to political office the money was spent on, and the amount provided.<sup>62</sup>

### *Interference with association and voice*

These reforms to political funds constitute a failure by the state to respect workers’ human rights to associate and express themselves collectively. The opt-in requirement contained in s 11 restricts workers’ freedom of association because it prevents them from exercising their right to form or join a union that automatically includes them within a political fund. In effect

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<sup>58</sup> Amending TULRCA s 84.

<sup>59</sup> Creating TULRCA s 84A.

<sup>60</sup> TUA ss 11(5)-(6).

<sup>61</sup> Trade Disputes and Trade Unions Act 1927 s 4; K. Ewing and J. Hendy (n 41) 408.

<sup>62</sup> TUA s 12, creating TULRCA s 32ZB.

the law prevents workers from forming or joining this category of organisation, which is a clear interference with their freedom of association. The requirement to actively opt-in to political funds also restricts workers' human right to express themselves collectively,<sup>63</sup> because it will curtail the funding available to unions for this purpose, and therefore restrict their capacity to exercise political voice on behalf of their members.

It might be argued that there is no interference with workers' collective expression because they still can still choose to exercise voice by opting-in to political funds, so there will be no impact on funding levels if members are 'happy to contribute'.<sup>64</sup> However, while s 11 does not wholly prevent workers from exercising political voice through unions it will certainly impact on the funds available to do so. Behavioural economics has demonstrated that changing the default position in this way has a significant impact on participation levels.<sup>65</sup> Following this, it is clear s 11 will reduce the resources available for unions to exercise political voice on behalf of their members. This was also the conclusion of the House of Lords Select Committee on Trade Union Political Funds and Political Party Funding.<sup>66</sup> While too early to fully assess the TUA's impact, there have been sharp increases in the number of union members not contributing to political fund since it came into force.<sup>67</sup>

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<sup>63</sup> Recognized in *Fraser v University and College Union* [2013] ET/2203290/2011; *Nilsen and Johnsen v Norway* [1999] ECHR 134; *Palomo Sanchez v Spain* [2011] ECHR 1319.

<sup>64</sup> HC Trade Union Bill Committee, 15 October 2015, col 118.

<sup>65</sup> C. Sunstein, 'Switching the Default Rule' (2002) 77 NYUL Rev. 106; R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Yale University Press 2008).

<sup>66</sup> HoL Select Committee on Trade Union Political Funds and Political Party Funding, 'Report of Session 2015-16' (2015-16 HL Paper 106), [125]-[134].

<sup>67</sup> J. Pickard, 'Labour's Biggest Donor Hit by Legislation on Political Funds' *Financial Times* (16 September 2019) <<https://www.ft.com/content/65bcbc62-d89b-11e9-8f9b-77216ebe1f17>> accessed 31 October 2019.

The reporting requirements in s 12 also interfere with the rights to association and political voice, because they impose costs and bureaucratic burdens on exercises of those rights. Trade union autonomy over their internal rules and administration is an essential and generally accepted element of freedom of association,<sup>68</sup> and the TUA interferes with this. As acknowledged by the Government, the reporting requirements impose a ‘regulatory burden’ on unions that exercise political voice on behalf of their members,<sup>69</sup> and this amounts to an interference with workers’ right to collective expression.

Following this, the TUA’s reforms to political funds violate workers’ human rights unless they can be justified by reference to conflicting normative considerations. As already stated, failures to respect human rights are only justified where they pursue a legitimate aim, the rights-interference is rationally connected to this aim, is no more intrusive than needed to achieve it, and is all-things-considered proportionate. The question is therefore whether the TUA’s political fund reforms passes these justificatory tests.

### *Legitimate aim*

While far from clear-cut TUA ss 11 and 12 plausibly pursue legitimate aims that are potentially capable of justifying the state’s failure to respect workers’ human rights. The political fund opt-in requirement is said by the Government to have the aim of ensuring that only union

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<sup>68</sup> ILO Convention No 87; *Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK* [2007] ECHR 184; K. Ewing, ‘The Implications of the ASLEF Case’ (2007) 36 ILJ 425.

<sup>69</sup> HC Deb, 27 April 2016, vol 608 col 1506; BEIS, ‘*Trade Union Act Impact Assessment*’ (2016) BEIS/17 18.



members who want to do so contribute to funding,<sup>70</sup> and 'assisting union members to make informed decisions about whether to contribute to a union's political fund'.<sup>71</sup> The rationale being that under the pre-2016 position, of automatic contributions to political funds, union members may be inadvertently funding political activities they disagree with.

If this genuinely is the aim of s 11 then it is legitimate. The Supreme Court has rightly recognised that freedom of expression includes the freedom not to express or support an opinion that one does not agree with,<sup>72</sup> and this is also true for workers' right to collective expression in the political sphere. Even if it is generally safe to assume 'from the very fact of joining that [members] agree to the union undertaking the particular activities funded',<sup>73</sup> this is irrelevant to the legitimacy of the aim of preventing unwilling contributions.

The s 12 obligation for unions to publish a breakdown of their political fund expenditure is said to have the aim of increasing transparency in political funding.<sup>74</sup> If this is accepted as being the goal of the reporting requirement then it is a legitimate one for the state to pursue. Transparency over the funding of political activities is an important element of a functioning democracy, as it safeguards against manipulation of the democratic process and helps those involved to make informed decisions. This goal underpins the existing regulatory regime for

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<sup>70</sup> HoL Select Committee on Trade Union Political Funds and Political Party Funding (n 66) 61.

<sup>71</sup> HC Deb, 27 April 2016, vol 608 col 1506.

<sup>72</sup> *Lee v Ashers Baking Company* [2018] UKSC 49.

<sup>73</sup> K. Ewing and J. Hendy (n 41) 409.

<sup>74</sup> BEIS (n 69) 9, 11, 17.

donations to political parties,<sup>75</sup> as well as the requirement for MPs to declare donations in the register of members interest.<sup>76</sup>

It might be doubted however, whether the political fund reforms have the aims attributed to them by the Government. In respect of the reporting requirements, the claim that the legislation aims to increase transparency in political funding is undermined by the fact that unions are singled out for this additional regulatory burden when the same concerns about transparency apply to other organisations, including companies who fund political campaigns and activities. It is not clear why an employee who is a union member should be entitled to see details of their unions' political expenditure and not that of their employer. If anything, the reasoning would seem to go the other way, as the political leanings and activities of trade unions are usually known, whereas those of companies are often concealed. The targeted nature of the reporting obligations and the lack of any similar reforms in the corporate sphere, which would largely affect Conservative party donors, gives us reason to doubt that 'transparency' is the true aim of s 12.

It is similarly questionable whether the underlying goal of s 11 is genuinely to prevent workers from unknowingly contributing to political activities that they might disagree with. A more likely explanation for this provision is that it is an opportunistic attempt to undermine an important source of income for the Government's political opponents, and to suppress worker voice as part of a broader agenda of de-democratising the public domain.<sup>77</sup> It is 'untenable'<sup>78</sup>

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<sup>75</sup> Political Parties, Elections and Referendums Act 2000.

<sup>76</sup> House of Commons, *'The Code of Conduct'* (2019) HC 1882 ch 1.

<sup>77</sup> A. Bogg, 'Beyond Neo-Liberalism' (n 24).

<sup>78</sup> *ibid* 311.

that the Government was unaware of opt-in requirement's likely impact on trade union political voice and the Labour party's financial resources given their establishment of a 'nudge unit',<sup>79</sup> and the well-known use of this technique in other policy areas.<sup>80</sup> It might reasonably be concluded from this that removing the possibility of automatic political fund contributions was intended to reduce participation rates and curb the exercise of workers' political voice.

The wider context within which the TUA was introduced further supports the view that political fund reforms do not have the legitimate aims put forward by the Government. Bogg argues the reforms to political funds are just 'one element in a broader repressive "de-democratisation" strategy designed to stifle political opposition and dissent'.<sup>81</sup> Other elements of this agenda include restricting political campaigning by charities and trade unions,<sup>82</sup> and a proposal to drastically cut the 'short money' used to fund opposition political parties which were eventually dropped and replaced with less severe reductions.<sup>83</sup>

If the political fund reforms *were* introduced to deliberately hamper worker expression and political participation, then it would not be possible for the Government to justify them, as this is not a legitimate aim and would demonstrate an attitude of disrespect towards workers' human rights. Even taking the Government's stated aims at face value however, the provisions fail to pass the remaining stages of proportionality analysis.

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<sup>79</sup> D. Halpern, *Inside the Nudge Unit: How Small Changes Can Make a Big Difference* (Random House 2015).

<sup>80</sup> For example, the Pensions Act 2008.

<sup>81</sup> A. Bogg, 'Beyond Neo-Liberalism' (n 24) 308.

<sup>82</sup> Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014, Part II.

<sup>83</sup> HM Treasury, '*Spending Review and Autumn Statement 2015*' (2015) Cm 9162, [1.309]. Short money is now updated in line with the Consumer Price Index rate of inflation, rather than the Retail Price Index. This will reduce the funding available to opposition parties by 10.6% in real terms by 2020, see HC Deb, 21 March 2016, vol 607 col WS55-WS56.

### *Rational connection and necessity*

Changing the operation of political funds from opt-out to opt-in cannot be justified because it is not rationally connected to the purported aim of preventing members from unwillingly funding political activities. While the political fund reporting requirements *are* rationally connected to the aim of transparency, they are also unjustifiable because they go further than is necessary to achieve this.

There is no rational connection between prohibiting automatic membership of political funds and the supposed aim of ensuring people are not unknowingly or unwillingly funding political activities they disagree with. As there is no evidence of this occurring under the pre-existing regulatory framework, the change introduced by s 11 can have no impact on furthering the goal of stopping it from happening.<sup>84</sup> It has repeatedly been found that there is no evidence that union members are unwillingly contributing to political funds. When the Donovan Commission considered the issue in 1986 they noted ‘the continued absence’ of any evidence the opt-out system was leading to union members inadvertently funding political activities, and were ‘unable to say that the case for substituting “contracting-in” for “contracting-out” has been established’.<sup>85</sup> More recently, the Committee on Standards in Public Life also found ‘no evidence to suggest that the legislation is not working satisfactorily, and no case has been made out for any reform’ of union political funds.<sup>86</sup> The lack of any

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<sup>84</sup> This reasoning was used in *Plon (Société) v France* [2004] ECHR 200.

<sup>85</sup> Royal Commission on Trade Unions and Employers’ Associations, ‘Report’ (1986) Cmnd 3623, [923].

<sup>86</sup> Committee on Standards in Public Life, ‘The Funding of Political Parties in the United Kingdom’ (1998) Cm 4057-1, [6.23].

causal relationship between the opt-in requirement and the problem it supposedly exists to solve means the state's failure to respect workers' rights to association and collective expression cannot be justified. The provision should therefore be repealed.

In contrast to the opt-in requirement, the new reporting obligations contained in s 12 are connected to their stated aim of increasing transparency in political funding. It undoubtedly furthers that aim for political fund expenditure to be made public. The justification of this provision fails for another reason however, namely the existence of alternative, less rights-intrusive, means of achieving the goal of transparency. The obligation to report expenditure applies to all unions whose political spending in a given year is more than £2000 with no *de minimis* exception for spending that can be excluded from this report. This is significantly more stringent than the reporting requirements for political donations, where contributions to individuals or campaigns do not need to be reported if they are below £500.<sup>87</sup> It is implausible that the aim of transparency could not have been furthered equally well by allowing expenditure under a certain minimum amount be excluded from the reporting regime. In addition, the level of detail unions must include in their annual return to the Certification Officer goes beyond what is required to achieve transparency. For example, the obligation to provide a list of names and locations for each electoral candidate supported, as well as how much each candidate received, will capture countless minor political activities carried out by unions and is excessive. In 1998, the Committee for Standards in Public Life rejected a suggestion that all political donations be subject to reporting requirements on the basis that

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<sup>87</sup> Political Parties, Elections and Referendums Act 2000, Part III.

this would be unnecessary for political transparency, and the same is true for the reporting obligations under s 12.<sup>88</sup> As such, this provision should also be repealed.

### ***3.2 Ballot thresholds***

The new industrial action ballot thresholds that must be met for subsequent action to be lawful contained in the TUA violate workers' right to strike, which is part of the human right to voice at work.<sup>89</sup> Sections 2 and 3 of the TUA breach workers' human right to strike because they erect legal barriers to the exercise of the right that cannot be justified by reference to conflicting normative considerations.

#### *The introduction of ballot thresholds*

Prior to the TUA 2016, industrial action benefitted from statutory immunity against civil liability if it was supported by a bare majority of members who participated in a postal ballot.<sup>90</sup> Perhaps the most significant change introduced by the 2016 Act was the introduction of two

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<sup>88</sup> Committee on Standards in Public Life (n 86), [4.30].

<sup>89</sup> See chapter 7, Section 3.2. On the right to strike in international law see, *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251; T. Novitz, *International and European Protection of the Right to Strike* (OUP 2003); T. Novitz, 'Freedom of Association: Its Emergence and the Case for Prevention of Its Decline' in J.R. Bellace and B. Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar 2019).

<sup>90</sup> Providing the range of other substantive and procedural restrictions governing industrial action are also complied with, see S. Deakin and G. Morris, *Labour Law* (Hart 2012) ch 11.

additional thresholds that must be met in industrial action ballots for any resulting action to benefit from this immunity.

The first threshold requires that as well as gaining majority support for industrial action among those voting, at least 50 per cent of those entitled to vote in the ballot actually do so.<sup>91</sup>

This 'turnout' or 'quorum' threshold applies to all industrial action ballots. The second threshold, in contrast, only applies to ballots where the majority of workers are 'normally engaged' in providing 'important public services'.<sup>92</sup> In such instances, in addition to the quorum threshold, industrial action must be supported by at least 40 per cent of all those eligible to vote in the ballot.<sup>93</sup> This 'net support' threshold sets a high bar for industrial action; in a ballot that narrowly meets the quorum threshold, support among those actually participating would need to be over 80 per cent.

The detailed definition of 'important public services' is left to subsequent regulations but is restricted to workers providing education to children under 17, working in fire, transport, health, and nuclear decommissioning services, and in border security.<sup>94</sup> Regulations for each of these industries, except nuclear decommissioning, came into force in 2017. To help combat uncertainty over its scope of application, the net support threshold does not apply where the union 'reasonably believes' that the conditions for the threshold applying are not present.<sup>95</sup>

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<sup>91</sup> TUA s 2, amending TULRCA s 226.

<sup>92</sup> TUA s 3, amending TULRCA s 226.

<sup>93</sup> TUA s 3, amending TULRCA s 226.

<sup>94</sup> TULRCA s 226(2E), as amended.

<sup>95</sup> TULRCA s 226(2B), as amended.

### *Interference with right to strike*

The TUA ballot thresholds both create substantial barriers to the exercise of worker voice through industrial action, so represent failures to respect the human right to strike unless they can be justified.

The quorum requirement means that even where there is overwhelming support for industrial action among those who vote, the silence of abstainers may prevent industrial action being lawful. This is tantamount to counting abstentions as votes against industrial action, something that would be inconceivable in other elections. Worse, abstentions are effectively *weighted* votes against industrial action; the difficulties in achieving high turnout rates in postal ballots means that a sizeable minority of members who oppose industrial action will likely be able to block it by deliberately abstaining, even if those who participate vote overwhelmingly in support.

The extent to which the 50 per cent turnout threshold interferes with the right to strike is evident from Darlington and Dobson's analysis of historical ballots, which shows that less than half of strike ballots in the period 1997-2015 would have met the requirement, with larger and national strikes particularly affected.<sup>96</sup> The impact of quorum thresholds on workers' right to strike is also evident from the Australian experience.<sup>97</sup> Indeed, the Government's own impact assessment estimates that, even accounting for increased efforts by trade unions to

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<sup>96</sup> R. Darlington and J. Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Institute of Employment Rights 2015) 24–28.

<sup>97</sup> B. Creighton and others, 'Pre-Strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action' (2019) 48 *ILJ* 343.



boost turnout, the ballot thresholds will reduce future industrial action by 29 per cent.<sup>98</sup> The impact of the quorum threshold can also be seen in the recent University College Union ballots, where several universities fell short of the turnout requirement by a handful of votes so were unable to take lawful action despite huge majorities (+80 per cent) in support of action among those voting.<sup>99</sup>

The 40 per cent net-support threshold for industrial action in important public services similarly imposes a legal barrier to industrial action and so fails to respect the right to strike. The impact of this provision is difficult to discern however, as the threshold may have little ‘further effect’ on unions’ ability to take lawful industrial action when considered alongside the 50 per cent turnout requirement, because ballots that meet the turnout threshold will likely also satisfy the 40 per cent net support requirement.<sup>100</sup> This threshold nevertheless creates a significant barrier to strike action in some contexts; only 1 out of 16 historical ballots by London Underground workers would have met the threshold for example,<sup>101</sup> and the effect is also more significant in general or national strikes.<sup>102</sup>

The interference with the right to strike by the two ballot thresholds is amplified by the requirement that ballots be conducted by post rather than in person or electronically, which makes it more difficult for unions to secure high levels of turnout.<sup>103</sup> While attempts to amend

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<sup>98</sup> BEIS (n 69), [120].

<sup>99</sup> Data available online <<https://www.ucu.org.uk/article/10399/UCU-members-back-strikes-over-both-pensions-and-pay-and-conditions>> accessed 4 November 2019.

<sup>100</sup> R. Darlington and J. Dobson (n 96) 31.

<sup>101</sup> *ibid* 30.

<sup>102</sup> *ibid* 29–30.

<sup>103</sup> B. Creighton and others (n 97).

the TUA to allow electronic voting were unsuccessful, the final text of the Act did promise an independent review on e-balloting.<sup>104</sup> At the time the Government stated it had ‘no objection in principle and that we expect statutory elections eventually to move towards online voting’.<sup>105</sup> Dukes and Kountouris viewed this as tantamount to ‘a “verbal guarantee” that e-balloting would be rolled-out’ provided the review found it was safe to do so.<sup>106</sup> Perhaps inevitably however, the review did *not* recommend electronic ballots be introduced and instead merely suggested pilot schemes ‘as a preliminary step’ that might ‘potentially be the basis for the Secretary of State to decide the matter’.<sup>107</sup> The Government are yet to respond to the review, as required by the TUA, and there has been no progress towards introducing e-balloting.

The interference with the right to strike by the TUA’s ballot thresholds means the state has failed in its duty to respect human rights unless these provisions can be justified. Again, this will be considered using proportionality analysis.

### *Legitimate aim*

A legitimate goal or reason must be pursued by the ballot thresholds for the state’s failure to respect the right to strike to be justified. The goals put forward by the Government as the underlying rationale for the thresholds are supporting democracy and reducing the disruptive

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<sup>104</sup> TUA s 4.

<sup>105</sup> HC Deb, 27 April 2016, vol 608 col 1471.

<sup>106</sup> R. Dukes and N. Kountouris, ‘Pre-Strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45 ILJ 337, 347.

<sup>107</sup> K. Knight, ‘*Electronic Balloting Review*’ (2017) 3.

effects of industrial action. However, it is hard to avoid the conclusion that there are other, less seemly, motivations underpinning these provisions, and that the ballot thresholds should therefore not be regarded as justified.

The underlying aims of the ballot thresholds are hard to ascertain, due to ‘the poor quality of the Government’s documentary material explaining and justifying’ them.<sup>108</sup> The Government’s initial Impact Assessment of the ballot thresholds was described by the Regulatory Policy Committee as ‘not fit for purpose’, and failing ‘to explain and present the rationale for the proposals in a straightforward and logical way’.<sup>109</sup> The statements we do have about the aims of the ballot thresholds refer to the ideas of ensuring democratic support for industrial action, and concerns about the disruption caused by strikes.<sup>110</sup> More specifically, Ford and Novitz identify three justifications advanced by the Government for the ballot thresholds; promoting democracy, ensuring industrial action is a last resort, and protecting public service users from disruption.<sup>111</sup>

The appeal to democracy as a justification for the ballot thresholds can be seen in the Government’s consultation on the Bill which stated, ‘industrial action should not take place on the basis of low ballot turnouts. Such action does not always represent the views of all the union members and is undemocratic.’<sup>112</sup> Ensuring the democratic legitimacy of industrial action was also the rationale given for the thresholds in the TUA’s revised impact assessment,

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<sup>108</sup> A. Bogg, ‘Beyond Neo-Liberalism’ (n 24) 322.

<sup>109</sup> Regulatory Policy Committee, ‘*Ballot Thresholds in Important Public Services*’ (2015) RPC15-BIS-2402.

<sup>110</sup> R. Dukes and N. Kountouris (n 106).

<sup>111</sup> M. Ford and T. Novitz (n 26) 530.

<sup>112</sup> BIS, ‘*Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services*’ (2015) BIS/15/418, [3].

which states ‘it is important that unions have the strong support of their members for industrial action’ and that the ballot thresholds are ‘the right approach to ensure this’.<sup>113</sup>

If the underlying aim of the thresholds is to promote democratic decision-making in respect of industrial action this would seem to be legitimate; unions are democratic organisations that should be accountable to their members. However, this is complicated by the fact that UK trade unions have no power to discipline members that do not participate in strikes. It is therefore less clear that promoting democracy over decisions to call industrial action is a legitimate ground for legal intervention. If individual members retain the choice over whether to go on strike why should a unions’ decision to call members out on strike need to be taken democratically? Pragmatically of course, a union will not call a strike when most members are opposed. But it is far from evident that regulating to ensure industrial action has ‘clear’ member support is legitimate given that members are not required to participate. This aside, the analysis here proceeds on the basis that promoting democratic accountability over decisions to call industrial action is a legitimate aim for the state to pursue.

The other justifications put forward for the ballot thresholds are ensuring that industrial action only takes place as a last resort, and protecting people who rely on public services from the disruption caused by industrial action.<sup>114</sup> This latter goal is certainly legitimate, as the state would be failing its citizens if it did not attempt to ensure continued provision of key public services. But it can only potentially justify the net-support threshold, which is targeted at public sector strikes.

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<sup>113</sup> BEIS (n 69), [13].

<sup>114</sup> BIS (n 112), [1]-[4].

Whether it is a legitimate goal to attempt to ensure strikes take place as a ‘last resort’ depends on the underlying motivations for pursuing this goal. If the intent is to decrease the level of industrial action as an end in itself, for ideological or political reasons, this will not be legitimate as it amounts to deliberate suppression of workers’ human right to strike, and preventing the exercise human rights cannot be a legitimate goal.<sup>115</sup> However, the Government might legitimately aim to ensure strikes are a last resort in order to achieve some *further* legitimate goal.

On a charitable reading, it is possible to interpret the Government as claiming the ballot thresholds aim to make strikes a last resort *in order* to achieve the further goals of industrial peace and protecting the economy. The Government’s consultation and impact assessment both state that the policy goal of the ballot thresholds ‘is to encourage workplace disputes to be resolved without the need for industrial action’.<sup>116</sup> Some indication that economic reasons underpin the ballot thresholds comes from the Queen’s speech, which announced the TUA as part of the package of measures ‘to raise the productive potential of the economy’, i.e. to promote harmonious industrial relations.<sup>117</sup> Economic concerns are also evident in the TUA’s impact assessment, which discusses the economic costs of industrial action and economic benefits of lowering levels of industrial action.<sup>118</sup> Industrial peace and economic growth are both legitimate aims for the state to pursue, so the ballot thresholds will pass the first stage of proportionality analysis if these genuinely are the provisions underlying goals.

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<sup>115</sup> As reflected in ECHR Article 18.

<sup>116</sup> BIS (n 112), [7]; BEIS (n 69), [76].]

<sup>117</sup> Available online <<https://www.gov.uk/government/speeches/queens-speech-2015>> accessed 2 December 2019.

<sup>118</sup> BEIS (n 69), [66].

In sum, the Government claims the ballot thresholds were introduced to further trade union democracy, ensure strikes are a last resort (to promote industrial harmony and the economy), and preventing disruption to people who rely on important public services (net-support threshold only). It seems more likely, however, that there are other less legitimate goals and motivations for the state's failure to respect workers human right to strike by introducing these thresholds that are not legitimate, and that they should therefore not be regarded as justified.

The claim that Government's main aim when introducing the ballot thresholds was to ensure democratic support for industrial action rings hollow given that such thresholds are not seen as necessary for democratic legitimacy in other elections, despite democratic accountability being more important in those contexts. Many political votes fail to meet the 50 per cent turnout threshold contained in the TUA,<sup>119</sup> and are not seen as democratically illegitimate. In addition, the 2016 EU referendum result falls short of the 40 per cent net-support threshold contained in the TUA.<sup>120</sup> The Governments' claim to be promoting democratic accountability over industrial action is further undermined by their refusal to allow voting to take place by means other than post, given that participation rates can be increased by allowing electronic or in-person voting.<sup>121</sup>

Furthermore, the stated aims of the ballot thresholds must be doubted given that the original source of the reforms, a Policy Exchange paper entitled 'Modernising Industrial Relations',<sup>122</sup>

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<sup>119</sup> Every London Mayoral Election has had turnout under 50 per cent and European and local elections frequently fall short of this threshold.

<sup>120</sup> R. Dukes and N. Kountouris (n 106) 362.

<sup>121</sup> B. Creighton and others (n 97).

<sup>122</sup> E. Holmes, A. Lilico and T. Flanagan (n 29).

was not revealed or even acknowledged by the Government. This is despite one of the paper's authors submitting evidence to the Bill Committee indicating a Special Advisor to the Cabinet Office was involved in developing the paper, and highlighting that it 'included a lot of the thinking behind the TU Bill'.<sup>123</sup> The document in question takes a very narrow view of the legitimate functions of trade unions, limiting these to reducing transaction costs and combating monopsony rather than recognising unions as a vehicle for worker voice.<sup>124</sup> It therefore seems reasonable to conclude the thresholds are 'likely to have other motivations' than those provided by the Government.<sup>125</sup>

Labour lawyers have suggested that other, less legitimate, aims underpin the ballot threshold reforms. Dukes and Kountouris, for example, argue that the TUA's aim is simply 'to make it harder for trade unions to organise industrial action'.<sup>126</sup> While the Government's assessment of the Act states '[n]one of these changes are about banning strikes',<sup>127</sup> it is certainly difficult to believe that hampering industrial action was not an important motivation or goal for introducing the ballot thresholds. This idea is further developed by Bogg, who argues that the ballot thresholds are premised on a rejection of pluralism in civil society and reflect the

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<sup>123</sup> Trade Union Bill Committee Written Evidence submitted by Tom Flanagan Consulting, 28 October 2015, TUB 42. Available  
<<https://publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub42.htm>> accessed 2 December 2019.

<sup>124</sup> E. Holmes, A. Lilico and T. Flanagan (n 29) 25–6; M. Ford and T. Novitz (n 28) 293.

<sup>125</sup> M. Ford and T. Novitz (n 28) 292.

<sup>126</sup> R. Dukes and N. Kountouris (n 106) 338.

<sup>127</sup> BEIS (n 69), [76].

Government's view that industrial action must be limited because it is a 'pathological disruption of the civil unity that should obtain in a political order'.<sup>128</sup>

Ford and Novitz agree that the TUA represents a politically and ideologically motivated attack on industrial action, and believe the decision to impose these restrictions on industrial action was motivated by a desire to contain the more lenient attitude towards balloting requirements that was being developed by the courts,<sup>129</sup> and to capitalise on the wide margin of appreciation adopted by the ECtHR in recent challenges to English labour law.<sup>130</sup> They also suggest a more pragmatic reason for introducing the thresholds; that the Government wanted to stifle the trade union response to their austerity policies, particularly in the public sector.<sup>131</sup> If, as seems plausible, any of these proposed alternative aims reflect the true goals of the ballot thresholds then they cannot be regarded as a justified interference with the right to strike.

### *Rational connection and necessity*

It is eminently plausible that the ballot thresholds' interference with the right to strike cannot be justified because they lack a legitimate aim. However, even if we were to accept the Government's claims about the reasons the thresholds were introduced it would still not be possible to justify them. There is no rational connection between the thresholds and the supposed aims of furthering democratic accountability or of making strikes a last resort, and

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<sup>128</sup> A. Bogg, 'Beyond Neo-Liberalism' (n 24) 325.

<sup>129</sup> *RMT v Serco* [2011] EWCA 226.

<sup>130</sup> *RMT v UK* (n 40).

<sup>131</sup> M. Ford and T. Novitz (n 28) 294.



while there *is* a rational connection between the net-support threshold and the goal of preventing disruption in public services the threshold is not justified because less restrictive means could have been adopted to achieve this aim.

The ballot thresholds are not rationally connected to the aims of promoting union democracy or making strikes a last resort because there is no evidence of the problems the thresholds are supposedly intended to solve existing under the pre-2016 regulatory framework; meaning the thresholds can have no causal effect in resolving them. The Government offers no evidence that strikes are not *already* a last resort. This lack of evidence is unsurprising, given the difficulty in organising industrial action, the time and expense involved for both unions and workers, and the risks of litigation, all mean that unions are unlikely to take industrial action other than as a last resort.<sup>132</sup> Furthermore, the ballot thresholds may well have the effect of making industrial action *more* likely to occur, and for longer periods, because unions will want to capitalise on any success they have in overcoming the barriers the thresholds establish to industrial action.

Similarly, the ballot thresholds do not promote democracy. Dukes and Kountouris point out that ‘the Government provided evidence of low turn outs in some pre-strike ballots but no evidence that abstainers in those ballots opposed industrial action’.<sup>133</sup> In fact, the Government’s own impact assessment shows exactly the opposite; that ‘as the turnout increases there is a slight increase in the proportion of voters who vote in favour’ of action.<sup>134</sup>

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<sup>132</sup> M. Ford and T. Novitz (n 26) 530.

<sup>133</sup> R. Dukes and N. Kountouris (n 106) 350.

<sup>134</sup> BEIS, ‘*Impact Assessment Industrial Action (Important Public Services) Regulations 2016 - The Trade Union Act 40% Threshold*’ (2016) BEIS/16/19 21

<[https://www.legislation.gov.uk/ukia/2017/8/pdfs/ukia\\_20170008\\_en.pdf](https://www.legislation.gov.uk/ukia/2017/8/pdfs/ukia_20170008_en.pdf)> accessed 2 December 2019.

That support for industrial action actually increases with turnout disproves the existence of a 'silent majority' of members opposed to industrial action, which is the premise of the Government's claim that the quorum requirement furthers democratic goals. Finally, the ballot thresholds undermine rather than promote the democratic legitimacy of industrial action ballots, because they incentivise individuals opposed to industrial action to abstain rather than participate in the ballot.

In contrast, the net-support threshold does seem to be rationally connected to the goal of protecting those who rely on important public services from disruption. By making it more difficult for workers in these public services to take industrial action, people who rely on the services are less likely to have their rights and lives disrupted by strikes. If this is accepted as the genuine aim of s 3, the net support threshold will therefore pass the second stage of proportionality analysis.

However, the 40 per cent net-support requirement cannot be justified by reference to preventing disruption, because there are alternate ways of achieving this goal that constitute lesser interferences with the right to strike. It therefore fails the necessity stage of proportionality analysis. For example, Ford and Novitz point out that the aim could equally be achieved by imposing an obligation to maintain a minimum service level throughout the period of strike action, as is required for the fire service and accepted under international human rights law.<sup>135</sup> Another alternative would be to apply the threshold only to the category

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<sup>135</sup> M. Ford and T. Novitz (n 26) 531.

of 'essential' public services, which is already an accepted concept in international labour law, rather than the broader and more novel concept of 'important' public services.<sup>136</sup>

Finally, the interference with the right to strike could be lessened by allowing balloting to take place in the workplace or via electronic voting. Workplace balloting is already used for votes related to trade union recognition and workplace consultation rights,<sup>137</sup> and electronic balloting is used in political votes including London Mayoral elections and political party internal elections. The Secretary of State for Business was unable to explain why these alternative methods of balloting were not being introduced for industrial action ballots,<sup>138</sup> despite the Government having the power to do so under the Employment Rights Act 2004.<sup>139</sup>

### ***3.3 Conclusion***

In sum, the reforms to political funds and ballot thresholds contained in the Trade Union Act 2016 violate the philosophical theory of human rights set out in Chapters 6 and 7. They represent failures by the state to respect workers' rights to freedom of association, collective expression in the political sphere, and to go on strike. As these pro tanto rights violations cannot be justified they are incompatible with the conception of human rights adopted here, and should be repealed or amended in a way that renders any interference with workers' human rights justifiable.

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<sup>136</sup> *ibid* 530–533.

<sup>137</sup> TULRCA sch A1; TULRCA ss 188-188A.

<sup>138</sup> HC Deb, 14 September 2015, vol 599 col 767.

<sup>139</sup> Employment Rights Act 2004 s 54.

#### 4. Legal Human Rights Analysis

The remainder of this chapter considers, in light of the above argument that the TUA's political fund and ballot threshold reforms violate human rights at the normative philosophical level, whether these provisions breach existing human rights *law*. The focus is on the ECHR and HRA due to the limited capacity of other sources of international human rights law to constrain UK Government action in this area.<sup>140</sup> The following sub-sections argue that both sets of reforms should be found to infringe the Article 11 right to freedom of association which is protected under the ECHR and HRA.

Article 11 states:

(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.

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<sup>140</sup> As demonstrated by their response to the Joint Committee on Human Rights' enquiry about the TUA's compatibility with ILO Conventions, see K. Ewing and J. Hendy (n 41) 400.

The TUA reforms to political funds and ballot thresholds both interfere with the right to association contained in Article 11(1), because this right protects the autonomy of organisations such as trade unions over their internal affairs,<sup>141</sup> and the right to strike.<sup>142</sup>

They are therefore incompatible with the Convention unless they can be justified under Article 11(2). This requires they be authorised by law,<sup>143</sup> pursue one of the aims specified in the text,<sup>144</sup> and be ‘necessary in a democratic society’ to achieve this aim. The test of necessity has been interpreted by the ECtHR as meaning interferences must be proportionate,<sup>145</sup> and the Court applies a similar approach to proportionality analysis to that discussed above, albeit the stages are often not clearly distinguished and are applied somewhat inconsistently.<sup>146</sup> Following this, when deciding whether interferences with Convention rights are ‘necessary in a democratic society’ the ECtHR asks if they are rationally connected to the interest or aim it pursues,<sup>147</sup> whether less intrusive means were considered or could have been adopted,<sup>148</sup> and if the rights-interference is ‘proportionate to the social need claimed for it’.<sup>149</sup> In addition to these stages of proportionality analysis, the Court gives a ‘margin of appreciation’ to

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<sup>141</sup> *ASLEF v UK* (n 68).

<sup>142</sup> *Enerji v Turkey* (n 89).

<sup>143</sup> On this requirement see *Huvig v France* [1990] 1 EHRR 528.

<sup>144</sup> For a rare example of an interference found unjustified on this ground see, *Darby v Sweden* [1990] ECHR 24.

<sup>145</sup> *Handyside v UK* [1976] EHRR 737; *Belgian Linguistic case (No 2)* (1968) 1 EHRR 252. For discussion see A. Legg (n 43) ch 7; S. Smet and E. Brems (n 44); G. Letsas (n 45).

<sup>146</sup> J. Gerards (n 43); J. Gerards and H. Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’ (2009) 7 *International Journal of Constitutional Law* 619; S. Sottiaux and G. Schyff (n 43); E. Brems and L. Lavrysen, ‘“Don’t Use a Sledgehammer to Crack a Nut”: Less Restrictive Means in the Case Law of the European Court of Human Rights’ (2015) 15 *H.R.L.R.* 139.

<sup>147</sup> *Smith and Grady v UK* (n 48).

<sup>148</sup> *Informationsverein Lentia v Austria* [1993] 17 EHRR 93, [39]; *Hatton v UK* [2003] 37 EHRR 28, [86].

<sup>149</sup> *Dudgeon v UK* [1981] ECHR 5, [59].

assessments of proportionality undertaken by domestic authorities which varies with the circumstances of the case, including its subject matter and the degree of interference with Convention rights.<sup>150</sup>

#### *4.1 Prospects for human rights law*

The outcome of any human rights challenges to the TUA is ‘unusually opaque at the current time’.<sup>151</sup> The prevailing view among labour lawyers is that such litigation is unlikely to succeed. Ewing and Hendy epitomise this position; arguing that a successful challenge is unlikely because the clearest violations of human rights were dropped from the Act, and because both domestic courts and the ECtHR are unreceptive to human rights arguments in the context of UK labour law.<sup>152</sup> However, while there is certainly evidence that supports Ewing and Hendy’s pessimism, there are also grounds for optimism.

First, the fact that many of the most obvious violations of human rights contained in the original text of the Bill were amended or dropped during the Parliamentary process does not mean that what remains does not violate human rights. Indeed, it has been argued above that the reforms to political funds and ballot thresholds introduced by the Act breach human rights

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<sup>150</sup> G Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705; A. Legg (n 43); J. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17 *European Law Journal* 80.

<sup>151</sup> A. Bogg, ‘Beyond Neo-Liberalism’ (n 24) 328.

<sup>152</sup> K. Ewing and J. Hendy (n 41) 412; see also M. Ford and T. Novitz (n 28).

on the normative philosophical level, and the following sub-sections argue that these provisions also breach human rights law under the HRA and ECHR.

The second reason for Ewing and Hendy's pessimism about human rights challenges to the 2016 Act is the reluctance of domestic courts to accept human rights arguments in the sphere of labour law. It is true that 'trade unions have made limited headway under the Human Rights Act 1998',<sup>153</sup> and the English courts have demonstrated no real enthusiasm for subjecting domestic labour law frameworks to human rights scrutiny.<sup>154</sup> It therefore seems fair to conclude that Strasbourg will need to lead the way if domestic courts are to become more willing to accept human rights arguments in this context.

Against this however, I want to sound a note of cautious optimism. For example, the case given by Ewing and Hendy as evidence of the English courts' 'passive approach' towards protecting human rights in the employment context is the Court of Appeal decision in *Unison*, on the legality of Employment Tribunal Fees.<sup>155</sup> This has since been spectacularly overturned by the Supreme Court, whose judgment is now the leading example of domestic courts using human rights arguments to protect workers.<sup>156</sup> The recent Supreme Court decision in *Gilham*, where human rights were accepted as requiring the personal scope of statutory employment rights be broadened, also demonstrates an increased willingness to use human rights to protect workers.<sup>157</sup> It remains to be seen whether these cases will lead to broader engagement

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<sup>153</sup> K. Ewing and J. Hendy (n 41) 413.

<sup>154</sup> See Chapter 4.

<sup>155</sup> *R (Unison) v Lord Chancellor (Court of Appeal)* [2015] EWCA Civ 935.

<sup>156</sup> *R (Unison) v Lord Chancellor* [2017] UKSC 51.

<sup>157</sup> *Gilham v Ministry of Justice* [2019] UKSC 44.

with, and acceptance of, human rights arguments made by workers and unions.<sup>158</sup> But, at the least, it indicates a successful human rights challenge against the TUA is not beyond the realms of possibility.

Finally, Ewing and Hendy believe that if a challenge to the TUA were to 'go the distance' the ECtHR would be unwilling to find the rules disproportionate.<sup>159</sup> As discussed in Chapter 4, 'the forward march of Article 11 to develop trade union rights was halted' in *RMT v UK*, which found the ban on secondary action under English law came within the 'margin of appreciation' and so did not breach Article 11.<sup>160</sup> In a superb analysis of five recent cases, Ewing and Hendy convincingly demonstrate the extent to which the ECtHR is willing to bend over backwards to avoid finding that UK labour law violates Article 11.<sup>161</sup> Several of these cases were declared inadmissible on questionable grounds,<sup>162</sup> and in others the Court relied on the 'margin of appreciation' to avoid substantively scrutinising the law.<sup>163</sup> According to Ewing and Hendy, the ECtHR's failure to find that English labour law infringes human rights is the result of political rather than legal considerations, evidenced by the fact that '[s]ince the fuss created by the Coalition and Conservative governments from 2010 onwards, there has not been a single successful Article 11 application from the UK'.<sup>164</sup> They suggest that the Court's decisions are motivated by a desire to appease the UK and avoid political controversy,

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<sup>158</sup> A. Bogg, 'The Common Law Constitution at Work: *R (on the Application of Unison) v Lord Chancellor*' (2018) 81 MLR 509.

<sup>159</sup> K. Ewing and J. Hendy (n 41) 414.

<sup>160</sup> A. Bogg, 'Beyond Neo-Liberalism' (n 24) 328; *RMT v UK* (n 40).

<sup>161</sup> K. Ewing and J. Hendy, 'Article 11(3) of the European Convention on Human Rights' [2017] EHRLR 356.

<sup>162</sup> *Brough v UK* [2013] ECHR 336; *Roffey v UK* [2012] ECHR 1157.

<sup>163</sup> *RMT v UK* (n 40); *Unite the Union v UK* [2016] ECHR 1150.

<sup>164</sup> K. Ewing and J. Hendy (n 41) 416.



in the face of high profile political attacks on the Court and the threat of UK withdrawal from the ECHR.<sup>165</sup> It certainly appears that these political considerations, also reflected in the Brighton Declaration's affirmation of the subsidiarity principle, have led to a wider margin of appreciation being afforded by the ECtHR, particularly towards more established Member States.<sup>166</sup> This troubling conclusion is reinforced when the UK experience is contrasted with decisions involving other countries, where unions have fared better.<sup>167</sup>

However, we should not give up hope of a human rights challenge to the TUA succeeding in Strasbourg. The threat of the UK leaving the ECHR has receded somewhat, which could encourage the Court to be bolder. The 2017 and 2019 Conservative Party manifestos both dropped the previous commitment to leave the ECHR, and the Government's white paper on Brexit stated that the UK is committed to membership of the ECHR.<sup>168</sup> Although unclear at present, the future of the UK's membership will also be cemented if it forms part of any eventual EU withdrawal agreement. Ultimately, it is hard to know how any human rights challenge to the TUA would fare, but the following sub-sections argue that the reforms to political funds and ballot threshold can and should be found to violate human rights on accepted legal principles.

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<sup>165</sup> K. Ewing and J. Hendy (n 161).

<sup>166</sup> I. Cram, 'Protocol 15 and Articles 10 and 11 ECHR—The Partial Triumph of Political Incumbency Post-Brighton?' (2018) 67 *International & Comparative Law Quarterly* 477.

<sup>167</sup> *Hrvatski Lijecnicki Sindikat v Croatia* [2014] ECHR 1337; *Veniamin Tymoshenko v Ukraine* [2014] ECHR 1016.

<sup>168</sup> HM Government, *The Future Relationship Between the United Kingdom and the European Union* (2018) Cm 9593, 52.

## 4.2 Political funds

The compatibility of the political fund reforms with human rights law was not considered during the passing of the TUA, either in the Government's ECHR memorandum, the Joint Committee on Human Rights (JCHR), or the House of Lords Select Committee established specifically to examine this aspect of the legislation.<sup>169</sup> This is disappointing given the changes arguably breach several of the rights protected by the HRA and ECHR.

The political fund opt-in and reporting requirements both interfere with workers' Article 11 right to freedom of association. The opt-in requirement restricts the freedom to associate by denying workers the right to 'form or join a trade union' which automatically includes them within the unions' political fund. In addition, the opt-in requirement will impact on unions' capacity to undertake political activities, and the ECtHR has found that analogous restrictions on political donations interfere with Article 11.<sup>170</sup> The ECtHR has also accepted that Article 11 includes 'the right of trade unions to draw up their own rules and to administer their own affairs',<sup>171</sup> and the s 12 reporting obligations interfere with this right to establish and run trade unions free from government interference by requiring unions to undertake specific administrative activities.

The reforms to political funds also interfere with other Convention rights. The Article 10 right to freedom of expression is engaged, for example, because the opt-in requirement restricts

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<sup>169</sup> For discussion see K. Ewing and J. Hendy (n 41) 408.

<sup>170</sup> *Basque Nationalist Party - Iparralde Regional Organisation v France* Application no. 71251/01 (7 June 2007), [36]-[38].

<sup>171</sup> *ASLEF v UK* (n 68), [38]; *Cheall v UK* [1986] 8 EHRR 74.

unions' capacity to exercise political expression on behalf of their members.<sup>172</sup> The fact that the opt-in requirement impacts the Labour party's income means that the state's obligation to hold free elections is also at stake.<sup>173</sup> Finally, ss 11 and 12 both interfere with workers' Article 14 right to non-discrimination in the enjoyment of their Convention rights, because they single out and subject trade union members to restrictions on their rights to association and expression, and union membership is a protected status under Article 14.<sup>174</sup>

As the political fund reforms interfere with workers' Convention rights to freedom of association and expression, to free elections, and non-discrimination, they are incompatible with the ECHR unless they are demonstrated to be authorised by law, and necessary in a democratic society for the pursuit of a legitimate aim.<sup>175</sup> The reforms are clearly authorised by law, so the question is whether they are necessary in a democratic society in the interests of one of the aims specified in the Convention. Interferences with qualified Convention rights can be justified when they are capable of achieving the legitimate aim they were carried out in pursuit of, go no further than necessary for achieving this aim, and are not disproportionate in the sense that the aim does not outweigh the interference.<sup>176</sup>

It follows from the arguments made in Section 3.1 of this chapter that the political fund reforms are not necessary in a democratic society. Even taking the Government's stated aims at face value, the opt-in requirement is not rationally connected to its supposed aim of

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<sup>172</sup> Restrictions on the funding of political expression may infringe Article 10, *Bowman v UK* [1998] ECHR 4.

<sup>173</sup> *Basque Nationalist Party* (n 170).

<sup>174</sup> *Danilenkov v Russia* [2009] ECHR 1243.

<sup>175</sup> ECHR Article 10(2); Article 11(2); Article 14(2); *Ždanoka v Latvia* [2007] 45 EHRR 17.

<sup>176</sup> *N v UK* Application no. 26565/05 (27 May 2008); *Nada v Switzerland* Application no. 10593/08 (12 September 2013); E. Brems and L. Lavrysen (n 146); G. Letsas (n 45); J. Gerards (n 43).

preventing people from unwillingly funding political activities, and the reporting obligations go beyond what is necessary to achieve their aim of transparency in political funding. The courts should therefore find these provisions incompatible with workers' Convention rights as protected under the HRA and ECHR.

The conclusion that ss 11 and 12 TUA violate human rights is in line with recent comparative case law on this issue.<sup>177</sup> Particularly relevant is *Unions New South Wales v New South Wales*, where the High Court in New South Wales struck down legislation that barred unions from making political donations and counted affiliated unions' political spending towards that parties' electoral spending limits.<sup>178</sup> These provisions were found to breach the constitutional freedom of political communication, because while it was a legitimate goal to prevent corruption in the political sphere these provisions did nothing to promote those purposes.<sup>179</sup> The courts' conclusion that these restrictions on political voice were therefore 'inexplicable'<sup>180</sup> applies equally to the TUA's political fund reforms.

The ECtHR should find the political fund reforms breach Convention rights despite their desire to avoid political controversy. The Court should not afford a wide margin of appreciation in this context because the reforms relate to the rule of law and maintenance of a fair democratic process rather than predominantly being concerned with striking a balance between employer and employee interests, which is more easily regarded as 'a matter for democratic decision'.<sup>181</sup> These are matters that domestic courts and ECtHR should be, and

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<sup>177</sup> See also *Citizens United v FEC* (2010) 103 S Ct 876.

<sup>178</sup> Election Funding, Expenditure and Disclosures Amendment Act 2012 No 1 (NSW).

<sup>179</sup> *Unions New South Wales v New South Wales* (2013) 304 ALR 266.

<sup>180</sup> *ibid*, [59].

<sup>181</sup> *Johnson v Unysis Ltd* [2001] UKHL 13, [37].

often are, prepared to take more a robust stance on than issues of social policy.<sup>182</sup> The ECtHR has emphasised that democracy is the foundation of European public order and provides strong protection for political speech and participation,<sup>183</sup> and affords only a narrow margin of appreciation in such cases.<sup>184</sup> Although the ECtHR has taken a hands-off approach in Article 11 cases involving UK trade unions, interferences with freedom of association must be scrutinised ‘all the more’ closely when they impact on participation in the political sphere.<sup>185</sup> The finding in *Hirst v UK* that the UK’s ban on prisoner voting violated the right to free elections demonstrates the ECtHR’s willingness to protect human rights in the context of political participation, despite the highly politicised and controversial nature of the decision.<sup>186</sup>

The *Animal Defenders* litigation, which found that the UK’s ban on political advertising did not violate Article 10, might be thought to point away from the political fund violations being disproportionate.<sup>187</sup> In that case the ECtHR stated ‘it is for each State to mould its own democratic vision’ and domestic authorities are best placed to safeguard ‘the democratic order’,<sup>188</sup> so the margin of appreciation for restrictions on political advertising should be

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<sup>182</sup> G. Phillipson, ‘Deference, Discretion, and Democracy in the Human Rights Act Era’ (2007) 60 *Current Legal Problems* 40; *R (International Transport Roth GmbH) v SoS Home Department* [2002] EWCA Civ 158, [83]-[87].

<sup>183</sup> *Plon (Société) v France* (n 84).

<sup>184</sup> *Murphy v Ireland* [2003] ECHR 352, [67].

<sup>185</sup> *United Communist Party v Turkey* Application no. 133/1996/752/951 (30 January 1998), [43].

<sup>186</sup> *Hirst v UK* [2005] ECHR 681; *Scoppola v Italy (No 3)* [2012] ECHR 868.

<sup>187</sup> *R (Animal Defenders International) v SoS for Culture Media and Sport* [2008] UKHL 15; *Animal Defenders v UK* [2013] ECHR 362.

<sup>188</sup> *Animal Defenders v UK* (n 187), [111].

‘somewhat wider... than that normally afforded to restrictions on expression on matters of public interest’.<sup>189</sup>

However, significant aspects of the ECtHR’s reasoning in *Animal Defenders* are not applicable to the political fund reforms, so the case should not be taken as indicating the political fund reforms do not infringe Convention rights. First, the ECtHR placed ‘considerable weight’ on the fact that the political advertising ban had been subject to ‘exacting and pertinent reviews’ both inside Parliament (by the JCHR) and outside (by the Electoral Commission, and Neill Committee on Standards in Public Life).<sup>190</sup> This is emphatically not the case with the 2016 reforms. Second, the prohibition of political advertising was found to be justified because it aimed to create a ‘level playing field’ and ‘thereby to protect the rights of the public to a fair functioning of an important part of the democratic process’.<sup>191</sup> Again, this is clearly not the case for ss 11 and 12, which apply only to trade unions and do not create a ‘level playing field’.

Following this, ss 11 and 12 of the TUA should be found to infringe the Convention rights to association and expression, as well as possibly to non-discrimination and free elections.

### ***4.3 Ballot thresholds***

The quorum and net-support ballot thresholds introduced by the TUA violate the right to strike which has been recognised as forming part of the Article 11 right to freedom of

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<sup>189</sup> *ibid*, [123].

<sup>190</sup> *ibid*, [114]-[116].

<sup>191</sup> *R (Animal Defenders International) v SoS for Culture Media and Sport* (n 187), Lord Scote at [40].

association.<sup>192</sup> Even courts reluctant to find violations of Convention rights would struggle to avoid the conclusion that the ballot thresholds interfere with the right to strike given that the Government's own impact assessment estimates the legislation will have the effect of reducing lawful strike action by 29 per cent in future.<sup>193</sup>

These interferences with the right to strike should not be found justified under Article 11(2) because, as argued above, they were not enacted in pursuit of a legitimate aim. Even accepting the Government's stated aims for the thresholds however, the courts should find them to be disproportionate. As Ford and Novitz argue, the requirement that ballots be conducted by post 'shows clearly why, on a proportionality test, the same aims could be met in a less restrictive manner'.<sup>194</sup> Lord Pannick drew attention to this when the draft Bill was being debated in the House of Lords, saying that the lack of opportunity for e-balloting would leave the thresholds 'particularly vulnerable' to challenge in the ECtHR.<sup>195</sup> Ford and Novitz believe that amending the Bill to include a review of e-balloting therefore 'cut off the most obvious proportionality argument at its root'.<sup>196</sup> But we now know that action to introduce other forms of balloting is not going to be forthcoming any time soon, raising the prospects of the ballot being found disproportionate on these grounds.

The fact that that Government failed to consider less restrictive alternatives to the ballot thresholds should also lead the courts to find a violation of Article 11. The ECtHR has stated that in order for rights interferences to be proportionate, the possibility of alternative

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<sup>192</sup> *Enerji v Turkey* (n 89). For discussion see Chapter 4, Section 3.2.

<sup>193</sup> BEIS (n 69), [120].

<sup>194</sup> M. Ford and T. Novitz (n 28) 535.

<sup>195</sup> HL Deb, 8 February 2016, vol 768 col 2001.

<sup>196</sup> M. Ford and T. Novitz (n 28) 295.

measures ‘must be ruled out’.<sup>197</sup> The Court has used this reasoning to find that a ban on a trade union protest was disproportionate, stating there has been a failure to ‘reflect on possible alternative solutions and propose other arrangements’.<sup>198</sup> A ‘failure to give due consideration to any alternatives’ was also an important factor in the Courts decision that a ban on strikes by railway workers was disproportionate in *Ognevenko v Russia*.<sup>199</sup> Following this, the Government’s lack of consideration of alternatives to the ballot thresholds should lead the courts to find them disproportionate.<sup>200</sup>

Another reason why the net-support threshold should be found disproportionate is that the Government has not provided sufficient reasons for singling out these public-sector workers for additional restrictions on their right to strike. The ECtHR in *Ognevenko* found that a ban on industrial action that singled out railway workers was disproportionate for this reason, where it was also relevant that these workers were not within the ILO’s definition of ‘essential’ workers who could be subject to additional restrictions.<sup>201</sup> The same can be said of the class of ‘important public services’ created by the TUA; this is a broader category than the ILO category of ‘essential’ workers, and has boundaries that have not been justified by the Government.

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<sup>197</sup> *Nada v Switzerland* (n 176), [183]; *Glor v Switzerland* Application no. 13444/04 (30 April 2009)..

<sup>198</sup> *United Civil Aviation Trade Union And Csorba v Hungary* [2018] ECHR 422.

<sup>199</sup> *Ognevenko v Russia* [2012] ECHR 1266, [77].

<sup>200</sup> *Gülbahar Özer and Yusuf Özer v Turkey* [2018] ECHR 439.

<sup>201</sup> *Ognevenko v Russia* (n 199).



The wide margin of appreciation that has been afforded in recent human rights challenges involving UK labour law has been trenchantly and persuasively criticised.<sup>202</sup> It is therefore hoped that the domestic courts and ECtHR prove more willing to apply proper scrutiny in future and apply a robust approach to proportionality analysis. This will be especially important in any challenge to the ballot thresholds, given that unlike in *RMT v UK* the impact of these provisions is not limited to secondary aspects of Article 11 and all industrial action is affected.<sup>203</sup> Although the Court did not determine the status of the right to strike as an ‘essential element’ of Article 11, the ability to take any primary industrial action was recognised in *RMT v UK* as the ‘very substance’ of trade union freedom under Art.11.<sup>204</sup> Following this, Bogg rightly argues that the decision in *RMT* ‘cannot bear the argumentative weight that is being placed upon it by the Government’ in justifying the 2016 Act’s interferences with Convention rights.<sup>205</sup>

Finally, the politically contested nature of the ballot thresholds provides another reason not to apply a wide margin of appreciation. In *RMT* the ECtHR placed significant weight on the fact that secondary strike action had been banned for a long time under several different Governments, and so represented a democratic consensus across the political spectrum.<sup>206</sup> They were therefore reluctant to undermine this consensus unless the interference was manifestly unreasonable. Leaving aside the criticism that longstanding societal acceptance of

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<sup>202</sup> A. Bogg and K. Ewing, ‘The Implications of the RMT Case’ (2014) 43 ILJ 221; K. Arabadjieva, ‘Another Disappointment in Strasbourg: *Unite the Union v United Kingdom*’ (2017) 46 ILJ 289..

<sup>203</sup> M. Ford and T. Novitz (n 26) 534.

<sup>204</sup> *RMT v UK* (n 40), [87].

<sup>205</sup> A. Bogg, ‘Beyond Neo-Liberalism’ (n 24) 331.

<sup>206</sup> *RMT v UK* (n 40) para [99].

a human rights violation should not count towards its justification, this reasoning does not apply to the ballot thresholds. There is a clear lack of political consensus on this issue, as demonstrated by the Labour parties' commitment to repeal them if they should come into Government, and the Welsh Government's ongoing attempt to disapply the s 3 threshold in respect of devolved public authorities.<sup>207</sup> A narrow margin of appreciation should therefore be given when scrutinising the ballot thresholds, which can and should be found to violate Article 11. It is altogether another question, however, whether either the domestic courts or the ECtHR would be willing to reach this conclusion.

## **5. Conclusion**

This chapter has provided an illustration of how the philosophical human rights framework developed in Chapters 6 and 7 can be operationalised as a tool to scrutinise existing labour law rules. Section 3 deployed this theory as a normative benchmark against which to assess the compatibility of some key provisions of the Trade Union Act 2016 with human rights at the normative philosophical level. From this analysis it was concluded that the TUA's reforms to trade union political funds and ballot thresholds both breach the state's duty to respect human rights. These provisions restrict workers' human rights to freedom of association and voice at work, and cannot be justified by reference to conflicting considerations.

Given the violation of human rights by these aspects of the TUA at the normative level, Section 4 of this chapter examined their compatibility with existing legal protections of human rights

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<sup>207</sup> A.C.L. Davies, 'The Trade Union (Wales) Act 2017/Y Ddeddf Yr Undebau Llafur (Cymru) 2017' (2018) 47 ILJ 135.

contained in the HRA and ECHR. It was argued that, despite some grounds for pessimism about the prospects of human rights challenges to UK labour law, the reforms to political fund and ballot thresholds should be found to violate Convention rights. They amount to interferences with rights protected under the ECHR and, as argued in Section 3, cannot be justified as necessary in a democratic society.

Following this, the legal protection of human rights aligns with the normative human rights analysis undertaken in the chapter. It must be acknowledged, however, that the prospects of any challenge to the TUA under the HRA and ECHR is uncertain at best. If a legal challenge to the TUA's political fund and ballot threshold reforms were to fail, the existing legal protection of human rights would fall short of the normative demands made by the theory of human rights adopted here. But even if this were to happen it would not prevent this philosophical conception of human rights from providing a useful framework for understanding and scrutinizing the law. The argument developed in this thesis demonstrates that human rights theory can provide an important normative tool for evaluating existing labour law rules and identifying shortcomings and areas in need of reform. This would remain true notwithstanding the lack of adequate legal protection of human rights.

## Chapter 9: Concluding Remarks

This thesis set out to clarify the relationship between human rights and labour law, and the role that human rights can play in providing justificatory foundations for the discipline. It was argued that a normative and philosophical approach should be adopted when examining these questions,<sup>1</sup> and that it is necessary to focus on specific philosophical conceptions of human rights to make progress in understanding the relevance and implications of human rights for the legal regulation of work. The main claim advanced is that human rights, understood as moral rights grounded in universal interests that protect the conditions of a decent human life, can provide normative foundations for labour law protections of decent working conditions and voice at work.

Human rights should be regarded as an important justificatory strand in labour law's pluralistic foundations. They help fill the 'normative gap' identified in labour law's traditional narrative,<sup>2</sup> namely that it exists to counteract the inequality of bargaining power between employers and employees,<sup>3</sup> and provide labour lawyers with a coherent and forceful response to ideological attacks on the discipline and economic arguments for deregulation.<sup>4</sup> Furthermore, human rights provide a normative benchmark for assessing and analysing

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<sup>1</sup> V. Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 Eur. Lab. LJ 151. See Chapter 4, Section 5.

<sup>2</sup> See Chapter 2.

<sup>3</sup> O. Kahn-Freund, *Labour and the Law* (2nd edn, Stevens 1977) ch 1.

<sup>4</sup> See for example R.A. Epstein, 'In Defense of the Contract at Will' (1984) 51 University of Chicago Law Review 947; R.A. Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92 Yale Law Journal 1357.

existing labour law rules, both domestic and international, and are an important source of guidance on how to best interpret and develop the law, and on what reforms should be introduced in response to the changing nature of work and labour market practices.

### **Contribution**

In examining the relationship between human rights and labour law the thesis made an original contribution in several ways. First, by explicitly advocating for human rights as an important, but not the sole, justificatory perspective within a pluralistic approach to labour law's foundations.<sup>5</sup> Second, by identifying the need to focus on specific philosophical conceptions of human rights to properly understand the relationship between human rights and labour law on the normative and theoretical level.<sup>6</sup> A specific conception of human rights is needed as a reference point, both to assess the objections to human rights as normative foundations, and to identify the implications of human rights for the regulation of work and make the case that human rights can provide normative foundations for labour law. Third, this thesis provided a detailed philosophical account of human rights under which they are moral rights grounded in universal human interests that protect conditions of a decent life, and used this framework to rebut the catalogue of theoretical arguments against human rights as foundations for labour law.<sup>7</sup>

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<sup>5</sup> Chapters 1 and 2.

<sup>6</sup> Chapter 4, Section 4; Chapter 5.

<sup>7</sup> Chapter 6.

Fourth, this thesis also clarified how and why human rights are relevant to labour law and identified two significant implications of human rights for labour law that follow from the modified interest-based account of human rights developed here. The first of these being that the protection of human rights must extend to all sphere of life, including securing workers human rights from infringement by their employers.<sup>8</sup> The state therefore has an obligation to introduce legal protections for workers against dismissal and other detriments being imposed on them by employers based on how they choose to exercise their human rights, unless these *pro tanto* human rights violations can be justified by employers. The second implication being that human rights to work in decent conditions and to exercise voice at work, including by going on strike, can be established within this theoretical human rights framework, meaning this conception of human rights provides normative foundations for key aspects of labour law. The human right to work in decent conditions demands that the state introduce legal protections and minimum standards that ensure working conditions are sufficiently decent to further our interests in self-realisation, autonomy, self-esteem, and in developing personal relationships and making a social contribution.<sup>9</sup> The right to voice at work requires that legal protections and institutional frameworks be established which ensure that workers are able to make their voices and views heard, including by going on strike, free from interference or retaliation by the state or employers.<sup>10</sup> More tentatively, it was also suggested that there may be a human right to participate in workplace governance, which would demand the state

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<sup>8</sup> Chapter 7, Section 2.

<sup>9</sup> Chapter 7, Section 3.1.

<sup>10</sup> Chapter 7, Section 3.2.

establish mechanisms for co-determination that allow workers a say in workplace decisions that significantly affect them.

Finally, this thesis demonstrated how human rights theory can be operationalised to provide a valuable normative vantage point from which to critically assess existing labour law rules and doctrines. This was illustrated by evaluating the Trade Union Act 2016's reforms to political funds and industrial action ballot thresholds from a human rights perspective. It was argued that these provisions represent an unjustified failure by the state to respect workers' human rights to freedom of association, to voice in the political sphere, and to go on strike, and therefore fall short of the normative standard set by the modified interest-based philosophical conception of human rights developed in this thesis.

### **Limits and Future Research**

This thesis contributes to the growing body of research on the justification and philosophical foundations of labour law.<sup>11</sup> It clarifies the relationship between labour law and human rights at the philosophical and normative level, defends human rights as a coherent and important foundational idea for labour law, and demonstrates how human rights theory can be used to scrutinise and advocate reform of existing labour law frameworks. The thesis leaves much still to be done, however, and is very much a first step in a broader research agenda.

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<sup>11</sup> See generally, G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006); G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011); A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015); H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

For example, adopting an explicitly pluralistic approach to labour law's foundations raises new questions about precisely *which* range of philosophical values and theories should be regarded as underpinning labour law, which aspects of labour law can be justified or grounded in each theory, and how these various ideas interrelate and interact with each other. Given that there is likely to be tension or conflict between these different philosophical perspectives in some instances, we also need to determine which should take priority or be regarded as more central to labour law's foundations. Answering these questions is crucial if we are to understand the full picture of labour law's plural foundations, rather than merely the role played by individual theories.

In addition, while this thesis set out in broad terms the normative implications of human rights for labour law, further work is needed to specify in more concrete terms the demands made by human rights in this context, and to scrutinise existing labour law protections against the moral standard established by human rights. For example, while it has been argued that workers' human rights must be legally protected against infringements by employers, it remains to be determined precisely what legal frameworks are needed to protect each individual human right, and when these should give way to conflicting considerations. Furthermore, this thesis did not attempt to assess the 'patchwork quilt'<sup>12</sup> of workplace human rights protections that exists in English law against the normative benchmark set by human rights theory, nor consider whether additional legislative frameworks need to be introduced to meet this.

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<sup>12</sup> See Chapter 4, Section 2.



Further research is also needed to flesh out and fully specify the normative content of the human rights to work in decent conditions and to exercise voice at work. Questions that need further consideration include what concrete policies, legal protections and minimum standards are required to ensure that working conditions meet the moral standard set by human rights, and when will the duties corresponding to the human rights to decent conditions and voice at work be overridden by conflicting considerations. It is important that these questions be addressed if human rights theory is to provide a fully determinate moral standard against which to evaluate existing labour law frameworks, or be useful in guiding the application, development and reform of the law.

Finally, there are a range of pressing issues facing labour law that can and should be approached from a philosophical human rights perspective that have not been considered here. This includes whether the existing categories of 'employee' and 'worker' used in English law to determine the boundaries of statutory labour law protections are consistent with these protections having their normative foundations in human rights.<sup>13</sup> Human rights theory could also provide a useful perspective on the increasing use of technology and algorithmic management in workplaces, and debates surrounding automation and the future of work. It is hoped that this thesis demonstrates the value of a philosophical human rights perspective for labour law and helps lay the groundwork for future enquiries in this area.

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<sup>13</sup> See, *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092; *Gilham v Ministry of Justice* [2019] UKSC 44; S. Fredman, 'Equality Law: Labour Law or Autonomous Field' in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

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