

Advancing human rights, capabilities and non-domination at work

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What is the best theoretical framework that can capture the type of injustice that people experience at work and justify legal intervention? Labour law scholars have been grappling with questions such as this, and have offered accounts explaining and applying to the employment context theoretical principles often developed to explain the relationship between the state and its citizens.¹ It is typically said that there is inequality of bargaining power at work, as it is the employer who owns the means of production and this creates dependency of the workers making them vulnerable. As a result, there is a relation of submission and subordination, which can lead to injustice.² In this chapter I focus on three justifications for labour intervention, which have been influential in academic literature, that involve dignity and freedom, rather than distributive justice, and have been employed to justify the law of work: the capabilities approach, the idea of non-domination and the concept of human rights. I argue that each of these frameworks provide insights which can support legal regulation and promote justice at work. However, to be fit for purpose they need to have the structural inequality of power that characterises free market employment relationships at the forefront of their considerations.

Human Capabilities at Work

The theory of human capabilities was originally developed by Amartya Sen and later by Martha Nussbaum and others. According to Sen, the capabilities approach places primary attention to freedom as a social good which ought to be maximised.³ The insight that the maximisation of freedom should be fundamental in our understanding of human well-being was original and highly influential in analyses of international development, serving as a better alternative to economic metrics of human well-being. On his account, what matters is not the per capita income. Instead, state authorities have an obligation to make people capable to pursue a series of valuable functionings. A functioning is an achievement, while a capability is the ability to achieve.⁴ To put it differently, a capability can also be described as a substantive opportunity or freedom to engage in a functioning.⁵

Labour law scholars have considered the implications of Sen's account for their discipline.⁶ Building on Sen, Langille challenged the traditional justification of labour law that focused on inequality of power at work, and explained that human capital is at the heart of human freedom.⁷ He argued that:

labour law is at its root no longer best conceived as law aimed at protecting employees against superior employer bargaining power in the negotiation of contracts of employment.

¹ See Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*, OUP, 2011; Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law*, OUP, 2018, hereafter cited as *Philosophical Foundations of Labour Law*.

² Hugh Collins, 'Is the Contract of Employment Illiberal?', in *Philosophical Foundations of Labour Law*, p 48; Guy Davidov, *A Purposive Approach to Labour Law*, OUP 2016, Chapter 1. Chapters xx, this volume.

³ Amartya Sen, *The Idea of Justice*, OUP, 2009, p 231.

⁴ Amartya Sen, 'The Standard of Living: Lives and Capabilities', in Hawthorn (ed), *The Standard of Living*, Cambridge University Press, 1987, p 20 at 36.

⁵ Amartya Sen, *Development as Freedom*, OUP, 1999, pp 74-76.

⁶ Brian Langille (ed), *The Capability Approach to Labour Law*, OUP, 2019.

⁷ Brian Langille, 'Labour Law's Theory of Justice' in *The Idea of Labour Law*, above n 1, p 112.

That is now an empirically limited and normatively thin account of the discipline. Rather, we can say that labour law is now best conceived as that part of our law which structures (and thus either constraints or liberates) human capital creation and deployment.⁸

The purpose of labour law, then, is the ‘regulation of human capital deployment; its motivation is both the instrumental and intermediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom’.⁹ Langille may be correct that the idea of inequality of power in negotiating the employment contract is not a sufficient justification for labour law. The employment relationship is often described as one of subordination, which involves the operation of the relation over long periods of time, and it is the power that the employer can exercise in that context that can be problematic. For this and other related reasons, critics have highlighted that Langille’s justification of labour law does not account for many aspects that are central in the discipline, including the weight to be given to employers’ freedom that is often conflicting with employees’ freedom, and its unsuitability for supporting crucial trade union rights.¹⁰ If we agree that the maximisation of freedom is the primary purpose of the law of work, employers will claim that they should also be free to run their business. They may further claim that they should be free not to engage in collective bargaining with workers. To maximise freedom, all these claims would have to be upheld, but promoting the employer’s freedom will often be detrimental to workers. The structure of the employment relation, with submission and subordination in its heart, cannot fit easily in this framework where the maximisation of freedom is the utmost consideration.

Langille explained that by deploying Sen’s capabilities approach in the employment context, he does not reject the position that there are concerns such as inequality of bargaining power. However, he insisted that Sen’s framework provides us with fresh tools to develop labour law, including a better understanding of human rights law.¹¹ On his view, the capabilities approach complements (rather than replacing) existing insights and brings new resources to understanding the discipline. He acknowledged that any account of labour law has to be based on or at least take note of economic and political power, and claimed that the capabilities approach helps understand why this is the case.¹² It is true that without analysis of inequality and power at its centre, any account of labour law will be limited for it will not be able to place the structure of the market as the background that creates imbalance of power in the employment relationship. However, the question whether Sen’s analysis of capabilities is the best way to understand imbalance of power at work remains.

Nussbaum’s account of human capabilities may also be promising as a justification for labour law. This analysis has close links to human rights as we find them in constitutions and other legal documents. Nussbaum developed a list of central human capabilities, and made commitments as to their content.¹³ According to her, the central capabilities are: 1. Life; 2. Bodily health; 3. Bodily integrity; 4. Senses, imagination and thought; 5. Emotions; 6. Practical Reason; 7. Affiliation (friendship and respect); 8. Other species; 9. Play; 10. Control over one’s environment (political

⁸ Ibid, p 104. See also B Langille, ‘Human Freedom: A Way Out of Labour Law’s Fly Bottle’ in *Philosophical Foundations of Labour Law*, p 141; B Langille, ‘What is Labour Law for? Implications of the Capability Approach’, in Langille (ed), above n 6, p 122.

⁹ As above n 7, p 114.

¹⁰ Hugh Collins, ‘What Can Sen’s Capability Approach Offer to Labour Law’, in Langille (ed), above n 6, p 21; Guy Davidov, ‘The Capability Approach and Labour Law: Identifying the Areas of Fit’, in Langille (ed), above n 6, p 42; Alan Bogg, ‘The Constitution of Capabilities: The Case of Freedom of Association’, in Langille (ed), above n 6, p 241.

¹¹ Langille, in Langille (ed), above n 6, p 133.

¹² Ibid, 134.

¹³ Martha Nussbaum, *Creating Capabilities – The Human Development Approach*, OUP, 2011, p 70, hereafter cited as *Creating Capabilities*.

and material).¹⁴ Nussbaum explained that her version of the capabilities approach focuses on areas of freedom that are of such importance that their violation makes a life undignified.¹⁵ She did not support a general principle of maximising freedom but endorsed a liberal account of capabilities. She was clear that her theory does not require that people pursue functionings, but simply that they are capable of pursuing them.¹⁶ Capability, namely freedom to pursue functionings, is the central idea, and not functionings themselves.¹⁷ In this way, her account is a liberal account which focuses on areas of human well-being that are particularly important.

Nussbaum's account of capabilities brings it close to an understanding of human rights as preconditions of a good life.¹⁸ Yet, as can be seen from the list that she developed, work was not her central concern. She did not include a capability to work explicitly in her list and has been criticised for this reason for underestimating work as a basic human good.¹⁹ However, she recognised a capability to exercise control over one's material environment, by inter alia having a 'right to seek employment on an equal basis with others [...]'.²⁰ Work is one of the functionings through which people can exercise control over the material environment thanks to the income generated from it. On this analysis, work is valuable for the resources it generates for it is seen as a means by which we get access to material goods.

Nussbaum's account may also support the protection of capabilities at work. According to her, a person has to be 'able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.'²¹ The capabilities of practical reason and affiliation come into play here. The capability of practical reason, namely 'being able to form a conception of the good and to engage in critical reflection about the planning of one's life',²² and the capability of affiliation, namely being able 'to engage in various forms of social interaction,' and 'having the social bases for self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others',²³ both play an architectonic role in Nussbaum's account, which means that the exercise of these two capabilities affects all other capabilities.²⁴ The capability of affiliation supports protection of developing personal relations at work, as well as protection of workers' associations, which can also be supported by the capability to control the material environment. This can include collective bargaining and a right to strike.²⁵ The capability of practical reason can lend support to freedom of expression at work. In addition, Nussbaum's list of capabilities also includes a capability to play, which is about being able to engage in recreational activities. This capability brings to mind the inclusion of a right of workers to rest and leisure, including holidays with pay, which we find in article 24 of the Universal Declaration of Human Rights.

Theories of capabilities were not developed as a general theory of justice at work, of course. They are theories of human flourishing. However, Nussbaum's account can be extended to apply at work more naturally than Sen's analysis of freedom. Still, as work is not her central concern, it is

¹⁴ Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273, pp 287-288.

¹⁵ Nussbaum, *Creating Capabilities*, p 31.

¹⁶ Nussbaum, *Creating Capabilities*, p 25.

¹⁷ Nussbaum, above n 14, p 289.

¹⁸ See, for instance, S. Matthew Liao, 'Human Rights as Fundamental Conditions for a Good Life', in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights*, OUP, 2015.

¹⁹ Andrea Veltman, *Meaningful Work*, OUP, 2016, p 49.

²⁰ Nussbaum, *Creating Capabilities*, p 34.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*, p 39.

²⁵ See further, Bogg, above n 10.

not a theory that accounts for the great bulk of labour law provisions that we have or ought to have to protect workers from exploitation. Nussbaum herself expressed specific scepticism about the role of trade unions and collective bargaining in practice in her work. 'It is the old story', she said. '[M]en defining "work" as what they do, and refusing to grant that dignified title to what women do'.²⁶ This explains in her view why women's work at home is under-recognised and typically unpaid.

To conclude this section, principles of capabilities theories were originally developed to address people's human flourishing and the role of the state. Even though elements of these theories may be usefully extended in the employment context, they cannot immediately be used to counteract the power of the employer against workers and address the risk of workers' exploitation that is due to the structure of the market.

Non-domination

A different account of freedom, freedom as non-domination, also caught the imagination of labour lawyers seeking to justify labour regulation.²⁷ Philip Pettit, one of the most influential thinkers in the area, developed the idea of freedom as non-domination as an alternative to freedom as non-interference that was a classical liberal account. He described domination as a relationship with three aspects. A person dominates another if a) they have the capacity to interfere b) on an arbitrary basis c) in certain choices that the other person is in a position to make.²⁸ It is important to highlight that this account of freedom as non-domination protects not only from actual interference but also from any power to interfere. On Pettit's view this is a rich account of freedom that does not need to be supplemented by principles of social equality.²⁹ Freedom as non-domination has also been described as a precondition of human flourishing.³⁰

What are the implications of this account of non-domination for the law of work? What legal framework do we need in place to protect workers from domination? I will first address the role of the contract of employment and the right to exit the employment relationship as possible safeguards against domination, before turning to other workplace rights. It could be said that if workers have agreed to their working conditions through their contract, employer interference is not arbitrary as the worker has consented to limitations of freedom.³¹ However, this response is not satisfactory given that employment contracts are offered to workers by employers on a 'take it or leave it' basis, against a background of job scarcity (and particularly scarcity of good jobs). The contract of employment, in other words, does not signify that interference of the employer with the freedom of workers is not arbitrary, because the contract itself can contain provisions that can be used by employers to dominate workers.

A different way to counteract the power to dominate workers may consist in the existence of a right to exit the employment relation.³² To the extent that workers have a right to leave their job, it can be said that their employer cannot dominate them. This too is questionable as a safeguard

²⁶ Martha Nussbaum, 'Labor Law and the Capabilities Approach', in Langille (ed), above n 6, p 62 at p 80.

²⁷ David Cabrelli and Rebecca Zahn, 'Civil Republican Political Theory and Labour Law', in *Philosophical Foundations of Labour Law* p 104; Guy Davidov, 'Subordination vs Domination: Exploring the Differences', (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 365; Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 391.

²⁸ Philip Pettit, *Republicanism – A Theory of Freedom and Government*, OUP, 1999, p 52.

²⁹ Philip Pettit, *Just Freedom – A Moral Compass for a Complex World*, Norton, 2014, p 104, hereafter cited as *Just Freedom*.

³⁰ Frank Lovett, *A General Theory of Domination and Justice*, OUP, 2010, p 130.

³¹ See discussion in Tom O'Shea, 'Are Workers Dominated?', (2019) 16 *Journal of Ethics and Social Philosophy* 1.

³² See Robert S Taylor, *Exit Left*, OUP 2012, Chapter 3.

against domination, though, given the scarcity of jobs and people's need for an income. It may be impossible to leave an employer, even if the employer does not respect workers' freedom, is abusive or exploitative, for there are often limited alternatives. In order for the right to exit work to be realistic and effective, scholars have suggested an unconditional basic income. To accept that an unconditional basic income is a good alternative that guarantees workers' right to exit, we have to first believe that income is the only reason people work (and not self-realisation, self-esteem or making a social contribution).³³ Second, this income would need to be as high as the income generated through work so that people can meet their basic needs but also pursue other valuable activities. Third, the unconditional basic income should not come with the stigma that reliance on social benefits often carries.³⁴

Given the difficulties with the above propositions, it is clear that more legal safeguards need to be in place to counteract the power of the employer to dominate workers. These have to include protections of individual rights, such as the right to private life or freedom of expression. For instance, it has been said that there should be legal constraints that deny dismissal without cause.³⁵ This has been applied to legal rules protecting people dismissed for activities that do not involve workplace performance but private life, including sex-related conduct, where it has been argued that the human right to private life should be interpreted in the employment context in a manner that protects from such dismissals.³⁶ In cases such as this, setting no limitations to the power of the employer to dismiss workers because of their activities away from work amounts to exercise of arbitrary power because their out of work conduct has no connection to workplace performance.

Moreover, legal protection against discrimination more broadly can be grounded on an ideal of freedom as non-domination, for when there are anti-discrimination rules in place, workers will be free to express their sexual identity, for instance, without fear that they may suffer negative consequences as a result.³⁷ The possibility of suffering negative consequences (even if short of dismissal) because of exercise of these rights also amounts to domination, so legal safeguards should extend to other detriment and not just dismissal. In addition, this account of non-domination would also support the provision of publicly funded legal aid being available for workers who want to access the rights in question but do not have the resources to do this.³⁸ All these legal protections would have to be in place, so that workers are not subject to domination by employers, for the mere possibility of suffering dismissal or other detriment at work for reasons infringing upon civil liberties would amount to domination.³⁹

Individual rights at work would not be sufficient for protecting workers from domination, of course. Workers may be reluctant to challenge legally their employer because of the consequences that this may have on their employment conditions and prospects, and in any case there are other instances of domination at work that simply cannot be addressed through individual rights. A line of scholarship has focused on workplace participation in order to address this problem.⁴⁰ Pettit

³³ Anca Geaus and Liza Herzog, 'The Goods of Work (Other Than Money!)', (2016) 47 *Journal of Social Philosophy* 70; Hugh Collins, 'Is There a Human Right to Work?' in V Mantouvalou (ed), *The Right to Work – Legal and Philosophical Perspectives*, Hart 2012.

³⁴ Timothy Besley and Stephen Coate, 'Understanding welfare stigma: taxpayer resentment and statistical discrimination', (1992) 48 *Journal of Public Economics* 165.

³⁵ Pettit, *Just Freedom*, p 105.

³⁶ Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', (2008) 71 *Modern Law Review* 912.

³⁷ Elizabeth Anderson, *Private Government – How Employers Rules our Lives (and Why We Don't Talk about It)*, Princeton University Press, 2017, p 48.

³⁸ This would be in line with Pettit's proposals in *Just Freedom*, p 105.

³⁹ Lovett describes this as indirect exploitation, as above n 30, p 131.

⁴⁰ Inigo Gonzalez-Ricoy, 'The Republican Case for Workplace Democracy', (2014) 40 *Social Theory and Practice* 232.

suggested that his account of freedom as non-domination supports unionisation,⁴¹ while labour law scholars have also built on Pettit's account and explained that it can support a right to strike, as well as protection of other collective labour rights.⁴² Pettit himself has not supported the right to strike unequivocally, though. He said that his account 'would defend constraints on how far a union can resort to strike action, whether in primary or secondary picketing of a firm; for example, it might require prior resort to arbitration of a grievance'.⁴³ This may be explained by Pettit because a strike or picketing may limit the freedom of non-striking workers, but has been criticised in labour law scholarship for being at odds with standards of the ILO.⁴⁴ This issue highlights a potential weakness of Pettit's account of freedom as non-domination for work law, insofar as primary attention is paid on individual rights only and not on broader structural features of the market that create the background conditions for domination at work.

An attempt to address the individualistic focus of accounts of freedom as non-domination was made by scholars who developed the idea of structural domination. Structural domination exists when people are 'dominated by a number of agents, but not any single, given agent in particular'.⁴⁵ Structural domination arises from the way the system of property ownership in a free market economy is organised. Given the power of market structures, in order to have fairness at work, radical transformation is needed, which 'would include democratic control over productive assets and equal worker control over the conditions and processes of work'.⁴⁶ Different accounts of structural domination may also support codetermination at work, as well as the right to strike.⁴⁷ The recognition that there is structural domination does not mean that we cannot identify responsibility of individual agents for domination or other forms of injustice. We can identify unjust market structures that constitute the background of social relations and consider what change is required to amend these; analyse legal rules that may facilitate domination and hold the state accountable for these rules; and also hold employers responsible for violating legal rules that protect workers from domination.⁴⁸

An instance where structural domination becomes particularly pertinent is the increasing use of precarious working arrangements, such as zero-hour contracts and agency work arrangements. These kind of arrangements were initially developed to cover short-term business needs. However, employers nowadays use them all the more in order to cover permanent needs in a way that reduces their costs, avoiding worker protective legislation. Workers employed in this kind of arrangements often do not do so by choice, but because they do not have alternatives.⁴⁹ Legal rules, in turn, make it difficult for workers to have job and income security. The concept of structural domination places attention not so much on the power of an individual employer on a worker in instances such as this, but instead on the power of all employers, which is due to legal rules that make workers vulnerable to domination and the broader background conditions of the market. On this

⁴¹ Pettit, *Just Freedom*, p 105.

⁴² Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in *Philosophical Foundations of Labour Law*, p 229; Cabrelli and Zahn, in *Philosophical Foundations of Labour Law*, p 104.

⁴³ Pettit, *Just Freedom*, 105.

⁴⁴ Bogg, 'Republican Non-Domination', as above n 27.

⁴⁵ Alex Gourevitch, 'Labor Republicanism and the Transformation of Work', (2013) 41 *Political Theory* 591, 596.

⁴⁶ *Ibid*, p 609.

⁴⁷ See also the analysis of 'impersonal domination' by Matthew Dimick, 'Marx and Domination: Issues for Labour Law', forthcoming.

⁴⁸ I discuss the role of legal rules in this context in Virginia Mantouvalou, *Structural Injustice and Workers' Rights*, OUP, 2023. On structural domination, alienation, the role of structures and agents, see Lea Ypi, 'On Dominated Dominators', in Virginia Mantouvalou and Jonathan Wolff (eds), *Structural Injustice and the Law*, forthcoming, UCL Press, 2024.

⁴⁹ *Ibid*, Chapter 6. See also, Hugh Collins, 'Segmented Labour Markets, Structural Injustice and Legal Remedies', forthcoming in Virginia Mantouvalou and Jonathan Wolff (eds), *Structural Injustice and the Law*, UCL Press, 2024.

analysis, precarious working arrangements amount to domination because they create significant vulnerability (even greater than workers' vulnerability in the standard employment contract).

Both human capabilities and non-domination are involved with individual dignity and freedom, as we have seen this far. However, accounts of non-domination can be deployed more readily than accounts of human capabilities as justifications of the law of work. As they are concerned with power, they can support legal rules that protect workers from the unfair exercise of employers' power both when we examine the individual employment relation and the inequality between worker and employer, and when thinking more broadly about structural features of the market and their effects at work.

Human Rights

A third framework that can serve as a basis of the law of work invokes human rights. Human rights are typically grounded on the value of human dignity that also figures in the preambles of many human rights treaties, bills of rights and declarations.⁵⁰ The 1944 Declaration of Philadelphia of the ILO outlined the fundamental principles of the ILO, emphasising that 'labour is not a commodity'.⁵¹ This has become a central slogan of the organisation, and can also be understood as a demand for the protection of human rights that are grounded on the status of being human, and not a commodity. The value of human rights as a justification for labour law consists in their special moral force but for this special moral force, it is important to analyse the philosophical grounding of human rights.⁵² In this context, Gilibert examined the concept of dignity in more detail in relation to workers' rights, and explained that different categories of workers' human rights have both legal protection and a grounding in the normative value of dignity, which he analysed as 'solidaristic empowerment'.⁵³ This means that people should be able to pursue a life that is decent and flourishing. Collins, in turn, examined human rights as a justification in the context of the theory of justice of John Rawls, and explained which workers' rights this account would support.⁵⁴

A challenge when thinking about the protection of human rights as a justification for the law of work, though, is that human rights may be associated with the worst injustices suffered by workers, such as the ones that we find in the law of human trafficking. The law of human trafficking focuses on criminalisation of traffickers and for this reason contains a very narrow definition of workers' exploitation.⁵⁵ For instance, the EU Human Trafficking Directive that criminalises trafficking 'for the purpose of exploitation'⁵⁶ explains the concept as follows:

Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging,

⁵⁰ See, for instance, the Preamble of the Universal Declaration of Human Rights and that of the Charter of the Fundamental Rights of the European Union. For analysis of dignity as a foundation of labour rights, see Pablo Gilibert, 'Labor Human Rights and Human Dignity', (2016) 42 *Philosophy and Social Criticism* 171.

⁵¹ ILO Declaration of Philadelphia – Declaration Concerning the Aims and Purposes of the International Labour Organisation, Article I(a).

⁵² See also Joe Atkinson, 'Human Rights as Foundations for Labour Law', in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law*, OUP 2018.

⁵³ Pablo Gilibert, 'Labor Human Rights and Human Dignity', (2016) 42 *Philosophy and Social Criticism* 171; and in Phil Foundations.

⁵⁴ Hugh Collins, 'Theories of Rights as Foundations for Labour Law', in *The Idea of Labour Law*, above n 1.

⁵⁵ Hila Shamir, 'A Labor Paradigm for Human Trafficking', (2012) 60 *UCLA Law Review*.

⁵⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 (EU Human Trafficking Directive) art 2 para 1.

slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.⁵⁷

Such a narrow focus is, of course, unsuitable as a justification for the law of work, the aim of which is to address workers' exploitation that is widespread and routine but often does not reach this extreme levels of abuse. The law of work contains rules on minimum wage, working time, health and safety and other working conditions that set a much more detailed and protective framework for workers. Another reason why this narrow view of the role of human rights is ill-suited for the purposes of the law of work is because the law of human trafficking involves individual criminal responsibility of unscrupulous employers and not the background conditions that create workers' vulnerability that is systematically exploited.⁵⁸ It is an individualistic agenda that focuses on victims and perpetrators, and is not primarily concerned with background unfairness.

Human rights law, on the other hand, has a broad scope and includes several workers' rights. In this body of rules we do not only find the prohibition of slavery, servitude, forced and compulsory labour (which covers human trafficking too),⁵⁹ but also the right to work, the right to decent working conditions, the right to private life, freedom of expression, the prohibition of discrimination and the right to form and join trade unions, including a right to strike. Indeed, all of these rights and many others are included in human rights treaties, constitutions or other legislation of higher status than ordinary legislation, in different legal orders at national and supranational level.⁶⁰

Moreover, even though human rights law was originally developed to protect the individual against interference by the state, over the decades case law of courts and other monitoring bodies have expanded its scope and explained that it imposes positive obligations on the authorities to protect workers in the private employment relationship.⁶¹ This can be achieved through the development of legislation that protects workers from dismissal or other detriment when exercising their rights at work, through protection of rights to organise and collective action, through monitoring of the implementation of legislation and effective access to justice of workers. All this goes to show that the scope of human rights law covers several instances of workplace injustice.

Moreover, the fact that human rights are legally protected, often in documents of higher status than ordinary legislation, constitutes an important strength when comparing it to other theoretical justifications. The legal status of human rights has implications for the law of work. It means that when legislation is passed that is incompatible with these rights, it can be closely scrutinised and challenged in national and supranational fora. Yet because human rights are framed as abstract principles in law, much depends on how they are interpreted by monitoring bodies. In this context, the theory of human capabilities or accounts of freedom as non-domination can be useful if employed effectively to elucidate the scope of workers' human rights. It has been suggested, for instance, that Sen's account of capabilities may provide a fresh understanding to the meaning of

⁵⁷ *ibid* art 2 para 3.

⁵⁸ For an overview of theories of exploitation, see Virginia Mantouvalou, 'Legal Construction of Structures of Exploitation', in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law*, (Oxford: OUP 2018).

⁵⁹ *Rantsev v Cyprus and Russia*, App No 25965/04, Judgment of 7 January 2010.

⁶⁰ See, for instance, the Council of Europe's European Convention on Human Rights, which is an established and influential regional system, the European Social Charter, the EU Charter of Fundamental Rights, the International Labour Organisation Declaration of Fundamental Principles and Rights at Work, the United Nations International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Organisation of American States American Convention on Human Rights, as well as some national legal orders.

⁶¹ See, for instance, *IB v Greece*, App No 552/10, Judgment of 3 October 2013.

freedom of association,⁶² while Nussbaum herself has explained that her list of capabilities can help elucidate our understanding of human rights. Theories of non-domination have been used to support specific interpretations of the right to strike,⁶³ and strong protection from dismissal for private activities.⁶⁴ This suggests that the alternative theoretical justifications for workers' rights do not compete with each other, but that they can reinforce and complement each other.

The protection of workers' rights in human rights law can have important implications. For instance, the European Court of Human Rights has developed extensive and influential case law in the field when monitoring compliance with the European Convention of Human Rights. It has supported the right to collective bargaining and the right to strike as elements of article 11 of the ECHR that guarantees freedom of association;⁶⁵ it has highlighted the importance of workplace privacy in the context of article 8 that protects the right to private life;⁶⁶ it has included principles of health and safety at work in the context of the prohibition of inhuman and degrading treatment in article 3,⁶⁷ and other such issues. In addition, it has taken into account materials of non-justiciable bodies that it has used in interpreting Convention rights,⁶⁸ giving in this way indirect legal effect to findings and documents of the ILO or other expert monitoring bodies that would have otherwise not have been enforceable in court.

A concern that is sometimes expressed when thinking about the role of human rights in this context is that they are framed as individual entitlements, while workers can only achieve justice at work when acting collectively, through unions.⁶⁹ Yet human rights law is not in conflict with collective values. If we look more carefully, we see that trade unions can also make legal claims in courts and other bodies on the basis of human rights law, and have often succeeded in challenging anti-union laws.⁷⁰ Strategic litigation can challenge unfair laws or practices that impact large groups of workers. In addition, this supposed weakness of human rights law in this context can be a real strength for workers who are under-unionised and generally excluded from the political process, such as undocumented workers. Undocumented workers have brought claims before human rights bodies and have in this context succeeded, when no other forum was available to them.⁷¹ The fact that human rights are typically viewed as universal both in theory and in legal documents makes them particularly suitable for groups of workers who are excluded from unionisation and from other political processes.

Another concern with using human rights as a justification for the law of work is that employers also have human rights. They may claim that their right to property, which is protected in some human rights documents,⁷² is violated when workers go on strike. On the same basis of the right to property, they may also claim that several rights of workers should be restricted when their exercise damages the efficiency of the business. There may be conflicts of rights, in other words.

⁶² See the work of Brian Langille, discussed earlier in this piece.

⁶³ Bogg and Estlund, above n 42.

⁶⁴ Mantouvalou, above n 36.

⁶⁵ See *Demir and Baykara v Turkey* 2008 DR; 48 EHRR 54; and *Ognevenko v Russia*, App No 44873/09, Judgment of 20 November 2018.

⁶⁶ *Barbulescu v Romania*, App No 61496/98, Judgment of 5 September 2017.

⁶⁷ *Mazukna v Lithuania*, App no 72092/12, Judgment of 11 April 2017.

⁶⁸ Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *Human Rights Law Review* 529; Keith Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

⁶⁹ Jay Youngdahl, 'Solidarity First: Labor Rights are Not the Same as Human Rights', (2009) 18 *New Labor Forum* 31; Lance Compa, 'Solidarity and Human Rights: A Response to Youngdahl', (2009) 18 *New Labor Forum* 38.

⁷⁰ See case law discussed in note xx above. But see *Young, James and Webster v UK*, App Nos 7601/76, 7806/77, judgment of 13 August 1981.

⁷¹ Siliadin; Chowdhury; Advisory Opinion on Undocumented Workers.

⁷² See, for instance, article 1 of Additional Protocol 1 of the ECHR.

When such conflicts arise, courts and other monitoring bodies examining cases that involve human rights at work have generally shown that they are sensitive to the inequality of power at work. We have seen, for instance, that human rights law can set limits to freedom of contract, when this is used as a vehicle of domination by the employer. In *Barbulescu v Romania*, for instance, the ECtHR examined workplace privacy and said that ‘an employer’s instructions cannot reduce private social life in the workplace to zero’.⁷³ Despite the fact that the worker had agreed in that case to be monitored at work, he still had a degree of privacy. Similarly, human rights courts are unlikely to view the right to exit work as an effective alternative to employers’ instructions that may violate workers’ rights. We saw that in the case *Eweida v UK*,⁷⁴ where a majority in ECtHR held that because of the importance of human rights, when a person complains about a violation in the workplace, ‘rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate’.⁷⁵ The underlying rationale was probably that any decision to consent to limitations of rights in the workplace is unlikely to be voluntary, because for reasons of economic necessity the possibility of resignation is not often a viable alternative for the worker.

It was earlier said that justifications of the law of work have to make the structure of the market a central consideration when assessing justice at work. This is also the case with human rights law. The structure of the market has to be central in analyses of the human rights of workers.⁷⁶ Human rights of course do not exhaust the scope of the law of work. Workers’ demands can be about fair pay and other working conditions that may not be within the scope of human rights provisions and may also be beyond the authority of courts and other monitoring bodies to assess. In addition, courts, and particularly supranational courts, may at times be reluctant to interfere with decisions of national authorities, for fear of a backlash that will be damaging to the interests of workers. In the European human rights system, we see this through the margin of appreciation that the Court grants to national authorities, when dealing with cases that raise sensitive social and political issues. This can be disappointing for advocates of workers’ rights.⁷⁷ Still, human rights have broad acceptance in many legal orders and significant moral force in political debate and advocacy. If properly analysed and implemented, they can therefore help develop a normative core for the law of work and form a basis of rules applicable to all workers, protecting them from injustice at work.

Conclusion

Each of the above theoretical justifications that involve workers’ dignity and freedom can provide valuable insights and tools to ground and guide the development of the law of work. Accounts of human capabilities help understand the importance of human flourishing which is not only about not being seriously ill-treated but also about being capable to achieve important functionings, to flourish at work and outside work. Non-domination can help capture the power of the employer, particularly when accounts of structural domination are employed. Both accounts of capabilities and non-domination can help elucidate the content of human rights. A clear strength of human rights, in turn, is that they are explicitly protected in law so they create legal avenues for workers to be heard when they bring a claim that they have been treated unjustly. Human rights, capabilities and non-domination do not offer a full account of justice at work, and do not exhaust the scope of the law of work. However, when understood and analysed against the background structure of

⁷³ *Barbulescu*, para 80.

⁷⁴ *Eweida and Others v UK*, App Nos 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

⁷⁵ As above, para 83.

⁷⁶ I discuss this in *Structural Injustice and Workers’ Rights*, Chapter 7.

⁷⁷ For criticism of the doctrine of the margin of appreciation by labour law scholars, see KD Ewing and J Hendy, ‘Article 11(3) of the European Convention on Human Rights’ [2017] EHRLR 356.

the market and the power of the employer that is due to this system, they can provide important insights on both basic principles of justice at work and the core of the law of work.