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Theories of Rights as Justifications
for Labour Law*Hugh Collins**

An investigation of the idea of labour law calls for a theory. Such a theory must address the moral, political, and legal force of labour law. Ideally, the theory 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. Given the general commitment in liberal societies to respect for freedom of the individual and a free market, labour law requires a theory of why such mandatory constraints should exist.

There is no shortage of theories of this kind.¹ Historically, it is possible to detect two predominant strands of justification. One strand appeals to efficiency or welfare considerations, in order to justify rules that address market failures caused by transaction costs and asymmetric information, problems arising in the governance of contracts of employment such as coercion and opportunism, and more generally the desirability of promoting productive efficiency and competitiveness through a well-coordinated and flexible division of labour. From this perspective, labour law addresses the idiosyncratic problems that arise in relation to contracts of employment through a mixture of special contract law and market regulation. The other predominant strand of justification for labour law appeals to considerations of a fair distribution of wealth, power, and other goods in a society. On this view, the principal aim of labour law is to steer towards a particular conception of social justice, such as a more egalitarian society, and the norms of labour law are required primarily for the instrumental purpose of securing that goal. This second strand of justification tends to support the practice of collective bargaining and the imposition of basic labour standards such as a minimum wage, because these interventions in the labour market are calculated to improve the position of poorer and weaker members of the society. In diverse combinations and variations, most labour lawyers have either explicitly or implicitly traditionally relied on these two kinds of competing and to some extent antagonistic justifications – efficiency and social justice – to explain the normative foundations of labour law.

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¹ Eg H Spector, 'Philosophical Foundations of Labor Law' (2006) 33 Florida State University Law Review 119.

Yet these justifications for labour law are evidently vulnerable to critiques that question whether the goals justify the means used in labour law. In brief, the problem is that the efficiency-based justifications for labour law can be deployed in ways that propose the dismantling of most of the special rules for employment. At the same time, the social justice justifications for labour law have been challenged both on the ground that they lack merit and for the reason that, even if they possess some worthwhile aims, these goals should be pursued through other, less intrusive, governmental measures involving taxation and expenditure on welfare, leaving the market free to maximize the wealth of a society as a whole. Combining this two-pronged critique of traditional justifications for labour law, it seems possible, as in the example of Richard Epstein,² to justify the elimination of labour law altogether and to replace it with a general freedom of contract regime. One can, of course, take issue with this sort of conclusion. Using a different economic analysis and a more complex conception of social justice than welfare maximization, one can produce a different outcome that justifies quite an elaborate labour law system. For instance, a combination of an appreciation of the persistence of certain kinds of market failures in the labour market combined with the insights of behavioural economics that individuals do not make rational assessments of risks in contracting can lead to justifications for fairly detailed mandatory protections for workers. Even such efficiency-based theories remain vulnerable to the further charge from the New Right of excessive paternalism: employers and workers are adults and should be permitted to fashion their contracts according to their preferences, whether or not they invariably reach the most efficient outcomes. It is better, on this anti-paternalist view, to permit the market to experiment, than to attempt to regulate these arrangements on the basis of imperfect information. Such challenges to the existence of labour law based upon considerations of efficiency and welfare are not merely theoretical.

Legal regimes steer markets or capitalist societies through many legal measures designed to protect their economic institutions and mechanisms. Not only does the law vindicate private property rights and contractual agreements, it also ensures that the competitive market cannot be subverted by participants through anti-competitive measures. In many countries such as the United Kingdom and the United States, labour law was initially conceived in order to create an exception to competition rules against cartels and interference with business by unlawful means. In the European Union, however, though strong rules in the Treaties protect the operations of the competitive single market against obstructions to free trade, there is no exemption for organized labour, a topic, indeed, which is technically outside the competence of European Union (EU) laws.³ Recent decisions of the Court of Justice reveal how this absence of strong protections for organized labour at European level may lead to legal restrictions on industrial action and collective bargaining that affects

² RA Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, 1992); RA Epstein, 'In Defense of the Contract at Will' (1984) 51 *University of Chicago Law Review* 947; and RA Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92 *Yale LJ* 1357.

³ Treaty on the Functioning of the European Union, Art 153(5).

cross-border trade.⁴ The lesson one draws from this history must be that collective labour law can only survive with strong laws that create a secure exception to the economic constitution that protects a market economy.

These challenges to the existence of labour law share a common perspective: considerations of efficiency and wealth maximization undermine mandatory employment standards and protections for organized labour. In response to such challenges, it is tempting to seek a theory of labour law that forecloses the discussions of efficiency and welfare by an appeal to an overriding value that justifies labour law. One sort of theory that holds out such a promise of foreclosure is a strong theory of rights. This special weight attributed to rights in some theories of politics and justice, sometimes described, following Dworkin, as 'rights as trumps',⁵ views appeals to rights as a form of exclusionary reason, in the sense used by Raz.⁶ Once a fundamental right is at stake, it tends 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. Not all theories of rights deliver the required degree of foreclosure: for instance, if rights are presented as important for the achievement of a particular goal, such as maximizing utility, individual well-being, or achieving 'capabilities and functionings' for individuals (following Sen and Nussbaum),⁷ it is always possible to argue that the rights, and the labour laws derived from them, should be discarded or modified in so far as the goal can be achieved more successfully by other means. Among theories of rights, only rights regarded as having pre-emptive force provide a theoretical basis for labour law that can securely withstand attacks that promote other values and goals which may argue against regulation of the labour market and the workplace.

Recognizing this potential trumping power of rights, in recent years many labour activists and lawyers,⁸ though by no means all,⁹ have been drawn towards the

⁴ Eg Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OU Viking Line Esti* [2007] ECR I-10779; and ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 126.

⁵ R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) Introduction and ch 12.

⁶ J Raz, *Practical Reason and Norms* (Hutchinson, 1975); Raz does not himself attribute such a strong force to rights, though they have 'peremptory force, expressed in the fact that they are sufficient to hold people to be bound by duties'. J Raz, *The Morality of Freedom* (Oxford University Press, 1986) 192.

⁷ MC Nussbaum, 'Human Rights Theory: Capabilities and Human Rights' (1997) 66 *Fordham L Rev* 273; S Deakin and F Wilkinson, *The Law of the Labour Market* (Oxford University Press, 2005) 342-53; and R West, 'Rights, Capabilities, and the Good Society' (2000-01) 69 *Fordham L Rev* 1901.

⁸ RJ Adams, 'From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining' (2008) 12 *Just Labour: A Canadian Journal of Work and Society* 48; L Compa, 'Labor's New Opening to International Human Rights Standards' (2008, March) 11(1) *WorkingUSA* 99; L Compa, 'Solidarity And Human Rights: A Response to Youngdahl' (2009) 18(1) *New Labor Forum* 38; J Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29 *Comparative Labor Law and Policy J* 29; and RJ Adams, 'On the Convergence of Labour Rights and Human Rights' (2001) 56 *Industrial Relations/Relations Industrielles* 199. More general discussions of this trend: P Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005); B Hepple, *Rights at Work* (Sweet & Maxwell, 2005); and L Compa and S Diamond (eds), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, 1996).

⁹ J Youngdahl, 'Solidarity First: Labor Rights are Not the Same as Human Rights' (2009) 18 *New Labor Forum* 31; H Arthurs, 'Who's Afraid of Globalization? Reflection on the Future of Labour Law'

articulation of the interests of workers and organized labour through the language of rights. Labour rights may be claimed as internationally protected human rights, or there may be calls for the constitutionalization of social and economic rights as well as civil and political liberties. In Europe, scholars speak of the rebalancing of the ‘Economic Constitution’ in the Treaties to secure a ‘Social Europe’.¹⁰ However expressed, the central idea seems to be the same: labour law should be grounded in fundamental rights that possess peremptory or constitutional force within the legal order.

Yet are labour rights really ‘human rights’ or some other kind of ‘fundamental rights’ with exclusionary force? What theory of rights justifies such a special status for labour rights? In addressing these questions, this paper searches for a justification for labour law that grounds this body of rules not by reference to welfare or social justice but rather on the imperative to vindicate fundamental rights. Added to this agenda will be the further question, if theories of rights can provide such a justification for labour law, what would be the content of these rules, their scope of application, and their degree of protection for collective organizations of workers? In response to these questions, the argument in this chapter concludes that the case for inclusion of labour rights as universal human rights appears weak. In contrast, it is argued that in a liberal political order the case for constitutionalizing labour rights is much stronger, at least with regard to certain fundamental rights such as the right to work.

A. Are labour rights human rights?

The modern idea of human rights, building on historical antecedents in natural law theory, proclaims that all human beings should be accorded certain fundamental rights by virtue of their humanity. These human rights are universal and imperative, with a special moral weight that normally overrides other considerations. Governments must always observe human rights. This conception of human rights clearly possesses the necessary attribute of peremptory force, but can a justification for labour law rest on this idea of universal human rights?

Some international declarations of human rights appear to secure a key place for labour laws. Articles 23 and 24 of *The Universal Declaration of Human Rights* (1948) are perhaps the pivotal measure in this respect:

in JDR Craig and SM Lynk (eds), *Globalization and the Future of Labour Law* (Cambridge University Press, 2006) 51, 64; RP McIntyre, *Are Worker Rights Human Rights?* (University of Michigan Press, 2008); and TJ Bartkiw, ‘Proceed with Caution, or Stop Wherever Possible? Ongoing Paradoxes in Legalized Labour Politics’, available at SSRN: <<http://ssrn.com/abstract=1513361>>.

¹⁰ ME Streit and W Mussler, ‘The Economic Constitution of the European Community – From Rome to Maastricht’ in F Snyder (ed), *Constitutional Dimensions of European Economic Integration* (Kluwer Law International, 1996) 109; W Sauter, ‘The Economic Constitution of the European Union’ (1998) 4 *Columbia J of European Law* 27; and C Joerges, ‘What is Left of the European Economic Constitution? – a Melancholic Polemic’ EUI Working Papers Law No 2004/13 (EUI, 2004).

Article 23

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

Article 24

- (1) Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holiday with pay.

To these provisions might be added other Articles such as the right to be free from slavery,¹¹ the right to non-discrimination and equal protection of the law,¹² the right to freedom of association,¹³ and the right to social security.¹⁴ This hallowed declaration undeniably supports a basic framework of labour law on the ground that these principles represent inalienable and universal human rights. When the two main Articles dealing with labour law were elaborated into four Articles of the UN Covenant of Economic, Social and Cultural Rights,¹⁵ these declarations of universal human rights plainly provided a solid grounding for the principal elements of a labour law system. For those who worry that labour law cannot any longer rely securely upon its traditional justifications, this route of linking the justification for labour law to the protection of universal human rights is surely extremely tempting.

The uncertain and controversial basis of human rights themselves presents a potential problem in seeking help from this direction. In a sceptical age, the idea that there are natural rights or rights to which every human being is entitled, regardless of their personal identity and geographical location, can be dismissed as at best wishful thinking and at worst a grand delusion that functions as a distraction from more important material issues such as hunger and homelessness. Human rights discourse has its detractors with respect to its mystical or irrational foundations in natural law, its indeterminacy in producing practical normative guidance, and its tendency to emphasize the individual at the expense of recognizing the importance of social institutions and collective solidarity. It is, of course, possible for supporters of human rights as a foundational political discourse to respond to these detractors with attractive and persuasive arguments. For instance, human rights discourse certainly places respect for the dignity and autonomy of the

¹¹ Article 5.

¹² Article 7.

¹³ Article 20.

¹⁴ Article 22.

¹⁵ Articles 6–9.

individual at the core of its framework, and this Kantian framework of treating individuals as ends rather than means offers an attractive starting-point for theories of how government can provide effective coordination of society whilst not becoming an oppressive system of domination. The opening phrase of the *Universal Declaration* reminds us of how respect for the dignity of the individual through rights provides a foundation for freedom, justice, and peace.¹⁶ Furthermore, the inclusion of social and economic rights as well as civil and political rights in that Declaration and other charters and conventions reveals that invocations of human rights need not be confined to a narrow (though nonetheless vital) agenda of securing individual liberty and dignity, but can be used to argue in favour of conditions of material social justice such as adequate housing, health care, and food. The strength of these arguments in favour of the universal human rights discourse has elevated it to one of the most potent normative arguments in contemporary politics, especially, but not exclusively, in international relations.

If one accepts the general framework of belief represented by universal human rights discourse, the question that arises in this context of thinking about the foundations of labour law is whether universal human rights might provide grounding for the normative values espoused by labour law. Are labour rights really the same kind of right as the rights that are central to universal human rights discourse? When one compares, for instance, the rights to dignity and freedom and the right not to be tortured with (say) the right to just remuneration and a paid holiday, we seem to be considering different kinds of rights. Whereas the former present an urgent and weighty moral claim, applicable to every person, in every country, the latter do not seem to present such a compelling moral imperative. Labour rights are important, but the interests they protect do not appear to many people as compelling as, for instance, liberty, security, and subsistence.¹⁷ As Waldron argues,¹⁸ some period of rest from work is important to prevent exhaustion from becoming life-threatening, but a day of rest or an upper restriction on hours of work for this purpose would surely suffice, so this justification would not extend to a paid holiday. Nor do labour rights invariably apply to everyone or universally, but normally only those in paid employment or in employment-like relationships. Furthermore, it seems likely that what will be regarded as fair pay and a reasonable holiday must depend to a considerable extent on what the relevant society can afford, whereas respect for dignity and liberty seems to require observance of minimum standards below which no government should be permitted to operate. Finally, universal human rights are often conceived as timeless fundamental needs, whereas it seems possible that labour rights may evolve according to the system of production, the forms of work,

¹⁶ 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...'

¹⁷ M Risse, 'A Right to Work? A Right to Leisure? Labor Rights as Human Rights' (2009) 3(1) *Law & Ethics of Human Rights* 1, 8.

¹⁸ J Waldron, *Liberal Rights* (Cambridge University Press, 1993) 12–13. Waldron effectively concedes this point by admitting that 'periodic holidays with pay represents a particular culture-bound conception' of the underlying interest in substantial respite from work.

and the division of labour.¹⁹ These four contrasts between universal human rights and labour rights with respect to the moral weight of the claims, their universal applicability, the strictness of the standards, and their variability over time, create a significant doubt whether labour rights are properly classified as universal human rights.

It is puzzling, therefore, how these apparently different sort of rights came to be inserted in the *Universal Declaration*. How did this happen? The best explanation seems to be that the labour rights in the *Universal Declaration* were adapted from the Versailles Treaty that had concluded the First World War.²⁰ That Treaty, which gave birth to the International Labour Office (later International Labour Organization (ILO)),²¹ was not merely concerned with a cessation of war, but sought to address the causes of war that were perceived to lie in aggressive economic competition between states in an increasingly global economy. One of the elements of this solution was to try to ensure social justice for workers by establishing minimum labour standards in binding international law, so that economic competition would not create intolerable economic hardship for ordinary working people and provoke a downward spiral of regulatory competition.²² The outcome of these deliberations was the creation of international labour standards through the International Labour Office that set both minimum mandatory standards and also protected the collective organization of workers for the purpose of collective bargaining. The Versailles Treaty stated that the priorities for minimum standards should include: freedom of association, an adequate wage, a maximum 48-hour week, minimum rest periods, equal pay for women, abolition of child labour, and fair treatment of migrant workers.²³ At the end of the Second World War, in response to the outrages committed by totalitarian governments, the *Universal Declaration* emphasized concerns about dignity and freedom of the individual, but it also included the earlier declarations that were still regarded as relevant, including the provisions on international labour standards. These standards were, however, reformulated into the new language of universal rights. Whereas the Treaty of Versailles only described freedom of association for workers and employers as a right, the *Universal Declaration of Human Rights* reformulated all these priorities for international labour standards in terms of rights. This historical explanation reveals that, at least in their origins, international labour rights were not regarded as universal human rights, but rather as standards concerned to address problems of social justice or welfare caused by international regulatory competition and the globalization of markets.

¹⁹ J Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell, 2007) 128; P Macklem, 'Labor Law beyond Borders' (2002) 5 *Journal of International Economic Law* 605, 617; and T Pogge, *World Poverty and Human Rights* (Polity, 2002) 54.

²⁰ Risse, above n 17.

²¹ Article 387.

²² Part XIII, Section 1, Recitals: 'Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.'

²³ Article 427.

This historical explanation of the origins of the idea of universal labour rights does not lead to a normative conclusion that there are not and should not be international labour rights. But it does lend support to the view, based on the contrasts between most universal human rights and labour rights, that the latter are not compelling candidates for presence in the pantheon of the former. If so, the plan to use the discourse of universal human rights to provide fresh secure foundations for labour law begins to look flawed. If we cannot seriously maintain that labour rights (or at least most of them) qualify as universal human rights, we cannot in good faith invoke universal human rights as the basis for the justification of labour law.

Yet we should notice that the above argument against using universal human rights as a foundation for labour law makes one important presupposition.²⁴ It relies on a particular definition of universal human rights that stresses how human rights are universal, natural, inalienable, and possessed by human beings simply by virtue of their humanity or ‘personhood’.²⁵ This view of universal human rights has its origins in ideas of natural law: the content of human rights must be discoverable by reason or rational intuition about human nature; they represent a pre-political moral foundation for all human societies.²⁶ Governments that systematically ignore or deny those rights can therefore be regarded as immoral and illegitimate regimes, not deserving of obedience on the part of their citizens and not secure in their sovereign powers from interference by the international community. Human rights discourse has been used in international law and international relations to justify interference in the internal affairs of sovereign states. For this purpose, it is essential to promote a narrow but extremely morally compelling account of rights, so that enforcement measures including war may be justified. For the purpose of justifying the need for labour law as a system of entrenched rights in every market economy, however, a non-universalistic, time-bound, less absolute and slightly less morally compelling, though still forceful constitutional type of right may prove viable.

B. Fundamental rights in liberal theories of justice

Theories of fundamental rights provide a key ingredient in liberal theories of justice. The idea of rights is employed to protect the liberty of the individual both against the state and other citizens. In his *A Theory of Justice*,²⁷ John Rawls provides a modern sophisticated interpretation of a liberal theory of justice. In brief,

²⁴ Charles R Beitz, ‘Human Rights and The Law of Peoples’ in DK Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press, 2004) 193.

²⁵ J Griffin, *On Human Rights* (Oxford University Press, 2008).

²⁶ The shift in language from natural rights to human rights avoids ontological questions about their existence by accepting that rights may merely rest upon a deep moral and political commitment (not ‘nature’ or ‘God’), and simultaneously stresses the responsibility of states and governments as the principal addressees of rights: Pogge, above n 19, 57.

²⁷ (Oxford University Press, 1972). Although the main ideas of Rawls’ theory are presented in that book, a subsequent book modified and explained many details, so this later work is used extensively here as well: J Rawls, *Political Liberalism* (Columbia University Press, 1993).

he asks the following question: what are the minimum conditions in terms of rules and political institutions that a reasonable person, who is ignorant of what goals and preferences he or she may have and how successful in achieving them he or she will prove to be (a condition known as the ‘veil of ignorance’), would set before agreeing to become a member of a society that had the power of coercion over its citizens? One condition, for instance, might be a requirement that all important decisions should be taken democratically or at least through some representative democratic process. Another condition that a reasonable person would probably require is that punitive coercion should not be exercised without a fair trial in accordance with the law. This line of reasoning quickly builds up support for the view that a democratic political system governed by the rule of law would be the conditions set by the reasonable person. Rawls uses this method of argument to insist that the reasonable person would in fact demand that the political arrangements should include some inalienable and inviolable individual rights. Without following all the intricacies of Rawls’ arguments, is it possible to use this method of philosophical reasoning about the basic conditions of justice in a society in order to construct essential or fundamental labour rights, which in turn would provide the theoretical foundation for a system of labour law?

It is important to understand that Rawls’ method in *A Theory of Justice* does not produce a blueprint for an ideal society, the goal towards which we should be aiming. He is merely concerned to articulate what kind of insurance or minimum guarantees that a rational person would demand before willingly submitting himself or herself to a political association with the power of coercion. He argues that these guarantees would comprise firm protection for some individual rights and a fairly rudimentary criterion for steering the economy towards a pattern of welfare distribution that protects to some extent the position of the least well off. These are the two principles of justice that he argues would emerge from rational deliberation.

- (a) Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
- (b) Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.²⁸

Rawls acknowledges that the model he produces may not be suitable for all societies, though it should be applicable to all developed societies.

Can we use this method of justification for fundamental rights as a philosophical grounding for protection of fundamental labour rights that would provide the basic principles on which labour law might be constructed? These rights would not be the same as universal human rights, owed to every individual simply by virtue of being a human. This method necessarily confines the rights to those who have

²⁸ *Political Liberalism*, above n 27, 291.

(hypothetically) consented to becoming a member of a community. The purpose of fundamental rights or ‘equal basic liberties’ in Rawls’ scheme is to provide essential guarantees for the individual against the potential misuse of power by the state. These rights are intended to provide an inviolable protection for the individual, even when the state may be pursuing beneficent purposes such as seeking to improve the welfare of society as a whole. The rights place constraints on the pursuit of welfare goals (as well as less attractive goals such as oppression, discrimination, and terror). The rights define certain basic interests of individuals, which they will not rationally wish to jeopardize, even in return for the benefits of membership of an ordered society. Most importantly, the rights represent a special group of individual interests that are so important that they should always (subject perhaps to wartime conditions, national emergencies, and the like) trump countervailing considerations such as welfare and social justice.

Readers familiar with Rawls’ works will be aware that he does not reach the conclusion that fundamental labour rights would be agreed during the hypothetical bargain between reasonable people. But that is beside the point here, because the aim is to use Rawls’ philosophical method rather than adopt his precise conclusions, and Rawls himself invites a continuing dialogue to refine his conclusions. Nevertheless, it is worth noticing how close Rawls comes to providing foundations for the subject of labour law, and why, ultimately, he does not do so.

1. The argument for fundamental rights

Assuming (behind the veil of ignorance) that the rational person does not know whether he will be an employer, a worker, or unemployed, but he or she knows that in a market economy most people earn the necessary income to support themselves and their families by taking a job, and that workers spend a large proportion of their time in the workplace and forge many of their social relations and opportunities through their experience in the workplace, what protective guarantees would the rational person insist upon? Rawls argues at length for the view that a rational person would conclude that everyone is very strongly committed to certain individual interests, which he names ‘primary goods’. He identifies five kinds of primary goods, which are, in summary: (1) civil and political liberties such as freedom of thought; (2) freedom of movement and free choice of occupation against a background of diverse opportunities; (3) powers and prerogatives of offices and positions of responsibility; (4) income and wealth; (5) the social bases of self-respect, so that the basic institutions protect the citizens in developing a sense of their own worth as persons and enable them to advance their aims and ends with self-confidence.²⁹

²⁹ *Political Liberalism*, above n 27, 308–9. This list of primary goods omits some undoubted primary goods such as subsistence and security: H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1980). Rawls seems to presuppose that these basic conditions will be met in a just society with a certain level of economic development, though security interests may be covered to some extent by the civil liberties protected under the first principle of justice, and subsistence could be met by the Difference Principle.

Each of these primary goods has considerable bearing on the workplace and labour law, some more obviously than others. Item (2) amounts to what is often meant by the idea of the right to work. Item (4) is similarly closely approximate to the right to fair remuneration. The other primary goods in Rawls' list can also without difficulty be related to the workplace. Accepting that the workplace necessarily involves constraints on freedom and some kind of hierarchical organization for the purposes of efficient coordination, it is not difficult to anticipate that some civil liberties under (1) such as privacy and freedom of association may need protection, that fair treatment in the workplace provides an institutional basis for self-respect under (5),³⁰ and that under (3), though Rawls has primarily in mind the powers and responsibilities of government, this interest in good government can be applied to the exercise of power by managers. Given the importance of employment in the lives of most people, this close coincidence between the primary goods defined by Rawls and important interests of workers is hardly surprising. It is the next step in Rawls' argument that proves more troubling for the task undertaken here.

He draws his famous distinction between the 'right' and the 'good', and argues for the priority of the right in a scheme of justice. His assumption here, which is characteristic of liberal political theories that value liberty or individual freedom highly, is that citizens have different, incommensurable, and to some extent irreconcilable conceptions of 'the good', or what it is to have a good life, though they should, after reasonable discussion, Rawls believes, accept what he terms the primary goods as basic ingredients for their diverse plans. This reasoning leads to his two principles of justice: in the first principle of justice, the basic liberties viewed as primary goods in (1) above are given priority over all other interests or primary goods. They are protected as rights, whereas other interests take second place, in the second principle of justice. Civil and political rights, which include the right to own personal property, deserve this priority over other interests, according to Rawls, because they guarantee the freedom or capacity necessary to pursue differing conceptions of the good. Freedom of thought or conscience, for instance, is necessary for individuals to develop their own ideas about how to live their lives, rather than to have their plans dictated for them by a particular religion or political ideology. In turn, freedom of thought or conscience needs to be secured in practice by other key rights such as freedom of speech, freedom of association, and freedom of religion. The priority of the civil and political rights is justified because they are essential guarantees of a liberal society, one in which each person can define their own goals and pursue them, capacities which Rawls regards as fundamental moral requirements for a just political system. To secure that priority for civil and political rights, these rights are given priority over the other primary goods. In this sense, the rights are trumps over other welfare and egalitarian policies, which are contained in the second principle of justice, known (in its second phrase) as the Difference Principle.

³⁰ Cf Hepple, above n 82: 'Our rights at work are "precious jewels" that give us a sense of identity, self-worth and emotional well-being and so enable us to contribute to society.'

2. The expansion of fundamental rights to include labour rights

Although these arguments seem highly persuasive ones for providing secure protection for civil and political liberties, the question arises why other primary goods should not also receive an equivalent measure of protection in the basic scheme of justice. Rawls' response to that question is, primarily, that the second principle of justice does provide a significant measure of protection of those interests in other primary goods, with its emphasis on fair equality of opportunity, and the requirement that social and economic equalities should be tolerated only if they are to the greatest benefit of the least advantaged. He then argues that to go any further in the protection of primary goods by giving them a guarantee framed as a right would be 'either irrational or superfluous or socially divisive'.³¹ Rawls' argument at this point is essentially that guarantees of other primary goods would lead to inefficiency in markets (which would be irrational to choose), or would be superfluous because of the second principle of justice, which secures adequately or at least as fairly as possible the other primary goods (social justice), or it would be socially divisive because it would lead to competing claims being raised about needs that are essential for particular life plans or conceptions of the good to be pursued.

Let us test this argument against a particular proposal. Suppose, for instance, it was argued that the right not to be unjustly dismissed by an employer should be elevated to the status of a protected right like a civil and political liberty.³² This right could be justified by reference to a number of the primary goods, perhaps even all of them. For instance, the right might defend workers against interference with their civil liberties by employers, or it might protect workers against being treated with little respect in the workplace. Would the introduction of such a right be irrational, superfluous, or socially divisive?

It would be irrational, according to Rawls, if the right led to inefficiency, such as the undesirable effects of lowering wages and/or levels of employment because the right imposes costs on employers. We return thus to the allegation of inefficiency and harm to welfare made by neo-classical economics against all labour rights. Although simple assumptions about the cost of legally protected rights for workers are open to question on empirical grounds, even if there is a problem with labour rights regarding the creation of inefficiency, that point seems a strange argument for Rawls to rely upon. His principles of justice are deliberately constructed to provide an alternative to welfare maximization or efficiency, in order to protect the freedom of the individual to pursue his or her own conception of the good life. To achieve that freedom adequately requires individual access to the other primary goods, even if that causes some inefficiency. Rights to the benefits of the other primary goods, which might include the right to protection against unjust dismissal, can only be

³¹ *Political Liberalism*, above n 27, 329.

³² It is important to note at this point that Rawls does not rule out the possibility that such a law might be chosen by the democratic process as a way of securing primary goods. The question here is whether the right should be elevated to the equivalent status as civil liberties in Rawls' scheme, so that the existence of the right is non-negotiable, a fundamental condition of membership in a just society.

avoided if those goods are secured adequately by the second principle of justice. So this first point collapses into the second claim that rights protecting other primary goods would be superfluous.

Would a right to protection against unjust dismissal be superfluous in view of the second principle of justice? Under the second principle of justice, it seems possible that legislation might be enacted to protect certain interests of workers. Certainly the fair equality of opportunity requirement would mandate anti-discrimination laws. But the implications of the requirement for ensuring that inequalities are arranged in order to maximize the position of the least well off seem to be unclear with respect to many labour rights. This principle could be interpreted to justify a generous social security system funded through taxation rather than to regulate the workplace directly. On that interpretation,³³ workers would not require protection against unjust dismissal, because if they became unemployed as a result of a dismissal, the social security system would provide for their needs. If that interpretation of the second principle of justice is correct, it reveals (in my opinion) how inadequate the principle is in securing the primary goods. It seems to view a job as merely a means to the end of securing an income. Whilst that may be true for some workers, most people attach more significance to their jobs. The job helps to achieve other primary goods such as self-respect, and can be a way of developing other capacities through dialogue and social interaction.³⁴

Finally, Rawls argues that to extend the range of protected rights beyond civil and political liberties would be divisive and could not be agreed in the original position. His concern here is that a more detailed scheme of rights would have distributive consequences, so that rational people would (correctly) perceive that claims for rights were really just claims for superior resources, which would inevitably provoke irreconcilable disagreements. He seems to overlook this problem of distributive consequences in his defence of civil and political liberties, which of course involve costs as well.³⁵ So the fact that there are distributive consequences should not be regarded as a decisive reason for rejecting candidates for rights. The question rather should be whether there are significant distributive consequences, which are likely to provide noticeably unequal or inequitable shares to some people. Civil and political liberties have moderate costs associated with them, and do not lead to unequal shares.³⁶ Similar arguments may be made about a right not to be unjustly dismissed: the costs to business and the legal system should be modest, and everyone is potentially an employee who would benefit from the protection. Other labour rights, however, such as a minimum wage or equal pay for men and women,

³³ This interpretation of limiting the Difference Principle to taxation and welfare provision has been challenged, eg: AT Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law J* 472; and KA Kordana and DH Tabachnick, 'Rawls and Contract Law' (2005) 73 *Geo Wash L Rev* 598.

³⁴ CL Estlund, 'Working Together: The Workplace, Civil Society, and the Law' (2000) 89 *Georgia LJ* 1; and A Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing, 2009).

³⁵ S Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton, 1999).

³⁶ Do accused criminals benefit disproportionately from the institutions associated with the Rule of law? In practice, yes, but presumably everyone is vulnerable to false accusations, so we all benefit from constraints upon such practices.

would more clearly engage Rawls's objection to the inclusion of divisive issues among the protected rights.

These rebuttals to Rawls's argument against social and economic rights do not secure the case for including some labour rights in the privileged group of values under the first principle of justice. More work needs to be done to demonstrate that, in order to secure some or all of the primary goods identified by Rawls, some further rights need to be added, and in particular that some of those rights should be key labour rights. Even so, we can feel reasonably confident that, given the centrality of work in the achievement of primary goods, some special protections for workers might be found to be necessary. It is not difficult, for instance, to see how the primary goods (2) and (4) could be used to justify some version of a 'right to work' that included the liberty to choose an occupation (subject to the capacity to do the job) and the right to be paid (in cash or its equivalent) for the work.³⁷

3. The content of the fundamental labour rights

Without exploring in any further detail how Rawls's method might be employed to justify at least some labour rights becoming fundamental constitutional guarantees, enough has been said, I hope, to explain at least the potential of this method for providing foundations for a system of labour law. Before leaving this investigation, however, it is necessary to highlight a probable implication of this method for grounding labour law in fundamental individual rights. This implication is that the fundamental rights seem more likely to secure individual employment rights than rights to collective bargaining and to strike.

To understand why this is so, recall that Rawls's method requires one to ask what guarantees an individual would require before accepting subjection to a state under the circumstance that the individual is ignorant of his or her lot in life. Even behind this veil of ignorance, it seems plausible that an individual would be concerned about enjoying a right to work, given how important work can be for income, meaning, and a sense of self-worth. Furthermore, it seems likely that the rights produced by Rawls' mode of reasoning about a hypothetical contract would emphasize the significance of civil liberties in the workplace, though this concern has not, at least historically, been at the forefront of issues addressed by labour law. If the rational person is worried, for instance, about the protection of privacy from surveillance by the government, so too would that person be concerned about similar intrusions by other powerful actors such as employers. This concern for civil liberties could extend to freedom of association, including the freedom to join a trade union, provided that it was recognized that trade unions function not just to

³⁷ As in Art 6, International Covenant on Social, Economic and Cultural Rights: 'The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.' On the meaning of the right to work: Bob Hepple, 'A Right to Work?' (1981) 10 ILJ 65; G Mundlak, 'The Right to Work: Reflexive Linking of Human Rights and Labour Policy' (2007) 146 International Labour Review 3–4; and J Nickel, 'Is There a Human Right to Employment?' (1978–1979) X Philosophical Forum 149.

serve the economic interests of workers but also to provide a voice for workers in the political process. But behind the veil of ignorance, the individual would not know whether his or her interests might be served or hampered by collective bargaining, or indeed whether or not his or her political beliefs might be favourable or hostile to trade unions. Under these conditions, it seems improbable that all reasonable people would agree to the necessity of having a fundamental guarantee that protects collective bargaining and the right to take industrial action. Instead, these questions would be left to be settled subsequently through the agreed democratic legislative process. If that line of reasoning is correct, this strategy of grounding labour law in fundamental rights would only serve the purpose of guaranteeing some aspects of labour law, particularly those relating to the individual interests of all workers, rather than providing a justification for the necessity of guaranteeing the right to collective bargaining as a constitutional right.

4. Dignity

So far we have concentrated our attention on a particular strand in liberal theories of justice and fundamental rights. Rawls awards paramount place to individual liberty or freedom. Other liberal theorists, whilst also emphasizing liberty, attach greater weight to closely related values such as individual ‘autonomy’ and ‘dignity’. The idea of autonomy is often understood to include not only the negative liberty of freedom from constraints, but also positive freedom to be able to choose a worthwhile and satisfying life.³⁸ Similarly, the concept of dignity extends beyond freedom of the individual to the opportunity to live a life with respect. A particular attraction of the idea of dignity, complex though it seems on closer investigation,³⁹ is that it can be regarded as a modern statement of the slogan ‘labour is not a commodity’, which itself has often been regarded as the guiding thread of justifications for labour law. The significance for our purposes of these other liberal theories is that they seem to offer a greater potential to justify labour rights as fundamental rights.

The emphasis on individual dignity, for instance, leads authors to stress the importance of satisfying the basic material needs of individuals, such as food, shelter, and health care. To ensure this fundamental requirement of justice, these liberal theorists often argue that as well as civil and political liberties, fundamental rights should include social and economic rights, without which civil liberties would be worth little and individual dignity would not be secured. Jeremy Waldron, for instance, makes this argument in two ways.

His first argument is that the protection of civil liberties is not much use to someone who is dying of hunger, suffering from untreated debilitating disease, or who has no shelter or security. Basic needs such as subsistence, shelter, clothing, and health have to be met if the civil liberties so cherished by liberals are to be worth

³⁸ Raz, *The Morality of Freedom* (above n 6).

³⁹ C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European J of International Law* 655.

having at all.⁴⁰ ‘If we truly respect human agency as an end in itself, we must follow that end where it leads and, in the circumstances of human life, that may well require us to attend to the needs of persons whose ability to function as agents is imperilled by poverty or disease or by the fear of those predicaments.’⁴¹ On this general point, there is probably no disagreement with Rawls, who tries to address the problem through his second principle of justice. Waldron seems to conclude from this argument, however, that at least some social and economic rights should be guaranteed, in order to prevent the level of destitution that would deny individuals any dignity at all (that is, undermine their civil liberties). What Waldron does not explain fully is why these needs have to be or should be satisfied by the establishment of rights in the strong sense. Presumably his point is that if civil liberties have to be protected as rights, necessary conditions for the enjoyment of those rights must also be defended as rights.

Waldron’s second argument more directly addresses this issue of the priority of socio-economic claims. The argument now is that ‘any moral theory of individual dignity’ is plainly inadequate if it does not take issues such as death, disease, malnutrition, and economic despair into account.⁴² He argues that the best way to express this moral imperative to address basic human needs in political discourse is to give the claims of the needy the strong claim provided by the language of rights. These rights in Waldron’s analysis are addressed to the state, which is under a correlative duty to coordinate efforts to meet these needs through progressive taxation, the institutions of the welfare state, and other regulation. He correctly observes that this framework necessitates the weakening of the priority attached to respect for private property in most liberal theories, so that any right to peaceful enjoyment of possessions must be qualified by the need to satisfy basic social and economic rights through taxation and redistribution.⁴³ Furthermore, because social and economic rights make demands for scarce resources, these rights cannot have quite the same peremptory force that might be attributed to some civil and political liberties. Nevertheless, Waldron concludes that in a society concerned deeply about the dignity and autonomy of individuals, ultimately social and economic rights are just the other side of the coin from civil and political liberties.

Although Waldron makes a compelling case for the recognition of some social and economic rights in a liberal political theory based upon autonomy and dignity, his arguments may not extend so far as to encompass most labour rights, but may be confined to claims that relieve destitution or provide a social minimum standard of living or satisfy urgent moral demands for food, shelter, and perhaps health care and education.⁴⁴ Indeed, given the scarcity of resources, there would have to be

⁴⁰ Cf H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1980) 19: ‘Rights are basic in the sense used here only if enjoyment of them is essential to the enjoyment of all other rights.’ It is not clear, however, how any right could satisfy such a stringent test: T Pogge, ‘Shue on Rights and Duties’ in CR Beitz and RE Goodin (eds), *Global Basic Rights* (Oxford University Press, 2009) 113, 122.

⁴¹ Waldron, above n 18, 8.

⁴² Waldron, above n 18, 11.

⁴³ Waldron, above n 18, 18–22.

⁴⁴ Nickel, above n 19, 139.

trade-offs between these social and economic rights, and some, such as the right to a paid holiday, might not be achievable at all (whilst meeting other basic needs). Even worse than this conclusion for our project seeking a justification for labour law, if we concentrate our attention on basic material needs, such as food, shelter, and clothing, as Waldron tends to do to make his argument rhetorically powerful, it is unclear that the issues addressed by labour law regarding the labour market and the workplace are really necessary features of imperative social rights at all. Although it is true that most people are likely to satisfy their basic needs of this kind through paid employment, it does not follow that it is necessary for there to be labour rights or that to address those needs the state would have to regulate employment. A government could instead simply say that if the labour market failed to satisfy basic needs or social rights, the welfare state would do so through the provision of income or free services. This problem is essentially the same as the one identified in Rawls' work: the Difference Principle can be satisfied by taxation and welfare benefits, without the insertion of individual or collective labour rights into the basic constitution of society. In short, there is a distinct possibility that this route for justifying labour law by means of providing a compelling philosophical argument for social and economic rights would end up providing no justification at all for labour rights and a labour law system based upon it.

C. Conclusion

Before trying to state a conclusion to be drawn from these philosophical reflections, it is perhaps helpful to restate the nature of the enquiry conducted here and to point out the issues that have not been addressed. The question posed has been a narrow one. In view of the challenges to the existence of labour law emanating from theories of welfare and efficiency, is it possible to identify firm philosophical grounds for justifying the need for a labour system in a theory of fundamental or constitutional rights?

An answer to that question does not address in any detail a host of other questions that might be asked about labour law and rights. Using human rights as a strategic rhetoric may serve labour activists well in some instances, even if we conclude that the philosophical grounding of labour rights as human rights is poor or non-existent. Similarly, employment lawyers may find that they can succeed in advancing certain kinds of claims by invoking the rights contained in Bills of Rights and other legally binding conventions. Again, any weakness of philosophical underpinnings for labour rights should not deter lawyers from adopting these legal strategies to serve worthwhile ends. Nor do any doubts about the strength of claims for labour rights prevent us from trying to describe and analyse existing labour laws from the perspective of individual and group rights. On the contrary, there is good reason to believe that such a description may provide great insights into the central issues of the subject. Nor should the discussion cast any doubt on the validity of the strategy of using politics and the law to require states to achieve a

social minimum for their citizens, as described in a charter of social and economic rights. Finally, it is worth observing that in so far as ideas of labour rights have been linked to concerns to prevent detrimental effects on workers resulting from the intensification of competition between economies, the problem remains and is probably worsening, so that the case for seeking agreement on and enforcement of core labour standards remains as compelling as ever.⁴⁵

The purpose of this chapter has been far narrower than the important issues raised in the previous paragraph. The enquiry has been about the justifications for a distinct scheme of legal regulation known as labour law. If (and this is a big ‘if’) the traditional justifications for labour law in terms of welfare or social justice have ceased to be convincing, is it possible to articulate a plausible case for the need for labour law based on a doctrine of fundamental rights? This doctrine would employ rights as powerful exclusionary reasons, so that the rights would override other considerations, in particular concerns about efficiency. To do the job assigned to them in this philosophical enquiry, the rights would have to possess this strong or urgent quality, but at the same time they would have to be sufficiently concrete to provide credible foundations for a body of law that resembles current labour law systems. None of the theories we have considered quite match up to these demands.

A doctrine of universal human rights, based upon natural law ideas, satisfies the test of possessing the quality of a moral imperative, but it was argued above that the sorts of labour rights that might provide the foundation for a labour law system do not share a similar moral imperative force. The inclusion of labour rights in political proclamations of universal human rights was explained as a method for addressing problems arising from globalization of the economic system, not as a coherent articulation of any philosophical doctrine regarding universal human rights with a suitably strong moral imperative force.

A more promising line of argument turned out to be an adaptation of the philosophical methods used in liberal political theory. The central idea in liberalism of identifying fundamental interests of individuals, such as freedom and dignity, and guaranteeing them through a strong legal framework, seems to have the potential of justifying some fundamental labour rights. Running counter to that potential, however, was a willingness in liberal theories to relegate the task of defending basic economic interests, such as those addressed by the right to work, through welfare measures funded from general taxation rather than constitutionalizing labour rights along with civil liberties. Rawls’ theory was criticized in this respect, because even though he recognized the significance of work to individuals in his list of primary goods, his two principles of justice only partly respond to this urgent demand by providing a justification for anti-discrimination laws. Some labour rights, such as a right to work, might also have to be included in a coherent restatement of liberal principles of justice in order to provide sufficient guarantees of the primary goods. From a core right, such as the right to work, it should be possible to derive support for other fundamental rights, such as general protection

⁴⁵ Arthurs, above n 9, 51; and K Banks, ‘The Impact of Globalization on Labour Standards’ in Craig and Lynk, above n 9, 77.

against discrimination on grounds unrelated to job performance and protection against unjust dismissal. Furthermore, the need to protect civil liberties against oppression by employers would also have to be included in a coherent liberal theory of justice. But the individualistic approach of liberal political theory does not readily embrace collective or group rights, so the elevation of solidarity rights, such as the right to strike, to constitutional status might not be warranted within this theoretical framework.