RELATIONAL AND ASSOCIATIONAL JUSTICE IN WORK

*Hugh Collins**

This Article explores the idea that the moral standards of relational or interpersonal justice can be used to lay the foundations for a theory of justice in work, rather than relying on principles of justice developed for society as a whole in philosophical theories of distributive justice. It is argued that a rich and distinctive scheme of interpersonal justice can be developed by using a method of internal critique and by focusing on two distinctive features of contracts of employment. Because they are incomplete by design, like other relational contracts, contracts of employment depend for their success on a broad obligation of performance in good faith. Contracts of employment also usually function within organizations which provide the source of customary norms of associational justice that govern relations between members of the firm. These principles of associational justice include rewards based on desert, a strong egalitarian principle, protection from unjustified exclusion, and a right to have a voice in the affairs and the direction of the organization.

Introduction

This Article explores a relatively uncharted approach to the question of what principles of justice should apply to work. The focus is on employment and other contracts for the personal performance of work. The main task is to construct moral principles by which the conduct of relations between employers and employees and between employees can be assessed to be just or fair. This conduct may concern basic terms and conditions of employment such as pay and working conditions, but it also may involve personal interactions and other forms of cooperation, such as the disclosure of information and consultation about business strategy. The project of an investigation of the principles of justice in work seeks a critical perspective on the law from which it may be possible to suggest amendments and reforms to bring the law into line with the moral requirements of justice in work.

The first step in the argument is to consider what kind of justice is required for the development of principles suitable for justice in work. A distinction is drawn between two kinds of moral theories of justice: distributive justice and interpersonal justice (Part I). Next, it is shown how these contrasting theories of justice suggest different approaches or starting-points for the development of principles of justice applicable to the workplace. It is proposed to follow the direction of interpersonal principles of justice rather than the currently popular application of distributive principles of social justice to the workplace (Part II). It is then argued that the

* Cassel Professor of Commercial Law, School of Law, London School of Economics.

principles of interpersonal justice applicable to contracts of employment are unlike those applicable to contracts in general because contracts of employment share two distinctive features: they are incomplete by design and performance of work normally requires membership in a voluntary association that constitutes a productive organization (Part III). We then consider the possible methodologies for identifying and articulating appropriate interpersonal principles of justice. It is argued that the most promising way to formulate those principles is not to attempt to construct a model based on abstract philosophical ideas such as equality and autonomy, but rather in this context of purposive, collaborative, and consensual activity to examine closely the functioning of the market transaction of employment, its normative assumptions, and its evolving legal regulation in order to obtain the most appropriate principles (Part IV). The Article then proceeds to use this methodology of internal critique to examine how the two distinctive features of contracts of employment provide reasons for its development of particular principles of interpersonal justice. It is argued that incompleteness by design leads to a special and demanding requirement in contracts of employment of performance in accordance with a broad standard of good faith (Part V). With respect to membership of a productive organization, interpersonal justice has developed special principles of associational justice in work (Part VI). The Article concludes by acknowledging that this use of the private law of employment can only take us so far in the development of principles of justice in work and that it has to be supplemented with public law norms that require respect for human rights and distributive justice (Part VII).

I. Distributive and Interpersonal Justice

In most contemporary political, moral and legal philosophy, studies of justice focus on the demands of justice for society as a whole.[1] These philosophical works typically examine and discuss prescriptions and evaluations of the fundamental institutional arrangements of a society such as its constitution and structures of government. Some theorists also explore the justice of the institutional arrangements within a wider federation of states, or even extend their enquiry to frameworks for global governance. These studies of social justice typically concern not only the constitutional arrangements for the exercise of power, such as democratic government and the protection of fundamental rights, but also social and economic issues about the allocation of power, wealth, freedom and other goods that most people value. Liberal and social-democratic studies of social justice, on which we will focus, argue for just distributive principles based upon values such as dignity, liberty, equality, need, utility, and virtue. As in the leading example, Rawls's *A Theory of Justice*,[2] the general ambition of these investigations of social justice is to

1 David Miller, Principles of Social Justice (1999); Brian Barry, Why Social Justice Matters (2005); David Miller, *Justice*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021), https://plato.stanford.edu/archives/fall2021/entries/justice/.

2 John Rawls, A Theory of Justice (1972).

demonstrate in accordance with moral principles what the basic institutions of a society should contain in order to ensure a just distribution of benefits and burdens among its citizens. For Rawls, a just society would establish a democratic mode of government, protect civil liberties, and steer the distribution of benefits by principles of equality of opportunity and a fair distribution of wealth. The legal arrangements for the realization of such a vision of distributive justice, such as a constitution and a regulatory tax and welfare system, are usually classified by lawyers as public law, because they govern the relations between citizens and the state.

Questions of justice may also arise at an interpersonal level: Has this person treated another individual justly? This dimension of justice has not been a central focus of political and moral philosophy, but it is a key concern of legal theorists. Issues of interpersonal justice or what is also called "relational justice"[3] arise between ordinary people going about their business and personal lives. The issue may be whether a parent has treated his children justly when favoring one over the others. Or the question of justice may ask whether a builder's firm should be paid in full for its work in the light of defects in workmanship? Or the question of justice may be whether one person should compensate another for carelessly causing damage to the other's car. Or, should a person be able to enforce a contract, even though the price for the goods or services seems unfair for being either excessive or inadequate? In such instances, claims about justice are primarily concerned about the rights and obligations between two persons (or organizations). These claims are not directly focused on the distribution of wealth and other benefits throughout society. The claims concern justice between two persons in the context of their direct relationship. As Dagan and Dorfman observe, "Whereas distributive justice focuses on considerations of justice in the holdings (or opportunities) of persons, taken severally, relational justice concerns the terms of the interactions between individuals."[4] Following Aristotle's distinction between distributive and corrective justice, such claims for interpersonal or relational justice are often described as claims for corrective justice.[5]

What is important to notice is that the moral principles that guide such interpersonal claims of justice may differ significantly from those advocated or approved for the distribution of benefits and burdens in society as a whole. For instance, a claim of interpersonal justice may be based on the argument that one person promised or agreed to confer a particular benefit. Alternatively, a claim may be based on an assertion that one person was at fault in causing damage to the property of another, or in taking it without his consent, so that compensation should be paid or the property returned. Such references to promise, consent, and fault are not usually part of the standards of distributive justice in society as a whole. For instance, a policy of taxing a wealthy person more than a poor one is not selected because of

3 Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 Colum. L. Rev. 1395, 1420 (2016).

4 Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 Law & Phil. 171, 173 (2018).

5 Aristotle, Nicomachean Ethics bk. V, ch. 4 (Roger Crisp ed., Cambridge Univ. Press rev. ed. 2000).

the wealthy person's wrongdoing or their consent, but because progressive taxation fits into a general scheme of fairness in the distribution of wealth. Demands for interpersonal or relational justice form a core concern of private law, which includes the law of contract and the law of wrongs or torts.

II. Two Approaches to the Development of Principles of Justice in Work

The distinction between distributive and interpersonal justice provides the basis for a contrast between two approaches to the assessment of questions of justice in work. The first draws on principles of distributive justice to measure the fairness or justice of the conduct of employers. The second develops principles of interpersonal or relational justice that should apply between employers and employees in work organizations.

On the first approach to issues of justice in employment and work, it is claimed that principles of social justice that apply to society as a whole, whether liberal, libertarian, utilitarian, or some other scheme of social justice, should be transplanted by the adoption of similar rules and principles to govern employment relations.[6] On this "monist" approach,[7] for instance, a libertarian theory might advocate complete freedom of contract between employer and employee in order protect liberty and to provide incentives for wealth maximization. For libertarians, as in their view nearly all taxation is theft and mandatory legal rules interfere with freedom, what is just is normally the outcome of freely negotiated contracts, not compulsory redistributions by agencies of the state.[8] In contrast, a liberal or social-democratic theorist might propose that an egalitarian principle for the distribution of wealth in society should be applied to the workplace. For instance, it might be proposed to apply Rawls's "difference principle" to all the wages within a firm, under which differences in wealth are only justifiable if they benefit the least well off.[9] On that approach, high pay for chief executive officers could be justified if and only if it could be demonstrated that by providing this incentive for business leaders, the level of pay for all (or perhaps just the lowest paid) workers in a firm would be maximized because they would share in the greater profitability of the company. On issues of freedom and domination, again we might apply liberal theories of justice to the workplace and insist that, just as autocrats must be controlled in society as a whole by principles such as the rule of law, democracy, and protection of civil liberties and human rights, so too employers must be constrained by similar legal structures of

6 This is the general approach in the essays collected in Philosophical Foundations of Labour Law (Hugh Collins et al. eds., 2018).

7 Liam B. Murphy, *Institutions and the Demands of Justice*, 27 Phil. & Pub. Aff. 251 (1999).

8 Robert Nozick, Anarchy, State, Utopia (1974).

9 G.A. Cohen, Rescuing Justice & Equality (2008); Samuel Arnold, *The Difference Principle at Work*, 20 J. Pol. Phil. 94 (2012); Guy Davidov, *Distributive Justice and Labour Law*, *in* Philosophical Foundations of Labour Law, *supra* note 6, at 141.

legality, industrial democracy, and respect for the fundamental rights of workers.[10] For instance, to protect the fundamental right of freedom of expression and discourage corruption by the managers of a business, workers might be granted strong legal protections if they become whistleblowers. This transplant approach, which uses the ideals of social justice to provide a critical perspective on employment relations, is certainly a powerful tool and serves to highlight many concerns about injustice in the workplace arising from inequalities in power and rewards.

A second approach to the question of justice in work investigates what principles of justice could be derived from thinking about employment as raising issues of justice at an interpersonal or relational level. At first sight, this approach, oriented as it is towards private law, may not appear to have much to offer. Private law claims are often viewed narrowly as being composed solely of claims to restore existing entitlements (or rights) or to compensate for their loss. In the context of contract law, those entitlements are often described as determined by the express terms of a freely concluded contract. It would seem to follow that justice in employment on this second approach would amount to little more than performance of whatever contractual terms had been agreed by the parties. Given that employers can often dictate terms in a one-sided way, this standard of justice would tend to condone current employment practices and contractual terms without presenting any critical perspective. For instance, this private law approach would appear to endorse the fairness of wages that have been contractually agreed, regardless of whether they are excessively high or fall below a living wage. To avoid that trap of simply endorsing the justice of the outcome of the power of capital to impose any terms that it chooses, normally liberal and social-democratic oriented political and legal theorists insist that justice in work must be derived from transplanted principles of social justice applicable to the state. Accordingly, these political and legal theorists appeal to human rights, the rule of law, and principles of distributive justice as the best guides to the moral standards appropriate for justice in work.

But that interpretation of the moral principles required within interpersonal or relational justice seems to be an unnecessarily pessimistic view of the interpersonal moral standards present in contracts of employment. Theorists of private law argue that interpersonal or relational justice applicable to contracts in general can provide a richer set of moral principles of justice than simply the enforcement of freely negotiated entitlements. As embodied in private law rules, those moral standards are also concerned with steering the interaction between individuals and helping them to establish worthwhile social and economic relations. This function of private law is described by Dagan and Dorfman in terms of facilitating cooperative arrangements between people that respect their claims to equal treatment in the pursuit of their autonomous goals:

> Only private law can forge and sustain the variety of frameworks for interpersonal relationships that allow us—given the normative significance of our interdependence—

10 David Cabrelli & Rebecca Zahn, *Civic Republican Political Theory and Labour Law*, *in* Philosophical Foundations of Labour Law, *supra* note 6, at 104.

> to form and lead the conception of our lives. Only private law can cast these frameworks of relationships as interactions between free and equal individuals who respect each other for the persons they actually are and thereby vindicate our claims to relational justice from one another. [11]

Perhaps more controversially, John Gardner linked the role of private law more closely to morality and support for morally required conduct:

> The main point of all law is to help people to do the things that they ought to be doing anyway, quite apart from the law . . . . The law exists to help people avoid wronging each other, to have healthy relationships, to avoid wasting their lives and destroying their self-respect, to cultivate their virtues, tastes, and skills, to overcome their limitations, and so forth.[12]

On this broader view of interpersonal justice in contracts, private law concerns the support of worthwhile relationships, whilst discouraging the commission of wrongs against another person. Support for worthwhile relationships requires private law to distinguish between contracts that do and do not facilitate the development of exchanges that are valuable to both parties, and to steer those transactions in ways that are likely to prove conducive to the better achievement of the goals of both parties. For example, private law is likely to insert into contractual relationships obligations that arise in the general law of wrongs, such as duties to take reasonable care of the other party's property and person. Similarly, private law will also try to prevent opportunism within contractual relations, such as demanding additional payments or trying to supply goods that have latent defects.

This Article draws on that general approach of private law theory to the identification of a richer set of norms that private law respects and protects. It focuses on the implications of those ideas about worthwhile cooperative relationships in the example of employment and contracts for the personal performance of work. However, this Article may part company from the work of many private law theorists in three important respects. First, it is not part of my argument that we should completely reject the first approach, the public law or regulatory approach, to questions of justice in work. My point is merely that the abrupt abandonment of private law and its moral standards on the ground that it merely endorses the interests of capital against labor is too hasty. My purpose is to explore the normative resources that may be discovered in principles of interpersonal justice.

Second, this Article argues that the contract of employment is unlike most contracts in two crucial respects. The kinds of moral standards that may be applicable to other common types of contracts such as sales of goods are of marginal significance in connection with contracts of employment. It will be argued that the special normative standards of interpersonal justice that are applicable to employment relations derive substantially from two distinctive features of those contractual work relations. These features will be elucidated in the next Part.

---

11 Dagan & Dorfman, *supra* note 3, at 1398; *cf.* Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 Cornell Int'l L.J. 361 (2018).

12 John Gardner, *Dagan and Dorfman on the Value of Private Law*, 117 Colum. L. Rev. 179, 197-98 (2017).

Third, the methodology adopted in this Article differs from that normally adopted by private law theorists. Instead of relying on abstract principles of moral philosophy and justice, such as respect for autonomy or dignity, the method adopted here is one that may be described as internal critique. This method will be explained and defended in Part IV.

III. Bilateral and Multilateral Interpersonal Justice In Employment

A contract of employment is similar in many respects to other kinds of contracts. Like most contracts, it is usually constituted by an exchange of promises. The worker promises to perform the required work in return for a promise by the employer to pay the agreed amount of wages when the work has been completed. The law is likely to enforce the justice of this agreed exchange as in other types of contracts. Justice requires enforcement of the bargain not only because it is unfair to break an agreement on which the other party has relied, but also because breach is likely to enable one party to enrich itself unjustifiably at the expense of the other. If the workers fail to perform the required tasks, they have normally no justified claim to the promised wages: no work, no pay. On the other hand, if the workers have performed their obligations in accordance with the contract, they are entitled to claim the promised remuneration. This wage-work bargain at the heart of the contract of employment explains why it is usually supposed that justice between the parties consists primarily in holding them to their agreement.

Whilst that supposition is plainly correct, it provides an incomplete account of the moral standards of interpersonal justice in relation to contracts of employment. Additional requirements of interpersonal justice for work arise because contracts of employment share two distinctive, though not unique, features. These two features concern their character as relational contracts and their functioning within an organizational framework.

A. Incompleteness by Design

It is often noted that one distinctive feature of contracts of employment is that the employer obtains under the contract a right to direct the employee in the performance of tasks.[13] The contract thus creates a relation of subordination. The employer has the right to issue commands and the worker is under a duty to obey. Whilst similar power relations sometimes obtain in other kinds of commercial relations, the relation of subordination is rightly regarded as characteristic of employment. The criterion of subordination is one of the main tools, for instance, used to distinguish contracts of employment from other kinds of contracts for the performance of services by independent contractors. If one party has the power to

13 Oliver E. Williamson, The Economic Institutions of Capitalism 249 (1985); Paul L. Davies & Mark R. Freedland, Kahn-Freund's Labour and The Law 18 (3d ed. 1983).

control and direct the performance of the work, the contract is likely to be classified as a contract of employment. In contrast, if the supplier of the service determines how the work should be performed, the law is likely to classify the contract as a contract for services.

Why is subordination and control a hallmark of contracts of employment? Transaction-cost economics offers an explanation of subordination.[14] It is suggested that where the costs of specifying the terms of the transaction are great, it is likely to be more efficient to create a contractual arrangement with some kind of governance structure that will add specificity when the need arises. For the contract of employment, this governance structure is one that confers the power to add detailed requirements exclusively on the employer. In other kinds of commercial contracts, the power may be conferred on a neutral umpire of some kind such as a quantity surveyor in a building project. But why is the contract of employment so hard to specify in advance? Why is it not like other kinds of contracts, such as the purchase of goods in a shop, where it seems straightforward to fully specify the transaction in advance? The answer normally given in transaction-cost economics is that the problem arises in long-term contracts because it is not possible to foresee all contingencies in advance. A long-term contract like the contract of employment is therefore bound to contain gaps or be drafted with insufficient specificity to address every contingency in advance. That argument is not entirely convincing for two reasons: First, good drafting of long-term contracts can usually address every risk that will arise by means of extensive exclusion clauses, force majeure clauses, and other devices that address every unknown contingency, but that degree of comprehensive rule-making does not seem to be possible in contracts of employment because employers always retain discretionary power to govern the workers. Second, not all contracts of employment are long-term. In the so-called "gig economy," short-term jobs may be offered that do not encounter the difficulty of addressing unforeseen contingencies. These two points seriously weaken the linkage drawn in transaction-cost economics between long-term contracts and the need for a relation of subordination in employment.

Is there an alternative explanation of why subordination is present in contracts of employment? I suggest that contracts of employment are incomplete not because of difficulties in foreseeing future external contingencies, though such may arise when markets change, but mostly because, at the time of hiring an employee, the employer is typically unsure what precise tasks the employee will be needed to perform. The broad range of tasks can be delimited by the terms of the contract by specifying that the work is for a particular kind of job such as a doctor, a nurse, or a porter in a hospital. But within that range the employer will want to allocate more specific duties on a daily or hourly basis. Those instructions will often be influenced by tacit negotiations with the employee about where their services are most needed and how best to perform the job. On this view, contracts of employment are not specified in advance, not because of the cost of providing such specificity in the terms of the contract, but because the employer is unsure in detail what kinds of

14 Williamson, *supra* note 13.

work will be required by the organization or business. Furthermore, though there is a relation of subordination, most employees retain some discretion about how they perform their work, how hard they work, and how much they help to promote the purpose of the organization. The contract cannot micromanage those exercises of discretion, no matter how limited they may appear to be.

In other words, contracts of employment are incomplete by design.[15] They function best when the employer retains discretion to redesign the job and the purpose of the contract, and the employees cooperate within their discretion to further the purpose of the organization. Contracts of employment that do attempt to specify the tasks to be performed in minute detail, which may sometimes be possible for work on a factory conveyor belt, seem unlikely to be the most optimal arrangement for the employer in the long run. When employees are treated like machines, they are unlikely to identify with the objectives of the organization and will minimize the extent to which they cooperate. It was a response to those kinds of demotivating attitudes provoked by scientific management that led to new techniques of human resource management that try to harness the cooperation of employees towards the goals of the organization. [16]

B. Multilateral Relations of Association

A second distinctive feature of contracts of employment is that most work relations are formed within productive organizations. Owing to the division of labor, the goods and services produced by a productive organization must be largely the outcome of teamwork. Employees have to constantly interact with managers and colleagues and subordinates within the organization in order to get the job done efficiently and successfully. Nearly all of these interactions between the employees of an organization will not in themselves be directly governed by a contractual relation. The contracts of employment are made with the employing entity. The relations between employees are governed by rules promulgated within the organization, such as a staff handbook or work rules. Some of those rules may be backed up by contractual sanctions if breach of a particular rule is treated by the terms of the contract as a binding term. However, more often these rules provide guidance rather than commands, aspirations rather than specific obligations, so they are not generally regarded as part of the contractual obligations formed by the contract of employment.[17]

Furthermore, although those rules set a framework for performance of work, the day-to-day interactions between managers and colleagues are not determined by the rules. The rules and expectations between workers are developed through

15 Hugh Collins, Regulating Contracts 161 (1999).

16 Elton Mayo, The Social Problems of Industrial Civilization (1949); David E. Guest & Riccardo Pecci, *Partnership At Work: Mutuality and The Balance of Advantage*, 39 Br. J. Ind. Relat. 207 (2001); Daniel Katz, *The Motivational Basis of Organisational Behavior*, 9 Behav. Sci. 131 (1964).

17 Hugh Collins et al., Labour Law 123 (2d ed. 2019).

custom and practice within the organization. They depend on personal relations and expectations of reciprocal assistance between the members of the organization.

The existence of these informal norms and expectations that govern relations between workers within a productive organization render the contract of employment rather different from most contracts. Sometimes this feature of contracts is used to describe them as "relational" in the sense that they rely for their successful performance on respect for a wide range or norms and customs that are not mentioned or governed by the terms of the contract. Whilst that relational element may serve to distinguish contracts of employment as a matter of degree from ordinary discrete transactions such as the purchase of goods in a shop, every contract does depend to some extent on informal expectations and norms.

What makes contracts of employment especially unusual is the way that these informal norms or their relational dimensions govern the interactions between coworkers with whom there is no direct contractual relation. The norms are important for guiding the multilateral relations of association within a productive organization. They indicate the accepted norms for many important features of such interactions between members of the team. For instance, they are likely to set standards for how one addresses colleagues and more senior managers, how one responds to their communications, how to remain polite but firm in cooperating to get the job done. None of these standards are governed by the contract because there is no direct contract between the members of the productive organization. Instead, like other associations such as clubs and trade unions, important interactions in the day-to-day functioning of the employment relation depend upon the unwritten rules of the workplace.

IV. Internal Critique

The previous Part argued that the contract of employment is unlike other kinds of contracts for two reasons: its incompleteness by design, and the multilateral relations of association in which work is performed. These differences from other kinds of contracts provide the basis for supposing that the normal criteria of fairness and justice that are applied to contracts will be inadequate to address issues of justice in work. As well as the normal moral criteria, such as the parties should keep their promises and comply with the terms of the exchange, the contract of employment requires additional moral standards to address its two distinctive features. The question posed in this Part is how one should discover and identify these additional relevant principles of interpersonal justice for contracts of employment.

One possible approach is to try to develop the principles and abstract standards that apply to contracts in general, in order to adapt them to the distinctive features of contracts of employment. For instance, we might say that the idea of liberty plays a crucial role in the moral standards applicable to contracts in general. It is acknowledged in maxims such as freedom of contract. We could then ask whether the idea of liberty could suggest moral standards that might address issues that arise

because of the incompleteness of contracts of employment. One possible issue is that an employer exercises its power of control over employees in a way that greatly restricts their liberty. An example might be a rule imposed by the employer that prevents any private phone calls and messaging during the working day. Could we say that this rule presents an unjustified interference with liberty? The difficulty with such an argument is that the employer might insist that employees have consented to the rule against private messaging by accepting a job with the business, so that they have voluntarily agreed to restrict their liberty in order to obtain the benefits of the job. To interfere with the employer's imposition of the rule against private messaging would be on this view to violate a basic principle of justice in transactions: to uphold freely made bargains. It is to escape that sort of argument about liberty and consent to oppressive terms that theorists of justice in work so frequently turn to the mandatory standards of public law, such as respect for human rights. In these circumstances, the right to respect for private life can justify the invalidation of a complete ban on personal messaging during the working day.[18]

An alternative approach to discovering relevant principles of interpersonal justice is to examine practice in the interpersonal relations of employment to discern customs and norms that arise in that context. That approach has the advantage of being able to take into account the actual historical claims made by workers and their employers about justice in the workplace. Through critical analysis of those claims and counterclaims and their associated social struggles, one can reconstruct what norms have been realized in the sphere of employment and what norms could be more perfectly realized.[19] For instance, as Axel Honneth observes, it is evident that in the early part of the nineteenth century,

> the whole idea of a 'free' labour contract has been normatively accepted or at least tolerated. If workers call for a 'right' to work, then it must be the case that people are no longer [legally] compelled to work; if worker safety and sick pay are demanded, then workers must be convinced that the labour contract obligates employers [not society as a whole] to provide a series of protective measures; and, finally, if 'exploitation' becomes a common accusation, then workers must implicitly be legally entitled to the product of their labour [rather than their feudal master].[20]

Reliance on actual social practice and the claims of justice associated with it carries the danger that it tends to regard current practice as constituting the appropriate moral standards of justice in employment. That risk of merely endorsing what employers do at present has to be met by an examination of the critical normative claims of the participants as well. That critical distancing can also be assisted by

---

18 Bărbulescu v. Romania, 840 Eur. Ct. H.R. 1725 (2010).

19 This style of "normative reconstruction" is the method of critical theory in general, as exemplified in Axel Honneth, Freedom's Right: The Social Foundations of Democratic Life (2014). For discussion of this methodology, see Gaël Curty, *Capitalism, Critique and Social Freedom: An Interview with Axel Honneth on Freedom's Right*, 46 Critical Soc. 1339 (2020).

20 Axel Honneth, Freedom's Right: The Social Foundations of Democratic Life 227 (2014) (words in square brackets added).

examining the norms and claims made in the discourse of the law, including private law that regulates employment.

The private law governing the contract of employment provides evidence of claims and counterclaims about justice in employment. Judgments draw on precedents and legislation to provide a reasoned accommodation between those claims. Modern legislation that confers private-law types of rights on employees provides a particularly fertile source of moral standards. This legislation often includes rights to bring claims for compensation for discrimination on prohibited grounds such as race and sex. Similarly, many countries have legislation that permits employees to bring claims for compensation for unjustified dismissal. The standards established in private law are not necessarily ones that merely endorse employers' practices. At the very least, the standards of private law aspire to consistency and coherence, which places constraints on purely instrumental judgments. Private law can therefore produce normative standards that enable workers sometimes to make successful claims against employers' conduct.

In the remainder of this Article, this second approach to the discovery of relevant principles of interpersonal justice in contracts of employment through internal critique will be pursued. The task is therefore to combine a careful investigation of actual conduct and struggles in the performance of work with a refined understanding of the relevant law of employment that confers private rights. We need to keep at the forefront of our deliberations the actual practices involved in the performance of work, because the interpersonal moral standards that we seek are those that help the valuable institution of work relations to flourish. We can also draw on the private law of employment, which has been refined over several centuries to provide regulation that both helps employment to function efficiently and effectively as an economic institution and also tries to address claims for fairness and justice. In doing so, however, we should not forget that the current law may not fully address problems of injustice that may arise within employment for many kinds of reasons such as accidents of precedent, judicial reluctance to intervene in contractual relations, and the internal logic of the law with regard to consistency and coherence.

In the next two Parts, this methodology will be applied to the two distinctive features of employment and its legal regulation mentioned above: that employment is a contract that is incomplete by design and that performance of the contract occurs typically as part of membership of a voluntary productive association.

V. Good Faith

The concept of a "relational contract" has become popular in recent years. Unfortunately, the term is understood in many different ways. In sociology, the idea of a relational contracting is a way of expressing the point that every contractual relationship, even those that are trivial and fleeting such as a purchase of a newspaper from a shop, rely upon and are embedded in conventional norms regarding the

mutual expectations and obligations of the parties.[21] In this sociological sense, every contract is to some extent relational. The concept of a relational contract has also been used by institutional economics (or socio-economics) to describe aspects of certain kinds of hybrid business organizations such as franchises that are neither business organizations nor simple commercial exchanges.[22] It has also emerged in economic game theory to model how some long-term business relations function in a self-enforcing manner without the need for legal sanctions.[23] But the concept of a relational contract has also been constructed recently as a legal concept in the English courts and elsewhere.[24]

How has the legal category been described? Judges in England have given examples of relational contracts and indicated some features that they may have. "Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements."[25] Features often mentioned are: the expectation of a longer-term business relationship; investment of substantial resources by both parties; implicit expectations of cooperation and loyalty that shape performance obligations in order to give business efficacy to the project; and implicit expectations of mutual trust and confidence going beyond the avoidance of dishonesty.[26] These are all helpful indications of the existence of a relational contract, but they do not provide precise guidance on the contours of this class of contract. In the absence of a clear definition, courts must use a multifactor approach for discerning the probability that a contract is properly classified as a relational contract.

Among the list of factors to be taken into account during the process of classification, however, there is one that appears necessary, even though it is not on its own sufficient to identify a relational contract. This factor is that the terms of the contract use indeterminate descriptions of both the expected performance obligations and the hoped-for outcomes of the transaction. Fraser J. has eloquently described this feature of the bargain between the parties to relational contracts: "The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract."[27] Incompleteness often occurs in relational

21 Stewart Macaulay, *Non-Contractual Relations in Business*, 28 Am. Soc. Rev. 45 (1963); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 Am. J. Soc. 481 (1985); David Campbell, *The Relational Constitution of the Discrete Contract*, *in* Contract and Economic Organisation: Socio-Legal Initiatives (David Campbell & Peter Vincent-Jones eds., 1996); Ian R. Macneil, *Contracts: Adjustment of Longterm Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978).

22 Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organisation*, 12 Rsch. Organisational Behav. 295 (1990); Networks: Legal Issues of Multilateral Co-Operation (Mark Amstutz & Gunther Teubner eds., 2009); Gunther Teubner & Hugh Collins, Networks As Connected Contracts (2011).

23 George Baker et al., *Relational Contracts and the Theory of the Firm*, 117 Q.J. Econ. 39 (2002).

24 Hugh Collins, *Is a Relational Contract a Legal Concept?*, *in* Contract and Commercial Law 37 (Simone Degeling et al. eds., 2016).

25 Yam Seng Pte Ltd v. International Trade Corp Ltd [2013] EWHC (QB) 111, [2013] All E.R. (Comm) 1321, 171 (Lord Leggatt J).

26 Fraser J. lists a similar nine factors in Bates v. Post Office (No.3) [2019] EWHC (QB) 606, [725].

27 Bates v. Post Office (No.3) [2019] EWHC (QB) 606, [725].

contracts for the same reason that indeterminacy is sometimes a feature of long-term contracts: because contingencies and necessary adaptations cannot always be foreseen.[28] In most long-term contracts, however, the goal is certain, even if the road there is littered with unexpected contingencies. What is distinctive about relational contracts is that even the destination is indeterminate in the sense that the precise outcome or product that may be achieved through cooperation is not defined in advance and can be reconfigured in the light of experience during performance of the contract. Although planning for contingencies may be incomplete as in other long-term contracts, relational contracts embrace a more profound uncertainty about the precise goal or purpose of the transaction. In other words, a necessary feature of the emerging legal category of relational contracts is that they are "incomplete by design."[29] As was established above, contracts of employment are also relational contracts in this sense.[30]

In contracts of employment, the incompleteness of the terms of the contract is partly resolved by the conferral on the employer of a right to control and direct work, with a corresponding obligation placed on employees to obey those instructions. Beyond explicit instructions, however, the contract of employment is unlikely to function successfully unless both parties cooperate to achieve the indeterminate purpose of the contract. Both employer and employees have to adjust and adapt to the changing demands and goals of the productive organization.

In contracts of employment, this need for cooperation is often expressed in law as a duty to perform the contract in good faith. In many common-law jurisdictions, as in civil-law jurisdictions, good faith in performance is a generally accepted standard for all contracts.[31] A general requirement of cooperation is also often implied into contracts in general. The requirements of good faith and cooperation seem likely to vary according to the context and type of contract concerned. Whereas in most contracts, performance in accordance with the terms of the contract and the avoidance of dishonesty will meet any requirement of good faith, in relational contracts the duties emerging from the standard of good faith are likely to be more extensive and critical to the success of the contract because of its indeterminacy. The standard of good faith amounts to placing an obligation on both parties to support the purpose of the contract and not to undermine its functioning by uncooperative and unfair

28 Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1091 (1981).

29 Hugh Collins, Regulating Contracts 161 (1999).

30 Robert C. Bird, *Employment as a Relational Contract*, 8 U. Pa. J. Lab. & Emp. L. 148 (2005); Douglas Brodie, *How Relational Is the Employment Contract?*, 40 I.J.J. 232 (2011); Douglas Brodie, *Relational Contracts*, *in* The Contract of Employment 145 (Mark Freedland ed., 2016); Hugh Collins, *Employment as a Relational Contract*, 137 L.Q.R. 426 (2021); Gabrielle Golding, *Employment as a Relational Contract and its Impact on Remedies for Breach*, Griffith L. Rev. 1 (2021).

31 Australia: Joellen Riley, *Developments in Contract of Employment Jurisprudence in other Common-Law Jurisdictions: A Study of Australia*, *in* The Contract of Employment, *supra* note 30, at 273; Canada: Claire Mummé, *A Comparative Reflection from Canada—A Good Faith Perspective*, *in* The Contract of Employment, *supra* note 30, at 295. *See also* The Restatement 2d Contracts § 205, which contains a duty of good faith and fair dealing in the performance of the contract which has been applied to terminations of contracts of employment in some states. *See, e.g.*, Fortune v. National Cash Register Co. 373 Mass.96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H.130, 316 A.2d 549 (1974).

behavior. In a case concerning a type of joint venture,[32] drawing on Australian authorities,[33] Leggatt J pointed to the crucial guide to the meaning of good faith in relational contracts: the common purpose of the parties in entering the transaction. The obligation to perform in good faith can be described as:

> an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.[34]

In English law, a similar idea is expressed by the requirement in contracts of employment that neither party should act in a way that is likely to destroy mutual trust and confidence.[35] This implied term can be invoked against duplicitous behavior,[36] failure to disclose information,[37] and highhanded action.[38] As Lord Nicholls has observed, "The trust and confidence implied term means, in short, that an employer must treat his employees fairly. In his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith."[39]

A similar implied obligation of good faith and loyalty to the employer's interests is placed on the performance obligations of employees.[40] This implied term is needed for the contract to function efficiently and effectively, for otherwise employees might "work to rule" or "withdraw goodwill," exercising their discretion to impede rather than promote the interests of the productive organization. These obligations of performance in good faith for both parties are acknowledged to be so essential to achieving the intended outcomes of the contract that it has even been suggested, contrary to orthodox accounts of contract law, that these implied terms should be non-excludable and mandatory.[41]

These standards of good faith and mutual trust and confidence set boundaries on how the parties should exercise their discretion in performance of the contract. Harsh and unfair treatment by a manager is likely to be regarded as an abuse of power and a breach of the implicit standards expected at work. Similarly, if an employee is lazy and does not cooperate with the rest of the team, this conduct is likely to be

---

32 Al Nehayan v. Kent [2018] EWHC 333 (Comm).
33 Paciocco v. Australia and New Zealand Banking Group Limited [2015] FCAFC 50 (8 April 2015) para. 288 (Austl.).
34 Al Nehayan v. Kent [2018] EWHC 333 (Comm) [175].
35 Mathew Boyle, *The Relational Principle of Trust and Confidence*, 27 Oxf. J. Leg. Stud. 633 (2007).
36 Post Office v. Roberts [1980] IRLR 347 (EAT).
37 Visa International Service Association v. Paul [2004] IRLR 42 (EAT).
38 Bournemouth University Higher Education Corp v. Buckland [2010] EWCA (Civ) 121, [2011] QB 323.
39 Eastwood v. Magnox Electric Plc [2004] UKHL 35, [2005] 1 AC 503, [11].
40 Secretary of State for Employment v. ASLEF (No 2) [1972] ICR. 19, [1972] 2 All ER 949, CA.
41 Douglas Brodie, *Beyond Exchange: The New Contract of Employment*, 27 ILJ 79 (1998); Mark Freedland, The Personal Employment Contract 164-66 (2003); Douglas Brodie, *Mutual Trust and the Values of the Employment Contract*, 30 ILJ 84 (2001); Hugh Collins, *Implied Terms in the Contract of Employment*, *in* The Contract of Employment, *supra* note 30, at 471, 483-90.

regarded by the employer as a breach of the duty to perform the contract in good faith. Once these expectations of cooperation in good faith are dashed, the parties are likely to consider termination of the contract: the employee may feel there has been unfair treatment and the employer will object to any shirking or withdrawal of goodwill. But these requirements of good faith in performance go beyond the exercise of discretion. For example, employees typically expect their employers to cooperate in the sense of providing adequate information and training to perform the job, to require only a reasonable workload within the competence of the employee, and more generally for the employer to treat employees fairly.

In this Part, it has been argued that a broad obligation of good faith is expected from the parties to contracts of employment. This expectation may in part arise from broader moral standards such as an expectation of employees that they should be treated with dignity, not like a disposable machine. But my argument for this obligation of performance in good faith has depended entirely on the claim that in relational contracts, which are indeterminate by design, it is necessary for the successful performance of the contract to supplement the express terms of the agreement not only by some kind of governance structure (in this instance, the subordination of employees to the control of the employer), but also by diffuse obligations of loyalty to the purpose of the transaction. The expectations of cooperation and performance in good faith form part of the customs of productive organizations. Private law has recognized these expectations and customary standards by tools such as the implied term of performance in good faith and other statutory interventions such as protections against unjustified dismissal.

VI. Principles of Associational Justice

We turn now to the second distinctive characteristic of contracts of employment highlighted above: the feature that most work is performed as a member of a voluntary association or team within a productive organization. What kinds of moral standards might be discerned in interpersonal relations in this multilateral context of a productive organization?

One way to explore this difference between ordinary commercial contracts and employment is to consider employees' reactions to colleagues and coworkers who are not doing their jobs properly. The simple model of a contract of employment as a bilateral exchange would suggest that only the employer has an interest and a right to complain about employees slacking off. Yet, I think many colleagues would be critical of other staff who are not doing their jobs properly. They might say that the shirkers are letting down the team, not pulling their weight, undermining the aims of the organization. But what is this moral high ground? What are the principles of justice that are being invoked implicitly within the organization or association? Drawing on both practice and legal regulation as evidence and for insights into the relevant moral obligations of justice in voluntary associations that require cooperation from the whole team for the success of the organization,

there seem to me to be at least four moral principles that are frequently invoked in practice: desert, treatment as an equal, protection from unfair exclusion, and a right to participate and exercise voice.

A. Desert

The first principle of associational justice is desert. Membership in the group provides a reason to help sustain it and contribute to its purposes according to one's role in the group and what is reasonably expected. The moral standard is that each member will make their expected contribution and receive a reward that is proportionate to that contribution. Within associations, desert is the dominant moral principle for the distribution of rewards such as pay and promotion.

Desert is a very different principle of justice than the one applicable to ordinary market transactions. In other exchanges, justice will be served by some kind of equivalence in the exchange or merely the opportunity to bargain for the best price. In general, the market price will be regarded as what is fair. Within an organization, however, desert is not based on market price, though of course the level of wages is likely to be influenced by the external market rate. In the "internal labor market" of employers, what matters more are relativities between different types of jobs.[42] In large organizations, wages are set mostly by reference to the grade of the job according to the rules of the organization, though increasingly with an additional discretionary bonus element to recognize especially valuable contributions. But even in a small business such as a self-employed plumber and an assistant and an apprentice, the relative wages within the group are likely to meet a customary standard of relativities observed by similar businesses.[43]

Furthermore, the moral standard of desert is not the same as entitlement under the contract of employment. An employee may be entitled to an astronomical salary in accordance with the contract, but it is a separate question whether that employee really deserves to be paid that much. The question of desert is likely to be based on a person's character and conduct.[44] It is likely to be influenced by considerations such as whether the employee has worked hard, brought innovative ideas to the table, or covered for other staff's absences.

B. Treatment as an Equal Member

A second principle of associational justice is a relatively strong egalitarian principle that goes further than a formal requirement of equal respect that applies to all contracts. Members of a productive organization expect to be treated as a valued member of the team involved in the organization's activities. Porters and cleaners may be the lowest paid and at the bottom of the hierarchy, but nevertheless they expect to be treated with respect, courtesy and fairly as long as they perform their

42 Peter B. Doeringer & Michael J. Piore, Internal Labor Markets & Manpower Analysis (1971).
43 Henry Phelps Brown, The Inequality of Pay (1977).
44 David Miller, Social Justice 88 (1976).

role. Because colleagues are all members of the same firm, whether they be the highest paid or the lowest skilled workers on a minimum wage, they deserve to be given preference over non-members of the organization. This partiality requires that other members of the organization should be treated with respect and dignity, as a colleague rather than an opponent, as one of "us" rather than one of "them."

This strong egalitarian principle within associations can be illustrated with many examples. In most productive organizations, conduct and speech that might be acceptable or tolerable between strangers would be regarded as a breach of associational norms if it caused even minor offence, anxiety, or stress. Similarly, disparities in pay between different groups of workers that reflect the relative bargaining power of these groups in the labor market may prove to be unacceptable according to the norms of the organization in which it is important that everyone be valued in order to ensure cooperation and fidelity to the purpose of the association.

The existence of these principles of desert and the egalitarian standards of treatment of members of association is most strikingly illustrated by equal pay law. Under the law of the European Union, not only must the pay of women be the same as men if they are doing the same job, but also women should be paid equally if their work is of equal value to that of their male colleagues, and vice versa.[45] Furthermore, even if their work is not of equal value to that of a male comparator, their lower value should only permit a proportionate diminution of their pay.[46] The very idea that jobs can be of equal value invokes a criterion of contribution and desert. The value of the job cannot be determined by reference to its prevailing market rate, for of course it is often that market rate that is being challenged by the claimant. The appeal to some other way of valuing the job in equal value claims clearly looks at the putative contribution of a woman and her male comparator to the outcomes of the productive organization. The granting of the claim to women also illustrates the principle of equal respect for all members of the organization. Finally, and crucially for the illustration of associational justice, the claim for equal pay can normally only be made within the same organization. There must be a single employing entity that determines the pay of the woman and her comparator.[47] The claim for equal pay illustrates an associational principle of justice because it requires fair treatment for members within the association, but ignores any wider distributional effects.

There is a problem, however, in how to determine membership in the association. Is a contract of employment with the employing entity essential or are there other routes to membership? Owing to the use of outsourcing, vertical disintegration, and the use of casual work arrangements, large sections of the workforce no longer experience the opportunity to be an equal among equals working cooperatively within

45 Consolidated Version of the Treaty on the Functioning of the European Union, art. 157(1), 2012 O.J. (C 326) 117-18 ("Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."); Directive 2006/54, of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 2006 O.J. (L 204) 23.

46 Case C-127/92, Enderby v. Frenchay Health Authority, 1993 E.C.R. I-5535.

47 Case C-320/00, Lawrence v. Regent Office Care Ltd, 2002 E.C.R. I-7325.

a productive organization.[48] In the case of agency workers, they work alongside employees of the client, but they have a different employer, which is normally the agency that found them work and pays them their weekly wage. Is performance of the same work alongside employees of the association sufficient to obtain membership in the association? A claim for equal pay is not possible.[49] However, under EU law, after a maximum twelve weeks it is normally possible for agency workers to demand the same pay as permanent staff performing the same job.[50] Similarly, fixed-term contracts of employment are normally automatically converted to permanent contracts after a period of four years.[51] The fact of working for the association appears sufficient to entitle a worker to claim some equal rights as members after a lapse of time. Similar questions might arise with respect to workers who are treated as self-employed or who are employed by a contractor who manages outsourced work for the core productive organization. The moral standards of equal treatment and a requirement of comparative fairness therefore appear to be accepted by legislators and participants in the workplace to apply to workers who are in practice assimilated into the membership of the organization even though they do not have a contract of employment with the firm.[52]

C. Unfair Exclusion

A third moral principle that is a hallmark of associational justice is the principle that the benefits of membership in the organization should not be lost unfairly, on arbitrary, irrational or irrelevant grounds. Membership in the voluntary organization is usually regarded by its members as a valuable benefit and a crucial means for personal development. Not only is employment in the organization likely to provide the main source of income and opportunities for personal development, but it also provides the benefits of human relationships, friendships, and social connections. Most people value the friendships they make through working relationships and often these relations with colleagues are the most powerful bonds that they form outside of the family. Losing a job can not only lead to economic hardship and frustration of ambitions, but also to social exclusion in the sense that the network of friendships that help to make one feel part of a community can be sundered. The moral principle is not that employees should not lose their jobs without their consent: jobs are not property rights. An employer may have many good reasons to terminate a contract of employment such a reduction in the needs of the business for workers of a particular kind, absenteeism or misconduct by the employee, or a reasonable belief that the employee is in breach of the requirement to perform the

48 Axel Honneth, Freedom's Right: The Social Foundations of Democratic Life 246-47 (2014).

49 Case C-256/01, Allonby v. Accrington & Rosendale College, 2004 E.C.R. I-873.

50 Directive 2008/104, of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work, 2008 O.J. (L 327) 9.

51 Council Directive 1999/70, of 28 June 1999 on concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, 1999 O.J. (L 175) 43.

52 Hugh Collins, *Multi-segmented Workforces, Comparative Fairness, and the Capital Boundary 'Obstacle'*, *in* Boundaries And Frontiers of Labour Law 317 (Guy Davidov & Brian Langille eds., 2006).

contract in good faith. The principle of justice is rather that employees should not be unfairly excluded from their membership in the organization.

To what extent is that principle of justice regarding unfair exclusion discoverable in the law? Most legal systems have legal protection against unjustified dismissal in accordance with ILO Convention 158.[53] Some use the mechanism of collective agreements that are broadly applicable to classes of employees to achieve the same result. It is true that many states in the USA permit termination at will, though that rule can be qualified by requirements of public policy and performance in good faith. Does the existence of termination at will in some jurisdictions provide evidence that the principle of associational justice that prevents unfair exclusion from membership does not really exist? That is possible, but there is an alternative explanation.

In seeking to justify termination at will in the common law, Richard Epstein argued that whatever the legal rule might permit, employers would normally be unwilling to act harshly or unfairly for fear of damaging their reputation.[54] If an employer earns a reputation for oppressive and arbitrary managerial techniques, employees will try to move elsewhere, which might cause great inefficiencies for employers. The interesting question is why would it damage an employer's reputation to act in accordance with the law and terminate contracts at will for good, bad, or no reasons at all? This harm to reputation will surely occur even if the dismissed employees quickly get another job with higher pay and better terms and conditions. If material loss is unnecessary, the damage to reputation of the employer arising from arbitrary though lawful dismissals seems to confirm the existence of a shared moral principle that members of the organization, the employees, should not be excluded from it without good reason. The employer's reputation is tarnished by unjustifiable dismissals because they are contrary to the associational principles of justice found as customs and expectations within productive organizations.

D. Voice and Participation

A fourth dimension of principles of associational justice concerns employee voice and participation in decision-making. Members of associations expect to be able to express their views about the direction of the enterprise and how any changes might affect themselves and their colleagues. This principle is not an application of the idea of democracy that is used in theories of social justice for society as a whole. It derives rather from standards of interpersonal justice that arise when there is a need for collective action within an organization. In order to promote loyalty to the aims of the organization and foster cooperation among its members, at least major

53 International Labour Organisation Convention on the Termination of Employment, Appl. 22.158 (1982).

54 Richard Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947 (1984); for justifiable skepticism about whether reputational damage actually stops unjust dismissals (and inefficient dismissals) in practice, see Samuel Estreicher & Michael C. Harper, Cases And Materials On The Law Governing The Employment Relationship 761 (2d ed., 1992).

decisions are more likely to be acceptable or even attain a consensus if there is a full explanation and discussion among members of the organization.

Of course, it is not being suggested here that workplaces are completely the same as purely voluntary associations such as sports clubs. The presence of hierarchy and subordination of employees in the workplace ensures that the power of voice is unevenly distributed among the workforce. Furthermore, the need to earn an income severely diminishes most employees' options of exit if they do not agree with what is happening in the organization. Yet, as Cynthia Estlund argues,[55] these constraints on the exercise of voice and participation in decision-making at the same time provide structures that provide useful channels of communication. These channels such as health and safety committees or works councils enable peaceful and possibly constructive communication to take place. They also can be arranged so that all members of a diverse workforce, including women and racial minorities, have the opportunity to express their views and assess the views expressed by others, both senior managers and colleagues. Although the discourse produced within these channels is not as vibrant, unconstrained, and passionate as might occur in the ordinary political arena, it may prove to be more thoughtful and effective in steering the direction of the productive organization.

Evidence for such a principle of voice and participation can be found in angry complaints by workers and industrial action when major events in the life of the organization such as a plant closure are announced without any warning or discussion with the workforce.[56] Judge-made common law shows little support for such a principle except insofar as some measures of individual consultation and information may be required under the relational principle of good faith mentioned above. Many statutory interventions, however, impose requirements for collective consultation and information prior to major events in the life of the firm such as mass redundancies, sales of the business, and major strategic decisions.[57] The right of workers to consultation and information is even regarded in the European Union as part of its Charter of Fundamental Rights.[58] The principle of voice and participation is also acknowledged by the law in its support for other measures such as collective bargaining with a representative trade union about wages and other terms and condition of employment. Many countries also have laws that protect employees who become whistleblowers against wrongdoing if their voice is not heard inside the organization. The need for the opportunity to exercise voice is also

55 Cynthia Estlund, Working Together 132 (2003).

56 *See, e.g.*, Amy Goldstein, Janesville: An American Story (2017).

57 Council Directive 98/59, of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, 1998 O.J. (L 225) 16; Council Directive 2001/23, of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, 2001 O.J. (L 82) 16; Directive 2002/14, of 11 March 2002 on establishing a general framework for informing and consulting employees in the European Community, 2002 O.J. (L 80) 29; Council Directive 94/45, of 22 September 1994 on the establishment of a European Eorks council, 1994 O.J. (L 254) 64.

58 E.U. Charter of Fundamental Rights, art. 27, 2000 O.J. (C 364) 13; *cf.* Council of Europe, European Social Charter (Revised), art. 21 (1996).

acknowledged by the practice of managers holding "town hall meetings" with staff. Together these informal norms and laws strongly suggest that interpersonal justice in the workplace recognizes an associational principle of voice and participation.

VII. Fundamental Rights and Distributive Justice

My argument in this Article has been that to discover adequate and appropriate principles of justice in employment relations, a good starting-point is to consider the explicit and implicit expectations and understandings embedded in the employment relationship itself. Instead of brandishing the abstract ideals of liberal political theories of distributive justice, such as liberty, autonomy, democracy, and equality, it is arguably more fruitful to start the enquiry into justice in work from a close examination of the expectations and implicit understandings of employment relations within productive organizations. This approach draws on social practice and the relevant legal norms, which are generally private law in form, though they may be either legislative instruments or judge-made common-law principles. Where practice appears to observe certain moral norms of justice and those norms are replicated to some extent in the law, there seems a strong case for including those norms in a proposed theory of justice in work.

To some extent, employment is likely to share implicit norms with other kinds of contracts, such as the general principle that the parties should conform to the contractual undertakings. At the core of this Article, however, has been an examination of what are claimed to constitute two distinctive features of contracts of employment in comparison to other economic transactions. Employment is normally a relational contract in which both the performance obligations and the ultimate goals of the contract are indeterminate. As a consequence, the contract needs to be constantly supplemented by the protection of implicit understandings, expectations, and commitments. In law those requirements are generally expressed by the idea of a requirement to perform the contract in good faith, a requirement that applies to both employers and employees. The second distinctive feature of contracts of employment is that they typically function within a voluntary association or firm. It is possible to identify what have been called here principles of associational justice, which mark out contracts of employment from most other types of commercial contract because employment is typically performed within a voluntary association. The key principles of associational justice were suggested to be the principle of desert by reference to contribution, equal respect for members of the organization, protection against unjustifiable exclusion from membership in the organization, and a right to voice for all members of the association. Together, these principles of interpersonal justice for employment provide a distinctive, richer body of norms than those standards that might be typically ascribed to contracts in general. These principles of relational and associational justice can constitute the core of a theory of justice in work.

Nevertheless, interpersonal justice cannot exhaust the scope of principles of justice in work. Some principles of social justice must be permitted to qualify, supplement, or reinforce aspects of the principles of justice derived from interpersonal justice. One example of the imposition of impartial principles of justice is when a distributive goal for society as a whole can be most efficiently and effectively implemented by regulation of employment relations. Examples of such regulation include minimum-wage laws and prohibitions against discrimination against protected groups, such as women, by employers. Another important strand in those impartial principles of distributive justice that must be included in the standards of the workplace concerns international conventions on human rights, including international labor rights. These conventions establish universal baseline standards for employment law, such as a maximum forty-hour working week and the right to a paid holiday. International conventions on human rights also protect freedoms of employees against infringement by employers, such as measures designed to curtail freedom of speech, control aspects of private life, or prevent the manifestation of a religion. Ultimately, the principles of interpersonal justice must give way if they permit unjustifiable interferences with fundamental rights.