Subordination vs Domination: Exploring the Differences

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Abstract

Subordination has long been a key concept in labour law theory. It aims to depict a central characteristic of employment relationships that explains (at least partially) the need for labour laws. More recently there is an increasing interest among labour law scholars with the concept of domination as developed in republican theory. On the face of it, being dominated by an employer appears to be very similar to being subordinated to an employer. To assess the relevance and usefulness of domination for labour law, I begin by providing an account of subordination and its different possible meanings. I then examine the different components of the definitions of domination developed by Philip Pettit and by Frank Lovett (with some reference to other scholars), and explore the similarities with, and differences from, the concept of subordination. I conclude that some key parts of domination — most notably the existence of arbitrary power — are not an optimal fit to describe employment relationships and justify labour law. In this respect domination cannot serve as a general theory of labour law. Nonetheless, republican theories are certainly helpful in providing normative support for *specific* labour laws as well as some other concrete benefits.

I. Introduction

In recent years we are witnessing increased interest in articulating the goals of labour law, and with it attempts to suggest new rationales for the field.[1] Whether the trigger for these attempts is defensive (to help protect the existing body of labour law) or reformist (to support suggested

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1 See, eg, Guy Davidov & Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press 2006).

changes to existing labour laws), it should be welcomed. It offers exciting new ways to understand the regulation of work relations and explain why it is needed. It helps us to assess whether existing laws are up to the (newly articulated) task and also to rethink how these laws should be interpreted.

One of the most influential new rationales promoted in the labour law literature is reducing domination. The concept of non-domination, as developed by Philip Pettit[2] and others, has attracted support from a growing number of labour law scholars. It has been suggested as a normative basis for collective labour law,[3] including (more specifically) freedom of association[4] and the right to strike;[5] as a justification for the right to private life, preventing employers from dismissing employees based on behaviour outside of work;[6] as inspiration for an individual right to contest employer decisions, including protection against related dismissals;[7] and most recently, as a more general justification for labour law as a whole.[8] These contributions by labour law scholars join a growing number of political scientists and philosophers arguing for labour market regulations on the basis of the republican idea of domination (whether by itself or in conjunction with other justifications).[9] The goal of the current contribution is to assess this new rationale and also to examine the connection between it and the 'old' rationales – specifically the idea of minimizing or confronting subordination.

On the face of it, the terms subordination and domination seem very similar. They are often used almost interchangeably.[10] However, the question is whether there is also similarity between the

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2 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

3 Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009) 144 ff.

4 Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 141.

5 Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' (draft presented at UCL conference, June 2016).

6 Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912, 925.

7 Bogg and Estlund (n 4).

8 David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' (draft presented at UCL conference, June 2016); Hugh Collins, 'Labour is Not an Instrument: Is the Contract of Employment Compatible with Liberalism?' (draft presented at UCL conference, June 2016); Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 Harvard Law & Policy Rev 479. See also some hints to this possibility in Bogg (n 3); Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan L Rev 225.

9 See, eg, Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31 Social Philosophy and Policy 48; Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31 Social Theory and Practice 115; Keith Breen, 'Freedom, Republicanism, and Workplace Democracy' (2015) 18 Critical Review of International Social and Political Philosophy 470; Richard Dagger, 'Neo-Republicanism and the Civic Economy' (2006) 5 Politics, Philosophy & Economics 151.

10 See eg Pettit (n 2) at 5: 'no domination without unfreedom… Freedom involves emancipation from any such subordination, liberation from any such dependency'. The same is true with regard to scholars who developed the idea of subordination in employment relationships: they sometimes use the terms domination, or dependency, to refer to the same phenomenon.

concept of subordination *as developed and understood by labour law theorists* and the concept of domination *as developed by republican theorists*. At the most general level, the two theoretical constructs share a similar structure: they aim to describe a real-life problem – to capture an empirical, social reality – and at the same time, to explain (at a normative level) why this captured reality is problematic and why it should be addressed (by law or otherwise) and curbed. There is, obviously, a difference in terms of scope: the idea of subordination (in the sense considered here) has been developed specifically for the context of employment relations, while republican theorists see non-domination as an organizing principle for political institutions and social justice much more generally. I do not purport to comment here on the theory of domination in general, only to ask to what extent it can be useful in the specific context of labour law. Given the structure just noted, the question is two-fold: first, can domination, as defined in republican literature, offer a good description of the 'problem' (vulnerability) characterizing employment relations? Secondly, at a normative level, can the theory of domination offer new justifications or new ways to explain why this situation requires legal intervention?

It is of course possible to address these questions directly without adding a comparison to the concept of subordination. Other contributors to this special issue are doing just that, and part III below – which analyses some key republican writings – can be read separately from the rest of this article as a contribution to the same discussion. At the same time, I believe it is useful and important to consider the 'new' idea of domination[11] against the concept of subordination which is already familiar to labour lawyers. Such a comparison is needed because the similarity between the concepts is not only linguistic; there are also similarities of *substance* between the two scholarly ideas.[12] This raises the question of what the idea of domination can *add* on top of what we already have/know in labour law theory.

To set the stage for the comparison, Part II introduces the concept of subordination as developed in labour law theory. Part III then offers a summary of the concept of domination as developed by republican political philosophers, together with an analysis of the relevance of this concept for labour law. I focus on several key issues: the concept of 'arbitrary power', the idea of freedom as non-domination, the existence of a social relationship and dependency on it, the idea of structural domination, and finally, the justifications of non-domination as articulated by republican theorists. During the discussion it will become clear that there are some important differences between the concepts of subordination and domination, and some deficiency in the ability of domination to capture the vulnerability experienced by employees. I will argue, as a result, that domination cannot explain or justify labour law in general. However, it offers helpful normative support for *specific* labour laws; helps to explain why subordination is problematic;

[11] Not really new, but new to the labour law discourse.

[12] The connection is made explicitly, albeit briefly, by Mantouvalou (n 6) 925; Bogg (n 3) 146-7; Bogg and Estlund (n 4) fn 35. In my own writing I have also made reference to the literature on domination in the context of explaining the idea of subordination; see Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 39. My aim in the current article is to examine the connection much more deeply.

and the tools developed to address domination can offer inspiration for legal analysis, including in labour law. Part IV concludes.

II. Subordination

The term subordination has been used with several different meanings. The goal of this part is to clarify the possible meanings and provide a brief review of discussions of subordination by key theorists, explaining the significance of this concept for labour law. I then conclude with my own suggestions as to the best use of this term and how it should be distinguished from related concepts.

Different uses of 'subordination'

We should distinguish, first, between subordination as a legal concept and subordination as an empirical fact, describing a social reality. In many legal systems subordination is used as a legal indicator (or test) to decide if an employment relationship exists.[13] I believe this is a good test assuming it attempts to identify the existence of subordination as an empirical fact, but in practice this is not always the case. It is possible, for example, for courts to decide that (legal) subordination exists only when the employee is obligated to follow detailed day-to-day instructions by the employer, or to look for explicit contractual obligations giving the employer the right of control. Such a judicial approach creates a gap between the legal meaning of subordination and the actual existence of subordination in the empirical sense. This is unfortunate. For current purposes I focus on subordination as an empirical/social phenomenon. While I believe that the legal concept should be aligned with the empirical fact, it is important that readers will not be confused by assuming that subordination means what some courts have interpreted it to mean.

It is also important to distinguish between subordination of a specific employee to a specific employer and subordination of one group to another. Group subordination is sometimes used to explain and justify equality laws: for example, American scholars have referred to the ongoing disadvantage experienced by black people as 'subordination' and have called for an anti-subordination approach to equality law.[14] Such an approach strives to remove the root causes of the disadvantage/inferior position in society suffered by the group, including by correcting historical injustices, as opposed to an anti-classification approach which simply prohibits current (new) discrimination based on group classification. This could be relevant to labour law when

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13 See, eg, the review in Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Ashgate 2007) ch 2.

14 See, eg, Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection' (1986) 61 NYU L Rev 1003; Reva B. Siegel, 'Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown' (2004) 117 Harvard L Rev 1470; Rebecca E. Zietlow, 'Free at Last! Anti-Subordination and the Thirteenth Amendment' (2010) 90 Boston U L Rev 255.

considering the specific context of workplace equality.[15] But the idea of group subordination also has a more general application in the labour context, if we say that employees as a class are subordinated to the owners of capital. This is very different from – although certainly related to – the subordination of a specific employee to a specific employer. If group subordination attempts to depict the inferiority of wage-workers compared to capital-owners in general (and the dependence of workers on employment by capital-owners), individual subordination is concerned with the characteristics of the particular relationship: being subject to the command of (or direction by) the specific employer.

Another way to explain the difference between the two meanings is by distinguishing between organizational subordination and economic subordination. Harry Arthurs has used the term 'economic subordination' to refer to structural weakness in the market – based on asymmetries of wealth and power – that exists in employment relationships and similarly among debtors, consumers, tenants and others.[16] This is quite similar to the idea that workers are generally dependent on wage work, but clearly different from the phenomenon of being subject to control and command by the employer after the relationship is formed. Below I will refer to group or economic subordination as *structural dependency*, a term which seems to better capture the vulnerability of being dependent on wages from unknown others for income, a dependency that is *external* to the relationship with a specific employer.

Subordination in the labour market: key contributions

Karl Marx considered both of these levels – or meanings – in his analysis of capitalism. First, he explained how the shift from a pre-industrial to an industrial society meant that people no longer produced by themselves, but had to work for others, becoming dependent on the willingness of capitalists to employ them. This structural dependency – not on a specific employer, but more generally on wages – was sometimes described by Marx as subordination (or subjection, or subsumption, depending on the translation) of labour to capital.[17] At the same time, he offered a striking account of the subordination experienced by specific employees vis-à-vis their specific employer once the relationship is formed: all combined labour on a large scale requires 'a directing authority, in order to secure the harmonious co-operation of the activities of individuals… A single violin player is his own conductor; an orchestra requires a separate one. The work of directing, superintending and adjusting becomes one of the functions of capital, from the moment that the labour under capital's control becomes co-operative.'[18] His collaborator Friedrich Engels made the point strongly as well: 'Wanting to abolish authority in

15 Christopher Mccrudden, 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*' (2012) 41 ILJ 30.

16 Harry Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 CLLPJ 585.

17 Karl Marx, Capital: Vol I (Penguin 1976, first published 1867) 1019-38.

18 Ibid 448-9.

large-scale industry is tantamount to wanting to abolish industry itself, to destroy the power loom in order to return to the spinning wheel… a certain authority… and, on the other hand, a certain subordination… are imposed upon us together with the material conditions under which we produce and make products circulate.'[19] Marx, of course, went on to argue that capitalists are using this authority to extract the greatest possible surplus-value from the workers, that is, to impose the greatest possible exploitation on the workers.[20] But it is not necessary to accept this view in order to understand the unavoidable existence of authority (or control) and the resulting subordination in employment relationships.

Hugo Sinzheimer, who is often considered one of the founding fathers of modern labour law, was strongly influenced by Marx.[21] It is not surprising, then, that the starting point for his analysis was this dual subordination, 'the injustices inherent in the capitalist mode of production: the subordination of labour to capital and the subordination of the individual employee to the employer.'[22] Sinzheimer relied mostly on the concept of *dependency*, rather than subordination, but it appears that he similarly used it with dual meanings. On the one hand, he considered labour law to be 'the body of law that regulated the relationships of workers… those who belonged to the social class that could only find a material basis for its existence by performing dependent labour.'[23] That is, *structural* dependency, in the general sense of having to rely on wage employment for subsistence. At the same time, the concept of 'dependent labour' was used by Sinzheimer to denote the control of the employer over the employee: 'in a relationship of dependent work, the worker was subordinated to the control of the owner of the means of production' and the task of labour law was 'to temper the employer's power to command.'[24]

The now-classic account of subordination was authored by Otto Kahn-Freund. Although he counted both Marx and Sinzheimer (his doctorate supervisor) as major influences,[25] in this particular context he appears to part ways with them, placing the emphasis on the individual level of subordination. In 'some reflections on law and power' – published as the introductory chapter of *Labour and the Law*[26] – Kahn-Freund makes three statements concerning the goal of labour law: 'labour law is chiefly concerned with [the] elementary phenomenon of social power' (at 14); 'the principal purpose of labour law… is to regulate, to support and to restrain the power

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19 Friedrich Engels, 'On Authority' in Karl Marx and Friedrich Engels, *Basic Writings on Politics and Philosophy* (Lewis S. Feuer, ed.) (Doubleday & Co., 1959, originally published 1872) 481.

20 Marx (n 18) 449.

21 Otto Kahn-Freund, 'Hugo Sinzheimer 1875-1945' (originally published in German in 1976), in Otto Kahn-Fruend, *Labour Law and Politics in the Weimar Republic* (Roy Lewis and Jon Clark eds., Basil Blackwell 1981) 73, 77; Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014) 14.

22 Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 J of Law and Society 341, 345.

23 Dukes (n 21) 15.

24 Dukes (n 21) 17. See also Kahn-Freund (n 21) 78-9.

25 Otto Kahn-Freund, 'Postscript' in Otto Kahn-Fruend, *Labour Law and Politics in the Weimar Republic* (Roy Lewis and Jon Clark eds., Basil Blackwell 1981) 195.

26 Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons 1983).

of management and the power of organized labour' (at 15); and, most famously, 'the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship' (at 18). Although the term 'inequality of bargaining power' attracted most attention, it is clear from reading the previous two statements, and the chapter as a whole, that Kahn-Freund is concerned with power in the sense of control in the individual employment relationship – which he also repeatedly calls subordination.[27]

He starts by saying that 'there can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers' (at 14). He calls this social power. This power has many sources – the law is but one of them, alongside wealth, personal prestige, tradition and so on – and it exists equally in the public as well as the private spheres (at 14). Kahn-Freund goes on to explain that command and subordination are 'necessarily inherent in the employment relationship… Except in a one man undertaking, economic purposes cannot be achieved without a hierarchical order within the economic unit. There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the "contract of employment"' (at 18). To be sure, in the background there is an understanding that the worker enters the relationship from a position of weakness, of dependency on wage labour: 'in its inception it is an act of submission' (ibid). But the focus for labour law remains on what happens after that: 'in its operation it is a condition of subordination' (ibid).

The reference to 'power of command' was not intended to suggest that the employer necessarily controls the day-to-day actions of the employee. Although this is often the case, at other times the employee is given independence to make professional decisions but is still in a position of subordination. The reference to command and subordination is thus broader, in the sense of being subject to the hierarchy and rules of the organization. This point was made clear by Kahn-Freund in a 1951 case note,[28] and was further developed some years later by Hugh Collins, who distinguished between market power and 'bureaucratic power'.[29] Collins argued that inequality of (market) bargaining power is only one source of subordination; another source is the bureaucratic structure of the organization. This explains why employees with strong bargaining power – whether because they are organized or thanks to special skills – are still in a position of subordination. He went on to argue that a distinction should be maintained between the contract and the rule-book of the organization; the latter is part of the managerial prerogative – the employer unilateral power – which should not be considered part of the contract, but rather should be subject to public-law-style limitations. In a recent contribution Collins added that subordination includes three components: employees have to subordinate their wishes to the

[27] See Davidov (n 10) 53. For another recent discussion of this issue see Collins (n 8).
[28] Otto Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 MLR 505.
[29] Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment (1986) 15 ILJ 1.

promotion of the employer's goals; the employer has *practical authority* over the employees, in the sense that she can issue orders that the latter have to obey; and this authority includes a discretionary power (the managerial prerogative) which is broad, though not unlimited.[30]

Making sense of subordination vs related concepts

My own attempt to contribute to this literature – in previous writings – started from a purposive approach: to understand the purpose of labour law we have to understand what is special (or different) about employment relationships – this in turn will explain the need for protective regulations. More specifically, we need to understand what makes employment different from other contractual relations involving work. Employment relationships are characterized by a set of vulnerabilities to which employees are exposed. And it appears that there are two main vulnerabilities: subordination and dependency. In previous contributions I made several arguments with regard to these basic characteristics of employment relationships:[31]

First, we should maintain a distinction between subordination and dependency. These are separate vulnerabilities that sometimes explain and justify separate labour laws. In the context of previous discussions of subordination, as summarized above, I would add that it is equally important to maintain the distinction between individual subordination and other meanings given to this term, most notably that of group or economic subordination, i.e. structural dependency. It is confusing to use the same concept to describe several different (even if related) problems. The concept of subordination is most appropriately used, in my view, in the meaning employed by Kahn-Freund: describing the existence of command and control by a specific employer over its employees.

Second, to explain why being controlled by someone else is problematic and requires regulatory intervention, I relied on the concept of democratic deficits. The fact that an employee has to follow the orders of a boss – whether on a daily basis or more generally by being subject to the rules of the organization and being part of its hierarchy – infringes on his/her autonomy and freedom. But this is only problematic – or at least it is only *really* problematic – because the employee is being *governed* by someone else without being able to participate in this government (pre-labour-law). When we buy a product or a service on a one-time basis we do not expect to participate in the government of the company making decisions about this product or

30 Collins (n 8).

31 See most recently Davidov (n 27) ch 3. See also Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52 U Toronto LJ 357; 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* (Hart 2006) 133.

service. But employment, unlike a discrete market transaction, is a structure of governance.[32] And the fact that employees (again pre-labour-law) do not take part in this government – whether directly or indirectly (through representatives or elections) – means that they suffer a democratic deficit.[33] The concept of subordination, then, should be used to include every situation in which such democratic deficits are present. This way we capture the essence of the vulnerability justifying protection/intervention, as opposed to just the surface manifestation of this vulnerability.

Finally, I have argued that the vulnerability resulting from dependency is due to inability to spread risks: unlike the situation in most other market transactions, employees rely (at least during the term of the relationship) on a specific employer for economic as well as social/psychological needs, and their ability to spread the risks among different employers/clients is very minimal.[34] This is a vulnerability characterizing employment – alongside subordination – and justifying the many protections included in labour law.

To be sure, *structural* dependency is also important. Most people who look for employment do so from a position of necessity – they need to find wage-labour in order to make a living – and this has a major impact on the terms they are able to secure. But this should be seen, in my view, as one of the *causes* for both subordination and dependency on a specific employer, rather than a direct justification for labour law. There are background facts that lead people to accept an employment relationship under terms that they might not otherwise prefer; most notably, the previous allocation of resources in society (which leads to structural dependency) and market failures. These background facts are what most people would call 'inequality of bargaining power'; and as we have seen, they have also been described as subordination (at last the part of structural dependency). However, in order to understand and justify labour law, I believe we should focus on the vulnerabilities that are *internal* to the relationship – subordination and dependency on a specific employer in the sense noted above – rather than background facts that led to these relations.

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32 The work of Oliver Williamson is especially helpful in this regard. See especially Oliver E Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Free Press 1975) ch 4.

33 This point was recently made strongly also be Anderson (n 9): 'Employees are governed by their bosses… Government exists wherever some have the authority to issue orders, backed by sanctions, to others… The government of workers is dictatorial under laissez-faire capitalism' (at 50, 55, 59).

34 A purposive approach – focusing on the vulnerabilities that require response – leads to the understanding that dependency is not only economic; people need the employment relationship, and rely on it, for other reasons as well. Work is an important part of our lives, and most people need wage employment to secure the social and psychological aspects of work. The vulnerability that characterizes employment is therefore dependency which is economic and/or social-psychological.

III. Domination

Political philosopher Philip Pettit has been the leading force behind the development of non-domination as a central ideal. Locating the origins of this idea in 18th-Century republicanism (itself based on much older Roman origins), he forcefully argued that it retains relevance today.[35] Pettit defines domination as the subjection to arbitrary power: 'having to live at the mercy of another, having to live in a manner that leaves you vulnerable to some ill that the other is in a position arbitrarily to impose… being subject to the potentially capricious will or the potentially idiosyncratic judgement of another.'[36] Such domination is seen by Pettit as the opposite of freedom, and curbing it is a normative goal (or in his terms, a political ideal) – 'a compelling account of what a decent state and a decent civil society should do for its members'.[37] Other leading political scientists have also championed the cause of non-domination: Ian Shapiro, for example, considers it 'the bedrock of justice';[38] and Iris Marion Young has argued that domination is one of two social conditions (together with oppression) that defines injustice.[39] In a recent attempt to offer a complete theory of domination, Frank Lovett has similarly argued that non-domination should be considered a general principle of justice.[40]

Put in these general terms, the concept of domination seems to be a good fit to describe a vulnerability that characterizes employment – being under the command of someone else – and it appears to be the same vulnerability captured by the concept of subordination. Pettit himself considers the employment relationship to be a prime example of domination.[41] Nonetheless, when we examine in more detail the theories developed by Pettit and by Lovett, some difficulties surface. Below I consider several components of these theories and ask to what extent they are compatible with an attempt to explain and justify labour laws, and to what extent they are different from the components of subordination.[42]

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35 Obviously, the original version of republicanism was directed only at a small group of elite males, while the current ideas (which Pettit sometimes call 'neo-republican') seek to make it universal. Pettit (n 2) 47, 95-6.

36 Ibid 4-5.

37 Ibid 6.

38 Ian Shapiro, 'On Non-Domination' (2012) 62 U Toronto LJ 293, 332.

39 Iris Marion Young, *Justice and the Politics of Difference* (Princeton UP 1990) 37.

40 Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010). Pettit himself has also argued in more recent writing for non-domination as a 'theory of social justice' (Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge UP 2012) 77).

41 Pettit (n 2) 5, 22, 141-2. Interestingly, though, Lovett never mentions employment as an example of domination. Like Pettit, he refers to slavery as the clear (extreme) example; but unlike Pettit, he does not extend the same analysis to employment. This can be explained by his different definition of 'arbitrary', which I discuss below.

42 The discussion below focuses mostly on the writings of Pettit and Lovett, as they are the ones who developed the modern theory of domination in most detail – and also the ones who inspired labour law scholars to adopt these ideas. Shapiro writes in more detail than others about the specific context of minimizing domination at work (see Ian Shapiro, *Democratic Justice* (Yale UP 1999) ch 6), but he is less concerned with defining domination and he focuses directly on solutions.

Arbitrary power

Pettit and Lovett both rely heavily on the idea of arbitrary power, and consider it to be the major component of domination. They both consider domination to be a phenomenon which exists in the public sphere (between state and citizens) and equally in the private sphere. According to Pettit's definition in his seminal book *Republicanism*, someone dominates another to the extent that: 1. They have the capacity to interfere; 2. On an arbitrary basis; 3. In certain choices that the other is in a position to make.[43] Lovett's definition, in turn, is that persons or groups are subject to domination to the extent that: 1. They are dependent; 2. On a social relationship; 3. In which some other person or group wields arbitrary power over them.[44] Both scholars discuss the different components at length, and I will consider below several aspects of these definitions. But the concept of arbitrary power is central.[45]

For Pettit, arbitrary power in this context means having complete (unlimited) discretion regarding a decision, and in particular, it implies that the decision can be made 'without reference to the interests, or the opinions, of those affected'.[46] Pettit makes it clear that the definition is not limited to situations in which the decision was actually taken arbitrarily; it is the *power* (capacity) to take such decisions that matters. This is explained through the example of the benevolent slave-master: even if he considers the interests of the slave before making decisions that affect him, it is still a relationship of domination.[47] The fact that he gets to choose, unilaterally, whether to consider the interests of the slave or not, is enough to put the slave in a position of being dominated by another.[48] A common metaphor employed by Pettit is the ability to 'look power in the eye'[49] – something that those dominated cannot do.

This is an extremely broad definition, covering numerous types of relations between individuals. In most of our private relationships we have the power to make decisions that have some impact on others without considering their interests and opinions (even if we sometimes choose to be considerate). This is most obvious in economic relations: in capitalistic economies, the most fundamental characteristic of the market is an exchange between parties that act in their own

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43 Pettit (n 2) 52.

44 Lovett (n 40) 119.

45 In a more recent book, Pettit notes that he now prefers to avoid the term 'arbitrary', because of the confusion created by the different meanings of this term. Instead of arbitrary power he uses the term 'uncontrolled interference' (n 40 at 58). I will refer to this alternative articulation as well below.

46 Pettit (n 2) 55.

47 Ibid 32. See also Lovett (n 40) 45.

48 On this point Shapiro disagrees; he defines domination to include only the actual abuse of power – the illicit, illegitimate use of power – rather than the potential for such abuse (n 38 at 308). However, he also believes that 'legitimate hierarchies often atrophy into illicit systems of domination' (ibid 334) and accordingly 'hierarchies should be presumed suspect… democrats should cast a skeptical eye on all hierarchical arrangements, placing the burden of justification on their defenders. Power need not be abused, but it often is, and it is wise for democrats to guard against that possibility' (n 42 at 42).

49 Pettit (n 2) 5, 71.

self-interest. Taking into consideration the interests of the other party is not required nor expected. According to Pettit's definition, then, every market exchange involves domination. Such a broad definition cannot help us understand, explain or justify the need for special regulations to protect employees.[50]

At the same time, in another respect Pettit's definition of domination is too limited. Imagine that before every decision, an employer (as the power holder) must ask its employees about their opinion and take their views and interests into consideration. Or, to put it otherwise, employees can effectively contest the employer's decisions.[51] According to Pettit this will not be a relationship of domination. But the vulnerability captured by the concept of subordination still exists. Although democratic deficits are lower when employees get a chance to voice their opinions, at the end of the day the decision is still taken by the employer; they do not get to vote on the decision or to choose the managers who make the decisions. Similarly, in terms of the substance of the decision, if we can somehow ensure that the interests of employees have been considered, this is surely an improvement; but it will not change the fact that the employer is still taking decisions unilaterally. The spectrum of possible decisions can be limited, but the employer nonetheless gets to choose between several options – and gets to decide in what way to balance its own interests with the interests of the employees. In such a case there is no arbitrary power (as defined by Pettit), and indeed the powers of the employer are limited, but she is still in a position to command and control the employees, to set rules for the workplace and enforce them. At least to some extent, subordination (that requires regulatory intervention) is still there. Not to mention dependency, which is unaffected by the limitations placed on the decision-making power of the employer.

Another way to explain the difficulty with Pettit's definition (in terms of its suitability to describe employment) is by reference to the unlimited ability of an employer to dismiss employees 'at will'. Pettit rightly points to this power as the key reason for domination in employment relationships;[52] it is because of the constant fear of being dismissed that employees cannot 'look their employer in the eye' and are fearful of voicing their concerns and opinions. Imagine, however, that the power to dismiss is limited by law or by collective agreement, so that

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50 Pettit addresses the problem of unbounded domination in the free market only very briefly (ibid 205). To explain why his theory is not 'hostile to every form of market arrangement', he argues that, although people are able to interfere with others, 'short of great differences of bargaining power' the others can interfere with them as well. Thus 'there is no question of permanent exposure to interference by another'. This explanation admits that in situations of bargaining power inequality – which in fact are prevalent not only in employment but in many other contexts – the definition of domination applies. (In a more recent contribution he seeks to show more explicitly that republicanism supports the free market, but again relies on what he admits himself are 'idealizing assumptions' about power equality; Philip Pettit, 'Freedom in the Market' (2006) 5 Politics, Philosophy & Economics 131). Moreover, Pettit appears to add a new implicit component to his definition when he talks about *permanent* exposure to interference. I refer to this component under the heading 'a social relationship' below.

51 For the use of these terms to describe non-domination see Pettit (n 2) 185.

52 Ibid 22, 142.

dismissals are only allowed for 'just cause' and there is an effective process to enforce this rule. It appears that according to Pettit no domination is present in this scenario. But obviously the subordination experienced by employees is still there. They still have to follow the rules and directions of the employer. Their situation is surely improved (compared to an 'at will' regime), but other protective regulations are needed nonetheless – and at least to some extent this is because of continuing subordination. The concept of domination as developed by Pettit could thus be helpful as a justification for 'just cause' regulations, but not so much as a general justification for labour law more generally.

Over the years there has been some development in Pettit's theory. He now puts the focus on whether the power is 'controlled' in some sense by those subject to it; *un*controlled interference equals domination.[53] This idea is discussed mostly in the context of the relationship between individuals and the State; it is not clear to what extent it is applicable to relations between individuals and/or firms as well. One could argue based on this idea that employees are subject to arbitrary power (or uncontrolled interference) if they lack the ability to control the employer through democratic participation in workplace governance. But this will still not justify or explain the multitude of employment standards that are an important part of labour law. Indeed, in a recent book, when Pettit himself offers a list of regulations justified by his theory, in the employment context he mentions only limitations on dismissals without cause and the right to unionize.[54]

Notwithstanding these critiques, Pettit's definition of 'arbitrary power' is helpful by making a clear connection between his idea of domination and democracy. If the problem of domination is epitomized by people with power making decisions without taking into account the views and interests of those affected, this is quite obviously a problem in terms of democracy. For decision-making to become democratic, decision-makers have to be 'accountable to the ordinary people whom they affect', and this can be assured if the affected people can effectively *contest* the decision and 'force an amendment'.[55] Pettit provides detailed analyses and proposals on how such contestation should take place, especially in the public sphere.[56] For current purposes the important point is the more general idea that a reality of domination is, in one sense or another, non-democratic. This corresponds with the idea that subordination should be defined by democratic deficits, and can be seen as offering support for this idea.

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53 Pettit (n 40) 58, 153-6.

54 Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Co 2014) 105. See also Pettit (n 40) 114-5.

55 Pettit (n 2) 186.

56 In the context of the *private* sector, the 'right to contest' has been used by Bogg and Estlund to justify workers' freedom of association as well as the right to strike and an *individual* right to contest (n 4 and n 5, respectively).

While Pettit's definition of arbitrary power is extremely broad (subject to the exception noted above), Levitt's definition is quite narrow: he equates 'arbitrary' with something that is not based on known rules.[57] This is more similar to the concept of arbitrary decision-making familiar to lawyers: a violation of the rule of law. A decision by a government agency which is not based on legislation or other rules that have been adopted in a transparent process will be considered arbitrary. To impose such a standard on private entities as well is certainly significant: it will mean that employers will have to publish rules and follow them. But this will not take away from their unilateral power. As long as they post the rules in advance and employees know what to expect, employers will remain free to make every decision they see fit.[58] Once again, then, while domination (according to Lovett) will not exist, the vulnerability captured by subordination is still there.

To conclude this section, subjection to arbitrary power does not seem to be an optimal way to describe the characteristics of employment relationships justifying protection. Subjection to command or control, to bureaucratic power, or to democratic deficits – all proposed in the literature dealing with subordination – seem like a better fit (alongside the separate vulnerability of dependency). The concept of arbitrary power is still helpful for the specific context of justifying unfair dismissal laws, and also for making the connection between domination (or subordination) and democratic deficits.

Freedom

A key distinction of Pettit's theory is between freedom (or liberty) as non-interference and freedom as non-domination.[59] Pettit sees the former as the main idea of liberalism, although he admits that even within liberalism freedom is not always negative and there is room for positive duties on the state (and others). Notwithstanding the various points of view within liberalism, a major strand focuses on negative liberty (non-interference) and legitimizes relations of unequal power, subject to preventing some specific instances of abuse of power. The claim of republicanism – at least as developed by Pettit – is that the mere ability to use power arbitrarily is problematic, and should be prevented or minimized.[60]

From the point of view of labour law, is it helpful to conceptualize the problem of domination (or subordination) as an infringement of freedom? At one level, this is a good way to explain the difficulty with employment relationships. Kahn-Freund made this point most eloquently, explaining that protective legislation *enlarges* the worker's freedom by restraining the power of management: when the law puts limitations on the duty of the worker to obey employer rules, it

57 Lovett (n 40) 96-9.
58 For a similar critique see Samuel Arnold & John R. Harris, 'What is Arbitrary Power?' (forthcoming) Journal of Political Power.
59 Pettit (n 2) 7-12, 66.
60 Ibid 22-3.

enlarges the worker's freedom 'from the employer's power to command, or, if you like, his freedom to give priority to his own and his family's interests over those of his employer'.[61] This idea is in perfect accordance with Pettit's freedom as non-domination. At the same time, we should remember Kahn-Freund's observation that 'nothing is more misleading than the ambiguity of the word "freedom" in labour relations'. In the legal mind, protective labour laws, although 'liberating' for the employee, are seen as a restraint on freedom of contract. And, Kahn-Freund adds, 'this paradox cannot be condemned. It is necessary for the law to see relations of subordination in terms of co-ordination, that is, an act of submission in the mask of a "contract," because this is the fiction through which is exorcises the incubus of "compulsory labour." One should not underestimate the real significance of verbal magic.'[62]

Assuming we agree with Kahn-Freund that the legal fiction plays an important role, is it an argument against using freedom as an additional justification for labour law? On the contrary. Some lawyers confuse the legal fiction with empirical fact, believing that employees enjoy *real* freedom in contractual relations. As a result, freedom is often raised as an argument *against* labour laws. It is helpful to counter such arguments with contradictory arguments on the same field (alongside other justifications). In this respect, the republican idea of freedom converges with the ideas put forward by Kahn-Freund and provides further support for arguments concerning the importance of labour law to ensure real freedom.[63] Note, though, that such arguments are articulated at a high level of generality and are not specific to labour law.

A social relationship

A necessary component of domination according to Lovett is the existence of a social relationship. He defines a social relationship as two or more persons or groups related to one another 'strategically', by which he means that whatever each of them wants to do depends at least in part on what the other party is likely to do.[64] Lovett notes that an exchange between a buyer and a seller in a fully competitive market is generally not a social relationship, because neither of them can affect the price (which is determined by the invisible hand of the market based on supply and demand). But he adds that the employment relationship is an exception,[65] i.e. it is a social relationship even without considering the existence of market failures. Why is this so? Lovett does not explain, but implicitly perhaps he assumes that a long-term continuing

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61 Kahn-Freund (n 26) 24. He adds: 'To restrain a person's freedom of contract may be necessary to protect his freedom, that is, to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will.' (at 25).

62 Ibid. Kahn-Freund goes on to stress that we must remember that freedom of contract is merely a symbol 'expressing a policy, an aspiration, a tradition' and not denoting a reality. 'The danger begins if "freedom of contract" is taken for a social fact rather than a verbal symbol' (at 25).

63 At this point there is also convergence with the idea of maximizing capabilities, seen as needed to ensure substantive freedom as well. I return to this connection in fn 84-85 and the accompanying text.

64 Lovett (n 40) 34-5.

65 Ibid 35-6.

relationship can lead to domination. Pettit, for his part, makes a brief note – only is passing – that suggests he considers only 'permanent' exposure to interference as constituting domination.[66] It appears, then, that both theorists implicitly see a difference between discrete market transactions and long-term relationships, the latter forming a more fertile ground for domination. Nonetheless, their definitions do not provide any clear explanation or exploration of this difference.

The suggestion mentioned above that subordination requires 'a structure of governance' is an attempt to capture this difference and separate between one-time brief transactions and longer-term ongoing relations.[67] Perhaps this distinction is not so important for the concept of domination, given that it attempts to cover a very broad range of relations. But in the context of employment this seems like a crucial component. One cannot be under the command of another person/entity in a fleeting transaction.

Dependency

Pettit does not mention dependency as a condition of domination, although, as noted, he sometimes invokes the term dependency (as well as subordination) interchangeably with domination.[68] For Lovett, this is a key component of the definition: there has to be dependency in order for domination to arise.[69] His explanation makes intuitive sense: if you are in a social relationship in which another party has arbitrary power over you, why don't you leave? He assumes that most people are rational actors and will not stay in a relationship that limits their freedom (or, in his terms, creates an obstacle to their human flourishing[70] – more on that below). If they *do* stay, presumably it is because they cannot easily leave; there are exit costs that make them stay involuntarily (at least to some extent). Lovett defines this situation as dependency.[71]

There is no doubt that dependency is a major characteristic of employment relationships. Arguably it is even more important than subordination, explaining and justifying larger parts of labour law. Some legislatures have already moved to expand parts of labour law to workers in a position of economic dependency even without subordination, and many scholars (myself

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66 See n 50 above.

67 I have developed this idea at some length in Davidov, The Three Axes (n 31) and Davidov (n 27) ch 3.

68 See n 10 above.

69 For a less extreme version of the argument see Shapiro (n 38) at 323: 'The less my ability to vindicate my basic interests depends on my relations with you, the less power you have over me – and hence the less capacity to dominate me'. Such a view about the connection between dependency and domination is not incompatible with the claim that the two vulnerabilities should be distinguished.

70 Lovett (n 40) 130.

71 Ibid 39, 49-50. See also Shapiro (n 42 at 163) (referring specifically to employment relationships as characterized by a vulnerability resulting from exit costs); Stuart White, 'The Republican Critique of Capitalism' (2011) 14 Critical Review of International Social and Political Philosophy 561, 566 (asymmetric dependency results in power of arbitrary interference which is the essence of domination).

included) support further expansion in this direction.[72] Two questions, however, are raised by Lovett's analysis: first, is dependency indeed a *necessary* precondition for being dominated (or subordinated)? Second, is inability to leave due to exit costs the best way to define/identify dependency in the context of employment?

To consider the first question, imagine that the market works perfectly (however unlikely this is) and a worker can easily leave and find another comparable employment at any time. For Lovett there is no dependency in such cases (and no possibility of domination), presumably because a worker facing arbitrary power can leave and secure alternative employment *without* arbitrary power. This may be so if one defines arbitrary power as something irrational and inefficient on the part of the employer. But a significant degree of unilateral power is in fact rational and efficient for employers to demand, so there is no reason to assume that a free market will lead to employment contracts without such power. Therefore, even with no-cost exit it is quite possible to find command and control by the employer, i.e. vulnerabilities that require redress – and only a very narrow understanding of domination can lead one to conclude that domination cannot exist in such scenario. Otherwise put, dependency as (narrowly) defined by Lovett may be necessary to create domination as (narrowly) defined by Lovett; but dependency even according to Lovett's definition is *not* a necessary precondition for the creation of subordination, which captures a key problem of employment relationships.

I now turn to the second question posed above, regarding the reliance on exit costs to identify dependency. As a matter of practice, a perfectly free market is little more than a theoretical possibility.[73] Even if we imagine a highly-skilled employee with offers from multiple employers, who can easily secure comparable employment elsewhere without effort, *some* exit costs are unavoidable; at the very least, the inconvenience related to getting used to a new environment, new colleagues and so on – which could be enough to make people reluctant to leave their employment. If exit costs are always present in the labour market – at least to some degree – then by Lovett's definition at least some dependency is always there. But then the question arises, is this the best way to assess the *level* of dependency and distinguish between cases that require protection/intervention and other cases?

The problem with using exit costs as a yardstick is threefold. First, the level of exit costs depends to a large extent on personal conditions, such as whether the worker has a spouse and kids and how difficult is it for them to move to a new location; or the extent to which the worker made job-specific investments (learning something which will not be useful in a new position), which varies dramatically from case to case. In other words, it is impossible to assess the level of exit costs by examining the structure of a particular relationship, without examining the personal circumstances of the particular worker involved. Second, imagine that the worker has one

[72] See Davidov (n 27) ch 6 and references therein.
[73] As Lovett himself also acknowledges (ibid 53).

employer (a full time job). Even if it is relatively uncostly for her to leave and find alternative employment, during the term of the employment there is still obvious dependency on a specific employer. This vulnerability is captured by examining the (in)ability to spread risks during the life of the contract. If I cannot spread my risks among several employers/clients/customers, I rely on the specific relationship with a specific employer for economic and other needs, and in a meaningful way *depend* on this relationship. Third, imagine that the level of exit costs is extremely low, but there are other market failures, leading to arbitrary power by employers throughout the market. Moving to another employer will not improve the worker's situation in such cases, so it seems strange to suggest that domination is not possible. Lovett suggests the possibility of dependency on the group of employers as a whole, rather than a specific employer,[74] but this seems highly artificial.

To conclude this section: at least in the context of labour markets, it is difficult to accept the claim that dependency is a precondition for domination (unless one uses an unhelpful definition of domination). Certainly it is not a precondition for subordination; although obviously, there is often a connection between the two. Similarly, I cannot agree with the view that dependency should be defined by reference only to exit costs; while these costs are important and affect the level of dependency, they capture only a partial set of cases, at best. Inability to spread risks is usually a more reliable indicator of dependency – although I did not have the space to fully defend it here.[75]

Structural domination

Pettit and Lovett both believe that domination requires two parties, one dominating and one dominated. At the same time, they both appear to be quite flexible about this condition when considering the problem of unequal bargaining power. Pettit stresses that lack of socioeconomic independence lessens one's prospects 'for the enjoyment of freedom as non-domination'.[76] Without personal and financial resources, he notes, people are dependent on others, although often not on anyone in particular (he calls this 'anonymous' dependence). While he does not consider such structural dependency to fall within the definition of domination, he does argue that it leads to domination and/or deepens it.[77] Lovett, for his part, while insisting on the existence of a specific dominating agent, adds that 'the complete set of masters' (and not only a specific master) could be the dominating agent.[78]

This apparent inconsistency, between the definition of domination and the desire to take into account the general dependency of labour on capital, is resolved in a recent contribution by Alex

74 Ibid 52-3.
75 I do so, to some extent, in Davidov, The Three Axes (n 31); Davidov (27) ch 3.
76 Pettit (n 2) 159.
77 Ibid 158-9.
78 Lovett (n 40) 52-3.

Gourevitch.[79] Relying on the writings of late-19th-Century American labour reformers, which he calls 'labour republicans', Gourevitch argues that they identified two different features of economic domination (or, as they have usually termed it, 'wage-slavery'). First, 'inside the workplace, they found their choices about the work activity to be subject to the arbitrary interference of new masters – bosses and owners. This subjection expresses itself… through organization of the workplace according to rules that laborers themselves had little influence in shaping'. This is exactly what we have referred to above as subordination. At the same time, the American labour reformers identified a second, separate form of domination which Gourevitch calls 'structural domination': 'Lacking access to land or tools, increasing numbers found themselves forced to sell their labor to employers to earn a living. Most immediately, this manifested itself in low wages and long hours. Bad on its own, this poverty reflected the underlying subjection of laborers to employers'.[80]

Gourevitch sees this as a crucial aspect of the vulnerability of employees.[81] He uses the term structural domination because he wants to emphasize the connection to republican theories of domination and supplement them; but in fact, a more fitting term is structural *dependency*. This would better capture a situation in which there is no dominating party: 'the unfreedom of the laborer is not a product of his situation vis-à-vis a specific employer, but rather of his dependence on *some* employer or another for livelihood'.[82] This is the same problem discussed in the previous part using this term. As argued there, it is important to maintain the distinction between structural dependency and dependency on a specific employer, given that these are two separate vulnerabilities (even if one leads to the other). And of course, it is important to maintain the distinction between these two and subordination.

The analysis of Gourevitch is helpful in supporting these arguments. At the same time, he makes his case too strongly when saying that 'some group of owners privately controls all of society's productive assets. Those who do not own are economically dependent on employers for jobs, wages, and thus their livelihood'.[83] It fact there is no clear dichotomy; many employees have at least *some* capital – whether from inheritance or their own savings – which theoretically could be enough to start a small business if they choose to do so. In this respect, they are not *entirely*

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

80 Ibid 595-6. For more on these labour reformers – including, specifically, their realization that freedom of contract in the labour market is illusory – see William E Forbath, 'The Ambiguities of Free Labor: Labor and the Law in the Guilded Age' (1985) Wisconsin L Rev 767. Similar arguments were expressed by labour unionists at the beginning of the 20th Century, when they argued that "workers could not experience freedom unless they could exercise a degree of conscious control over their own work lives" (James Gray Pope, 'Labor's Constitution of Freedom' (1997) 106 Yale LJ 941, 964).

81 In more recent work he describes *three* "moments" of wage-slavery in the labour republicans' writings: structural domination making the acceptance of wage-work necessary; accepting the terms of the contract (specifically the wage) dictated by the employer; and the submission to the employer's authority (Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge UP 2014) 106-16).

82 Gourevitch (n 79) 602.

83 Ibid.

dependent on the employer class. But if they are risk averse, or otherwise not interested in starting their own business, they will still find themselves structurally dependent at least to some extent; and most importantly, dependent on their specific employer in the sense of inability to spread risks during the term of employment. This shows that structural dependency comes at different levels, even among employees. It also provides further support for the need to distinguish between such structural dependency and dependency on a specific employer, which more directly supports labour law.

When discussing structural domination/dependency, or (in Pettit's terms) lack of socioeconomic independence, republican theorists point to the resulting lack of freedom. In this respect the idea of domination converges with the literature on capabilities – also a major inspiration for labour law scholars in recent years.[84] Without some minimal level of resources, or capabilities, people are not truly 'free' – in the sense that they have very limited options open to them and come to most interactions/contracts from an inferior position.[85] These are good arguments to support socio-economic rights in general but they are not specific to labour law and are not related to the specific vulnerability that characterizes employment relationships.[86] For these reasons such arguments should be considered separately.

The justifications of non-domination

The normative justifications for considering non-domination an important societal goal are articulated by Pettit by way of comparison with non-interference. The main instrumental benefit of non-interference, he argues, is 'not having your choices blocked or inhibited by others'.[87] Non-domination secures this goal as well, though only to a limited extent: preventing blocked choices only when the interference is made on an arbitrary basis. But non-domination 'more than compensates', Pettit says, by adding three *additional* benefits: it minimizes uncertainty (that comes with being subject to arbitrary power), with the associated anxiety and inability to plan; it saves people from the need to engage in 'strategic deference' and to anticipate the moves of the powerful; and it prevents the perception (of oneself and by others) that a person is inferior, weaker and vulnerable – which Pettit terms 'subordinate' status.[88] He goes on to argue, further, that non-domination is attractive both as an egalitarian ideal and as a communitarian ideal; that

84 For efforts to import the insights of Amartya Sen into labour law theory, see notably Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 290 ff; Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 111; Riccardo Del Punta, 'Labour Law and the Capability Approach' (2016) 32 IJCLLIR 383.

85 The connection between non-domination and capabilities is explicitly made – albeit in brief – by Pettit; see n 2 at 158, and see Philip Pettit, 'Capability and Freedom: A Defence of Sen' (2001) 17 Economics and Philosophy 1, 17-9. For further discussion of this connection see Del Punta (n 84).

86 The 'labour republicans' themselves called for the abolition of the wage-system in favour of co-operatives; see Gourevitch (n 80) 118-126, 166-7.

87 Pettit (n 2) 83.

88 Ibid 86-9.

is, it advances equality and it is also a common good and a social good.[89] Lovett, in turn, prefers to articulate the ills of domination by reference to human flourishing: 'some degree of non-domination is a condition of human flourishing, and therefore it ought to be regarded as an important good'.[90]

These justifications are relevant for labour law – at least for specific labour laws – even when the relations are not characterized by arbitrary power as defined by Pettit (or Lovett). They are therefore helpful in providing further justification for the need to address the problems of subordination and dependency. On top of that, Pettit's idea of arbitrary power can be used to support specific labour laws designed to confront such occurrences. I have argued above that arbitrary power is not a good description of employment relationships and therefore the republican idea of domination cannot serve as a *general* theory of labour law. Otherwise put, we need labour law even when the relationship is not characterized by arbitrary power. But this does not negate the possibility of arbitrary power in specific situations, a problem that should be confronted. Along these lines, Virginia Mantouvalou has argued that employers should not be allowed to interfere with the private lives of employees by dismissing them for private actions unrelated to their employment.[91] If we allow an employer to do so, it amounts to arbitrary power (in some sense).

While the republican approach focuses on freedom, the concept of domination also has an obvious connection to equality. Michael Walzer has argued that 'the aim of political egalitarianism is a society free from domination'.[92] Elizabeth Anderson has argued that the point of equality is to end oppression, and ensure that people stand in relations of equality with each other – and she mentioned domination as one of the faces of oppression.[93] More specifically in the context of labour law, she recently argued that ideas of freedom (in the republican sense) and equality converge to justify workplace regulations. She further added that 'hierarchical firms are distinct from markets, and often threaten the dignity and personal independence of workers'.[94] Samuel Bagenstos has argued that the main goal of employment law is advancing 'social equality' – eliminating hierarchies of social status.[95] He mentions the concept of domination (as well as subordination) to describe the *opposite* of social equality. It appears that Bagenstos uses these terms in the sense of structural dependency. Most recently, Brishen Rogers relied on the anti-domination principle to justify employment law, by noting especially the ills to equality,

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89 Ibid 110-26.
90 Lovett (n 40) 134.
91 Mantouvalou (n 6).
92 Michael Walzer, *Spheres of Justice: A defense of Pluralism and Equality* (Basic Books 1983) xiii. On the same page he says: 'The experience of subordination… lies behind the vision of equality' – apparently using these two concepts interchangeably.
93 Elizabeth Anderson, 'What is the Point of Equality?' (1999) 109 Ethics 287, 288-9, 312.
94 Anderson (n 9) 66.
95 Bagenstos (n 8).

distributive justice and dignity created by domination.[96] This list of values – equality, dignity etc. – is not new to labour law;[97] but all of these contributions can surely enrich the (already existing) discourse on justifications for labour law.

IV. Conclusion

It has long been clear to labour lawyers that the employment relationship is characterized by subordination, in the sense that the employee is subject to command and control by the employer, and subject to the rules of the organization. It is similarly widely agreed that the employment relationship is characterized by economic dependency. Replacing the term 'subordination' with 'domination' is possible but not very meaningful if the new term is used with the same meaning. The term 'domination' is equally unhelpful if invoked as shorthand for subordination plus economic dependency, thereby helping to disguise the differences between these two vulnerabilities. The question is whether the republican political philosophy that comes with the new term can help us to better understand labour law or provide new justifications for the field.

Before turning to critically review the literature on domination (as applied to the labour context), I started with a brief review of the literature on subordination. This has helped to revisit the vulnerabilities faced by employees (which in turn explain the need for labour law). There are vulnerabilities vis-à-vis a specific employer – subordination and dependency – and many have also stressed the importance of structural dependency (by this or other names), i.e. the general dependency of workers on wage-labour. The internal vulnerabilities explain the unique characteristics of employment and can therefore provide a general justification for labour law. Structural dependency is also important but I have argued that it should be understood as a background fact leading to (internal) subordination and dependency; it is not by itself a characteristic descriptive of employment.

As noted in the introduction, the concepts of subordination and domination have a similar structure, in the sense that both are descriptive and normative at the same time. At the descriptive level, they try to capture a specific aspect of reality, a vulnerability that people experience. At the normative level, they explain why this reality is problematic and should be curbed as much as possible, by law or otherwise. The discussion above has shown that descriptively, domination (as defined by Pettit and Lovett) is *not* an optimal fit to capture the vulnerability characterising employment relations. Most notably, the concept of arbitrary power, central to both Pettit and Lovett, and the concept of dependency as defined by Lovett, do not accurately describe the problem of employment relations. Domination turns out to be too broad in some respects and too

[96] Rogers (n 8) 500-4.

[97] For a review of the general goals see Guy Davidov, 'The Goals of Regulating Work: Between Universalism and Selectivity' (2014) 64 U Toronto LJ 1; Davidov (n 27) ch 4.

narrow in others. For this reason, at the normative level, domination cannot be seen as a general justification for the entire project of labour law. To be clear, when I say 'general' justification, I do not necessarily mean exclusive; Cabrelli and Zahn, for example, have explicitly adopted a pluralistic approach – to which I entirely agree – arguing that non-domination is but one goal of labour law among many.[98] The question is, rather, whether the idea of domination can be used to explain and justify labour law *in general* as opposed to justifying only one or several specific laws. It is in this sense that I argued here that the republican idea of domination does not stand up to the challenge; and for this reason it also cannot be used to help delimit the scope of the field and set labour law's coverage.[99]

However, given the similarities and points of convergence between the concepts of subordination and domination, the republican theory is still helpful in several ways: providing justifications for some *specific* labour laws (such as protections against unfair dismissals); offering tools to address domination – such as Pettit's right to contest – that have also proved to be useful for justifying specific laws; helping to explain why subordination is problematic (by providing support to the idea of democratic deficits); and enriching the discourse on the general goals of labour law.

Domination and subordination are therefore, descriptively, like two partially overlapping circles. There is some overlap in the vulnerabilities that they describe. But it is subordination, in my view, that better captures the problematic aspect of employment that requires labour law's intervention. Because the overlap with the 'problem' of employment is only partial, at the normative level domination cannot serve as a general justification for labour law. But the descriptive overlap is sufficient, and significant enough, to make the normative force behind domination relevant for *some* labour law purposes as well.

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98 Cabrelli and Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?', this issue.

99 On this point I disagree with Cabrelli and Zahn (n 8) who argue that non-domination leads to the conclusion that zero-hours contracts and other casual employment should be included in labour law, based on the existence of dependency, power imbalance and arbitrariness, as defined by Lovett. I think that the same conclusions can be reached based on the existence of subordination and dependency, and this method would be more accurate and defensible. Similarly I disagree with Rogers (n 8) who argues that Uber drivers should be considered employees based on the anti-domination principle. This seems to be too general, without the ability to delineate boundaries.