

# Distributive Justice and Labour Law

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## Abstract

Redistribution is considered one of the main goals of labour law. When we refer to redistribution as a goal, we usually do so, implicitly, as shorthand for distributive justice. The goal of this chapter is to explore theories of distributive justice, and ask to what extent current labour laws are in line with those ideas, and what else labour law can (or should) do to advance this goal. I examine several theories: that distributive justice should be based on ‘desert’; theories of distributional equality – notably, luck egalitarianism – which demand redistribution in order to achieve equality in distribution; and theories of redistribution as instrumental to the advancement of equality. At the end of each part I will briefly consider the possible implications for labour law, both in terms of employer-employee relations and in terms of intra-worker distribution. The question will be: what kinds of labour market regulations (if at all) can be supported by each distributive justice theory? Specifically, to what extent do these theories justify existing labour laws? Then in the concluding part some remarks are offered on one area that requires *new* labour law regulations to address distributive justice concerns: in light of the previous parts, I will suggest several steps that should be taken to address divisions in two-tier and dual labour markets.

## I. Introduction

Redistribution is considered one of the main goals of labour law,<sup>1</sup> alongside various other goals, that often complement (but sometimes have to be balanced against) each other.<sup>2</sup> When we refer to redistribution as a goal, we usually do so, implicitly, as shorthand for distributive justice. It would

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<sup>1</sup> The term labour law is used in this chapter in its broad sense, including employment law and anti-discrimination law.

<sup>2</sup> Guy Davidov, ‘The Goals of Regulating Work: Between Universalism and Selectivity’ (2014) 64 *University of Toronto Law Journal* 1; Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) chs 3-5.

be useful to explore, then, theories of distributive justice, and ask to what extent current labour laws are in line with those ideas, and what else labour law can (or should) do to advance this goal.<sup>3</sup> The discussion will focus on the distribution of income and job opportunities – with some brief references to distribution of power and risks as well, where appropriate.<sup>4</sup>

It should be clarified at the outset that there are many other reasons for redistribution, quite apart from distributive justice. For example, redistribution can be required to protect workers' dignity, or freedom from non-domination,<sup>5</sup> and so on. However, in the context of justifying, explaining and interpreting labour laws, if the goal is to protect dignity (for example), then this point should be made explicitly. We should assume that *all* rights have a positive aspect, and protecting (or advancing) them will sometimes require the allocation or redistribution of resources. If we say that a minimum wage law is justified for reasons of (a) protecting dignity and (b) redistribution,<sup>6</sup> the latter has no independent meaning as an argument if it only follows from the former. To the extent that there is an *independent* justification for redistribution it relies on an attempt to advance distributive justice. Accordingly, notwithstanding the fact that dignity (for example), in itself, could require redistribution, and without downplaying in any way the importance of such redistribution, the current chapter will focus on ways in which redistribution is required for other, independent reasons, which are more properly termed distributive justice.

There is one exception in which it makes sense to include *instrumental* justifications of redistribution in the current discussion, and it has to do with the relations between distributive justice and equality (or egalitarianism). The philosophical literature often uses the terms interchangeably. Justice requires equality, and the distribution required to achieve equality can either be called distributive justice or be seen as part of equality. However, there is a difference

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<sup>3</sup> Law-and-economics scholars often argue that redistribution should be performed only through taxation and government spending/welfare payments. But many others have made good arguments in support of redistribution through other legal rules – including private law – as well (for a brief discussion and references see Davidov, *A Purposive Approach* (n 2) 58). As a matter of practice, there is no doubt that labour laws have a redistributive role, so for current purposes it is not necessary to engage in this debate.

<sup>4</sup> There are different views on whether power and risks should be considered part of the distributive justice discussion. For broad views concerning the subject matter of redistribution see, e.g., Jonathan Wolff and Avner de-Shalit, *Disadvantage* (OUP 2007) 6; Hila Shamir, 'Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care' (2009) 30 *Berkeley Journal of Employment & Labor Law* 404, 426-8. But see, in contrast, Iris Marion Young, *Justice and the Politics of Difference* (Princeton UP 1990) ch 1 (criticising the over-extension of the logic of distribution to non-material things or relations). For further discussion see David Miller, *Principles of Social Justice* (Harvard UP 1999) ch 1.

<sup>5</sup> Frank Lovett, 'Domination and Distributive Justice' (2009) 71 *Journal of Politics* 817.

<sup>6</sup> Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 *Modern Law Review* 581.

even for philosophers between ‘distributional equality’<sup>7</sup> and other forms of equality (legal/social/political etc.). For lawyers the term equality usually means anti-discrimination, and while legal scholars referring to equality as a *normative* ideal often use a broader understanding, for the most part in the legal mind arguments for equality do not challenge the basic distribution of resources in society. In theory, arguments for equality can certainly go to the extent of advocating equality of distribution, but given the current convention regarding the meaning of this term, it makes sense to maintain (at least for current purposes) the distinction between justifications of equality/non-discrimination and those of distributive justice, in the sense of *distributional* equality. However, given the close proximity between these ideas, arguments for redistribution in support of (other kinds of) equality will also be considered in this chapter.

Alongside the theoretical interest in exploring the role of distributive justice within labour law, my practical motivation in pursuing this line of research lies in the growing division between different groups of workers, for example in two-tier and dual labour markets. Such divisions often (or at least sometimes) appear to result from arbitrary reasons, creating resentment among large groups in society. While these divisions are hardly new, they have been exacerbated in recent years, creating increased interest in the role labour law plays – and the role it should play – in addressing conflicts between different groups of workers.<sup>8</sup> The distribution of resources created by these labour market phenomena appears (at least on its face) to be *unjust* – hence the need to examine it through the lenses of distributive justice.

Accordingly, the goal of this chapter is to provide a brief review of distributive justice theories and examine the implications for labour law. Part II is dedicated to the view that distributive justice should be based on ‘desert’. On this view, people should get what they deserve, given their contribution, or effort, or some other quality representing moral worth. This is perhaps the most intuitive approach, although it has been somewhat discredited by philosophers. Part III reviews theories of distributional equality, which demand redistribution in order to achieve equality in distribution. This is based on a rather radical idea of equality, in the sense that society cannot satisfy itself with treating all individuals equally; it also has to redistribute in order to eliminate previous (including inborn) disadvantages. There are many different theories about what should be equalised – whether income, resources, opportunities, well-being, access to advantage or capabilities – but they all share the same starting point of challenging the previous and ‘natural’

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<sup>7</sup> For this term see Ronald Dworkin, ‘What is Equality? Part 1: Equality of Welfare’ (1981) 10 *Philosophy & Public Affairs* 185. Another term that is sometimes used is *economic* equality; see, e.g., Stuart White, *Equality* (Polity Press 2007) 7.

<sup>8</sup> See Guy Mundlak, ‘The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 315; ACL Davies, ‘Identifying ‘Exploitative Compromises’: The Role of Labour Law in Resolving Disputes Between Workers’ (2012) 65 *Current Legal Problems* 269.

allocation of resources. Part IV then moves to consider redistribution as instrumental to the advancement of equality. This view puts emphasis not on distribution *per se* but on equality of status. Redistribution is justified only to the extent it is needed to allow each individual to function as equal in society.

The philosophical literature on these issues is enormous. I cannot do justice to it here, nor claim sufficient expertise to confront all its nuances. My review will be cursory, but hopefully sufficient for our current purposes: at the end of each part I will briefly consider the possible implications for labour law, both in terms of employer-employee relations and in terms of intra-worker distribution.<sup>9</sup> The question will be: what kinds of labour market regulations (if at all) can be supported by each distributive justice theory? Specifically, to what extent do these theories justify existing labour laws? I will not attempt to choose between the different theories; to a large extent, they can live side by side, and in any case, the idea is to put forward the connections between distributive justice theories and labour law, allowing readers to decide for themselves which theories they find convincing and draw the conclusions accordingly. Finally, in the concluding part (part V) some remarks are offered on one area that requires *new* labour law regulations to address distributive justice concerns: in light of the previous parts, I will suggest several steps that should be taken to address divisions in two-tier and dual labour markets.

## II. Desert-Based Distribution

The idea that people should ‘get what they deserve’ seems to accord with common-sense conceptions of justice. We would probably all agree, for example, that research grants should be allocated based on merit, or that an opening in our Faculty should be filled by offering the job to the most deserved. Is it generally the case that resources should be distributed based on desert? It would be highly difficult and problematic to engage in assessing the general moral worthiness of individuals as a basis for dividing resources;<sup>10</sup> but why not allocate resources based on desert/merit that is *relevant to the resource being distributed*?<sup>11</sup> In the context of the labour market, shouldn’t

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<sup>9</sup> There are several ‘sites’ in which distributive justice issues may arise: (a) between a specific employer and a specific employee; (b) between different workers at the same workplace; (c) between different groups of workers across workplaces; (d) between capital and labour at the societal level; and (e) the last two also at the global level. I focus mostly on (a) and (b) which are the main concern of labour law, with some brief references to (c) where relevant. The other two levels are out of the scope of the current contribution.

<sup>10</sup> John Rawls, *A Theory of Justice* (first published 1971, rev edn, Harvard UP 1999) 274-5. I put aside, for now, the idea that distributive justice should take into account people’s responsibility for their actions; this will be discussed separately below.

<sup>11</sup> See Miller (n 4) ch 7 (justifying distribution based on desert by reference to ‘performance’) and see especially p135 (the kind of performance relevant to desert depends on the context).

we reward people for their contribution (actual or potential), or their effort? To some extent, of course, this is what the market does, so desert-based theories can be invoked to justify the ‘free market’. But the market does this very crudely (and often fails). Moreover, the market is designed first and foremost to maximise utility/efficiency, not to distribute according to desert – although workers can generally be expected to receive compensation in line with their contribution, this is subject to constraints of supply and demand. Therefore, if distributing according to one’s contribution or effort is *justified*, this can support some interventions in the market to correct unjustified results.

It may be useful to start thinking about this by considering an extreme example. LeBron James has a unique set of talents and physical qualities which made it possible for him to become the best basketball player in the world of his generation. As a result, he earns many millions of dollars each year from playing basketball and from related endorsements. Can the rest of us complain about this distribution? James has to work hard to succeed as a basketball player, and surely, he deserves reward for this effort. But it is reasonable to assume that the level of effort required is not different from that required in many other jobs. So, by far the largest share of his compensation rewards his inborn talents (that rely also on his physical qualities). Does he *deserve* to earn so much more money than the rest of us?

Let us put aside the issue of incentives. It could be argued that if James does not get to enjoy all the rewards of his talents he will not bother to make an effort to train and develop his talents, and as a result we will all lose. The extreme version of this argument is surely incorrect, as even with high levels of taxation he will still have enough monetary incentive to work hard. There are also of course non-monetary rewards that come with professional success. But more importantly, these are considerations related to maximising utility/efficiency and not distributive justice. They should be taken into account separately, and perhaps balanced later on against considerations of distributive justice. But first we have to ascertain what distributive justice requires in this situation.

One could answer that if the public is interested in what James has to sell, and people are willing to pay a lot of money to enjoy watching him play, then the distribution created by this set of contracts is just. Everybody is happier thanks to James, so he deserves the rewards. But this assumes that he deservedly ‘owns’ his talents and all of their fruits.<sup>12</sup> This assumption was contested by John Rawls in his critique of desert-based distribution, when he pointed out that ‘the initial endowment of natural assets and the contingencies of their growth and nurture in early life

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<sup>12</sup> See Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 161-3 (Wilt Chamberlain example). I will not discuss Nozick’s theory here; although he described it as a theory of distributive justice (ibid 149) it is concerned with the acquisition of property. Arguments for private property are based on other normative justifications, quite separate from the ones considered here under the heading of distributive justice.

are arbitrary from a moral point of view’, and even ‘the effort a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him’.<sup>13</sup> This line of thought was developed by a number of philosophers who have later been dubbed ‘luck egalitarians’.<sup>14</sup> While luck egalitarians differ on what exactly has to be equalised – an issue I will discuss in the next part – they all agree that people should not suffer the consequences of bad luck. Factors beyond our control (such as the level of talent) should not form the basis for decisions about distributions and cannot in themselves justify an existing (or market) distribution. On the contrary, distributive justice requires us to neutralise, as much as possible, the impact of the unequal allocation of talents, physical qualities and other attributes and abilities.

The idea that because all people are fundamentally equal the distribution should *make* us equal, despite differences in talent and other such differences beyond our control, is likely to be appealing to some but reprehensible to others. This basic disagreement is probably rooted in the question of whether one can complain or make demands when nobody else is at fault. Although sometimes the advantage enjoyed by some people is socially constructed and not ‘objective’ – for example the conception of what is pretty/attractive that allows some people to enjoy rewards – quite often there are objective advantages to having a talent. If one has the good fortune of possessing useful talents or the bad luck of not having them, there is obviously no-one to blame. Elizabeth Anderson has argued that a conception of justice should be interpersonal, that is, can include only demands that people can make from others.<sup>15</sup> People with less talent do not have any valid claim against people with more talent; therefore, according to Anderson, the distribution of talents is not unjust and does not require redress. But it is difficult to accept the claim that justice is necessarily limited in this way.<sup>16</sup> There is no reason why we cannot demand, as a matter of justice, the correction of results created by nature, if we find this to be warranted.<sup>17</sup>

There are two other and perhaps more convincing replies that we can make to luck egalitarians, and they are more practical than principled. First, we each have a ‘package’ of talents, physical

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<sup>13</sup> Rawls (n 10) 274. As noted by Daniel Markovits, ‘How Much Redistribution Should There Be?’ (2003) 112 Yale Law Journal 2291, 2295-6, the same point was made much earlier by John Stuart Mill.

<sup>14</sup> See Elizabeth S Anderson, ‘What Is the Point of Equality?’ (1999) 109 Ethics 287 for this term. For a prominent example of luck egalitarianism see G A Cohen, ‘On the Currency of Egalitarian Justice’ (1989) 99 Ethics 906.

<sup>15</sup> Elizabeth Anderson, ‘The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians’ (2012) 40 Canadian Journal of Philosophy 1.

<sup>16</sup> For the view that people have a *duty to justify* any superior position they have relative to others see Shlomi Segall, *Equality and Opportunity* (OUP 2013) 22-3. Note that one need not accept this position either in order to conclude that as a society we should intervene to offset specific inequalities.

<sup>17</sup> According to Anderson, if some people make more (thanks to their talents) it is not to anyone’s disadvantage. This ignores the fact that one’s status in society is relative to others. Moreover, even if it is objectively beneficial to be smart (for example), the rewards that the market bestows on this quality are not in themselves ‘natural’; the market is a construct which we devise as a society and we are therefore responsible for.

qualities as well as other good and bad attributes; and we each have our share of good and bad luck in different areas of life. It could certainly be the case that Lebron James had some bad luck (or lack of talents) in other parts of his life; he is not necessarily happier than the rest of us. It is not possible to separate one part of the ‘package’ from others. Some people have the gift of being kind and sociable and they enjoy some rewards for these attributes (not necessarily monetary rewards) on a daily basis. Others have the good fortune of finding the perfect match for a partner. Yet others have marketable talents which make them rich, but at the same time they could be miserable because of other misfortunes. It seems unfair to ‘equalise’ one part of the package while ignoring other parts that are not quantifiable and might pull in other directions. In other words, if we take the idea of luck egalitarianism to its logical conclusion, it requires full equality of welfare/well-being. I will return to this option in the next part; for now, suffice it to say that it is clearly impractical. Admittedly, however, this argument has only limited power because at the end of the day, we all want more money; and if luck should be neutralised, by redistributing money at the very least we will get *closer* to just distribution. Some could argue that the non-monetary parts of the ‘package’ can be assumed to be similar (and then ignored), given that it is impossible to assess them.

A second practical objection to luck egalitarianism maintains that it is impossible to distinguish between choice and circumstance, or (more specifically) between effort that is voluntary (made by choice) and effort that is rooted in inborn characteristics.<sup>18</sup> As noted by Samuel Scheffler, ‘people’s voluntary choices are routinely influenced by unchosen features of their personalities, temperaments, and the social contexts in which they find themselves’.<sup>19</sup> The question is whether this should lead us to ignore effort altogether, or to ignore the inborn differences altogether,<sup>20</sup> or rather (which seems most reasonable to me) to take both of them into account.

Overall, while the argument against desert-based distribution is certainly powerful, I think it is overstated. The basic idea behind the critique is important: it is difficult to accept the claim that the lucky ones should be able to enjoy *all* the rewards of their luck; and more importantly, that the *unlucky* should suffer all the consequences themselves. Luck egalitarianism can support a high level of taxation and redistribution. At the same time, the idea of desert does not entirely lose its

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<sup>18</sup> Indeed, Rawls’s critique focused mostly on the argument that ‘the idea of rewarding desert is impracticable’ (n 10 at 274). See also Cohen (n 14) 915. For an attempt to articulate a basis for distinction see Richard J Arneson, ‘Desert and Equality’ in Nils Holtug and Kasper Lippert-Rasmussen (eds), *Egalitarianism: New Essays on the Nature and Value of Equality* (Clarendon 2007) 262 (arguing that people are not deserving for things they did not control, but accepting desert for ‘consciousness striving’).

<sup>19</sup> Samuel Scheffler, ‘What is Egalitarianism’ (2003) 31 *Philosophy & Public Affairs* 5, 18.

<sup>20</sup> See Miller (n 4) 148-9 (concluding that because natural talent cannot be separated from effort we should reward effort).

validity.<sup>21</sup> Rewarding contribution and effort that enlarge the pie or otherwise increase welfare seems just (subject of course to taxation and other conflicting considerations).

This middle-ground approach arguably conforms to the theory of Ronald Dworkin, who imagined a hypothetical system of insurance against bad luck. Starting from the premise that people should be responsible for their choices, including the management of risks, he asked what kinds of bad luck ‘average people’ would have insured themselves against if they could. If we do not know which set of talents and abilities we might get (or what would be the implications of these talents and abilities in the market), what kind of insurance would we buy? It is safe to assume that no reasonable person would buy insurance against the bad luck of not getting the talents of LeBron James; both in the sense of not being able to afford it and in the sense of not finding it necessary. In contrast, we can certainly expect rational people to insure themselves against the risk of having no marketable talents or abilities, thus ending up unemployed or stuck at minimum wage jobs.<sup>22</sup> This thought-experiment suggests that people are happy to allow others to enjoy the rewards of their good fortune, and would only require redistribution to protect against cases of (relatively extreme) bad luck. Otherwise put, although supporting redistribution to correct for bad luck, Dworkin’s view appears to leave room for desert-based distribution.

If indeed contribution and effort should be rewarded, what about other aspects of work? One could argue that some kinds of work are more deserving than others, for example when people assume exceptional risks (dangerous jobs) or positions that most people prefer to avoid (‘dirty’ work). However, in contrast it could be argued that jobs that require a high degree of responsibility deserve more compensation. Overall it would be difficult (and probably harmful to people’s dignity at work) to create a ranking of jobs in terms of desert.

What could be the implications for labour law, assuming one accepts the view that at least one relevant criterion for distributive justice is desert, meaning specifically contribution and effort? David Miller distinguished between four possible claims against unjust distribution based on desert,<sup>23</sup> which can *potentially* translate into four levels of regulation: (a) decisions about distribution should not be made based on criteria that are evidently irrelevant from the point of view of desert, such as race, gender or religious affiliation; (b) when people in the same group are

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<sup>21</sup> Although for some years following the publication of Rawls (n 10) there appeared to be an almost consensus view against desert, more recently there is revived interest in it. There is even a view that desert should replace the concept of equality altogether; see Shelly Kagan, ‘Equality and Desert’ in Louis P Pojman and Owen McLeod (eds), *What Do We Deserve? A Reader on Justice and Desert* (OUP 1999) 298. However, the work of Kagan and the debate following it do not include any discussion of the appropriate *bases* of desert – an issue he explicitly avoids also in his later work; see Shelly Kagan, *The Geometry of Desert* (OUP 2014) 6.

<sup>22</sup> Ronald Dworkin, ‘What is Equality? Part 2: Equality of Resources’ (1981) 10 *Philosophy & Public Affairs* 283, 314 ff.

<sup>23</sup> Miller (n 4) 151-5.



equally deserving, they should enjoy the same benefits; (c) when two groups are equally deserving, people in these groups should enjoy the same benefits; and finally, (d) there are non-comparative arguments, i.e. simply that someone is deserving of a certain benefit by virtue of a certain performance.

The idea of desert can thus support anti-discrimination laws (claim type a), as well as pay equity laws (type b and sometimes type c). It can also support arguments for further equality within organizations (type c): pay equity laws are usually limited to equal pay for men and women, and in some countries also equal pay for workers through temporary employment agencies and for part-time and fixed-term workers. This seems to be based on the understanding that gender, as well as the form of employment arrangement, are irrelevant considerations when determining the level of desert. The same understanding could support additional regulations to confront disparities between workers that cannot be explained by contribution and effort.

Miller himself is quite sceptical about our ability to make determinate conclusions when comparing two different groups (i.e. type c). He gives as an example the claim that doctors are more deserving than manual workers, which he considers impossible to say by how much.<sup>24</sup> According to Miller, it would be easy to conclude that a society that pays doctors *less* than manual workers is unjust; but if they are paid more, it is difficult to say by how much is ‘just’. However, the difficulty of making clear-cut determinations should not deter regulators from action. In fact, in pay equity cases this is already performed in many legal systems: in comparing the salaries of men and women doing different jobs, experts evaluate whether these jobs represent ‘equal value’ and as a result deserve equal pay. A legislature can similarly intervene to ensure appropriate compensation for workers when the market fails to reward their contribution and effort sufficiently – which can become apparent by comparison to other workers (even if this is not based on clear-cut numbers but requires some judgment).

What about non-comparative desert arguments (type d)? Miller considers them highly problematic for social policy because it is impossible to make determinate claims of this sort. However, while it may be too extreme to expect the law to determine the ‘right’ or ‘fair’ level of wages for a specific worker or profession, it is quite possible to say that below a certain level, compensation cannot reflect sufficient reward for reasonable contribution and effort – thus supporting minimum wage laws.

### **III. Redistributing to Achieve Equal Distribution**

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<sup>24</sup> *ibid* 153-4.

The current philosophical debate concerning egalitarianism revolves around two basic approaches. One stems from the critique of desert as described in the previous part: according to luck egalitarians, the principle of equality demands neutralising the impact of factors that we are not responsible for, including inborn talents and physical qualities, or lack thereof. Obviously, this requires massive redistribution, and there are different views about how far to take this idea and at what point people become responsible for their own fates. In contrast, so-called ‘relational egalitarians’ refuse to accept the idea that society has to redistribute in order to offset the cost of bad luck. The latter approach is discussed in the next part; the current part is dedicated to attempts to achieve equality of distribution, predicated on the assumption that it is unjust for people to enjoy (or suffer) the consequences of unequal natural endowments.

If our talents and handicaps are ‘morally arbitrary’, how can we neutralise their impact? Rawls was concerned with the unequal distribution of *income and wealth* created by these endowments (among other things).<sup>25</sup> Accordingly he viewed social and economic inequalities as presumptively unjust. As part of the well-known ‘difference principle’ he maintained that such inequalities can be justified only if they are ‘to the greatest benefit of the least advantaged’.<sup>26</sup> Simply put, if the least advantaged members of society benefit from an unequal situation – for example thanks to the creation of improved work opportunities, or progressive taxation – the situation is justified. This formulation is based on the assumption that the more talented need an incentive (in the form of higher salaries) to work hard or otherwise to put their talents to use, and society benefits from that.<sup>27</sup> This part of Rawls’s theory of justice is thus an attempt to balance considerations of distributive justice with considerations of efficiency. It has later been questioned whether (or to what extent) such incentives are really necessary;<sup>28</sup> and also whether the result would be just for the middle class (people that will not necessarily benefit from the inequality).<sup>29</sup> A further problem arises from the exclusive focus on the *absolute* position of the least-advantaged without giving any weight to their *relative* position.<sup>30</sup>

Income and wealth are obviously not important in themselves. Rawls defined a person’s good as ‘the successful execution of a rational plan of life’, and this requires liberty and opportunity, as well as income and wealth as means to achieve one’s ends (Rawls considered all four, together with the social bases of self-respect, ‘primary goods’).<sup>31</sup> The question of what exactly we should

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<sup>25</sup> Rawls (n 10) 53, 79.

<sup>26</sup> *ibid* 266.

<sup>27</sup> *ibid* 68.

<sup>28</sup> See e.g. G A Cohen, *Rescuing Justice and Equality* (Harvard UP 2008) ch 1.

<sup>29</sup> See e.g. White (n 7) 109-10.

<sup>30</sup> See e.g. Julian Lamont and Christi Favor, ‘Distributive Justice’ in *Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), <<http://plato.stanford.edu/entries/justice-distributive/>> accessed 11 June 2017.

<sup>31</sup> Rawls (n 10) 380.

equalise became central in subsequent contributions. Dworkin started his inquiry with a critique of *equality of welfare*, arguing that people should be responsible for their choices.<sup>32</sup> To equalise welfare, or well-being (whether we define it as preference-satisfaction, enjoyment or otherwise) we will have to subsidise risky and lazy behaviour, as well as expensive tastes. Dworkin distinguished between ‘brute luck’ which people should not be penalised for, and ‘option luck’ – the risks and choices people are taking voluntarily, for which they should enjoy the rewards but also pay the costs. Otherwise put, the distribution should be ambition-sensitive but not endowment-sensitive.<sup>33</sup> To this end he proposed *equality of resources*. The goal is not to eliminate all uncertainties, but ‘to make people equal, as far as this is possible, in the resources with which they face uncertainty.’<sup>34</sup> Dworkin accordingly supported a tax-and-redistribution system that would mimic the results of the hypothetical insurance scheme mentioned in the previous part. People with disabilities, or who are less talented, would have to get more to reach the same level of resources; but only to the extent an average person would have insured herself against this kind of bad luck.

Dworkin’s approach is similar to Rawls’s in its focus on resources. Although Rawls called them primary goods and included a more specific list of such goods, they both considered income and wealth as major resources that should in principle be equalised, subject to the conditions they each developed. If resources are just a mean to an end (‘the successful execution of a rational plan of life’, for Rawls) we have to wonder whether the same level of resources will give different people the same opportunities and ability to reach their goals. Surely people with disabilities, or otherwise detrimental conditions, will be able to do much less if given the same resources. Dworkin attempted to rectify this problem with his scheme for redistribution to compensate for brute bad luck. A different solution to this problem was developed by Amartya Sen, who argued that we should focus on ‘capabilities’ instead of resources. According to Sen, what is important for people is *effective, real freedom* to pursue their plan of life. Sen called what we need and want ‘functionings’ – a specific list of those can be identified as especially crucial for humans’ well-being – and he pointed attention to the importance of capabilities to achieve these functionings.<sup>35</sup> Although Sen originally developed this idea in response to the question ‘equality of what?’,<sup>36</sup> his focus was more on freedom than equality (capabilities being a way to understand effective human freedom). In principle, one could argue in favour of redistribution towards full *equality of*

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<sup>32</sup> Dworkin (n 7).

<sup>33</sup> Dworkin (n 22) 311.

<sup>34</sup> Ronald Dworkin, ‘Sovereign Virtue Revisited’ (2002) 113 *Ethics* 106, 107.

<sup>35</sup> Martha Nussbaum has later developed a detailed and influential list of functionings; see Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge UP 2000).

<sup>36</sup> Amartya Sen, ‘Equality of What?’ in Sterling M McMurrin (ed), *Tanner Lectures on Human Values* (Cambridge UP 1980). See also Amartya Sen, *Inequality Reexamined* (Harvard UP 1992). My discussion here focuses on Sen’s *normative* theory of capabilities. In earlier writings, he developed the idea of capabilities as an alternative to GDP in measuring successful development.

*capabilities*, but Sen himself is sceptical about this idea.<sup>37</sup> He supports equality of capabilities only in the ‘sufficientarian’ sense: ensuring that everyone has a set of basic capabilities. Thus construed, his theory can be used (and has been used) to support relational equality, which I discuss separately in the next part.<sup>38</sup>

The view that equalising resources is insufficient is shared by luck egalitarians such as Gerald Cohen, Richard Arneson and John Roemer. These scholars accept the premise (stressed by Dworkin) that people should be responsible for their choices and it would not be justified to equalise welfare in a way that ignores these choices. However, they argue that what Dworkin considers ‘option luck’ is not truly optional: our laziness (or in contrast ability to work hard), our propensity to take risks, our expensive tastes – these are all (to some extent) the result of inborn character and early childhood education/socialisation. Because these factors are somewhat beyond our control, they too are morally arbitrary, and a just distribution should aim to eliminate their impact. This brings us closer to examining equality of final outcomes, i.e. ultimately of welfare. However, in an attempt to separate the implications of bad luck (even if indirectly) from the results of voluntary choices, it has been suggested to equalise *opportunity for welfare*<sup>39</sup> or alternatively *access to advantage*;<sup>40</sup> or to ask whether people who exercised a ‘comparable degree of responsibility’ have equal opportunities, regardless of their circumstances.<sup>41</sup>

Such proposals obviously run into significant practical problems. To the extent they aim to take into consideration non-monetary aspects of happiness and well-being, this is mostly a theoretical exercise (unless one wishes to engage in extreme violations of privacy, alongside wild speculations). Distinguishing decisions taken in free choice from other kinds of decisions is also

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<sup>37</sup> Amartya Sen, *The Idea of Justice* (Harvard UP 2009) 295.

<sup>38</sup> I will not refer here to capabilities as an independent justification for labour law or as part of a justification centred on human freedom. These issues have been the focus of much discussion among labour law scholars in recent years. Capabilities are considered in this chapter only to the extent they could be relevant to distributive justice.

<sup>39</sup> Richard Arneson, ‘Equality and Equality of Opportunity for Welfare’ (1989) 56 *Philosophical Studies* 77.

<sup>40</sup> Cohen (n 14). The term ‘advantage’ is broader than welfare, in the sense that if poor people are satisfied with very little, this cannot be an excuse to perpetuate their situation. Even if they score high in terms of preference-satisfaction or enjoyment, we should still offer them more advantage. In this respect, Cohen’s argument is similar to Sen’s. The term ‘access’ is used to convey the need to ensure that opportunities are really equal, in the face of disparities in talent and other endowments.

<sup>41</sup> John E Roemer, ‘A Pragmatic Theory of Responsibility for the Egalitarian Planner’ (1993) 22 *Philosophy & Public Affairs* 146, 149; John E Roemer, *Theories of Distributive Justice* (Harvard UP 1996) 276-9. Roemer gives as an example the question of whether society should compensate people for lung cancer which resulted from smoking. The problem is to decide whether the decision to smoke was a free choice, and at what point people should be held responsible for this choice. He argues that the answer is different depending on the ‘type’ of person (determined by economic class, level of education etc.). We can decide, for example, that 10 years of smoking by a college professor are equivalent to 30 years of smoking by a steelworker, in terms of the ‘degree of responsibility’.

highly difficult as a practical matter, and when used to deny benefits to some people (based on their choices) would create problems of stigma and harms to dignity and self-respect.<sup>42</sup> Moreover, if we take luck egalitarianism to the extreme, people with inborn genetic or environmental advantages will end up having to pay harshly to offset these advantages. The good fortune of being born with a special talent will turn into a curse of having to pay for it in cash throughout one's life in the name of distributive justice.<sup>43</sup> However, such unreasonable results will only ensue if one ignores all other goals, values and principle of justice. This is certainly not required by accepting luck egalitarianism (or any other of the above-mentioned theories). We can appreciate the value of luck egalitarianism while at the same time acknowledging the importance of dignity, autonomy, efficiency and other values (including other forms of equality).<sup>44</sup> Laws regulating complex human affairs often have to take into account a multitude of purposes and justifications and sometimes balance between them.

What are the implications of 'distributional equality' theories (as discussed in this part) for labour law? First, these theories support anti-discrimination laws, because they can prevent differences in distribution on the basis of 'luck' in terms of being born male or female, with a certain skin colour, ethnicity etc. Affirmative action programs are also justified in order to counteract the disadvantage resulting from those inborn traits.<sup>45</sup> For similar reasons, distributional equality supports pay equity laws and could support their further expansion to ensure equal pay for equal value not only between men and women but between other groups in society as well. Second, relying on the general idea that distribution based on natural endowments (including talent) is unjust, or at least problematic, we can minimise the impact of these factors by reducing wage differentials. This can be achieved by supporting labour unions and collective bargaining (which are known to flatten wage differentials),<sup>46</sup> and/or through direct intervention in the maximum ratio

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<sup>42</sup> Jonathan Wolff, 'Fairness, Respect, and the Egalitarian Ethos' (1998) 27 *Philosophy & Public Affairs* 97.

<sup>43</sup> Michael Sandel uses a powerful story by Kurt Vonnegut to vividly illustrate this difficulty. The short story depicts a time in the future in which 'everybody was finally equal', and strict equality is enforced by the State by methods such as government transmitters sending a sharp noise into the ears of smart people to prevent them 'from taking unfair advantage of their brains', requiring attractive people to disguise their beauty, and requiring strong people to walk around wearing heavy scrap metal to offset their physical strength. See Michael J Sandel, *Justice: What's the Right Thing to Do?* (Farrar, Straus and Giroux 2009) 155, referring to the story 'Harrison Bergerson' (1961) included in Kurt Vonnegut Jr, *Welcome to the Monkey House* (Dell Publishing 1998) 7.

<sup>44</sup> And see Sen (n 37) 317 (rejecting a 'unifocal' approach to equality and to justice, acknowledging instead a plurality of concerns); Cohen (n 14) 908 (adopting a 'weak equalisadrum' claim, meaning that equality can be limited in favour of other values). See also Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 *New Left Review* 68 (proposing ways to reconcile claims for redistribution with claims for recognition).

<sup>45</sup> For a luck egalitarian approach to hiring, see Segall (n 16) chs 4-5.

<sup>46</sup> Richard B Freeman and James L Medoff, *What Do Unions Do?* (Basic Books 1984) ch 5; Bruce Western and Jake Rosenfeld, 'Unions, Norms, and the Rise in U.S. Wage Inequality' (2011) 76 *American Sociological*

between high and low salaries within the firm (which can be called ‘maximum wage laws’).<sup>47</sup> Third, a minimum wage can be justified to prevent extremely low wages which are likely to result from lack of talent or lacking childhood education etc. (again minimising the impact of such ‘brute bad luck’). Fourth, in terms of the distribution of wealth between employers and employees, which at least to some extent can be presumed to result from luck, unions and the minimum wage are once again instruments for reducing disparities.

Admittedly, for all of these regulations, there is a risk that employers will shift the costs to the protected group – or to other groups of workers – eventually leading to regressive redistribution. While this risk should not be ignored, there is certainly no reason to believe that redistribution attempts are hopeless. For each specific regulation, a full separate analysis of the expected redistribution is required before concluding what results can be expected. It is certainly possible to include within the above-mentioned laws measures that prevent or at least minimise the risk of cost-shifting; and in some cases, even if it occurs, the results are still expected to be progressive.<sup>48</sup>

So far, the discussion has been limited to the distribution of material goods. But distributive justice can arguably refer to the distribution of power and risks as well.<sup>49</sup> If we adopt this broader view, regulations supporting unions and collective bargaining receive further support (because they redistribute power from employers to workers) and other protections such as unfair dismissal laws can also be supported (because they redistribute risks from employees to employers). Redistribution along these lines can be justified once again based on the assumption that without it, the distribution of power and risks created by the market gives too much weight to factors that are morally arbitrary (such as the bad luck of being fired for arbitrary reasons).

Finally, can we apply Rawls’s difference principle in labour law? Because labour laws apply to people who have jobs, almost by definition they do not cover the ‘least advantaged’ members of

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Review 513. See also Ewan McGaughey, ‘All in ‘It’ Together: Worker Wages Without Worker Votes’ (2016) 27 *King’s Law Journal* 1.

<sup>47</sup> Such a law was recently adopted in Israel with regard to the financial services sector (banks, insurance companies etc.). The new Act determines that payment of a yearly salary higher than 2.5 million NIS (app. US\$700,000) requires a burdensome process of approval within the company, and cannot be approved if the overall cost of the compensation package is more than 35 times the cost of employing the lowest-paid employee working for the company (including those employed through temporary employment agencies, as well as cleaning and security workers through contractors). Moreover, any surplus paid over the above sum (if approved) cannot be deducted as a business expense for tax purposes. See *Compensation for Executives at Financial Corporations (Special Approval and Prevention of Tax Deductibility of Exceptional Compensation) Act 2016*.

<sup>48</sup> For examples of distributional analyses concerning specific labour laws, all of which support such laws at least partially, see Christine Jolls, ‘Accommodation Mandates’ (2000) 53 *Stanford Law Review* 223; Shamir (n 4); Davidov (n 6).

<sup>49</sup> See n 4.

society (who are presumably unemployed). Accordingly, it could be argued that laws redistributing in favour of employees – who are not the least advantaged – are unjustified.<sup>50</sup> However, we can use the general idea to suggest that inequalities *in the labour market* can be justified only if they benefit the least advantaged *workers* (i.e. the least advantaged members of the labour market). This idea can be used to justify (and require) regulations that redistribute resources, power and risks in favour of low-wage, precarious workers. Moreover, it has been argued following Rawls that job complexity, authority and responsibility should be considered primary goods, because of their importance for ‘self-governing and social capacities of the self’;<sup>51</sup> according to this view we should be concerned not only with income equality, but also with *occupational* equality, meaning the distribution of jobs with opportunities for self-fulfilment and self-respect. This could lead to a proposal to ‘flatten workplace hierarchies and democratize workplace governance’, subject to Rawls’s constraint that such hierarchies and non-democratic governance could be justified if they benefit the least advantaged.<sup>52</sup> Arguably this provides further support for regulations supporting unionisation and collective bargaining.

#### IV. Redistribution to Advance Relational Equality

The idea of distributional/economic equality is contested by some philosophers, who argue that our focus should be *social* or *relational* equality: to ensure that people have equal status, are treated as equals and have the ability to function in society on ‘equal terms’.<sup>53</sup> The idea of equality, they argue, is to fight oppression, castes, hierarchies between classes etc. and not bad luck.<sup>54</sup> The relational approach therefore considers equality a social and political ideal and not a distributive ideal *per se*. Proponents of this approach accordingly try to avoid the term distributive justice, describing their theory as dealing with equality or egalitarianism. However, they do not settle for formal equality (in the sense that the rule of law applies to all equally) but rather understand that resources have a crucial impact on the ability of people to function as equals in society. Because relational egalitarians realise that redistribution is necessary to secure equality – and make an effort to explain how this should be done – this theory can be seen as a theory of distributive justice as well.

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<sup>50</sup> For this interpretation of Rawls see, e.g., Horacio Spector, ‘Philosophical Foundations of Labor Law’ (2006) 33 Florida State University Law Review 1119, 1134.

<sup>51</sup> Samuel Arnold, ‘The Difference Principle at Work’ (2012) 20 Journal of Political Philosophy 94, 98, 106.

<sup>52</sup> *ibid* 107.

<sup>53</sup> See Anderson (n 14); Scheffler (n 19). On social equality see also Miller (n 4) 232.

<sup>54</sup> Scheffler (n 19) 22.

What kind of redistribution is needed to achieve equality of status? Obviously the social status and political power enjoyed by a billionaire are dramatically higher than those held by poor people. Therefore, in principle the idea of equal status could be taken to require equality of resources. However relational egalitarians prefer a ‘sufficientarian’ approach: each individual must have a *basic* level of resources, not less than the minimal level needed to ensure one’s ability to function in society as equal. It immediately becomes clear that the above description is hopelessly circular: the idea of ‘equal status’ cannot in itself provide any guidance as to what is sufficient to function as equal. One has to rely on some additional theory to figure out what is required in terms of distribution.

Elizabeth Anderson turns in this juncture to the capabilities approach, arguing (following Sen) that society has to ensure ‘our freedom to achieve valued functioning’.<sup>55</sup> She includes three aspects of functioning: as a human being, as a participant in a system of cooperative production (the market), and as a citizen of a democratic state. The second of those is most relevant for current purposes, and in this regard Anderson explains that it requires ‘effective access to the means of production, access to the education needed to develop one’s talents, freedom of occupational choice, the right to make contracts and enter into cooperative agreements with others, the right to receive fair value for one’s labor, and recognition by others of one’s productive contributions’.<sup>56</sup> The last two points seem to rely (implicitly) on an idea of desert. The other rights and freedoms which Anderson considers to be required in this context all aim to ensure *access* and nothing more. Although Anderson herself calls this ‘effective’ access,<sup>57</sup> in practice she seems to settle for a very minimal level of effectiveness: just enough to ‘avoid being oppressed by others’.<sup>58</sup> She does not consider income inequalities to be problematic in themselves. She admits that such inequalities are problematic when they are easily translated into ‘status inequality – differences in the social bases of self-respect, influence over elections, and the like’<sup>59</sup> but refuses to assume (even though it would be reasonable to assume) that this is normally the case.

Further development of the capabilities approach that can be helpful in the current context has been offered by Jonathan Wolff and Avner de-Shalit, who argued that alongside the level of functionings we must be concerned with the ability to sustain them. *Insecurity* of functionings creates risk and vulnerability which are in themselves problematic. They give casual employees as an example, characterising the insecurity of being possibly out of work at any given time as a

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<sup>55</sup> Anderson (n 14) 316.

<sup>56</sup> *ibid* 318.

<sup>57</sup> *ibid* 318.

<sup>58</sup> *ibid* 320.

<sup>59</sup> *ibid* 326.



disadvantage requiring societal response.<sup>60</sup> Moreover, in an attempt to identify the least advantaged members of society, they show how disadvantages ‘cluster’ together, multiplying in severity.<sup>61</sup>

What would be the implications of distributive justice based on relational equality for labour law? Anderson points to the minimum wage as one mechanism that can help ensure that people are not ‘deprived of the social conditions of their freedom’.<sup>62</sup> She also supports the right of people with disabilities to accommodation, to the extent this is needed to allow them to participate in society.<sup>63</sup> The emphasis on insecurity proposed by Wolff and de-Shalit could support various protections for precarious workers. David Miller goes a step further; noting that ‘if we want our society to be egalitarian, then we will try to shape our distributive practices so that the emergence of hierarchy is discouraged’, he argues that large, cumulative inequalities that exist in current liberal democracies – in education, income and organizational power – mean that ‘these societies are still effectively class-divided’.<sup>64</sup> Accordingly, he argues that differences in wages within firms should be compressed, suggesting as an example that the managing director of a large company should not be paid more than three or four times the wage of an unskilled worker.<sup>65</sup> This goal can be advanced (as noted in the previous part) through direct regulations – a ‘maximum wage law’ – and/or indirectly by supporting labour unions.

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<sup>60</sup> Wolff and de-Shalit (n 4) 9, 70. They further argue that ‘the government should guarantee genuine opportunities for secure functionings’ (at 14).

<sup>61</sup> *ibid* ch 7.

<sup>62</sup> Anderson (n 14) 325.

<sup>63</sup> *ibid* 331. In a later, recent contribution Anderson applies republican theories of non-domination to the labour context, arguing that the idea of non-domination can support various labour laws, as well as possibly more radical interventions such as co-determination – Elizabeth Anderson, ‘Equality and Freedom in the Workplace: Recovering Republican Insights’ (2015) 31(2) *Social Philosophy and Policy* 48, 66-8. I note this here because she stressed the connection between relational equality and non-domination (at 65). However, her article focuses almost entirely on non-domination rather than equality, and such arguments should be examined separately. See also Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press 1997) 110-9 (arguing that advancing non-domination – in line with the ideal of freedom as non-domination – is also egalitarian, but adding that it does not lead to ‘material egalitarianism’). There are obviously strong connections between minimising domination and distributive justice (see also Lovett (n 5)), but I believe, as noted in the introduction, that they are better construed as separate arguments. For a discussion on non-domination arguments as justifications for labour law see Guy Davidov, ‘Subordination vs Domination: Exploring the Differences’ forthcoming in *International Journal of Comparative Labour Law & Industrial Relations* (2017). Horacio Spector, another supporter of relational equality as a justification for labour law, relies especially on the connection of this idea to Kant, who rejected contracts ‘whereby people disclaim their equal worth and autonomy’ - Spector (n 50) 1145-6. I believe it would be more appropriate to use dignity directly as a justification rather than distributive justice or equality in this case.

<sup>64</sup> Miller (n 4) 242.

<sup>65</sup> *Ibid* 243. Compare to the recent Israeli legislation mentioned at n 47.

Samuel Bagenstos has taken a broad approach and argued that ‘social equality’ can also be used to justify laws concerning workplace discrimination, unjust dismissal, workers’ privacy, workers’ political speech, whistleblowing, child labour and maximum hours.<sup>66</sup> This is based on the idea that the point of all these laws is ‘to ensure that individuals have the time, space, and ability to participate in democratic citizenship’.<sup>67</sup> This appears to be a useful justification for some laws, but quite artificial and too indirect for others. For example, the idea that we need free time from work in order to be able to use it for participation in society as equal citizens is plausible, as a supporting/secondary justification, but would be strange to be seen as the main justification. Maximum hour laws are needed first and foremost to give workers an opportunity to rest and have time for themselves and their family, and to prevent their exploitation and abuse.

## V. Conclusions – and Implications for Intra-Worker Distribution

Labour laws have various goals.<sup>68</sup> Distributive justice is certainly not the only goal of labour law; it is probably not even the main one. However, it is one important goal that has been relatively neglected (as an *independent* justification) in the labour law literature. The goal of this chapter was to review several theories of distributive justice and examine to what extent labour laws can be said to advance them (or, otherwise put, to what extent distributive justice theories can be used as justifications for labour laws). We have seen that, for the most part, the different theories do not contradict each other; they all support several basic labour law protections. There is some difference of emphasis depending on which theory is adopted, but as long as we avoid extreme versions of the different theories, they can live side by side.

Desert-based distributive justice can support anti-discrimination laws, pay equity laws (not only gender-based but also pay equity for part-time, fixed-term and temporary employment agency workers), as well as corrections of market failures leading to under-valuation of workers in specific jobs or sectors, given their level of contribution. Distributional equality theories similarly support anti-discrimination and pay equity law (broadly conceived), as well as laws supporting unionisation and collective bargaining; and minimum wage laws. If we adopt a broad view of distributional equality and include the distribution of risks as well, we find justification for unjust dismissal laws. And inspiration from Rawls’s difference principle can provide support for laws

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<sup>66</sup> See Samuel R Bagenstos, “‘Rational Discrimination,’ Accommodation, and the Politics of (Disability) Civil Rights’ (2003) 89 Virginia Law Review 825 for workplace discrimination law; Samuel R Bagenstos, ‘Employment Law and Social Equality’ (2013) 112 Michigan Law Review 225 for all other laws.

<sup>67</sup> *ibid* 269.

<sup>68</sup> Which I discussed extensively in previous writings; see most recently Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

that protect/advance the situation of low-wage, precarious workers. Finally, relational equality theories support minimum wage laws; accommodation for people with disabilities; protection for precarious workers; and potentially (if adopting a broad view) also laws supporting unions and collective bargaining, and various other employment standards.

It should be made clear that these justifications provide only a *prima facie* case for the above-mentioned laws; a full consideration must also take into account additional justifications as well as possible critiques (conflicting normative arguments), apart from distributive justice.

Alongside support for current labour laws, theories of distributive justice point attention to one area in which current laws are especially lacking: the proliferation of two-tier (or dual) labour markets. There are two different levels to this problem, the micro level (of a specific organisation/employer) and the macro level. At the micro level, the problem presents itself in three different ways. First, a distinction between full-time long-term employees and other employees who are relegated to fixed-term, part-time, temporary or otherwise ‘second grade’ contracts. Second, a division between ‘insiders’ who enjoy a full package of rights and benefits and ‘outsiders’ who work for the benefit of the organisation but are formally employed by a contractor or a temporary employment agency, where the level of wages and benefits is significantly lower. Third, in unionised workplaces, there are sometimes collective agreements that create two tiers of workers, allowing veteran workers to enjoy generous benefits but depriving new workers of these benefits. In all three methods, workers at the ‘secondary’ markets are relegated to an inferior position. At the macro level, there are sharp distinctions between unionised and non-unionised workplaces, which are even more extreme when comparing workers at governmental monopolies (who often have the power to exert exceptional pressure and enjoy exceptional rewards as a result) with low-wage workers in small private-sector establishments.

The sufficientarian approach associated with relational equality is not likely to support significant interventions to address intra-worker disparities, as long as the workers in secondary markets are guaranteed minimum protections (minimum wage etc.). However, the other two theories seem to support radical changes. This is true for distributive justice based on desert, because the sharp differences between workers noted above are often not based on contribution or effort (or any other desert-base). The case for significant intervention is even stronger if we accept the ideas of luck egalitarianism (or otherwise the basic premise of distributional equality) – as I think we should. The reasons for being in the secondary market are often – even if not always – arbitrary, a mere bad luck. Sharp differences between the income and benefits of different workers that result from bad luck cannot be justified. Redistribution is justified, and required, to correct this injustice. The question then becomes how to separate differences in pay that *can* be justified (based on contribution/effort) from arbitrary (bad luck) differences that cannot be justified, and what are the best methods to prevent/correct the latter.

A further complication that requires special attention is how to amend existing labour laws that *cause* distributional injustice, and how to do so without jeopardising the goals of these laws. It is important to realise that at least *some* of the problem of intra-worker distributional injustice is caused by labour laws. One does not have to accept a strict ‘free market’ adherence to acknowledge that some degree of cost-shifting as a result of labour laws takes places, and could lead to regressive redistribution, as noted above. One common strategy used by employers to avoid the costs of labour laws is shifting work to secondary labour markets, where costs can be minimized.<sup>69</sup> Measures must be taken to *prevent* the proliferation of secondary markets and the ability to use them as ‘shelters’ from legal obligations. I have noted in part III above that a careful distributional analysis is required for each labour law to examine the expected distributive results; legislatures have sometimes failed to perform such an analysis, or at least failed to adopt the necessary preventive measures. In some cases, the problem is not with costs created directly by labour laws but with strategies adopted by labour unions that lead to greater inequality between groups of workers.<sup>70</sup> Again, the implication is not to avoid unionisation, but rather to find ways to address and minimize such concerns.

Our starting point should be that luck necessarily plays some role in a market economy, so if we want a market economy (and we do) we have to accept it to some extent. The goal is not to eliminate the impact of luck completely, but to minimise it as much as possible, especially by preventing clear-cut cases of distributive injustice. Singling out the cases in which a distinction between groups of workers is not based on desert but rather results from mere bad luck is not easy; a full attempt to do so will have to await future research. For now, I will make just a few preliminary points. First, two-tier collective agreements cannot be justified; they are a stark example of distributive injustice. Second, labour laws should not allow ‘temporary’ positions (whether in direct employment or indirectly through temporary employment agencies) that are not truly temporary in reality. When such methods are used only to relegate the worker to a secondary market, artificially, the distributional injustice cannot be tolerated. Third, to minimise the distinction between unionised and non-unionised workers, all effort must be made to ensure real and effective freedom of association; the ability of monopolies and their workers to exert excessive rents must be curtailed, possibly through price control (on the firms) and some limitations on the right to strike (on the unions); and a system of extension orders should be considered (to extend some of the benefits secured by unionised workers to non-unionised workplaces as well). Finally, a maximum wage law, limiting the ratio between the top and bottom salaries in the same firm, is

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<sup>69</sup> See, e.g., Sharon Rabin-Margalioth, ‘Cross Employee Redistribution Effects of Mandated Benefits’ (2003) Hofstra Labor & Employment Law Journal 311.

<sup>70</sup> See Mundlak (n 8) 319-21; Davies (n 8) 273-6, 280-1.

an important technique to limit distributive injustice, if we presume (as I think we can) that excessive wage variations can only be explained by considerable good/bad luck.