ARTICULATING LABOUR LAW'S GOALS: WHY AND HOW

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1. INTRODUCTION

The concern of this article is the goals (or purpose) of labour law. I use the traditional term "labour law" but this should not be understood as an intention to limit the discussion to traditional or narrow boundaries. You may feel free to replace the term "labour law" with "employment law",[1] "work law",[2] "labour market regulation"[3] or any other title of your preference – if it is about the regulation of work then it is within the concern of this article. Recently debates about the goals of labour law have assumed centre stage in labour law scholarship.[4] However I will not attempt to articulate the goals of labour law here, but rather consider some preliminary methodological questions that seem to me crucial for this kind of endeavour.

It may seem obvious to most readers that before doing anything – let alone something as important as interpreting or reforming labour law – we must ask ourselves what exactly is the goal of what we do. This seems to be the only rational approach to such tasks. Yet quite often we do things automatically, without stopping

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1 Hugh Collins, *Employment Law*, 2 ed. (OUP, 2009) 5.

2 Orly Lobel, 'The Four Pillars of Work Law' (2006) 104 *Michigan Law Review* 1539.

3 Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP, 2005); Richard Mitchell and Christopher Arup, 'Labour Law and Labour Market Regulation', in Christopher Arup *et al.* (eds.), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 3.

4 For recent examples see the contributions included in Guy Davidov and Brian Langille (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart, 2006); Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011); Christopher Arup *et al.* (eds.), *Labour Law and Labour Market Regulation* (Federation Press, 2006). And see Richard Mitchell, 'Where are we Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2011) 24 *Australian Journal of Labour Law* 45; Mathew Finkin, 'The Death and Transfiguration of Labor Law' 33 *Comparative Labor Law and Policy Journal* 171 (2011).

to think about them.[5] The goal of this article is to explain *why* we need to articulate explicitly the goals of labour law, and *how* this should be done. It proceeds in two parts. Part I addresses the question of "why" and "when" is it necessary to explain (to ourselves and to others) the goals of labour law. Part II then discusses the "how", going through a number of steps that can assist us in articulating goals, and attempting to resolve a number of issues that arise when starting to think about the best way to approach this problem.

There has been some discussion in recent years about the boundaries or scope of labour law as a scholarly field.[6] It should be made clear at the outset that this is not the concern of the current article. My discussion below is not geared towards articulating a unifying coherent idea for labour law as a subject of study or teaching, nor will I engage here with discussions on whether we should expand the field which we describe as "labour law". My concern in this article is rather very practical – the actual application and improvement of labour laws – and the articulation of goals which is required for these practical purposes. I do, however, focus for this purpose on regulations that are traditionally understood to be included in labour law (broadly conceived). If we expand the term "labour law" to include, for example, regulations that are aimed to protect unpaid work at one's home,[7] at least some of the goals mentioned in this article as examples will lose their relevancy.[8] I doubt if this will be helpful for the regulations dealing with employer-employee relations.[9] Nor does it seem to be a necessary step for creating better protections for unpaid work. In any case, however, in general the discussion below (examples aside) still applies even for such a broadened view of labour law.

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5 Scholars who champion purposive examination often make reference to a powerful quote attributed to Friedrich Nietzsche: "To forget one's purpose is the commonest form of stupidity." See, *e.g.*, L.L. Fuller and William R. Perdue, Jr., "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale L.J.* 52, 52; Brian Langille and Guy Davidov, 'Beyond Employee and Independent Contractors: A View from Canada' (1999) 21 *Comp. Lab. Law & Policy J.* 7, 9. In the current context it would be more correct to say that too often people *neglect to articulate* – even to themselves – the purpose of what they do.

6 See, e.g., Mitchell, above note 4; Judy Fudge, 'Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 120; John Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work', in Davidov and Langille, *ibid.* at 295; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2011).

7 As suggested for example by Fudge, above note 6.

8 This problem does not present itself when one wants to use other areas of law (such as procurement law, for example) to protect workers, because then the other law is harnessed for the same goals of "traditional" labour laws. See Catherine Barnard, 'Using Procurement Law to Enforce Labour Standards', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 256. For additional examples see Howe, above note 6.

9 And see Noah D. Zatz, 'The Impossibility of Work Law', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 234.

2. PART I: WHY

There are three main (practical) reasons for articulating labour law's goals. One is at the level of the legislature or otherwise the policy-making sphere (asking whether changes/additions to the law are needed). The second is at the level of the courts or otherwise the realm of applying the law (interpretation). The third is at the level of the constitution, in case the law is challenged as unconstitutional. I will discuss them in turn.[10]

2.1. THE POLICY-MAKING LEVEL

Labour laws are often under attack. They are seen by some as impediments to efficiency, flexibility and growth; as a reason for unemployment; as creating inequality between different groups of workers and between those employed and the unemployed; and as an outdated form of regulation due to their mandatory ("command and control") type. These critiques can be debated on their own terms: for example, there is empirical evidence refuting the claim that labour laws (specifically, the minimum wage law) bring about unemployment.[11] However, it is fair to assume that there is at least *some* truth in these allegations. At least some labour laws, in some contexts, demonstrate the ills listed above (and probably a few others). Obviously, however, this should not in itself result in a conclusion that such laws should be repealed. Laws are usually a compromise between conflicting values and interests. There could certainly be justifications for labour laws that outweigh their drawbacks.

Any attempt to respond to attacks on labour law, from whatever direction, must therefore be based on a clear view and articulation of why such laws are needed. Otherwise put: faced with claims that a labour law X has a negative effect Y, one could respond by denying the Y effect, or by arguing that despite Y, there are other reasons that justify the law. Those other reasons – we can call them a positive effect Z – are the justifications that need to be articulated explicitly.

To be sure, policy-making in labour law is not only defensive (or at least *should not* be only defensive). It is not limited to "attacks" or "defence" of a given set of regulations. Reforms are often needed, for several reasons. First, to respond to changes in labour market conditions. Thus, for example, macro changes such as the feminization of the

10 It should be clear by now that I am not trying to articulate the goals of labour law as a "source of inspiration" (Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 88, 97). Once we articulate the goals for our (legal) purposes, they might also serve as a source of inspiration and they might not. Hyde it too discouraged by the state of US labour law to believe that the former option is possible. But this is beside the point, as far as the current paper is concerned.

11 For discussion and references see Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 *Modern Law Review* 581 (hereinafter "Minimum Wage"); Guy Davidov, 'The (Changing?) Idea of Labour Law' (2007) 146 *International Labour Review* 311 (hereinafter "Changing Idea").

workforce, or labour migration, required (or still require) changes in labour laws. Second, reforms are needed to address ongoing changes in employment practices. For example, the shift towards indirect, temporary and part-time employment requires changes to protect workers in new forms of employment. Third, reforms could be needed to reflect developments in societal values. For example, the increased importance that society allocates to the work-family balance requires some rethinking of labour laws, to amend laws that are not sensitive to such needs. Finally, reforms are often needed to correct regulations which turned out to be failures in some respect, or just need improvement, after a period of examination. For example, when introducing the National Minimum Wage Act in 1998, the British legislature has simultaneously set up an independent body (the Low Pay Commission) to advise it on the way the Act is actually working. The Commission produces yearly reports[12] and often recommends amendments to the Act, in light of experience accumulated "on the ground" with the Act's impact, successes and failures. Reflection on the actual working of labour laws is not always so well-structured, but it is certainly always needed.

These are only some examples of why policy-makers should always think about the need to reform labour law. And when doing such re-thinking, it is necessary to have a clear view of what the law is supposed to achieve, *i.e.* what are its goals. If we suspect that current labour laws are not working, or need updating, for one of the reasons mentioned above, how do we know that they are not working? In what sense are they failing? What would amendments try to achieve? All of these crucial questions require an explicit articulation of goals. The goals of the law are the basic yardstick by which we have to examine whether it is working or not.[13]

A similar reasoning can be used to explain the importance of articulating goals when courts have to fill gaps in the legislation. Regulating is not a task restricted to legislatures; courts also play a major role in making policy choices, in areas not covered by legislation. This is most obvious in common-law systems, where major parts of the private law are left for judicial development, but there are some parallels in civil-law systems as well. Sometimes the rules developed by courts can be seen as flowing from interpretation of the (usually implied) contract of employment. But quite often judicially-developed rules also place limits on what the parties can agree upon. Consider, for example, the question of whether an employer can log into e-mail accounts he has assigned to employees and read their correspondence. In some countries there are explicit answers in legislation to this question, but other legislatures have refrained from any discussion of this issue. The Israeli National Labour Courts recently had to develop rules for such problems, brought

12 See www.lowpay.gov.uk/.

13 For a similar point see Stephen F. Befort and John W. Budd, *Invisible Hands, Invisible Objectives: Bringing Workplace Law & Public Policy Into Focus* (Stanford UP, 2009), Chapter 1. See also Brian Langille, 'Labour Law's Theory of Justice', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 101 (arguing that it is necessary to provide labour law with a theory of justice – an ethical account).

before it by employees contending violation of their privacy.[14] One could search for solutions in contract law or property law for such questions, but these provide very limited guidance. At the end of the day there is no way (and no reason) to avoid an examination of a policy-making nature. When legal questions arise without any solution in legislation, judges have to look for the best solution, in light of the *purpose* of (possible) regulations in this field, and in line with the general purposes of labour law as a whole.

2.2. PURPOSIVE INTERPRETATION

We have seen that articulation of goals is needed when legislating or rethinking legislation, and in filling lacunas. The same is true at the stage of *applying* the law. It is well-known that there is no law without interpretation. Very often judges need to decide on the meaning of legal provisions or even just single words in a particular context. Sometimes the legislature intentionally leaves a broad room for judicial discretion – for example, when labour laws apply only to "employees", and the legislature refrains from any definition of this term. Given that disputes about whether one is an employee or an independent contractor are very common, the lack of any definition in the law means that courts were entrusted with the task of developing tests and applying them, to give meaning to this term. But even if the legislature *does* include a detailed definition, there is still (always) some debate about what the definition means and whether specific cases are covered by it or not. It is impossible to anticipate in advance every possible contingency and provide solutions in advance to every problem.

What should courts rely on when interpreting legislation? It would be naive to suggest that they must simply rely on the "literal" meaning of words, as found in the dictionary. Quite often there is more than one possible meaning to choose from, and moreover, the meaning of words often depends on their context and can sometimes change over time. On the other extreme, it is difficult to accept the view that judges should simply be looking at the expected results, choosing the interpretation that would bring about the best consequences in their (own) view, without any other frame of reference.

There seems to be broad agreement that laws should be interpreted in light of what they try to achieve.[15] In Britain this is sometimes called the "mischief rule,"[16] meaning that laws should be interpreted in light of the "mischief" they aim to cure. In

14 *Tali Issakov v. The State of Israel*, Judgment of 8 February 2011 (in Hebrew).

15 See e.g. Fuller and Perdue, above note 5.

16 *Heydon's Case* (1584) 76 ER 637. For a contemporary application of this approach see, e.g., *R v Secretary of State for the Environment, Ex Parte Spath Holme Limited*, [2000] UKHL 61, [2001] 1 All ER 195 (opinion of Lord Nicholls).

Continental Europe it is usually referred to as the "teleological approach".[17] There are disagreements on whether courts could go so far as to adopt interpretations that do not conform to the language of the law, but these are not important for current purposes. We can assume that judges are limited to what the semantic possibilities allow. This still leaves a broad range of options in many cases, which raises the question of how to choose among those options.

How would we know what a piece of legislation is trying to achieve? One option is to decipher or try to assess what the intention of the legislature was.[18] However, legislation is usually based on political compromise, so different members of the legislative body may have somewhat different views about what it means and why it is needed.[19] Moreover, since the legislature cannot foresee every contingency, it will not always have an "intention" with regard to the interpretive problem at hand.[20] Finally, and more fundamentally, the meaning of a law is not "frozen" in time. The legislature can have specific reasons for enacting a piece of legislation, but a future legislature might have different reasons for choosing not to repeal it.[21] Seen in this light, legislative documents can be helpful when trying to understand the reasons behind the law, but they are only the beginning of the enquiry and not the end.

However important text and legislators' intent may be, they are not sufficient for the task of judicial interpretation. They must be supplemented by *purpose*. This view is formulated in the influential work of Hart and Sacks as follows: "In interpreting a statue a court should: (1) Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then (2) Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either – (a) a meaning

17 It is often maintained that judges only turn to the teleological (purposive) approach when the language is unclear or when there is a lacuna in the law. But this is still quite common, especially in labour law. See, e.g., Nigel Foster and Satish Sule, *German Legal System and Laws* (4 ed., OUP 2010) 75–76; Massimo La Torre, Enrico Pattaro and Michele Taruffo, 'Statutory interpretation in Italy', in Neil MacCormick and Robert Summers (eds.), *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991) 213, 222; Claire M. Germain, 'Approaches to Statutory Interpretation and Legislative History in France' (2003) 13 *Duke J. Comp. & Int'l L.* 195, 201. On the prevalence of judicial law-making in the labour law context see, e.g., Manfred Weiss, 'Industrial Action, Collective Bargaining and Trade Union Rights: Examples of Judge-made Law in Germany', paper presented at the Hebrew University (January 2011), available at http://isllss.huji.ac.il/weiss%20adler%20conference.doc.

18 See, e.g., Joseph Raz, *Between Authority and Interpretation* (OUP 2009), Chapter 11.

19 Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard UP, 1986) 318–321; Kent Greenawalt, 'Constitutional and Statutory Interpretation', in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, 2002) 268, 288.

20 Dworkin, above note 19, at 325.

21 Another way of saying this is by pointing to the preferred understanding of a given section. Perhaps the original legislature preferred a given interpretation, but the current legislature prefers a different one (to the same text of the law). It is difficult to justify giving preference to the views of the original legislature. See Andrei Marmor, *Interpretation and Legal Theory*, rev. 2 ed. (Oxford: Hart, 2005) 133.

they will not bear, or (b) a meaning which would violate any established policy or clear statement."[22] Another useful formulation can be found in the Spanish Civil Code, which states: "Norms are to be interpreted in accordance with the proper meaning of their words, in relation to the context, the historical and legislative background, and the social reality of the time in which they are to be applied, bearing in mind, fundamentally, the spirit and purpose of the former."[23]

Otherwise put, when interpreters ask what the law is trying to achieve, rather than focus on the intent of its drafters or look for hidden meanings in the words themselves they should place most emphasis on trying to understand the *purpose* behind it. Others have added that laws should not be read in isolation, but as part of a broader system. Ronald Dworkin has argued that judges should interpret the law in light of its surrounding political history, and consider the "abstract intent" of the legislature, which is to fulfil fundamental principles of justice, fairness and procedural due process.[24] Aharon Barak also believes that interpretation should take into account fundamental values and principles of the legal system, although not necessarily limited to those three. He has offered a set of rules to structure and limit judicial discretion in performing the interpretive task. Judges should consider "subjective" alongside "objective" purposes, and there are various techniques and presumptions that Barak has developed for this purpose. But at the end of the day he leaves the balance and choice between competing views to judicial discretion.[25]

Such approaches are still fiercely objected by some, notably by American judges who define themselves as "textualists". Justice Scalia of the US Supreme Court, for example, argues that judges should focus on the text and ask how a reasonable person would have understood it at the time of the enactment.[26] His claim is that if judges use more abstract notions such as purpose or fundamental values in aid of interpretation, it will result in them interpreting the law *as they want it to be*, rather than as it is.[27] We know, however, that reasonable people often disagree about the meaning of a text. Perhaps it is better to acknowledge the fact that there is room for judicial discretion in interpretation, and offer tools to perform this role (e.g. by looking for purpose), than to deny it and end up with "subjective" considerations entering in a less structured, principled and transparent way.[28] Moreover, even if we assume that textualism *does*

22 Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge: Tentative Edition, 1958) 1200.

23 Article 3.1 (as quoted in Lawrence M. Solan, 'Linguistic Issues in Statutory Interpretation', forthcoming in Peter M. Tiersma and Lawrence M. Solan (eds.), *Oxford Handbook of Language and Law* (OUP 2012).

24 Dworkin, above note 19, chapters 7 and 9.

25 Aharon Barak, *Purposive Interpretation in Law* (Princeton UP, 2005).

26 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP, 1997).

27 This is by no means the accepted view on the US Supreme Court. Some of the other judges support the purposive approach; see e.g. Stephen Breyer, *Active Liberty* (OUP, 2008) 108.

28 "Indeed, new textualism may very well expand judicial discretion… outside any normative framework." (Barak, above note 25, at 282). See also William N. Eskridge Jr., "The New Textualism" (1990) 37 *UCLA L. Rev.* 621, 674–5.

provide more certainty and lessens the risk of judicial encroachment, this comes with a hefty price: we can end up with results that frustrate, rather than promote, the goals of the law.

Admittedly, the more judges rely on abstract "fundamental values" of the system, the higher the risk of losing touch with what the specific law was actually trying to achieve, and the easier it is to replace legislative purpose with the judges' own purposes. Nonetheless, it is important to remember that the legislature can always correct judicial mistakes in future legislation.[29] Moreover, the fear of purposive interpretation creating democratic/legitimacy problems is significantly reduced once we focus more on finding *justifications* that can explain the law,[30] rather than making assumptions about the goals of the law based on presumed "fundamental values" of the system.

The purpose of the law therefore plays a significant role in the everyday task of legislative interpretation.[31] This requires us to articulate (and re-articulate every once in a while) the goals of every piece of labour legislation. It also requires us to articulate the more general goals coming out of the labour law system as a whole. This general articulation is important for placing the specific legislation in context, and it is useful because different laws are usually based on the same basic assumptions about the vulnerability of workers and the need to protect them. I discuss the distinction between general and specific goals further in part II below.

2.3. CONSTITUTIONAL CHALLENGES

Many legal systems are based on written constitutions and offer the option of challenging legislation as unconstitutional.[32] In the UK a similar challenge is now possible when legislation is claimed to contradict the European Convention of Human Rights.[33] Labour laws could be the target of such challenges, because by their very nature they are designed to intervene in the contractual relationship between employer and employee, and often to redistribute resources from one to the other. Accordingly they can be seen as infringing the right to property, the freedom of contract and the freedom to conduct a business (protected, all or in part, at least in some constitutions).[34]

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29 As Eskridge and Frickey note, interpretation is a "dynamic enterprise"; and the "counter-majoritarian anxiety" is often exaggerated (William N. Eskridge Jr. and Philip P. Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 43 *Stan. L. Rev.* 321, 378–381).

30 Dworkin, above note 19, at 338.

31 For a recent example from the UK Supreme Court see *Autoclenz Limited v. Belcher and others*, [2011] UKSC 41, para. 35.

32 Usually this option is offered explicitly in the Constitution; at other times (as in the US or in Israel, for example) it is assumed by the courts.

33 Unlike the situation in most constitutional democracies, UK courts cannot declare a statute unconstitutional and therefore void, they can only declare its incompatibility with the convention and refer the issue to the legislature. Human Rights Act, 1998, section 4.

34 See, e.g., US Constitution, Fourteenth Amendment; Charter of Fundamental Rights of the European Union, 2007, Articles 16–17.

It is not only employers that can use the Constitution to put labour laws into question. Some laws could also infringe employee rights; for example, a law regulating surveillance over employees (and allowing it in some circumstances) could be challenged as violating the right to privacy, and a law regulating collective bargaining but excluding some groups of workers from its scope is arguably violating their freedom of association.[35] Exceptions in labour laws that exclude some workers are quite common; they can also be seen as infringing the right to equality. Finally, in some countries where *social* rights are entrenched constitutionally, whether explicitly or by way of interpretation, labour legislation can be challenged for infringing (or even failing to positively protect) the right to strike, the right to work or the right to fair work conditions.[36]

Of course, constitutional rights are not absolute. Once a piece of legislation is constitutionally challenged, the State (and the other party to the dispute) can defend it in courts by showing that the infringement is justified. This is usually examined through the tests of proportionality.[37] The courts will have to examine whether there was a legitimate purpose behind the infringement of rights, and whether – given this purpose – the infringement was necessary. This obviously requires an articulation of purpose, both to examine the legitimacy of the purpose itself and to examine the means-end relationship.[38]

Usually it is not an entire legislation that is challenged, but rather a specific section of it. This means that both the goals of the specific section under dispute and the goals of the legislation as a whole have to be examined as part of the constitutional analysis. Once again, then, we see that articulating the *purpose* (i.e. goals) of labour laws is crucial. We need it for making new laws or improving old ones; for interpreting pieces of legislation; and for examining their constitutionality.

3. PART II: HOW

This part is dedicated to offering some suggestions on how to articulate the goals of labour laws. It proceeds by examining the following questions: Should we accept a

35 On the latter example see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (Supreme Court of Canada).

36 For explicit constitutional social rights see, e.g., Constitution of the Republic of South Africa, 1996, s. 23; Charter of Fundamental Rights of the European Union, 2007, Articles 27–34. For social rights derived from civil rights see, e.g., *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 (Supreme Court of Canada deriving the right to collective bargaining from freedom of association).

37 David Beatty, *The Ultimate Rule of Law* (OUP, 2004).

38 In many legal systems, the means-end examination includes three steps: Is there a rational relation between the two (i.e. the means can rationally lead to the end)? Are the means chosen minimally impair the right (i.e. are there any other means that can achieve the goal with a lesser impairment)? And finally, is there proportionality between the harm caused and the benefit achieved by the legislation? See, e.g., *R. v Oakes*, [1986] 1 S.C.R. 10 (Supreme Court of Canada).

presumption in favour of the "free" market? Should we articulate the goals of each labour law separately, or rather the entire body of labour laws as a whole? Should we look for explanations (which might include hidden or unjustified goals) or rather focus on normative justifications? Is it possible to articulate goals without reference to a specific time and place? Should we distinguish between main goals and ancillary ones? Can we find the goals within legal texts or are we required to perform a multi-disciplinary search? And finally, how do we choose the appropriate level of abstraction? Let us discuss all of these issues in turn.

3.1. A PRESUMPTION IN FAVOUR OF PRIVATE LAW RULES?

The discourse on the goals of labour law – at the political as well as the academic level – takes the basic rules of private law as a background. That is, the laws of contract, property, corporations and so on are taken for granted – they are assumed to exist without question and, in effect, are given priority. These private law rules are seen as structuring and protecting the "free market," which in turn is seen as a necessary and important component of democratic societies. Labour laws, in contrast, are conceptualized as "interventions" in the free market – and special justifications are needed for such impediments to be accepted.

This view is so entrenched in the way we think about labour law that it is difficult to conceive of an alternative view. It also, however, creates an unfair default in favour of employers. Contract law gives force to agreements without inquiring into the power disparities between the parties, thus favouring in effect the more powerful (in most cases, the employers) who can impose terms preferable to them. Property law gives employers full ownership and control over the workspace, the equipment and everything produced in the workplace, ignoring the interests of workers who arguably could have been seen as equal partners in this production. Company law limits the liability of employers incorporated as companies, thus allowing them to enjoy rewards while in effect shifting risks to others (including employees). These pillars of private law could all be restructured in a way that gives more weight to the interests of those without bargaining power, without property and without access to the benefits of limited liability. So there is something unfair about giving these laws default status, while requiring special justifications from any changes to this default. Otherwise put, it is misleading to view private law rules as a given and any deviation from the "free market" which they create as an "intervention" which is by definition suspicious. The "free market" is not the "natural" state of affairs. It is created by regulation (contract, property, company law and so on) and enforced with the mechanism of the State (courts, police and so on). In principle, private law rules are not different from other laws regulating the market (such as labour law) and accordingly, should not enjoy a superior default position.

It is important to have these reservations in mind. However in this article I will accept the common capitalistic structure and offer justifications for labour laws as

interventions in the "free" market. Private law rules have their own justifications, of course. Whether they are justified in the forms currently existing or should be modified to give more weight to workers' interests is an interesting and important question, but out of the scope of this article. Moreover, given that (as an historical matter) the basic rules of private law were developed *before* the advent of labour law, presumably legislatures accepted them as a background. Reluctantly, then, I accept a presumption in favour of the market. Usually this is assumed implicitly; acknowledging it explicitly is important, to remind ourselves that background rules can (and should) be questioned as well.

3.2. GENERAL AND SPECIFIC GOALS

Assume a labour law system with ten different pieces of legislation regulating different employment standards (such as minimum wage, maximum hours, and so on) as well as a law regulating collective bargaining and strikes and a law designed to ensure equal opportunities at work. They may come separately or in one Labour Law Code with several chapters. Either way, it is quite obvious that each piece of legislation (or chapter) has its own goals. If we ask ourselves what are the goals of setting a minimum wage, and what are the goals of allowing and promoting collective bargaining (for example), we will come up with different answers, albeit with some overlap. We can say that the minimum wage law is designed to protect the dignity of employees and redistribute resources from employers to employees,[39] and that collective bargaining laws are designed to promote workplace democracy, redistribute resources from employers to employees and enhance efficiency.[40] Of course, there can be other views about the goals of these laws, and also one could argue that their goals should be articulated at a different level of abstraction (an issue which I discuss separately below). But it would be difficult to deny the claim that different laws regulating labour relations can have different goals. At the same time, it is quite obvious that they also have something in common – that they share some basic reasoning.[41] Should we, then, articulate the goals of each labour law separately, or the goals of the entire enterprise as a whole?

The answer is both. When thinking about a specific law (the minimum wage, for example) – whether it requires changes, or how to interpret it, or whether it is constitutional – one must articulate the goals of the *specific* law (and sometimes even the goals of the specific section under discussion). At the same time it is useful in such cases to have a *general* understanding of why labour laws are needed, using it as a

39 Davidov, *Minimum Wage*, above note 11.

40 Guy Davidov, 'Collective Bargaining Law: Purpose and Scope' (2004) 20 *Int. J. Comp. Lab. L. & Ind. Rel.* 81.

41 Matt Finkin recently argued that labour law has developed as a series of responses to specific social problems (Finkin, above note 4, at 181). But this does not mean that these problems and/or responses do not have something in common, that distinguishes them from other sets of problems/responses.

starting point to examine the purpose of the specific regulation. In most cases this is simply a practical solution: given that different labour laws are often needed for similar reasons, which flow from the very nature of the employer-employee relationship, there is no reason to "invent the wheel" again every time. Relying on the general understanding of labour law – at least as a starting point – will also ensure some coherence and consistency in the system (for example, regarding the interpretation of similar terms in different labour laws).

Consider the following example: the term "employee" appears in different labour laws. It is used – without being defined in the laws themselves – to set the scope of these laws. Courts need to give meaning to this term – to interpret it. Assume that a worker is suing for a minimum wage, but the defendant is arguing that the worker is in fact performing the work as an independent contractor and the minimum wage law does not apply. In order to decide whether the plaintiff is an employee or not, courts will usually use a number of tests and indicia which they have developed. Indeed, there is no need to develop new tests in every case. However, in difficult cases, when applying these tests it is helpful to have in mind the purpose behind them. Moreover, every once in a while it is important to ask whether the tests still serve their purpose.[42] To re-examine the tests and perhaps develop new ones, we need to ask why the distinction between employees and independent contractors is needed. And to make sense of this distinction we need to ask why labour laws are needed. Then we can come up with tests that could help us distinguish those who need to be covered by such laws from those who do not. The term "employee" can then be interpreted accordingly.

In principle, from a purposive point of view, one could be an employee for minimum wage purposes, and an independent contractor for collective bargaining purposes, or vice versa. However there is an obvious advantage in maintaining a degree of uniformity in the system, to allow workers to know their rights and employers to know their obligations. So this particular example gives another reason for articulating the *general* goals of labour law before looking into the more specific ones. It is useful to create a general test for "who is an employee", and a presumption that this test will apply in different labour law contexts, unless there is a strong reason – given the *specific* goals of some law – to deviate from this default.[43]

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42 In the specific context one can also ask whether these tests were developed in line with some clear purpose in the first place. In some legal systems the tests used to decide whether one is an employee or not have in fact been developed (at least according to one view) in a different context altogether: to decide whether the employer should bear vicarious liability for workers' actions. See P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967), Ch. 5. These tests have then been adopted in the labour context as well. But obviously the purpose of the "employee" definition in tort law is entirely different (or at least *could* be entirely different) from the purpose of applying labour laws to some people who work for pay but not others.

43 Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52 *U. Toronto L.J.* 357.

3.3. JUSTIFICATIONS OR EXPLANATIONS?

In an important analysis of American labour law, James Atleson uncovered five hidden assumptions that can explain the attitude of judges and their decisions: continuity of production must be maintained; employees, unless controlled, will act irresponsibly; employees owe a measure of respect and deference to their employers; the workplace is the property of the employer and primarily under management's control; employees cannot be full partners in the enterprise because that would interfere with inherent, exclusive managerial rights of employers.[44] These assumptions all seem to be based on the basic legal concepts of private property and freedom of contract, which in themselves are difficult to deny. In some countries the right to property and freedom of contract appear in constitutions, in others in legislation; but even where they were developed by courts as part of the common law, it should be acknowledged that these principles are important pillars not only of the "free" market but of the legal system. There are obviously strong justifications for having a right to private property and to freedom of contract – generally, to protect autonomy and maximize efficiency.[45] So in principle, judges cannot be faulted for interpreting labour laws in line with such other basic principle of the legal system. Indeed, as already noted, it is fair to assume that labour laws themselves were legislated with the background assumption of a system based on property and contract rights.

Nonetheless, the fact that property and contract rights are present in the background does not mean that such rights should only support the employer. Here judicial assumptions about what constitutes "property" and what the parties have implicitly agreed upon in the contract indeed play a major role.[46] Which raises two important questions: when articulating the goals of the labour law system as a whole, should we take into account the laws developed by courts, alongside legislation? And assuming we do, should we look for the "real" goals even if they are hidden and unjustified, or rather search only for normative justifications?

I would answer the first question positively. Judges are obviously partners in the enterprise of law-making. Through case-by-case advancement they give meaning to open-ended concepts in legislation. Their interpretation completes the legislation by connecting it to real-life problems as they arise. They fill gaps in pieces of legislation that cannot provide solutions to every legal problem. All of this is an important part of labour law – of our understanding of what labour law is all about. Assuming, of

44 James B. Atleson, *Values and Assumptions in American Labor Law* (Amherst: University of Massachusetts Press, 1983) 7–9. For a descriptive-positive analysis of goals, see also Hyde, above note 10 (listing 22 different "ideas" of labour law, many of them descriptive); Michael Quinlan, 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective', in Christopher Arup et al. (eds.), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 22.

45 See, e.g., Michael J. Trebilcock, *The Limits of Freedom of Contract* (1993).

46 Philip Selznick, *Law, Society and Industrial Justice* (Russel Sage 1969); Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (Faber & Faber 1974); Atleson, above note 44.

course, that it does not contradict (but only completes) the spirit of the legislation itself. As for uncovering the hidden assumptions and political preferences of judges, this is a highly important task as part of critically analysing the case law. However, these are not "goals" in the same sense discussed in this article. For purposes of reforming/improving the law, and for purposes of interpreting it, we are interested in the *normative* level – in goals that can be defended.[47] So judicial attitudes towards the law (that could sometimes be negative and constricting) should not constitute part of our understanding of what the law is about; but the general approach of the court, to the extent that it conforms to the ideas behind the legislation, should be taken into account.

This might seem confusing. Are we looking for *justifications* or rather for *explanations* of the law? In my view, the answer should be both. Adopting the influential methodology of Ronald Dworkin, I would argue that we should give the law the best possible reading. This can be done by thinking about normative justifications, but at the same time making sure that there is a reasonable degree of "fit" with actual law.[48] In other words, we are looking for justifications that can best explain the law as it is.

To avoid an inherently conservative bias, one should be careful not to require "fit" with specific solutions or details. That would lead to interpretations that cannot break away from previous precedents when they are no longer appropriate, and to difficulties in suggesting legislative reforms. The idea of "fit" in interpreting legislation is simply to ensure that the interpretation chosen (based on justifications) conforms to the text of the law, and, as much as possible, to other relevant pieces of legislation. In the context of common-law judicial development of the law, "fit" means ensuring some continuity – in Dworkin's terms, the idea is to write another chapter in a chain-novel,[49] so you can

47 The case of constitutional challenges is a bit more complicated. Sometimes (even if rarely) a legislature might have hidden goals that cannot be defended and because of that are not explicit. For example, an Israeli law prohibiting family unification of Palestinians in Israel cited security concerns, but it has been argued that in fact the reasons behind it were demographic (preserving the Jewish majority in Israel). See *Adalah v. The Minister of Interior*, 61(2) PD 202 (2006) (Supreme Court of Israel), English version available at http://elyon1.court.gov.il/ Files_ENG/03/520/070/a47/03070520.a47.pdf. Arguably, hidden goals should be uncovered as part of the constitutional analysis – and if they are illegitimate, the legislature should not be able to enjoy the mask of other (explicit) goals. However, the analysis of proportionality itself will be conducted in light of the explicit goals – assuming there are any (see Guy Davidov, Jonathan Yovel, Ilan Saban and Amnon Reichman, 'State or Family? The 2003 Amendment to the Citizenship and Entrance to Israel Law", 8 *Mishpat Umimshal* 643 (2005) (in Hebrew)). The task of articulating goals is thus still concerned with *goals that can be justified* – for the purpose of constitutional challenges as well.

48 Dworkin, above note 19. Dworkin's theories in general have been the subject of much debate and critique, but this particular methodology is, as far as I am aware, relatively uncontroversial. There were objections concerning the subjectivity which is unavoidable when a judge decides what would be the best reading of a statute (or how to view it in the "best light"). But a degree of judicial discretion – which includes some subjectivity – is a necessary part of interpretation either way. Moreover, for current purposes, we do not need to accept Dworkin's views that the fit-justification methodology is also a correct *description* of how judges actually operate, or his view that there is only one "right" interpretation (both of which have been strongly challenged).

49 Dworkin, above note 19, at 228.

certainly add something new, but it cannot be detached from previous chapters. The same is true if we think that a piece of legislation needs to be improved – for example, that a specific section needs to be changed. The new proposal has to be justified normatively, but also has to have some degree of "fit" with the existing structure of the law and the ideas behind it. Unless, of course, one wants to start something entirely new, whether in legislation or in common-law. In such cases there are fewer constraints in terms of "fit". That is certainly possible and *should* be possible, but it is much less common.

3.4. GOALS SPECIFIC TO TIME AND PLACE?

Given the assumption that we aim to articulate goals that will have some "fit" with existing labour laws, the question arises whether it is possible to articulate goals that are not specific (or "contextual") in terms of time and place. In the UK, for example, there have been some interesting discussions regarding changes in the goals of labour law as a result of changes in government.[50] It appears, though, that at least in developed economies (and perhaps in other legal systems as well) the basic goals are very similar across time and place. The situation may be different if one is trying to articulate the goals as a purely positive-descriptive matter.[51] But the current project is, first and foremost, normative. And it seems that the basic idea behind labour law does not change much as a result of government changes, or between countries.

To be sure, in some countries and at some times, employment relations are less heavily regulated, but that does not mean that the goals are different. It is also quite possible that there are differences in terms of emphasis on some goals and not others, depending on the time and place. So there should certainly be sensitivity to context, and one should be mindful to variations. However given that labour law has developed as a set of solutions to "labour problems"[52] – and the problems are virtually the same across countries – there are sufficient similarities across legal systems to make it possible to pursue a general analysis of goals.[53]

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50 Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 244; Hugh Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 31 ILJ 17; Hugh Collins, 'Is There a Third Way in Labour Law?', in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP 2002) 449; Sandra Fredman, 'The Ideology of New Labour Law', in Catherine Barnard, Simon Deakin and Gillian S. Morris (eds.), *The Future of Labour Law: Liber Amicorum Bob Hepple* (Oxford, Hart 2004) 9.

51 See above note 44.

52 See Finkin, above note 4, at 181.

53 And see Adrián Goldin, 'Global Conceptualizations and Local Constructions of the Idea of Labour Law', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 69. Goldin argues that there is a global "basic idea" of labour law, which is still dominant in European and Latin American systems. He notes that in common-law countries, scholars are more inclined to revise this basic idea. However, he does not bring any evidence to show that this has actually happened as a matter of law.

3.5. MAIN AND ANCILLARY GOALS

The next issue we should consider is whether there needs to be some hierarchy among goals. Are some goals more important than others, and should one receive priority in case of conflict? Consider, for example, the issue of efficiency. Some could say that maximizing efficiency is one of the main goals of labour law.[54] Others would argue that labour laws are by their very nature – because of their intervention in the "free" market – *impediments* to efficiency. From here the argument could take two opposing directions. Neo-classical economists would argue that because of their inefficiency labour laws are unjustified (and thus would favour in most cases deregulation). The "traditional" view of labour lawyers, on the other hand, has been to accept (at least implicitly) the charge of inefficiency, but argue that labour laws are justified because they are designed to achieve other goals (say, protect the dignity of workers) that *trump* efficiency concerns. With this basic approach in the background, presumably labour lawyers would accept efficiency at least as an ancillary goal, meaning that, if there are two equally valid ways to achieve the goals of labour law, one should prefer (all other things being equal) the law that is more efficient (or less *in*efficient).

Most scholars today probably hold a more nuanced view towards efficiency: labour laws sometimes enhance it, sometimes they are neutral in this respect, and at other times they can be inefficient and still justified for other reasons.[55] In the first group of cases, efficiency is one of our goals, and obviously should not be relegated to some lower status compared with other goals. However in the second and third groups of cases, when the law is *not* designed to promote efficiency, arguably it still makes sense to add it as an ancillary goal, in the sense noted above.

Another example is fair distribution of resources or opportunities among workers.[56] In some labour laws – notably employment equal opportunities laws – this is one of the main (and explicit) goals. But in other cases, the law might appear to be oblivious to this issue. In such cases, one could argue that fair "horizontal" distribution (between workers, as opposed to redistribution from employers to employees) should still be taken into account as an ancillary goal. That is, even if the law aims to achieve other goals, all else being equal it is better to structure or interpret

54 Alan Hyde goes some way towards this view when he argues that the main goal of labour law is to correct market failures. See Alan Hyde, 'What is Labour Law?' in Guy Davidov and Brian Langille (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart 2006) 37.

55 For the view that labour laws are *sometimes* efficient see, e.g., Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in Hugh Collins, Paul Davies and Roger W. Rideout (eds.), *Legal regulation of the employment relation* (London, Kluwer 2000), 3; Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal', in Collins *et al*., *ibid*., 29. See also Davidov, 'Changing Idea', above note 11.

56 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.

the law so as to promote equality (or fair distribution) among different workers. It appears, then, that there is some room for a distinction between main and ancillary goals in labour law.

3.6. THINKING ABOUT GOALS: A MULTI-DISCIPLINARY ENDEAVOUR

I have suggested some ground rules for articulating labour laws' goals. But we are still left with a fundamental question: how (or where) do we "find" the goals? Think about a specific labour law first. One answer would be to search in the legislation itself, perhaps there is a "purpose statement" at the beginning explaining what the law is aimed at, or perhaps the goals can be understood from the language of the law. Then there are legislative documents: the proposed bill (presumably with explanatory notes), background papers prepared at the relevant Ministry, protocols of discussions on the legislature and on committees preparing the bill, and so on. Finally, still within the "internal" confines of law, one could look for insights in the case-law, and perhaps in other (relevant) pieces of legislation.

These are all useful and important sources, but as noted above in the discussion of purposive interpretation, not sufficient. These sources are often not up-to-date, and are sometimes based on unstated assumptions. If our aim is to provide the law with the best possible reading (in interpretation), or to suggest well-informed reforms (in policy-making), we will benefit most from theoretical and empirical explorations of this law (or the problems that the law addresses). We know that a piece of legislation aims to achieve certain social goals. To best understand and articulate these goals, one should look for academic discussions, especially *outside* the confines of doctrinal law – in economics, sociology, psychology, philosophy, political science and more. Obviously this is not an easy task for judges and legislatures. It is the role of academics to assist in this task.

Consider, for example, a minimum wage law. Looking at legislative documents in Israel (for example), one would find references especially to the goal of alleviating poverty. This was also cited in the Israeli case-law as one of the main goals of the minimum wage legislation. However, while it might make sense for politicians to discuss the law in these terms, it is a very imprecise and rough articulation of goals, and as a result will be of little help for our purposes. If the goal was to alleviate poverty, one would expect to see a law that targets those most in poverty. But in fact the unemployed who are presumably poorer then low-wage employees are not covered by minimum wage laws. Based on academic sources from different disciplines I have argued elsewhere that the goals of the minimum wage are redistribution of resources to the lowest-paid employees and protection of employees' dignity.[57] Obviously other views about the goals of this law can be just as valid. My point here is simply about the importance of relying on a careful reading of extra-legal sources, both theoretical and empirical.

57 Davidov, 'Minimum Wage', above note 11.

A related question is whether we should consider critiques as part of this analysis. To continue with the minimum wage example, there is a fierce debate among economists about the desirability of this law – with the traditional/conservative view being that an imposed minimum wage is not only inefficient but also harms the most vulnerable workers (who will lose their jobs). According to this view, the group of low-wage workers who will get a raise as a result of the law will do so on the back of workers who are even weaker. Employers will shift the cost of the law to this group, leading to regressive – rather than progressive – redistribution. To be sure, this is by no means the accepted view. There are recent studies that show that a minimum wage set at a reasonable level does not lead to unemployment, and that the costs of the minimum wage are borne to a large extent by employers themselves.[58] The debate is on-going, and different people could make different conclusions from it. However an informed view about what the law aims to achieve should take this debate – or more generally, critiques of the law – into account. Critiques can obviously support reforms, and they can also be used as part of the process of interpretation: to give a law the best possible reading, its potential negative consequences should be taken into account. For example, when interpreting sections dealing with exceptions in the legislation – such as a lower level of minimum wage for young workers or workers with disabilities – we should consider the context which includes the fears of harming employment prospects for these groups. And the best way to understand such fears is by reading the critiques of the minimum wage law.

So far our focus has been on a specific labour law. But the same ideas (the multi-disciplinary nature of goal-searching and the need to consider critiques) apply when articulating the *general* goals of labour law as well. To understand why we need labour laws, we need to start from understanding what is unique about the employment relationship. Then it will become clear why we need to regulate this relationship in certain ways. The unique nature of the employment relationship has been studied extensively by economists, sociologists, psychologists and others. Such studies are most informative for understanding and articulating the general goals of labour law.

3.7. CHOOSING THE LEVEL OF ABSTRACTION

The final issue that needs to be addressed concerning the "how" question is, in my view, the most elusive and difficult one: how to choose the appropriate level of abstraction or generalization. One could say that the goal of the minimum wage law (for example) is simply to ensure that every worker is paid at least X Euros per hour of work. This is obviously correct, but too specific and as a result not very useful for the purposes discussed above. On the other extreme, one could say that the goal of the minimum wage is to protect workers, which is also correct, but this time too general and again not useful. The point of the exercise, as we have seen in the previous part, is to assist

58 See references in Davidov, *ibid.*

us when suggesting reforms, or interpreting the law, and so on. It is difficult to see how any of these articulations – ones that are very specific or very general – can help us when attempting to make informed choices about reforms or the best interpretation.

Thinking about the *general* goals of labour law, one could find at least three levels in the literature.[59] At the highest (first) level we can refer to abstract values that labour laws aim to protect or promote, such as autonomy, equality, democracy (or "voice"), human dignity, social inclusion and distributive justice.[60] The idea that labour rights should be conceptualized as human rights, which receives increased attention in current discussions, can also be understood as leading to goal-articulation at this level.[61] Some argue that the concept of "decent work" can provide a normative basis for labour law.[62] In recent years "capabilities" have been added to this list (with ever-growing support),[63] and just recently "stability" has also been offered as one of the values underpinning labour law.[64] Somewhat more specifically (second level), we can point to some broad characteristics of labour markets that explain/justify the need to regulate them, such as inequality of bargaining power,[65] the prevalence of market failures,[66] the commodification of labour[67] or the existence of obstacles to the realization of human capital.[68] The goal of labour law is then understood (sometimes implicitly) as addressing this problem. Finally, the more specific (third)

59 See Guy Davidov, 'Re-Matching Labour Law With Their Purpose', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 179.

60 On the latter two see, e.g., Collins, above note 1, at 12, 21. On Democracy, see, e.g., Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart 2009). On voice, see Befort and Budd, above note 13. On dignity, see, e.g., David C. Yamada, 'Human Dignity and American Employment Law' (2009) 43 *U. Richmond L. Rev.* 523; Freedland and Kountouris, above note 6, at 372.

61 See, e.g., Colin Fenwick and Tonia Novitz, *Human Rights at Work: Perspectives on Work and Regulation* (Oxford, Hart 2010); Hugh Collins, 'Theories of Rights as Justifications for Labour Law', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 137.

62 Adelle Blackett, 'Situated Reflections on International Labour Law, Capabilities, and Decent Work' (2007) hors série *Revue Québécoise de Droit International* 223.

63 Deakin and Wilkinson, above note 3, at 290; Brian Langille, 'Labour Law's Theory of Justice', in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 101, 111; Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 *Comp. Lab. Law & Policy J.* 29; Freedland and Kountouris, above note 6, at 377. The idea of capabilities comes from Amartya Sen, *Development as Freedom* (OUP, 1999).

64 Freedland and Kountouris, above note 6, at 379. I prefer the concept of security myself; see Guy Davidov, 'In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws' (2007) 23 *Int. J. Comp. Lab. L. & Ind. Rel.* 117.

65 The classic articulation of this view is Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3 ed. 1983) 18. For discussion and additional references see Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: 'Employee' as a Viable (Though Overly-Used) Legal Concept', in Guy Davidov and Brian Langille (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart 2006) 133.

66 See, e.g., Hyde, above note 54.

67 See, e.g., Collins, above note 1, Chapter 1.

68 Brian Langille, 'Labour Law's Back Pages' in Guy Davidov and Brian Langille (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart 2006) 13.

level is focused on the unique characteristics of employment relationships that put the employee in a vulnerable position, for example, the existence of democratic deficits (or subordination, broadly conceived) and dependency on a specific employer (in the sense of inability to spread risks).[69] On this view, the general goals of labour law would be minimizing these vulnerabilities and preventing unwanted outcomes resulting from them.

The different levels do not contradict each other, indeed they are perfectly compatible. One can agree with all of the above articulations at the same time. So the question becomes which one is more relevant (or useful) for given purposes. Otherwise put: to choose the appropriate level of abstraction, we should ask what the goal of the enquiry is – i.e. use a purposive approach to the question of how to perform the purposive analysis. The answer depends on the context: if we are looking into proposed reforms, perhaps we should articulate the goals differently than when interpreting the law. Also, when interpreting a specific section we might have to use a different level of abstraction than the one used for more general problems (such as "who is an employee").

I do not have a general formula that can point to the best level of abstraction in each context. It is, first and foremost, important to be mindful of the issue – to realize that this is a critical part of the goals-articulation process. And then one should make an effort to find a level that is useful for the purpose of the enquiry. I would, however, argue that too much emphasis has been given over the years to the second level, while in fact the third one turns out to be much more useful in most cases. Ideas like "inequality of bargaining power" are perhaps important in terms of putting forward a narrative to support labour laws. But such articulations are not easy to translate into concrete interpretations or legislative improvements. Elsewhere I gave several examples of the main actual problems with the application of labour laws – all of them pointing to a degree of mismatch between labour laws and their purpose – and argued that in order to solve these problems we have to focus on the specific vulnerabilities of employees as mentioned above.[70] This is true whether we are suggesting solutions by way of legislative reforms or by way of judicial interpretation. Just to give one example, it is difficult to interpret the important concepts of "employee" and "employer" – setting the scope of labour law – by reference to inequality of bargaining power (for example). But these concepts can certainly be given meaning by reference to the vulnerabilities that characterize employment relationships.

So far we have discussed the level of abstraction when articulating the general goals of labour laws. What about the goals of *specific* regulations? Here one might continue to an even more concrete (fourth) level, and focus on concrete results that society finds unacceptable (for example, wages that are below a certain level). The goal of the law would then be to prevent such unwanted results. However this will

69 Davidov, above note 43.

70 Davidov, above note 59.

simply raise the question of *why* these results are unacceptable, and perhaps the best way to explain this would be by going back to the most general level of values. I have tried to show elsewhere that broad goals such as achieving redistributive justice and protecting human dignity can be useful in interpreting specific sections of a minimum wage law.[71]

4. CONCLUSION

We have seen in the first part of this article *why* it is necessary to explicitly articulate the goals of labour law: for purposes of improving/changing the law, or filling in the gaps; for purposes of interpreting the law; and to examine constitutional challenges. I then discussed in the second part several methodological questions about *how* to articulate the goals: I (reluctantly) accepted a presumption in favour of the "free" market; argued that we should articulate the goals of each labour law separately, and at the same time the *general* goals of labour law as a whole; explained that we should be looking for *justifications* that can also *explain* the law; argued that it is possible (although requires caution) to articulate goals that are not "contextual"; argued that there could be some ancillary goals distinguished from our main goals; showed that the goals cannot be found only within legal texts, but rather require a multi-disciplinary search; and pointed attention to the importance of choosing the right level of abstraction.

Armed with these (hopefully useful) insights, one can move on to consider some possible articulations of goals. This requires a separate article. I did, however, include reference to some possible options when giving examples throughout the previous part. This is a "hot" topic and debates on the goals of labour law are ongoing, with new contributions coming all the time. So the examples provided in the previous part are surely not exhaustive. The goal of this article was to provide tools to perform this task (articulating goals) and this can also help in assessing the various proposals in this area.

71 Davidov, 'Minimum Wage', above note 11.