Fat Cats, Production Networks, and the Right to Fair Pay

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Abstract

Should there be a legal right to fair pay in the sense that anyone might challenge the fairness of their pay in comparison to others? The international law of human rights does not clearly support such a right, in part because of uncertainty about the meaning of fairness in pay. The article attempts to dispel this uncertainty by explaining the marginal relevance of theories of distributive justice. It argues that standards of fairness should be discovered instead in principles of interpersonal justice, in particular in the bilateral principle of good faith, and in the associational principles of desert by reference to contribution and recognition of persons. These associational principles contain a strong egalitarian impulse that provides moral reasons for rejecting market rates of pay. It is then argued that these associational principles should apply not merely to single corporate entities, but to corporate groups and to networks of companies that share an integrated production scheme. Finally, the details of the most appropriate regulation for enacting a legal right to fair pay are explored with a view to achieving reflexive yet effective regulation using the mechanism of works councils to fix outer limits to wage dispersal ratios.

A. Introduction

My question is: should there be a legal right to fair pay? This legal right to fair pay would entitle employees to demand that their remuneration package should be fair. Just as they have a right not to be unjustifiably dismissed or discriminated against, so too, if there were a legal right to fair pay, employees would have a right to challenge the fairness of their wages. Such a general legal right does not exist in the UK. Nor, as far as I know, has it ever existed in other countries. Of course, pay has been regulated for such purposes as fixing a minimum wage,[1]

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[1] National Minimum Wage Act 1998.

eliminating sex discrimination,[2] and extending the coverage of collectively agreed rates of pay to all workers in a particular business sector.[3] But none of those causes of action have extended so far as to permit every employee or worker to question the fairness of their pay in a tribunal. Such a right might, for example, enable the shelf-stackers in supermarkets to claim better pay in view of the fact that their senior managers and CEOs earn more than a hundred times their wages.[4] Or such a right might enable junior hospital doctors to question why they only earn about a seventh of the pay of a NHS trust CEO.[5] Or such a right might enable a cleaner who works for a contractor to claim equal pay with the office workers in the buildings that she cleans long before dawn.

Popular media promulgate many stories about fair and unfair pay.[6] A curious feature of the UK 2017 general election caught my eye. Though disagreeing on most political issues, both Theresa May and Jeremy Corbyn promised to tackle the problem of excessive pay of chief executive officers (CEOs) of large corporations.[7] Indeed, the pay of 'fat cats' generates regular moral outrage in the press. These CEOs earn typically more than £1000 an hour, or about £4 million a year, which is about 130-140 times as much as the average worker, and 80 times the median wage of their own employees,[8] and possibly 200 times the wages of outsourced workers such as office cleaners. Another persistent theme in the media concerns global inequalities. Pay disparities within Western corporations or national labour markets are dwarfed by comparisons of wages at either end of international supply chains.[9] If workers in mines, fields, and sweatshops in the developing world are paid the not unusual wage of an

[2] Equality Act 2010, Part 5, Chapter 3.
[3] Otto Kahn-Freund, *Labour and the Law* 2nd edn, (London: Stevens, 1977) 140-9, 158-60. Such measures (now abolished) included the Fair Wages Resolution 1946, Wages Councils Act 1959; Agricultural Wages Acts 1948 and 1949; Terms and Conditions of Employment Act 1959, s.8; Employment Protection Act 1975, Sched 11.
[4] Sainsbury Plc, *Annual Report 2020*, 85 reports a pay ratio for the CEO of 173:1.
[5] Glassdoor, *Department of Health UK NHS Chief Executive Salaries* https://www.glassdoor.co.uk/Salary/Department-of-Health-UK-NHS-Chief-Executive-Salaries-E230892_D_KO24,43.htm
[6] E.g. Channel 4 News, 'FTSE executive earns 2,500 times more than low-paid employees' 29 August 2017; https://www.channel4.com/news/factcheck/top-ftse-executive-earns-2500-times-more-than-low-paid-employees.
[7] Labour Party Manifesto 2017, *For the Many not the Few*, p.17; Conservative Party Manifesto, *Forward Together*, 2017, p. 18.
[8] CIPD and High Pay Centre, *Executive pay 2018: review of FTSE 100 executive pay packages* p.7; https://www.cipd.co.uk/knowledge/strategy/reward/executive-pay-ftse-100-2018
[9] E.g. K. Crawford and V. Joler, 'Anatomy of an AI System: The Amazon Echo as an anatomical map of human labour, data and planetary resources', available at: https://anatomyof.ai

amount roughly equivalent to one dollar a day,[10] the ratio of their pay to the CEO of the controlling organisation at the head of the supply chain might easily be 4000:1.

These news stories about huge and growing wage disparities feed into a broader concern about the increasing inequality in wealth in Western societies, as highlighted by Atkinson and Piketty.[11] By some measures, disparities in wealth between a rich elite and the average worker are back at the levels of the Victorian era. Certainly, the share of the Gross Domestic Product paid out in wages as opposed to returns on capital investment has been steadily declining since the 1980s.[12] The concern about increasing inequality in wealth is partly moral – huge inequalities in wealth might be viewed as moral wrongs in themselves – and partly a pragmatic concern that the super-rich elites will abuse their advantages to undermine the basic values of a liberal democracy such as equal respect for all citizens, in effect turning us back into a plutocratic oligopoly and a status-based society. But my topic is not directly concerned with the growing inequality in wealth and its moral and political implications.

My focus is on fairness of pay or remuneration. The emphasis is on the employment relationship itself, not on broader questions of social justice in society or globally. Of course, the level of pay influences the distribution of wealth to some extent. But disparities in wealth today are largely determined by, first, income from capital, and the growing share of growth captured by owners of capital – that is Piketty's main point; and, second, taxation and welfare payments – as Atkinson emphasises, the presence or lack of redistribution of wealth by the state is the other major determinant of the distribution of wealth. Disparities in pay may contribute to growing levels of inequality in wealth, but only at the margins. Issues about fairness in pay arise even in a context of diminishing disparities in wealth.

Such a proposed legal right to fair pay requires a theory about what amounts to fairness in pay. On that moral question of fairness, there is considerable confusion, which I hope to diminish in the course of this lecture. Furthermore, a legal right to fair pay requires a view about how such a right might be enforced. What should be the regulatory mechanism for securing a right to fair pay? We should acknowledge that, if current wage disparities are largely the product of market forces, any law is likely to encounter considerable resistance to regulation

[10] Amnesty International, *Democratic Republic of Congo: "This Is What We Die For": Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt* (London, January 19, 2016) Index Number: AFR 62/3183/2016

[11] A. B. Atkinson, *Inequality: What Can be Done?* (Cambridge Ma.: Harvard, 2015); T. Piketty, *Capital in the Twenty-First Century*, trans. A. Goldhammer (Cambridge Ma.: Belknap/Harvard, 2014).

[12] Organisation for Economic Cooperation and Development, *OECD Employment Outlook 2012,* Chapter 3; ILO/ OECD, *The Labour Share in G20 Economies*, Report prepared for the G20 Employment Working Group Antalya, Turkey, 26-27 February 2015.

that alters those outcomes. To be effective, therefore, any regulation needs to be smart. However, before dealing with those moral questions about the meaning of fairness in pay and the regulatory issue of how best to construct an effective legal right to fair pay, it is worth pausing briefly to review the extent to which a human right to fair pay has been recognised in international law.

B. **The Human Right to Fair Pay.**

The Universal Declaration of Human Rights of 1948 contains the seed of a right to fair pay. Art 23 (3) states:

> 'Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'.

This formulation of the human right contains two crucial ambiguities.

First, it is unclear whether the right concerns pay itself, as opposed to household income from both pay and other forms of social support such as Universal Credit and the National Health Service in the UK. Given that in Article 23(3) the right to just and favourable remuneration can be achieved, where necessary, by welfare measures, a human right to be paid fairly by one's employer appears to be qualified by the alternative of a resort to state support or 'social protection'. That interpretation of the right is unsatisfactory, because welfare payments do not achieve 'an existence worthy of human dignity' in the same way as a fair wage. While a living wage achieves self-esteem for workers who can support their households through their own efforts, welfare dependency, as Joe Woolf insisted many years ago,[13] incurs calculated humiliation and the anxiety caused by a rigid and incomprehensible bureaucratic social security machine. It seems to me that only a fair wage can achieve the objective of Article 23(3): 'an existence worthy of human dignity'.

Secondly, even if the right in Article 23(3) concerns a right to claim fair pay, it is unclear whether it is merely concerned with a right to a basic wage, one that assures 'an existence worthy of human dignity', or whether it is a right to fair pay that permits challenges to any unfair disparities in pay on the ground that they are unjust and unfavourable.

[13] J. Wolff, 'Fairness, Respect, and the Egalitarian Ethos', (1998) 27 *Philosophy and Public Affairs* 97.

These ambiguities have been addressed in subsequent Conventions on human rights.[14] Article 4 of the European Social Charter is concerned with pay, not household income, but is confined to a living wage.[15]

> All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.

Article 7 of the International Covenant on Social, Economic and Cultural Rights[16] goes further by stating that the right to the enjoyment of just and favourable conditions of work should ensure, at a minimum,

> 'Fair wages and equal remuneration for work of equal value without distinction of any kind…'

That Article appears to support a right to 'fair wages' that goes beyond a minimum wage to include possibly a right to challenge unfair differentials in pay.

It is worth noticing, however, that, in contrast, the International Labour Organisation (ILO) has not promulgated a Convention on a right to fair pay. No doubt the ILO supports fair pay, but holds the view that it is best achieved through collective bargaining between employers and trade unions. This strategy is delivered by the ILO's strong support for the right to form trade unions for the protection of the interests of workers through collective bargaining.[17] One attraction of that approach to fair pay is that it avoids difficult questions about fairness by endorsing the result of free collective bargaining. The well-known disadvantages of this approach are that not every group of workers can be organised to achieve effective collective bargaining, unions do not always represent all their members fairly, and crucially from my perspective, there is no reason to believe that market bargaining, albeit at a collective level, produces a morally justifiable outcome for the level of wages. Perhaps recognising those difficulties with collective bargaining as the sole route to fair pay, in recent years, the ILO has

[14] However, there is no right to fair remuneration in the European Union Charter of Fundamental Rights, due in part to hostility by Member States to such a broad principle, but also because the issue of fair wages is generally outside of the competence of the European Union: J. Hunt, 'Fair and Just Working Conditions', in T. Harvey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (London: Bloomsbury, 2006) 45, 54.

[15] The European Social Charter 1961, and the Revised European Social Charter 1996 are expressed in identical terms.

[16] International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

[17] This fundamental right is also contained in article 23(4) of the Universal Declaration of Human Rights and Article 11 of the European Convention on Human Rights, as interpreted in *Demir and Baykara v Turkey* [2008] ECHR 1345; K.D. Ewing and J. Hendy 'The Dramatic Implications of Demir and Baykara' (2010) ILJ 2.

also stressed the value of 'decent work', a term that includes, at least in some definitions, a requirement of a fair income.[18]

This brief overview of protection for fundamental rights in international law of the right to fair pay provides strong support for the idea of a right to a living wage or a wage in which a household can live in dignity. Apart from an additional prohibition on sex discrimination in setting pay, however, it provides ambiguous support for the right advocated here of a right to fair pay in the sense of a right to challenge unfair differentials in pay. For the past century, in so far as a human right to fair pay has been acknowledged, it has been reconfigured into a right to free collective bargaining rather than an independent human right to fair pay. This modification reflects, no doubt, a pragmatic recognition that in the past collective bargaining was the most effective means of achieving better wages for most workers. This celebration of 'collective laissez-faire', as Otto Kahn-Freund called it,[19] was surely also an admission of uncertainty about what amounts to fairness or unfairness in pay. We should therefore turn to that moral question of fairness next.

The moral criteria of fairness will be developed in three steps. The first draws a distinction between principles of distributive justice and principles of interpersonal (or relational)[20] justice. This distinction is important because it provides the basis for rejecting both market driven and egalitarian theories of distributive justice as relevant moral criteria of fairness in wages. The second step describes the key moral principles for assessing fairness in wages, in which interpersonal justice is accorded priority but not an exclusive role. These interpersonal principles of justice include both bilateral and multilateral (or associational) principles. The third step considers the scope of application of those multilateral or associational principles of fairness.

C. Distributive and Interpersonal Justice

Despite their howls of outrage, on close inspection the political and media philippics provide scant guidance about the moral standard of fairness in pay that they are using as the basis for their criticism of fat cats. Scholarly reports also demonstrate time and again, for instance, that

[18] Decent work is also contained in goal 9 of the UN 2030 Agenda for Sustainable Development (2015). The ILO mentions a fair income as part of its general definition of decent work, but the proposed measurements of the achievement of decent work emphasise instead the creation of full employment and access to labour rights at work.

[19] O. Kahn-Freund, 'Labour Law', in O. Kahn-Freund, *Selected Writings* (London: Stevens, 1978) 1, 8.

[20] H. Dagan and A. Dorfman, 'Just Relationships' (2016) 116 Colum. L. Rev.1395; J. Gardner, 'Dagan and Dorfman on the Value of Private Law' (2017) 117 Colum. L. Rev. 179.

in recent decades the pay of CEOs has been growing many times faster than the wages of ordinary workers,[21] and that it has increased considerably faster than the profitability of the companies concerned.[22] It is also regularly pointed out that the wage ratio in organisations from the top position to the lowest decile has been increasing for the past half century, especially in the USA and the UK. In the UK 'senior corporate pay has risen far faster than corporate performance, and the gap between those paid most and those paid least has grown from 47:1 in 1998 to 128:1 in 2015',[23] reaching 160 times average earnings by 2017.[24] Closer to home, without any obvious link to performance measures, in the UK vice-chancellors' pay has risen on average by 41% in the last decade compared to academic staff's increase of 3%, so that in the Russel group vice chancellors earn more than 12 times the salary of the average member of academic staff.[25]

Although these statistics prove that wage disparities between the highest and lowest paid in organisations have been growing rapidly, it is unclear why this fact demonstrates unfairness. If CEOs are paid relatively much more today than they used to be 50 years ago, why is that necessarily wrong? Perhaps they were underpaid before and now receive a fair reward for their efforts; perhaps their contribution is greater today because of better education and technology; perhaps, like José Mourinho, these special ones are worth it.

It seems most unlikely that these political and economic commentators view any inequality in material resources, income, or pay as unjust. That is not a view shared by many.[26] It is widely believed that strict egalitarianism would destroy incentives to work hard, to specialise in complex and arduous tasks such as being a doctor, and to be highly productive in the sense of producing goods and services in high demand in the market. It may also be asked, as a matter of principle, where is the justice in giving equal reward both to those who choose

[21] House of Commons Business, Energy and Industrial Strategy Committee, *Corporate Governance* (London: House of Commons, 2017) 35.
[22] Incomes Data Services, *A Report for the High Pay Centre: Executive Remuneration in the FTSE 350 – a focus on performance-related pay*, (October 2014).
http://highpaycentre.org/files/IDS_report_for_HPC_2014_final_211014.pdf
[23] Conservative Party Manifesto, *Forward Together*, (2017) 18; House of Commons Business, Energy and Industrial Strategy Committee, *Corporate Governance* London: House of Commons, 2017, 48.
[24] Prem Sikka et al, *Controlling Executive Remuneration: Securing Fairer Distribution of Income* (November, 2018) 7.
[25] https://www.telegraph.co.uk/news/2018/06/06/vice-chancellor-salary-study-demolishes-claims-pay-rises-based/
[26] D. Miller, *Principles of Social Justice* (Cambridge Ma.: Harvard, 1999) 68.

to use their talents in productive activities and at the same time to those who muck about playing computer games, tweeting and texting whilst they are supposed to be working?[27]

Most critics of wage disparity therefore do not adopt a stance of demanding strict equality in wages. They criticise a CEO's pay for being excessive, but not that it is wrong to reward that leadership role better than most.[28] Similarly, the main criticism of low pay is not that it is unequal to the highest paid, but rather that the wages are either not really enough to sustain a decent life or they undervalue the work being performed. The standard criticism of wages in overseas sweatshops is not that they are unequal to wages in the UK, but rather that they are set at exploitative levels. If the moral objection to disparities in wages is not that they are unequal, what is the criterion of fairness?

Although politics and economics lacks a clear moral compass with respect to fairness in pay, we might expect to find better insights by turning to philosophy. Unfortunately, moral and political philosophy has rarely addressed the question of fairness in pay. Although there is a vast and erudite elucidation of different theories of social or distributive justice in modern political philosophy, these philosophical investigations are not really pertinent to the issue fairness in pay. Instead, moral philosophers are normally concerned about distributive justice in society as a whole with respect to all benefits and burdens. They assess the fairness or justice of the distribution of wealth between individuals or households. But the issue of fair pay is not directly concerned with the distribution of wealth or even the distribution of income in society as a whole. It is concerned rather with the distribution of wages within an organisation or within a particular contractual relationship. Moral philosophy typically overlooks the crucial distinction between distributive justice and what can be called interpersonal justice (or relational justice).

Distributive justice is concerned with the distribution of benefits and burdens in society as a whole. Moral philosophers (in the Anglo-American tradition) ask whether justice requires that the inequalities in wealth produced by the operation of the market should be counteracted by measures such as progressive taxation and welfare benefits. Libertarians like Nozick regard taxation as theft and insist that the outcomes of a free labour market are just.[29] In contrast, liberals like Rawls believe that market outcomes often result in unfair distributions of benefits and burdens, so it is necessary for the state to secure social justice or greater equality through

[27] R Dworkin, *Justice for Hedgehogs*, (Cambridge Ma.: Belknap/Harvard, 2011) 347: 'Why is it desirable that people should have the same wealth, when some spend while others save, or when some work and others play?'
[28] D. Miller, *Principles of Social Justice*, above n 26, 71
[29] R. Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

redistributive measures.[30] Both libertarian and liberal political philosophies agree, however, that wages should be fixed by market forces, not by interventions in the contractual arrangements themselves.

In contrast, interpersonal justice is focussed on the contract of employment and the employment relation. It is directly concerned with the terms of the contract and the fairness of the remuneration paid. Interpersonal justice is about the justice of the exchange of work in return for pay. Interpersonal justice is also concerned with disparities of pay within an organisation. For reasons of fairness, differences in pay have to be justified by reference to the same criteria that ensure the justice of the individual exchange. Relative pay within the organisation is a special topic of concern for interpersonal justice, because it may reveal unjustifiable forms of discrimination such as unequal pay for women performing like work or disproportionate wage differentials. In addressing the issue of fair pay, therefore, the focus must be on the moral criteria within theories of interpersonal justice, not distributive justice, for they are likely to provide the most determinate guidance on the issues with which we commenced this discussion such as excessive executive pay.

Gerry Cohen, an Oxford philosopher, famously challenged the Ivy League consensus between libertarians and liberals about the justice of free markets by asking, 'If You're an Egalitarian, How Come You're So Rich?'[31] His argument was that the general principles of distributive justice advocated by egalitarian liberals such as Rawls should be applied to personal and private relations for reasons of consistency. For instance, if one believes in an egalitarian principle of distributive justice such as Rawls's difference principle, in which disparities in wealth are only justifiable if they function to benefit to least well off, this principle should be applied to one's personal dealings such as the wages one works for. Cohen gave the example of a doctor who, having applied the difference principle to her own wages, decided that she ought to take a pay cut.[32] Perhaps Gary Lineker, the former footballer and television presenter, was guided by Cohen's argument by applying the difference principle to his own salary at the BBC when he took a 25% voluntary pay cut to a mere £1,360,000.[33] Notwithstanding this unlikely celebrity endorsement, in my view Cohen's argument is misconceived, for it attempts to apply principles of distributive justice to a question of interpersonal justice. In other words, he tried to apply principles for the distribution of wealth

[30] J. Rawls, *A Theory of Justice* (Oxford: OUP, 1972); J. Rawls, *Justice as Fairness: A Restatement* (ed. E. Kelly (Cambridge, Ma.: Belknap/Harvard, 2001).
[31] G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, Ma., Harvard, 2000).
[32] G.A.Cohen, *Rescuing Justice and Equality* (Cambridge Ma.: Harvard, 2008) 70.
[33] https://www.bbc.co.uk/news/entertainment-arts-57722068 (6 July 2021).

in society as a whole to the different question of interpersonal justice concerning the fairness of pay in a particular contractual relationship.

Such a mistake would not be made by most lawyers. We understand that private law, and in particular contract law, is primarily concerned with justice between the parties to the contract, not justice in society as a whole. Private lawyers understand that the first principle of interpersonal justice in employment is that the employer should pay remuneration for the work performed according to the terms of the contract or pay damages for breach of contract. What is just between the parties does not depend primarily on how wealth ought to be distributed in society as a whole. Unfortunately, some private lawyers make the opposite mistake to that made by Cohen and believe that considerations of distributive justice and social policy are irrelevant to interpersonal rights and obligations.[34] That view results eventually in the abolition of all special regulation of consumer contracts and contracts of employment. Although justice in the law of contract concerns, in the first instance, standards of interpersonal justice that are sometimes called corrective justice, those standards should never, in my view, entirely exclude considerations of social justice such as protection for weaker parties who are likely to be taken advantage of in competitive markets. As Anthony Kronman argued, if contract law can be used efficiently and effectively to regulate markets in support of distributive goals, it should be considered as an option.[35] Private lawyers who believe the contrary should be confined to their ivory towers.

What makes Cohen's argument for applying principles of distributive justice to contractual arrangements superficially attractive is its appeal to consistency. He argued that if you believe that distributive justice requires a more egalitarian society, that view should be applied to all one's personal dealings. But the argument for consistency is ultimately unconvincing. Thomas Nagel once drew a helpful distinction between two moral standpoints.[36] One is the objective, impersonal standpoint that argues that we ought to construct a just society that treats everyone with equal concern and respect as free and equal persons. This impersonal standpoint stands back from our personal interests and preferences and tries to imagine what would be morally right from an objective or universal point of view. The opposite standpoint

[34] E.g. E. Weinrib, *The Idea of Private Law* (Oxford: OUP, 1995) 80; P. Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Rev 515, 607; R.H. Stevens, *Torts and Rights* (Oxford: OUP, 2007); A. Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Virginia Law Review 1391, 1395.

[35] A. Kronman, 'Contract Law and Distributive Justice (1980) Yale LJ 472; A. Bagchi, 'Distributive Justice and Contract' in G. Klass, G. Letsas, & P. Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: OUP, 2014) 193.

[36] T. Nagel, *Equality and Partiality* (Oxford: OUP, 1995).

is partial in the sense that we believe it is right to pursue our own interests and values in order to seek personal fulfilment. On this partial moral viewpoint, we are right to prioritise our own personal development, our aspirations, and the interests of those who are personally close such as our families and friends. Nagel argued that the central problem of all theories of justice in society as a whole is to find a way to reconcile those two standpoints. It is not immoral or wrong to value our own autonomy and personal development. The difficult question is rather how to accommodate this partiality for oneself with the similar and equal moral claims of everyone else in society. The implication of Nagel's distinction is that we should reject Cohen's argument from consistency: we should not apply the objective standpoint to our personal dealings such as bargaining for better wages in our contract of employment.[37] Instead, we should recognise that it is morally right to permit individuals to pursue their own interests in their personal dealings,[38] though always in accordance with the background law that is designed to protect objective standards of justice.

Nagel worried that his recognition of the moral validity of the partial standpoint tended to support the justice of free markets in the same vein as the Ivy League consensus between liberals and libertarians, even though he believed that justice required greater equality. But this worry assumes that interpersonal justice in contractual relations is exhausted by the requirement to respect freely negotiated agreements whatever they may contain. On that view, the pay of fat cats and of those below a living wage is fair because it has been agreed without the use of force or fraud. That narrow view of what interpersonal justice requires with respect to fair pay seems to me to be mistaken. As I shall now explain, the requirements of interpersonal justice applied to wages are more complex and nuanced than the simple application of the principle of freedom of contract.

To conclude this section about moral standards of fairness in wages, my argument is that the relevant principles of justice to the enquiry about fairness in wages will be in the first instance those derived from interpersonal justice. It is only when those principles of interpersonal justice have been applied that we may appropriately turn to considerations of distributive justice. That does not mean that considerations of distributive justice will be

[37] Cohen responds to this point by qualifying the requirement of consistency so that it becomes merely an obscure requirement to show regard to impersonal justice though in a way that is different from the state: G.A. Cohen, *Rescuing Justice & Equality,* above n 32*,* 10.

[38] The idea that the pursuit of personal projects is right even though they may not support objective requirements of justice has its origins in: J. J. C. Smart and B. Williams, *Utilitarianism For and Against* (Cambridge: Cambridge University Press, 1973) 116-117; S. Scheffler, *The Rejection of Consequentialism* (Oxford: OUP, 1982)5-6; D. Estlund, 'Liberalism, Equality, and Fraternity in Cohen's Critique of Rawls' (1998) 6 Journal of Political Philosophy 99.

completely ruled out. For instance, a statutory minimum wage might be justified as a contribution to a fair distribution of wealth in society and should be used whenever it efficiently and effectively prevents the payment of wages that drive households into poverty and lives without dignity. Nevertheless, moral principles of distributive justice should play a secondary role in assessments of the fairness of pay.

D. Interpersonal Justice Applied to Wages

The moral criteria of interpersonal justice applicable to pay can be divided into bilateral and associational principles. Bilateral principles concern the contractual relation between employer and employer. Associational principles concern the functioning of the productive organisation and the multilateral relations between all its members.

Bilateral Principles

We have already noted that the first principle of interpersonal justice with regard to wages is the elementary rule mentioned already that employees should be paid what was contractually agreed. To uphold this principle, not only must employees be empowered to claim wages owed, but also employers should be prevented from making arbitrary deductions from pay or in other ways use the power to withhold wages to oppress or punish workers without good reasons supported by the terms of the contract. The law of contract and various statutory protections dating back to the Victorian truck acts implement this principle. Notice that this first principle of interpersonal justice tends to support the payment of any contractually agreed wages.

Strict compliance with the terms of the contract is, however, an inadequate standard of bilateral interpersonal justice for contracts of employment because they are a type of relational contract.[39] Although the concept of relational contract has been used in many different ways, in English law it has become a more precise legal concept.[40] Features of relational contracts often mentioned are: the expectation of a longer-term business relationship; investment of substantial resources by both parties; implicit expectations of co-operation and loyalty that shape performance obligations in order to give business efficacy to the project; and implicit

[39] H. Collins, 'Employment as a Relational Contract' (2021) 137 LQR 426.

[40] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB): [2013] All E.R. (Comm) 1321; *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) paras 167-176; H. Collins, 'Is a Relational Contract a Legal Concept?' in S. Degeling, J. Edelman and J. Goudkamp (eds), *Contract and Commercial Law* (Sydney: Thomson Reuters, 2016), 37.

expectations of mutual trust and confidence going beyond the avoidance of dishonesty.[41] 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.'[42] Although it is common for gaps to emerge in the express terms of contracts because parties do not foresee every contingency, relational contracts are distinctive because even the destination is indeterminate in the sense that the precise outcome or product that may be achieved through contractual co-operation is not defined in advance and can be reconfigured in the light of experience during performance of the contract. Relational contracts are indeterminate by design,[43] not by accident or as the result of the limits of human foresight.

Contracts of employment are relational contracts because, except in unusual cases, the framework of the express terms leaves the goals of the job and the manner in which it should be performed indeterminate. The vagueness is resolved by an employer's right to control and direct work, which is usually regarded as a hall-mark of contracts of employment. An employer acquires the right and the authority to control what outcomes are required and how the work should be performed within the loose constraints of the terms of the contract.

A necessary incident of relational contracts is an obligation of good faith in performance. They cannot function successfully unless both parties meet the reasonable expectations of the other in furthering the purpose of the transaction. Both employer and employee need to co-operate in good faith for the contract of employment to achieve the desired results for both parties. In particular, employers need to exercise their power and authority in a manner that is consistent with the purpose of the contract and the need to co-operate with the workforce to achieve a successful outcome. Accordingly, employers should perform their obligation to pay wages in good faith. This obligation requires more than sticking to the terms of the contract. It requires employers to act rationally, to discriminate in the pay of their employees for relevant reasons, not to act capriciously or arbitrarily, and more broadly, as employment lawyers say in the antique language of Chancery courts, not to act in a way that undermines mutual trust and

[41] *Bates v Post Office (No.3)* [2019] EWHC 606 (QB) at [725].
[42] *Ibid*.
[43] H. Collins, *Regulating Contracts* (Oxford: OUP, 1999) 161.

confidence. There are many examples in the reported cases of courts holding that employers have broken this requirement of good faith in performance in relation to pay.

Many cases concern the exercise of discretionary powers conferred by the contract of employment, such as the award of annual discretionary bonuses,[44] or the payment of compensation to dependants of a deceased employee.[45] In such cases, the discretion must be exercised for the purpose for which it was conferred, on rational grounds, without taking into account the irrelevant consideration that it is in the employer's rational self-interest not to pay the bonus if it does not compelled to do so. Similarly, groundless or irrational discrimination between wages paid to employees will undermine mutual trust and confidence.[46] In recent decades, many employers including universities have set about dismantling their final salary pension schemes and replacing them with inferior contributory schemes, which their employees perceive to be a breach of good faith, though the legal constraints of good faith can usually only defer such replacement pension schemes or confine them to new employees. Similarly, as highlighted in the recent British Gas dispute, many employers impose unilateral pay cuts by using threats of impending redundancies to induce employees to resign and then accept a new contract on inferior terms. Hundreds of engineers went on strike and then resigned from their jobs because they believed that their employer was not acting in good faith.[47] Although British Gas and other companies that impose pay cuts may strictly speaking comply with the requirements of the formal contractual arrangements by seeking consent to the variation in terms, employees regard this attempt to impose wage cuts by threats as bullying and a breach of the psychological contract that makes them loyal to a particular employer.

All these examples illustrate the application of a second principle of interpersonal justice to contracts of employment, the requirement of performance in good faith. As well as conforming to the express terms of the contract, employers must also pay wages in accordance with a standard of good faith that is guided by the need for co-operation and trust and confidence in order for the contract to achieve its purpose.

Associational Principles

The multilateral principles of interpersonal justice will be called associational principles of justice because they concern the value of membership of an association. Moral principles of

[44] *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] ICR 402.
[45] *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] ICR 449.
[46] *Transco plc v O'Brien* [2002] EWCA Civ 379, [2002] ICR 721.
[47] BBC News, 'Hundreds lose job in British Gas contracts row' (16 April 2021) https://www.bbc.co.uk/news/business-56746656

associational justice apply because work is normally performed within productive organisations, whether they be small or large businesses or public services. As a member of a voluntary organisation, employees are not only partial towards their own interests such as better pay and conditions, but they are also partial to the interests of the organisation and its other members, for their own prospects for a worthwhile life depend in large part on the success of the organisation for which they work. That success depends upon good faith co-operation by all members of the organisation in order to achieve the purposes of the organisation. Everyone has to perform their allotted role and help others to perform theirs. In order to bind everyone to this cooperative venture and to establish solidarity among its members, the organisation and its members must treat everyone fairly. The kind of solidarity that arises within productive organisations is not a general, though weak, sense of solidarity shared between all workers of the world. It is a preference for the interests of other members of the organisation over outsiders, because there are reciprocal benefits from co-operation. Once it is believed that there are free riders and other members ripping off the system, cooperation is likely to break down to the disadvantage of all. There is, for instance, considerable evidence to support the view that organisations with pay differentials that are perceived as unfair are less efficient.[48] For the purpose of setting moral standards of fairness for pay within productive organisations, two principles of associational justice appear to predominate: rewarding desert and giving due recognition.

Desert. Within associations, desert is the most frequently cited moral principle for the distribution of rewards such as pay and promotion.[49] It is generally believed that employees should be paid according to their valued contribution to the productive organisation. Those who work hard and achieve much in their jobs for the benefit of the goals of the organisation should be rewarded for that contribution. It follows as well that those who contribute little should not expect high levels of pay.

Desert is a very different principle of justice than the one applicable to ordinary market transactions. In other bilateral exchanges such as sales of goods, justice will normally be satisfied 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 presumptively as what is fair. Within an organisation, however, fairness is not based on market price, though of course the

[48] *Hutton Review of Fair Pay in the Public Sector: Final Report* (March 2011) 7; E. Rouen 'Rethinking Measurement of Pay Disparity and its Relation to Firm Performance' (2017) Harvard Business School Working Paper 18-007.

[49] D. Miller, *Principles of Social Justice*, above n 25, 131; *Hutton Review of Fair Pay*, above n 48, 4: 'The golden thread that runs through this review is the notion of fairness as due desert …'.

rates of pay are likely to be influenced by the labour market price for labour. In the 'internal labour market' or pay scales of productive organisations, what matters more are relativities between different jobs including both horizontal and vertical pay equity.[50] In large organisations, wages are normally set primarily by reference to the grade of the job according to the rules of the organisation, though increasingly with an additional discretionary bonus element to recognise especially valuable contributions.

The reason why desert is the appropriate moral principle for fair pay is that productive organisations are voluntary organisations that pursue a particular goal such as assembling a popular make of car, creating software systems, or providing a world-class education to students. As in any kind of team production, members of the organisation should be rewarded according to their contribution to the purpose of the organisation. If the principle of desert is ignored or flouted, members of the team will either cease to pull their weight or quit altogether. Desert is therefore an existential principle for productive organisations.

In theories of distributive justice for society as a whole, desert is correctly regarded with suspicion. Today's critics of a meritocratic society,[51] in which rewards are distributed according to talent, or more accurately talent plus expensive education, point out that it is mere luck to have the talent, so that talent should not determine distribution in society as a whole, and to have a good education almost certainly means that your parents are well-off and can support you through many years of higher education. This does not seem to be a moral principle for a fair distribution – it seems to be rather like the dubious principle of the ruling elites of having your cake and eating it. But within a productive organisation, it seems to me entirely appropriate and functionally necessary to distribute tasks according to talent and to reward the effective use of those talents with better pay. When promoting someone to a managerial position or hiring someone to perform a particular skilled task, merit according skills, talents, and education should be the primary consideration. While we may join the criticisms of a meritocratic society that in practice maintains a self-perpetuating ruling elite, it is entirely justifiable on the basis of partiality to use merit as the main criterion for hiring and promotion decisions within productive organisation. This contrast corresponds to the distinction between distributive justice – according to which meritocracy can be problematic –

[50] D. Weil, *The Fizzured Workplace: Why Work Became So Bad for So Many and What can be done to Improve It* (Cambridge, MA: Harvard, 2014) Chapter 4.
[51] M. J. Sandel, *The Tyranny of Merit* (London: Allen Lane, 2020); D. Markovits, *The Meritocracy Trap* (London: Penguin, 2020).

and interpersonal justice, in which merit and desert, as opposed to patronage, nepotism, and corruption – is a guiding moral principle.

The great difficulty presented by desert as a moral standard is that an individual's contribution is always hard to measure. As in a sports team, a successful goal-scorer or a manager may be highly lauded and rewarded, but every member of the team's contribution is in fact essential to their success, as is usually revealed when a player is sent off. Where work involves the creation of particular items, such as sewing a t-shirt together, pressing widgets, or stuffing cuddly toys, merely counting the number of pieces completed may provide a rough measure of desert. As soon as work involves making decisions, co-ordinating work with others, exercising discretion, planning the performance of tasks, and generally using intellectual abilities and discretion, desert based on contribution cannot be measured with objectivity and precision. Although desert by reference to contribution is therefore usually indeterminate in its guidance about levels of pay, if an organisation needs every job to be performed effectively, every employee's contribution is indispensable and valuable. In a sense, therefore, everyone is a special one for the organisation and deserves to be rewarded by a level of pay that clearly values their contribution and does not simply pay the statutory minimum wage or the market rate.

Due Recognition. As well as the principle of desert, fidelity to the association requires due recognition for all members of the organisation. Due recognition requires treatment by other members of the organisation not only with respect and courtesy, but also in ways that enable everyone to have a positive understanding of themselves or self-respect. It is often said that work enables people to have self-respect, but that seems wrong to me. Self-respect or esteem results from other people's signals or messages of respect. Fair wages are a clear signal that someone is respected for their contribution to the organisation through the performance of their jobs. Due recognition requires the organisation to show that all members, not least the lowest paid, are valued and respected as persons for their indispensable contribution to the productivity of the organisation. Due recognition through fair wages for the lowest paid is especially important, because they are likely to be disproportionately drawn from disadvantaged groups such as racial minorities, women, and migrants for whom recognition is often especially difficult. As a principle of interpersonal justice, due recognition is not aimed

at distributive justice as a whole, but it can support rather than obstruct redistributive goals at the margins.[52]

The operation of these two principles of desert and due recognition, which form part of the associational principles of justice,[53] is 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 they should be paid equally if their work is of equal value to that of a male colleague.[54] Furthermore, even if their work is not of equal value to that of a male comparator, their lower value should only be permitted to have a proportionate diminution in their pay.[55] 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 it is of course it is usually 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 organisation. The granting of the claim to women also illustrates the principle of due recognition for all members of the organisation. Finally, revealing its grounding in associational principles of justice rather than considerations of distributive justice, the claim for equal pay can normally only be made within the same organisation. There must be a single employing entity that determines the pay of the woman and her comparator.[56] The claim for equal pay illustrates a morally partial principle of justice because it requires fair treatment for members within the association, but ignores any wider distributional effects.

The first and second principles of interpersonal justice – upholding the agreement and performance in good faith – tend to endorse the inequalities in pay that result from market forces. But the third principle of interpersonal justice – the associational principles of desert and due recognition - provide the missing account of why we can assert that CEOs are paid excessively and that the lowest paid such as the porters and cleaners are frequently undervalued. Relative pay within organisations is the target of the associational principles of justice, not levels of absolute pay. The principles are concerned with the distribution of wages

[52] The principle of due recognition therefore partly resolves 'the redistribution-recognition dilemma' by locating recognition in the realm of interpersonal justice; see: N. Fraser, *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (New York and London, Routledge, 1997) 13.

[53] Other principles of associational justice are considered in H. Collins, 'Relational Justice in Work' (2022) 24 Theoretical Enquiries in Law (forthcoming) ; and below n.?

[54] Treaty on the Functioning of the European Union (Consolidated) 01/03/2020, article 157(1): '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/EC (Sex Equality) (OJ L 204/23).

[55] *Enderby v Frenchay Health Authority* Case C-127/92 [1993] ECR I-5535, [1994] ICR 112.

[56] *Lawrence v Regent Office Care Ltd* Case C-320/00 [2002] ECR I-7325.

from top to bottom of the pay scale. The principle of desert acknowledges that everyone should be rewarded in accordance with their contribution. The principle of due recognition insists that disparities in pay should not be so great as to imply that any member's contribution is worthless or of little significance with the consequence that they lose self-respect. Durkheim observed that the division of labour is a source of social solidarity only if everyone's contribution is paid according to its real value to the community.[57] Similarly, within productive organisations, everyone's contribution needs to be properly recognised in a manner that acknowledges their abilities and humanity.[58] The associational principles of justice therefore contain within them a strong egalitarian impulse. They challenge wide disparities in wages because such pay schemes do not conform to the moral requirements of desert and due recognition.

In short, the reason why the growing disparity in wages within organisations is morally wrong is that it appears to treat the contribution and abilities of some employees in a way that tends to undermine self-esteem and denies recognition to the low paid. It is hard to avoid such an inference when the CEO earns one hundred or two hundred times the amount of the lowest paid in the organisation. It is therefore not the absolute amounts of income of CEOs and the resulting inequality that is objectionable. It is comparative rates of remuneration within the organisation that provide the fuel for justified moral outrage in newspapers and campaigning groups.

E. The Scope of the Associational Principles of Justice

The crucial role played by associational principles of justice in providing the moral standard of fairness in pay raises a further question that needs to be considered. How far does the association extend? What are the boundaries within which measurements of contribution and desert must be made? Similarly, what are the boundaries within which due recognition is required by members of the association?

In modern business production schemes of so called 'boundaryless organisations',[59] this question about the limits of the associational principles of justice has become harder to answer than ever. Workers can be brought together into a team to co-operate to achieve a project even though they may have different employers such as sub-contractors, consultancies, employment agencies, and other companies within a group of companies. In the 1980s it

[57] E. Durkheim, *The Division of Labour in Society* (1902), S. Lukes ed. (London: Macmillan, 2013) Book 1.
[58] A. Honneth, 'Recognition or Redistribution? Changing Perspectives on the Moral Order of Society' (2001) 18 Theory, Culture & Society 43, 49-50.
[59] L. Hirschhorn and T. Gilmore, 'The New Boundaries of the "Boundaryless" Company ' Harvard Business Review, (May/June 1992).

became a widespread business strategy and a favourite government policy to streamline large business and government bodies by contracting out functions that were regarded as falling outside the core business or service.[60] This vertical disintegration narrowed the scope of application of the associational principles of justice.[61] The workers of sub-contractors could no longer compare their rates of pay to those in the core business if it was assumed that the boundaries of the association were fixed by the presence of a contract of employment with a particular employer. Workers in the public sector whose jobs were privatised found it harder to demand wages in accordance with the principles of desert and equal treatment by making comparisons with the remaining public sector workers.

In more recent times, globalisation has shown how disaggregated organisations can operate at an international level in order to take advantage of lower wages abroad. In order to avoid any claims that associational principles of justice should apply to these global businesses, a core business presents its international dealings as 'supply chains' or 'value chains', in which, through a succession of unrelated contracts, products and services are purchased and sold on by independent business until the final product is assembled and then sold by the core business. The terminology of 'supply chains' makes the business structure appear to be merely a succession of separate contracts between independent businesses.

Yet in business schools they teach courses on the management of value chains. It is recognised that chains are in fact integrated production systems led by a core business. For instance, Apple needs to ensure the adequate supply at the right price of all components and therefore controls as far as possible everything that happens from the designers in Seattle, the factory assembly workers in China, and the child miners of lithium in Rwanda. In my view, supply chains are better understood as production networks: they need to function as a collective entity, an organisation, even though they take the form of independent companies. Indeed, they are often so closely integrated that there is in fact no need to have binding contracts between the hub company and its suppliers and customers; as within a single corporation, the relationship can be managed by sheer economic power rather than any need to secure contractual rights.[62]

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[60] H. Collins 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

[61] H. Collins, 'Ascription of Legal Responsibility to Groups in Complex Economic Organisations', (1990) 53 MLR 731.

[62] F. Kessler, 'Automobile Dealer Franchises: Vertical Integration by Contract' (1957) 66 Yale LJ 1135, 1150; S. Macaulay, 'Non-Contractual Relations in Business' (1963) 28 *American Sociological Review* 45; S. Macaulay, 'The Standardized Contracts of United States Automobile Manufacturers', (1973) 7 *International Encyclopaedia*

This history of vertical disintegration and production networks teaches us that the presence of a contract of employment within a single legal entity such as a company or a government department provides an unreliable and deeply unsatisfactory guide to the scope of the associational principles of justice. In legal reasoning, of course, these formal boundaries between different companies tend to prove to be insuperable obstacles. We have already noted that, subject only to narrow exceptions, a woman can claim equal pay with a man if and only if their employer is the same legal entity, even though they may be doing the same job working side by side.[63] Similarly, lawyers assume that one company cannot be held responsible for the wrongs of another: if the supplier of clothing made in Leicester, Istanbul, or Bangladesh employs under age-children at rates of pay below the applicable statutory minimum wage, it is not the legal responsibility of the core business – a retailer on-line or in the high street. Very often, however, this formal legal boundary does not correspond to the reality of economic control within a production network. The core business has the power to tell its suppliers within the production network how they should treat their workers, just as they also dictate the quality and design of products, the prices that will be paid, and the delivery date.

Despite some praiseworthy recent attempts by the Supreme Court to extend responsibility of parent companies for the torts of their subsidiaries,[64] the law's focus on its own boundaries of the corporate form for setting responsibility has prevented it from properly addressing the challenges presented by boundaryless organisations. What is needed is a legal concept that holds businesses and governments accountable for actions that they control in practice, or could control if they did not turn a blind eye to them, within their own production networks. For this purpose, we need to develop the concept of a production network as a legal concept in which the core or hub business can be held responsible for wrongs committed by companies that it controls for the purpose of co-ordinating its production of goods and services.[65] The source of this control need not be ownership or common corporate board membership. The vital aspect of production networks is that they represent a form of integrated production of goods and services, even though they have the legal form of contracts between independent businesses.

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of Comparative Law 3; H. Collins, *Regulating Contracts*, (Oxford: OUP, 1999) 102-110; R. Cranston, *Making Commercial Law Through Practice 1830-1970* (Cambridge: CUP, 2021) 264-269.

[63] *Allonby v Accrington and Rossendale College* [2004] ICR (ECJ).

[64] *Vedanta Resources v Lungowe* [2019] UKSC 20, [2020] A.C. 1045; *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3, [2021] 1 W.L.R. 1294.

[65] G. Teubner, 'Piercing the Contractual Veil? The Social Responsibility of Contractual Networks', in T. Wilhelmsson (ed), *Perspectives of Critical Contract Law* (Aldershot: Dartmouth, 1993) 211; G. Teubner, *Networks as Connected Contracts*, edited and Introduction H. Collins, (Oxford: Hart Publishing, 2011).

If such a legal concept of a production network could be developed, it would provide the tool for extending the application of associational principles of fairness in wages beyond the core business to its entire supply chain. It would be possible to conceive in law that the core business should be held responsible for exploitative wages paid to the employees of its suppliers and their suppliers provided that they all form part of an integrated production system controlled by the centre. Unfortunately, at present, production networks remain management systems of organised irresponsibility, since a 'network' is still not a recognised legal concept.

F. The Right to Fair Pay

We turn finally to the question of how best to secure a legal right to fair pay. We have already noted many existing legal measures that contribute to securing a fair wage, such as a minimum or living wage law, protection against arbitrary deductions from pay, the right to equal pay, the elimination of discrimination against vulnerable groups in pay, and not least legal measures to protect the right to free collective bargaining. As important as these laws are for the protection of fair wages, none of them creates a general right to a fair wage that would enable individual workers to challenge employers in court simply on the ground that their wages are unfair in comparison to other employees such as the CEO or other groups of workers. Is such a right just a pipe dream? I suggest not. Unexpectedly, an initial vital step towards a such a right to fair pay has been taken in company law rather than employment law.

Regulation of public listed companies has been moving in the direction of an implicit recognition of a right to fair pay, though the legal measures enacted so far have proven ineffective and probably counterproductive. The problem of fair pay in corporations has been conceived by governments as mainly a problem of excessive pay for CEOs, a phenomenon that brings business as a whole into disrepute.[66] Economists and policy makers assumed that there must be a market failure where CEOs appeared to be receiving rapidly increasing remuneration packages. In fact, this trajectory was probably caused substantially by another intervention masterminded by economists to solve what they call the principal and agent problem. To align the incentives of CEOs with shareholders, in accordance with corporate codes of governance,[67] the major part of remuneration packages was tied to the price of shares, so that if the share price rose, which it might do for all kinds of reasons outside of the control of management (and

[66] Department of Business, Energy, and Industrial Strategy, *Corporate Governance Reform: The Government Response to the Green paper consultation* (August 2017).

[67] Financial Reporting Council, *The UK Corporate Governance Code*, (July, 2018) Principle P, at p. 13, and rule 36, at p. 14. Most listed companies are required to comply with the Code or explain why not: Financial Conduct Authority Handbook, Listing Rules

others inappropriately within their control such as share buy-backs), the remuneration package increased accordingly. Having decided, however, that the problem of excessive CEO pay was market failure, in accordance with economic orthodoxy, the proposed regulatory solution was to remedy the problem through information and transparency. Listed companies were required to report the CEO's salary.[68] Similar disclosure requirements were imposed on the public sector and universities. The idea was that transparency would discourage excessive remuneration. That approach failed. On the contrary, publication of salaries created a race to be the highest earner. At the same time, corporate boards were happy to offer astronomical deals to try to convince everyone that they had the best CEO in the world to run their business.[69] Transparency therefore probably increased the rate of growth of remuneration packages of CEOs.

To try to salvage this reporting approach, regulation increased the requirements of transparency by requiring ever more detail about the remuneration packages of CEOs and for their wages to be set by a remuneration committee composed of non-executive directors.[70] Shareholders were given the right to reject at periodical intervals the remuneration package for the CEO proposed to the Annual General meeting of the company. It is doubtful whether any of these measures has slowed the increase in the pay of CEOs to any significant degree. Increased reporting requirements create the problem of information overload – the reports of remuneration committees are incomprehensible to most people. The remuneration committees themselves are suspected of being hand-picked chums of the directors, who will engage in the practice of mutual back-scratching. And so far no meeting of shareholders in the UK has rejected a remuneration package, though some threatened rebellions have in effect caused revisions to be made.

Undaunted by the ineffectiveness of all previous efforts to correct what was believed to be a market failure by requirements for disclosure, the latest regulations increase reporting requirements even further. But on this occasion, there is a vital difference. Borrowing from the idea of imposing reporting requirements about the wages of all employees in the forlorn hope of combatting the gender pay gap, corporate reporting requirements now require disclosure of wage rates throughout a large public listed company. The Government has introduced requirements for more detailed statements in annual corporate reports of wage

[68] Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, (2008 no. 410) Schedule 8, Regulation 11 (directors' remuneration report).
[69] *Hutton Review of Fair Pay*, above n 48, 74.
[70] Financial Reporting Council, *The UK Corporate Governance Code*, (July, 2018), rule 32, at p. 13.

disparity inside organisations.[71] Companies with more than 250 employees must report the pay ratio of the CEO to three categories of UK employees: one at the 25th percentile, one at the 50th percentile and one at the 75th percentile. This requirement moves in the same direction as, but is more detailed than, section 953(b) of the Dodd-Frank Act in the USA,[72] under which the Securities and Exchange Commission requires companies to publish the ratio of the annual median compensation of all employees to the compensation of its CEO. The disclosure of pay ratios is also being implemented in the public sector where pay is not already a matter of public record. For instance, the Office for Students now requires universities in England and Wales to publish the ratio of the annual median compensation of all staff as a ratio of the Vice-Chancellor's remuneration, and in addition to report on the number of senior staff (a category that tellingly excludes professors) who earn over £100,000, broken down into bands of £5000.[73] The Code of Practice of the Committee of University Chairs, which the regulator requires universities to follow, also encourages universities to report on the ratio of the vice-chancellor's salary to the median academic and professorial salary.[74]

Given that the existing law on corporate reporting and transparency in public sector salaries already requires shareholders and the public to be informed in detail about the pay of the CEO and directors of a company or the highest paid public sector workers, the question arises what purpose may be served by the production and reporting of these wage dispersal ratios. This question is especially pertinent if it is correct that the existing disclosure requirements may not have led to any significant abatement in the wages or the wage increases of CEOs, directors, vice chancellors, and senior civil servants. If the shareholders are told that the CEO earns £3.5 million and do nothing about it, why would they act if they are told that this sum is 100 times the earnings of an employee at the median level of wages?

Although it seems doubtful that these new reporting requirements will lead to any significant changes on their own, in my view they represent a promising foundation for the regulation of fair pay. These reporting requirements about the dispersal of pay within organisations seem to me to assume that the moral foundation of fairness are constituted, as I suggested above, by the associational principles of justice, in this instance desert by reference to contribution and treatment as an equal. The proportional relations between the top and the

[71] The Companies (Miscellaneous Reporting) Regulations 2018 (2018 No. 860) Regulation 15, inserting new regulations 19A et seq into SI 2008 No 410, above n.64.
[72] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010
[73] Office for Students, *Regulatory Advice 9: Accounts Direction*; Reference OfS 2018.26, 19 June 2018.
[74] Committee of University Chairs, *The Higher Education Senior Staff Remuneration Code* (June 2018) principle 10.

lowest group of earners matter both because, contrary to the principle of desert, it seems dubious that their contributions to the success of the organisation are so disparate, and because, where ratios seem excessive, there is an implied disrespect for the lowest paid members of the organisation. The disclosure requirement now provides us for the first time with the morally relevant information: the ratios of different wage groups within an organisation. The question now becomes what to do with this information.

The next step should be to identify the outer limits of acceptable pay ratios. What is the morally acceptable pay ratio? Prime Minister David Cameron suggested that pay ratios between top and bottom in the civil service should not exceed 20:1. That proposal was defeated, as was a referendum in Switzerland that sought to limit the pay ratio in all businesses to 12:1.[75] Some faith organisations and churches insist on narrower wage dispersal, as in the case of the Quakers who adopt a maximum differential of 1:4. [76] In the Russell group of the university sector, pay ratios between the vice chancellors' total remuneration and the average of all other directly employed staff is about 12:1.[77] There are also a number of voluntary codes of practice that propose maximum wage ratios. For instance, 'Wagemark' is an international wage standard used to certify that the ratio between a business, non-profit organization, or a government agency's highest and lowest paid earners (defined as the average pay of the bottom decile) is no more than 8:1. In a survey of employees' attitudes to pay ratios, a quarter thought ratios were irrelevant, but among those who though they did matter, around a third thought that a CEOs pay should be less than five times an average employee's salary, and around a fifth believed it should be between five and ten times above. Those in the not-for-profit and public sectors were more likely to say that the pay ratio should be less than five times.[78] And, as we have already noted, in the large FTSE 100 companies, remuneration committees are happy to endorse ratios well in excess of 100:1. Looking at the defeat of broad ranging political proposals for maximum pay ratios combined with evidence of considerable diversity in perceptions of what are morally acceptable ratios, the conclusion must be that each association or productive organisation is likely to take a different view on how contributions are to be measured and what is required to treat every member of the organisation with equal respect. It

[75] Atkinson, *Equality: What is to be Done?* Above n.11, 151.
[76] Similarly, *Traidcraft* (a Christian trading organisation) limits pay disparity to 6:1. Impact and Performance Report for Traidcraft 2013–14, p. 42.
[77] Office for Students, *Senior Staff Remuneration: Analysis of the 2017-18 disclosures* (OFS 2019.3, 12 Feb 2019). https://www.officeforstudents.org.uk/advice-and-guidance/regulation/senior-staff-pay/
[78] CIPD, Pulse Survey, *The view from below: What employees really think about their CEO's pay packet* (December 2015) p.4. The-view-from-below_2015-what-employees-think-CEO-pay-packet__tcm18-8916.pdf (cipd.co.uk)

is therefore probably impossible both practically and politically to impose a single formula on all employers or even on particular sectors of the economy. Instead, what must be required by a regulatory framework is for each organisation to set its own standards with respect to ratios of pay.

Who in the organisation should decide the permitted ratios? Under the corporate governance code, remuneration committees of non-executive directors are expected to take into account the culture of an organisation when setting the pay of senior executives, but their reports appear focussed on external market rates and incentives for senior executives, and I have not noticed any that appear to consider any version of the associational principles of justice. In any case, it is arguable that the relevant principles of pay ratios should be established by the whole workforce, not the remuneration committee, for the question is about the character of the whole organisation, what it means to be a member of the group, what is necessary to bind the organisation together into an effective organisation, and how far everyone wants to support and respect each other. Another principle of associational justice may be that all members of the organisation should have a voice in discussions of organisational goals and values, so that the issue of pay ratios ought, as a matter of justice, to be considered by the membership as a whole.[79]

Where collective bargaining between a trade union and an employer determines pay in a particular firm or sector, the topic of maximum pay ratios could be negotiated as part of a pay settlement. Employers might be willing to agree to this demand, but probably only if existing pay ratios were maintained or even increased. In my view, the process of annual pay negotiations may not prove conducive to the necessary process of democratic deliberation about pay equity within an organisation.

A better legal mechanism for debating those principles of associational justice for a productive organisation is probably the existing legal structure for information and consultation with the workforce.[80] The requirement for employers to engage in an information and consultation procedure applies to undertakings employing more than 50 employees, not just listed companies. At present the regulations focus on information and consultation about the long-term development of the undertaking and employment prospects within it.[81] To turn this into a forum for establishing principles of associational justice in pay, it would be necessary to

[79] See H. Collins, 'Relational Justice in Work' above n. 53.
[80] The Information and Consultation of Employees Regulations SI 2004 no 3426. Similar rules apply to the civil service: Cabinet Office, *Code of Practice on Informing and Consulting Employees in the Civil Service*. See, H Collins, K.D.Ewing, A. McColgan, *Labour Law* 2nd edn (Cambridge UP, 2019) 669.
[81] Ibid Regulation 20.

expand its remit slightly to clarify that it should apply to wage policies and ratios within the organisation. Works councils would also need to consider the scope of application of the agreed pay ratios and how far they should apply to subsidiary companies and the surrounding production network. Without such extensions, it would be too easy to circumvent agreed pay ratios by outsourcing work provided by the highest paid and the lowest. Under the current regulations, a penalty can be imposed on an employer that fails to provide information or consult about it,[82] but there is no requirement for an employer to reach any kind of agreement or even respond to representations by the workforce. But legal sanctions may not be necessary. If senior managers ignore principles of associational justice that are supported by a consensus in the works council, not only are they likely to be in breach of the corporate governance code,[83] but employees will hear the implicit message that they reject the publicly shared culture of this organisation and feel less committed to the interests of the business.

The final step in designing appropriate regulation is to identify the right holders who should be able to enforce the applicable pay ratios. Ideally, the legal right to fair pay would become a cause of action to enforce the agreed ratio for the organisation available to all employees. Low paid workers could enforce the ratio to obtain a pay rise, but also there could be legal right to enforce the ratio of the median to the top and bottom. Because individual employees are usually reluctant to sue their employer, trade unions could perform a crucial role, as they do in connection with equal pay claims, by coordinating multiple claims on similar facts and protecting individuals against victimisation.[84] Remuneration committees could continue to fix the CEO's pay as they wish, but a significant pay rise that would take the CEO's remuneration outside the permitted ratio would give low paid workers the right to claim a pay rise through their right to fair pay. The proposed mechanism would function in practice rather like Rawls' difference principle: pay rises for the highest paid would only be lawful, if they were accompanied by a correlative rise in the wages of the lowest paid in order to remain within the permitted ratios.

Implementation of such a right to fair pay would face many obstacles. Companies and the public sector might avoid its consequences by outsourcing highly paid work to consultants and free-lancers, so that none would be included in the calculations. One of the reasons why private equity businesses are taking over public listed companies is that by avoiding listing,

[82] Ibid Regulation 22.
[83] *Corporate Governance Code*, above n. 70, Principle P and Provisions 33 and 38; C. Villiers, 'Corporate Governance, Employee Voice and the Interests of Employees: The Broken Promise of a "World Leading Package of Corporate Reforms' (2021) 50 ILJ 159, 173.
[84] *Farmah v Birmingham City Council* UKEAT/0286/1; [2017 I.R.L.R. 785.

they can avoid disclosure requirements, so that in this instance, the fat cats can take as much cream as they like and nobody but themselves will know. The ratios can also be manipulated by excluding the lowest paid workers from the calculations by outsourcing and using production networks rather than ownership within a single organisation to manage the business. Unless closely integrated production networks are included in the disclosure and calculation of pay ratios, businesses will be able to minimise pay differences in the core business whilst exporting all the low paid jobs to other contractors, whether at home or abroad.[85]

G. Justice in Work

As these potential obstacles illustrate, to regulate the fairness of pay is to attempt to control the place where the sharpest teeth of a capitalist society bite: its labour market. Challenges to market rates of pay risk unemployment effects, loss of competitiveness, regulatory arbitrage, and disinvestment. The regulatory framework suggested here, with its emphasis on self-regulation of permitted pay ratios, consultation with stakeholders, and the absence of any bright-line rules except compliance with self-regulation is sufficiently 'reflexive',[86] I hope, to avoid those alarming risks. At the same time, the vesting of an individual right to claim fair pay in individual workers ensures that, unlike mere transparency requirements, those who have the greatest interest in fairness in pay also have the legal right to demand redress. The recognition of a right to fair pay would make a small but vital contribution to justice in work.

[85] Business interests lobbied successfully to limit disclosure of pay ratios to UK employees. Department of Business, Energy, and Industrial Strategy, *Corporate Governance Reform: The Government Response to the Green Paper Consultation* (August 2017), para 1.51.

[86] G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.