ARTICLES

Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law

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A. Introduction

Cosmopolitan constitutionalism contends that supranational governance can achieve a democratic character. It assumes that an essential core of the concept of democracy can be disembedded from the notion and institutions of the constitutional nation state and re-planted within transnational governance systems, in the EU and beyond, even while these fail to provide for representation and accountability along traditional lines.[1] It further asserts that social ordering deriving from transnational governance that is *democratic* will be *legitimate*.[2]

One "yardstick" for these two properties, democracy and legitimacy, that has been suggested is deliberative. Democratic legitimacy, it is said, "requires public justification of the results to those who are affected by them". Deliberation is further claimed to embody the democratic principles of congruence ("those affected by laws should also be authorized to make them") and accountability (which relates to reason-giving practice "wherein the decision-makers can be held responsible to the citizenry, and that, in the last resort, it is possible to dismiss...incompetent rulers").[3]

Within this conceptual framework, the issue has been raised of the dynamics of interaction of transnational economic integration, proceeding through law, as in the

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[1] E.g. Erik Oddvar Eriksen & John Erik Fossum, "Europe in Transformation. How to Reconstitute Democracy?", RECON Online Working Paper 2007/1, (2007), 4.

[2] See, further, Erik Oddvar Eriksen & John Erik. Fossum, *Europe in Search of Legitimacy: Strategies of Legitimation Assessed*, 25 INTERNATIONAL POLITICAL SCIENCE REVIEW 435 (2004).

[3] Eriksen and Fossum, *supra* note 1, 4, and further, at 8: "The *public sphere* located in civil society holds a unique position, because this is where everyone has the opportunity to participate in the discussion about how common affairs should be attended to. It signifies that equal citizens assemble into a public, which is *constituted by a set of civil and political rights and liberties*, and set their own agenda through communication" (emphasis added).

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EU and WTO, on one hand, and constitutional norms and standards, of both national and international origin, subsumed by such systems, on the other.[4] There is a need to assess, it has been contended, whether the package once associated with state citizenship, including all of the classical attributes of legal, political and socio-economic citizenship, can be reconstructed and reconfigured across different constitutional sites, or whether the language and practices of constitutionalism beyond the state instead hollow out the capacity for full constitutional citizenship at nation state level, without adequate replacement or substitution above or below.

To this inquiry, this article contributes a study of recent reflections on the consequences of global economic integration within the field of labor law. This provides the basis for a synchronic comparison, in outline, across legal sub-disciplines. In their framings, methodologies, precepts, and functional identities, social science disciplines and sub-disciplines evince and prosecute a range of cognitive and normative concerns.[5] Viewing the transformations and potentials of globalization and supranational governance through the lens of labor law ought, then, to help to illuminate the preferences and selections of deliberative cosmopolitan constitutional theory, and so offer means to refine and enrich it.

The first main finding to emerge from this exercise is that the working definitions of democratic legitimacy, congruence and accountability stated at the start tend to re-produce a limited democratic horizon that is classically liberal in orientation. Axiomatically and functionally, labor law is concerned with the sphere of market relations. Normatively, it is engaged by challenges to individual autonomy which arise in the course of work - its understanding of which essentially embraces distributive issues – and which may be crystallized in "private" legal relations, principally contract. During the twentieth century, labor law – through state constitutions, national and sectoral collective agreements, statute and court decisions [6] - articulated individual and collective rights in response to such challenges. At various moments, it sought to extend the scope of application of concepts of civil rights, citizenship and democracy into the realm of industrial production, as a framework for the conduct of economic life (since, originally, these

[4] This question is pitched within the RECON project by Work Package 9, *Global Transnationalisation and Democratisation Compared*, see further http://www.reconproject.eu/projectweb/portalproject/ResearchObjectives WP9.html.

[5] Renate Mayntz, *Embedded Theorizing. Perspectives on Globalization and Global Governance*, MPIfG Discussion Paper 05/14 (2005); Mark Bevir & R.A.W. Rhodes, *A Decentred Theory of Governance: Rational Choice, Institutionalism, and Interpretation*, Berkeley Institute of Governmental Studies Working Paper 2001-10, (2001).

[6] See, for example, Florian Rödl, *Towards a Reflexive Labor Constitution. On the Form of Regulating Labor Relations in Europe*, Cidel concluding conference Paper No. 14 (2005).

set parameters channeling the conduct of politics).[7] Feminist labor analyses, for their part, have conclusively shown interdependencies, and the gendered nature of the boundary between market/non-market rights, rewards, and statuses, within the constitutional frameworks of existing democratic states.[8]

By contrast the "deliberative yardstick", as defined above, implicitly reaffirms a liberal constitutional paradigm [9] that restricts the scope of democratic self-governance, citizenship and associated rights to one side of the conventional public-private divide. Analysis with this starting point, it is suggested, already hollows out the capacity for state constitutional citizenship, including all of the classical attributes of legal, political and socio-economic citizenship, before it begins. Deliberative cosmopolitan approaches to transnational constitutionalism should instead, I argue, explicitly acknowledge and engage with communication, rule-making and coercive power[10] within the economy as well as in the "public" sphere and civil society, and should include in the scope of study the altered dynamics affecting them that stem from transnationalization's de-borderings and re-borderings.[11] If its proponents elect to take the other course, at the very minimum, they must openly register and defend this choice as such.

The second conclusion has a methodological basis. Labor law - more frequently than constitutional legal theory - historicizes its concepts and institutions.[12] It thus highlights the co-evolution of democratic constitutions with industrialization and the development of national welfare regimes. Social integration, it underlines, has material as well as political and cultural bases: national constitutions represent settlements with distributive as well as political dimensions, and modern democratic legitimacy has depended on the delivery of acceptable standards of living as much as on public justification, formal rights of political participation or

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7 T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS (1992 (1950)), Harry Arthurs, *Developing industrial citizenship: a challenge for Canada's second century*, XLV LA REVUE DE BARREAU CANADIEN 786 (1967); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY, (1970), PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE, (1978).

8 See, classically, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARVARD LAW REVIEW 1497 (1983).

9 Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO LAW REVIEW 771, (1996).

10 As discussed further, in interview, by Iris Marion Young and Jane Mansbridge: Archon Fung, *Deliberation's Darker Side: A Discussion with Iris Marion Young and Jane Mansbridge*, 93 NATIONAL CIVIC REVIEW 47 (2004).

11 SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS. FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

12 THE ECONOMY AS POLITY: THE POLITICAL CONSTITUTION OF CONTEMPORARY CAPITALISM (Christian Joerges, Bo Stråth and Peter Wagner eds., 2005) marks an exception.

the power to dismiss rulers.[13] "[T]he solidaristic basis of the nation state, as well as of the welfare state", it has been said, encompasses *more* than "the symbolic 'we'".[14] On the basis indicated by labour law, deliberative cosmopolitanism's "results" requiring public justification must therefore extend to the material social outcomes for whose achievement constitutions provide the framework, and which derive not just from the public but also the private arrangements they permit, including in the world of work. Moreover, principled calibration of such results – prerequisite to justification through rational discourse, as *deliberative* cosmopolitanism would demand – will require collection and evaluation of information regarding substantive (including relative) levels of individual and collective welfare, in terms of both their public and private components.[15] There are, in other words, definite technical-institutional implications, flowing from a normative preference for deliberative cosmopolitanism, which touch on distribution and "private" social ordering, in addition to those relating, for example, to supporting the coalescence of post-national communicative space and party-political representation.

These observations, it is suggested, run flush with, and lend support to, a *thick* theory of deliberation, that is, one which sees a wide range of factors, social as well as personal, as affecting the extent and quality of individual participation in rational discussion preceding the making and approval of legal norms,[16] and the extent to which these norms express the needs, preferences and values of different social groups.[17] If we fail *explicitly* to specify substantive social, welfare and labor objectives (which may be structured through reference to socio-economic rights[18]) as both a *goal* and *pre-condition* of reconstructed cosmopolitan democracy, by contrast, it seems unlikely, in the context of negative market integration underpinned by law, we will be able to restrain policy trends favoring market values over social values.

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[13] See Fred Block, *Towards a New Understanding of Economic Modernity*, *in* THE ECONOMY AS A POLITY: THE POLITICAL CONSTITUTION OF CONTEMPORARY CAPITALISM, 3, 13-14 (Christian Joerges, Bo Stråth & Peter Wagner eds., 2005) for discussion of perceptions of historical complementarities between market expansion and popular "protective counter-movements", despite superficially contradictory objectives, in the works of Karl Polanyi, Karl Marx and E.P. Thomson.

[14] See Fossum & Eriksen (*supra,* note 1, 20): "A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an imagined common fate…This constitutes the solidaristic basis of the nation state, as well as of the welfare state…"

[15] See Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Global Justice*, 9 FEMINIST ECONOMICS 33 (2003).

[16] David A. Crocker, *Deliberative Participation. The Capabilities Approach and Deliberative Democracy* (*mimeo,* 2004).

[17] See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2000); also, JACK H. NAGEL, PARTICIPATION (1987).

[18] See Nussbaum, *supra* note 15.

This leads back to the starting point of much recent deliberative cosmopolitan theorizing, the crisis of EU constitutionalism. In an early response to that crisis, one authoritative voice called for efforts "…to *conserve* the great democratic achievements of the European nation-state, *beyond its own limits*", and so including "…not only formal guarantees of civil rights, but levels of social welfare, education and leisure *that are the precondition of both an effective private autonomy and of democratic citizenship*".[19] In other words, the resource-distributive dimension of democratic self-governance, key to both social productivity and social reproduction, and highlighted here through the lens of labor law, must be embraced by the "language and practices of constitutionalism beyond the state" if they are to secure, for the EU, or any other supranational governance system, the legitimacy desired.

I proceed as follows. Section B breaks down recent labor law readings of global economic integration according to the perceived impact of the latter's major trends on its foundational sub-disciplinary concepts and categories: industrial production, labor, work, the worker, the employment relationship and collective worker representation. The discussion substantiates the points outlined above. Labor law, in reflecting on global economic integration, is chiefly concerned with impacts in the "private" sphere, whether directly via transnationalization of private law, or indirectly, via market dynamics affecting private law's conduct or states' capacity to regulate in the labor field. In gauging changes to its institutions and norms, labor law envisions them in social-historical context, products of the interwoven emergence of markets and democracies.

The following section presents four reconstructions proposed by labor lawyers in response to a perceived "crisis" of the sub-discipline provoked by transnational economic integration. Assessing national legislatures and trade unions as now beset by systematic limitations, each seeks to reanimate labor law's distributive democratic agenda by a novel route. Respectively, they concentrate on the contract of employment;[20] site-level worker representation;[21] the corporation;[22] and

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[19] See Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REVIEW, 5, 6 (2001) (my emphasis).

[20] See Hugh Collins, *Is There a Third Way in Labor Law?*, *in* LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 449, (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002).

[21] See Cynthia Estlund, *Rebuilding the law of the workplace in an era of self-regulation*, 105 COLUMBIA LAW REVIEW, 319 (2005).

[22] See Simon Deakin, *The Many Futures of the Contract of Employment*, and Paddy Ireland, *From Amelioration to Transformation: Capitalism, the Market and Corporate Reform*, both *in* LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, respectively 177, 197 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002).

supranational social citizenship, re-defined as an expanded set of procedural rights alongside substantive social and welfare entitlements.[23] Mis-assumptions, I, however, suggest, invalidate the first three reconstructions. Not so the fourth, which is recommended as a necessary complement to supranational governance, capable of countering the tendencies of its modalities (such as subsidiarity and self-regulation) in practice to autonomize market relations and market actors. Consequently, it is urged, that this, or a similar vision of social citizenship, must form an integral element of any model of post-national democracy taking its cues from deliberative cosmopolitanism. The Conclusion recapitulates the case for an urgent reframing of the latter.

B. Globalization, transnational economic integration and labor

As a sub-discipline, labor law sees itself as profoundly altered by globalization, which has acted on its baseline concept, industrial labor, via changes to the various elements that previously constituted it: industrial production, work, the standard employment relationship, and the contract of employment. These are also indicated to have transformed, and partially dissolved, the former foundations of labor solidarity, as well as its national and international institutional embodiments. Voiced first in the 1970s,[24] but prominently from the mid-1990s, allusions to the crisis,[25] or "disintegration" of labor law, and a need for its re-invention,[26] are commonplace.[27] In this section, the bases of these evaluations are examined in greater detail.

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[23] See Alain Supiot, *The transformation of work and the future of labor law in Europe: A multidisciplinary perspective*, 138 INTERNATIONAL LABOR REVIEW 31 (1999) and ALAIN SUPIOT, AU-DELA DE L'EMPLOI: TRANSFORMATIONS DU TRAVAIL ET L'AVENIR DU DROIT DU TRAVAIL EN EUROPE. RAPPORT POUR LA COMMISSION EUROPÉENNE (1999).

[24] In 1972, Kahn-Freund observed "the entire basis of our thinking on collective labor relations and collective labor law is destroyed", (Otto Kahn-Freund, *A Lawyer's Reflections on Multinational Corporations*, JOURNAL OF INDUSTRIAL RELATIONS *(Aus.)*, 351 (1972).

[25] See Massimo D'Antona, *Diritto del Lavoro di Fine Secolo: Una Crisi di Identita?*, 48 RIVISTA GIURIDICA DEL LAVORO E DELLA PREVIDENZA SOCIALE 31 (1998); see, also, Hugh Collins, *The Productive Disintegration of Labor Law*, 26 INDUSTRIAL LAW JOURNAL 295 (1997).

[26] See Karl Klare, *The Horizons of Transformative Labor and Employment Law*, *in* LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 3 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002); see, also, Supiot, *supra* note 23.

[27] For example, "…[the] social and political world classically imagined by labor law is disappearing, gradually in some places, quite abruptly in others", so that, "labor law must be invented": see, also, Klare, *supra* note 26, 4.

I. Global Economic and Political Transformations

Concerning globalization trends, labor law shares basic viewpoints with political science, economics, international relations, and other legal sub-disciplines, refining and adapting these to its own context and concerns. That the world economy has, over the last thirty years, undergone qualitative alteration is thus widely accepted. Technological innovation has extended the horizons of information systems, accelerated communications, de-materialized goods and services and stimulated the development of cross-border corporate and social networks.[28] Facilitated by liberalizations affecting global currency transactions, trade, foreign direct investment, inter-national capital flows, and privatization, these trends continue to deepen and thicken transnational economic and political relations, constituting transnational markets. In turn, this has permitted the rise of multinational enterprises (MNEs): directly, for example, by permitting MNE entry into formerly public sectors, and indirectly, by allowing the concentration of market power on a global scale. Completing the circle, through their legal and commercial praxis, and in the influence which they wield over policy at national and international levels, MNEs themselves are agents and promoters of transnational market integration.

Labor lawyers also identify a qualitative political shift as having occurred. Neo-liberal hegemony followed swiftly on the demise of socialist states, substituting for Keynesian reliance on state ownership, planning and intervention as strategies to achieve political goals, including with respect to regulation of labor markets,[29] renewed confidence in the legitimacy, as well as efficiency, of competitive markets as a distributive mechanism.[30] Critical labor lawyers sometimes supplement this general account by pinpointing the operation of interest-driven political dynamics of specific historical moments.[31] State sovereignty over labor regulation, it is said in

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[28] *Id.*, 5; see, generally, MANUEL CASTELLS, THE INFORMATION AGE: THE RISE OF THE NETWORK SOCIETY VOL. I (2000).

[29] See, for example, Csilla Kollonay Lehoczky, *Ways and Effects of Deconstructing Protection in the Post-socialist New Member States - Based on Hungarian Experience, in* BOUNDARIES AND FRONTIERS OF LABOR LAW. GOALS AND MEANS IN THE REGULATION OF WORK, 221 (Guy Davidov & Brian Langille eds., 2006). D'Antona (*supra* note 25, 34-5, 38) highlights, in this context, the marginalization of worker interests and labor law within national constitutions.

[30] See, for example, Harry Arthurs, "Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labor Market Regulation", *in* LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 471 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002). See, also, Habermas, *supra* note 19, 11-12.

[31] For example, highlighting the 1980s "global debt crisis" of the 1980s as the platform for definitive insertion into the institutional frameworks of developing countries of neo-liberal trade and economic policies, via IFI-imposed structural adjustment packages, including labor market flexibility agenda;

this context, was subjected to policy steering by international organizations, under which "social controls" on foreign investment and state support for domestic production were eliminated,[32] restraining "Third World" development and re-instating dependence on industrialized nations.[33]

II. Transformations affecting Production, Employment and "the Worker"

Labor law envisages various connections between macro-level economic and political transformations and the alteration of the character of industrial production, work, the employment relationship, and the legal and social identities of the "worker". Starting with production, in Europe and elsewhere in the developed world, diminishing labor demand, due to mechanization, has been followed (often via long transitional periods of high unemployment) by the growth of employment of different kinds, for instance, in light manufacturing and services. Increasing ease of transportation of production factors and dematerialization marginalized the need for continuous plant operation by a local workforce. Facilitated by the liberalizations mentioned above, this has meant that vertically integrated production systems contained by national boundaries have yielded to global supply chains - production networks held together by non-ownership legal relations, principally contract, but also, for example, licensing and franchising agreements.

Concerning employment, one effect of such changes has been to normalize short-term relationships between employers and employees, removing the need and incentive for undertaking long-range investment in training and wellbeing of workforces, and in relationships with their representatives. Sub-contracting fragments responsibility, and decreases transparency for employers, employees and third parties. It also creates novel spaces for informal working in transnational production which, in contrast with national production in many developing countries, was previously largely formalized.

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secondly, via trade-related treaties concluded with developed countries. Rittich highlights labor rights and labor market flexibility as "distinct normative visions with respect to the structure and operation of labo[u]r markets and the location of authority and control in the workplace…" : Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?, in* LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT, 161 (The International Bureau of the Permanent Court of Arbitration, 2003).

[32] See, for example Philip Alston, *Labor Rights Provisions in US Trade Law: 'Aggressive Unilateralism'?*, 15 HUMAN RIGHTS QUARTERLY 1 (1993), for early critique of the NAFTA regime's impact on national labor rights.

[33] See, for example, David Montgomery, *Labor Rights and Human Rights. A Historical Perspective*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, 15 (Lance A. Compa & Stephen F. Diamond eds., 1996); see, also, Rittich, *supra* note 31.

With respect to work, one effect has been intensification,[34] for instance, proceeding via revision of job descriptions and categories in the context of weakening union representation. Another dimension, flagged by labor lawyers as transformative, but infrequently recognized in general social scientific accounts of globalization, is "feminization" - the "gendered transformation of work".[35] Feminization has been made possible, in part, by relative de-materialization, diminishing the need for heavy manual labor, but also by enhanced personal mobility and communications, and the social and cultural impacts of political movements for women's equality that have followed autonomous trajectories.

Feminization does not correspond merely to the numerical rise of women in the global workforce. Rather, it stands for what has accompanied this, that is, the pronounced growth of "contingent, non-standard or atypical work", "part-time, casual, temporary, own account or self-employed, home work, and contract work", sometimes given the label "precarious" work,[36] and the *normalization* of these forms of work, and the terms of their performance, with respect to the workforce as a whole.[37] Increasingly, these substitute the "standard employment" norm, around which labor and welfare law, and the ends and modalities of collective action, were historically constituted: the (typically white) male head of household, engaged continuously from post-education to standard retirement age, on the basis of a permanent, full-time contract, performing site-based work, according to a regular schedule, and earning, and socially understood as entitled to, a "breadwinner" or "family" wage.[38]

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[34] See, generally, RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM (1998).

[35] See Kerry Rittich, *Feminization and Contingency: Regulating the Stakes of Work for Women, in* LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 117 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002).

[36] See Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, *in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS, 3 (Judy Fudge & Rosemary Owens eds., 2006).

[37] See Guy Standing, *Global Feminization Through Flexible Labor*, 17 WORLD DEVELOPMENT 1077 (1989), and Guy Standing, *Global Feminization through Flexible Labor: A Theme Revisited*, 27 WORLD DEVELOPMENT 583 (1999). According to recent studies, migrant workers number 80-100 million: about half of these workers are women, amongst whom domestic work is the most common occupation: ILO, *About MIGRANT* http://www.ilo.org/public/english/protection/migrant/about/index.htm, *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide-Booklet 1: Why the Focus on Women International Migrant Workers,* 5 (2003).

[38] See Rittich, *supra* note 35.

A further consequence of feminization, then, is the foregrounding of the instability, rising with global market integration as defined above, of the boundaries "public"/"private", "market"/"home–family-social". These have been identified by feminist labor theorists as the principal sites on which the tensions between the functions of individuals with regard to society's *productive* and *reproductive* capacities are played out.[39] Always contingent and infused by ideology, the distinction between market- and non-market work is blurred as a combination of the two becomes the norm for individual workers, also exposing the "inter-constitution" of structures of production and reproduction.[40] Its corrosion proceeds across multiple dimensions: geographical, in the vanishing separation between work/non-work space (for example, as in home-working); temporal, in the fusion of work/non-work time (for example, self-employment); financial, in the meshing of workers' production and living costs (for example, child care expenditure). To an extent this as a side effect problematizes the corporation which increasingly serves a vehicle for own-account working. In aggregate, these developments mean that women workers collectively are subsidizing both the costs and risks of production, while, as individuals, they suffer cuts in real income and the dilution of the benefits of paid work.

Thus revealed is labor law's founding ideal of the male unencumbered worker. Also uncovered is the constitution/production of the legal and policy categories of labor, work and employment by wider frameworks of legal regulation, their still-gendered distributions of legal rights, property and goods, both public and "private", as well as by the national, international and supranational constitutions that frame them. Family law, taxation, social welfare law, health care policy - all impact on the ability to perform paid and unpaid work, and to access the attached payments. Feminization then presents fresh opportunities to consider the ways "employment" on the one hand, and work, on the other, are "formed by and articulated with other [social] institutions such as the family or household". It should also force recognition, at last, of the lack of any necessary definitional relationship between them and their non-coextensivity in practice.[41]

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[39] See Fudge and Owens, *supra* note 36.

[40] See Rittich, *supra* note 35, 128. Appreciation of the interdependence of market and non-market activities, risks and rewards is mirrored by international human rights law discourses' notions of "interdependence and indivisibility" of human rights across the categories of civil and political, social and economic human rights (see, for example, *Beijing Declaration* of the UN's Fourth World Conference on Women, UN Doc. A/CONF.177/20 Annex I (1995)).

[41] Rittich, *supra* note 35, 123.

III. Collective Labor Institutions – Trade Unions

Despite diversity in national arrangements, historically and persisting to the present time, [42] trade unions' trajectories over the last two decades display certain similarities across jurisdictions. Union density and union membership have declined "precipitously" across developed and developing economies where they were formerly strong. [43] How does labor law explain these changes? A typical answer links the demise of Keynesian labor policies of "counter-cyclical job creation, collective bargaining, protective labor legislation, and equality-enhancing strategies"[44] to the dismantling of the "four pillars" on which they formerly rested - nation state, large factories, full-time employment, and generalized union representation.[45]

Some authors points to supplementary factors. A significant strand in the literature (and one whose discussion goes beyond the scope of this paper) asserts the role of regulatory competition in creating downward pressure on national regimes of labor regulation.[46] Secondly, feminist labor analysis points to trade unions' hesitance in responding to changing work patterns and recognizing non-standard workers, as a result of which women and racial minorities were historically denied equal employment rights.[47] Against this background, the normalization of atypical work

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[42] For example, in socialist states, trade unions were often integrated into totalitarian systems of rule; as a result, they were generally unable to exert strong influence over post-Communist labor constitutions. In some post-colonial states, by contrast, trade unions functioned as organs of civil resistance to military rule; elsewhere, as quasi-official "workers" organizations", their collusion won industry-specific protectionist intervention within directed economies. In some states, such as China, free trade unions do not yet exist.

[43] See, for example, Richard Michael Fischl, *Organizing Low-Wage Workers in the US: Some Lessons from the Miami Janitors Campaign*, *mimeo*; and Paul Benjamin, *Beyond the Boundaries: Prospects for Expanding Labor Market Regulation, in* BOUNDARIES AND FRONTIERS OF LABOR LAW. GOALS AND MEANS IN THE REGULATION OF WORK, 181 (Davidov & Langille eds., 2006), with regard to South Africa.

[44] See Arthurs, *supra* note 30.

[45] See D'Antona, *supra* note 25.

[46] See, now classically, Wolfgang Streeck, *Industrial citizenship under regime competition: the case of the European works councils*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY, 643 (1997); and, also, Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware*, 25 EUROPEAN LAW REVIEW 57 (2000), and Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, 12 EUROPEAN LAW JOURNAL 440 (2006).

[47] See Fischl, *supra* note 43, 3. Practices such as giving priority to full-time workers for promotion and job security tend disadvantage of female workers.

can be seen to have had a dual relationship with union decline. In the first instance, precarious work emerges partly as a result of non-standard workers "definitional exclusion" by collective organizations.[48] Unprotected as they entered the labor market, non-standard workers subsequently functioned, through no fault of their own, to encourage the spread and embedding of atypical, less advantageous terms and conditions of work.

Secondly, the incompatibility of full-time, long-term continuous commitment with the demands of women's unpaid work undoubtedly encouraged the growth of atypical employment to meet women's needs, albeit unsatisfactorily. Individualized and de-sited, and hence, "invisible", precarious work poses obstacles to the coalescence of solidarity and worker organization. In combination with their political and social marginalization – partly prior, but also an effect of low employment status and lack of employment-related benefits (for example, income, healthcare, pension) in the past restricted to unionized sectors – this has had the outcome that a substantial segment of the total working population are now relatively disempowered by the standards of earlier decades.[49] Whereas national and international politics and law-making at one time often sought explicitly to articulate employees' (and trade unions') interests, now this scarcely happens.[50]

Subsequently, unions have sought to embrace atypical workers (such as the notionally "self-employed") even where this threatens standard employment terms and conflicts with the interests of existing members.[51] Some unions, for instance, now select organizing goals and strategies *ad hoc* according to target groups and the nature of the work performed.[52] Identity-based organizing[53] takes a multi-

[48] See Rittich, *supra* note 31, 118.

[49] See Maria Ontiveros, *A New Course for Labor Unions: Identity-Based Organizing as a Response to Globalization*, in LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 417 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002), observes, in addition to sex discrimination, female workers' ongoing subordination via family roles and expectations strongly influenced by patriarchal social structures. On the other hand, Fischl (*supra* note 43) describes migrant workers as geographically and temporally dispersed, racially and culturally heterogeneous, economically disempowered and precarious, due to irregular immigration status.

[50] See Simon Deakin, *The Many Futures of the Contract of Employment*, in LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 177, 194 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) frames this as a shift in the role of trade unions, from that of co-regulator, to monitor and enforcer, *ex post facto*, of labor-related legal norms.

[51] For example, the US Service Employees International Union was established in the 1990s as a break-away from AFL-CIO, over the latter's "perceived failure to devote sufficient resources and ingenuity to organizing new workers": Fischl, *supra* note 43, 1.

[52] See Ontiveros, *supra* note 49. Fischl, *supra* note 43, illustrates with reference to site security jobs, which cannot be outsourced, and are already sub-contracted.

dimensional view of workers: in addition to the economic interests that were historically the explicit basis of solidarity, it recognizes the inter-linked individual, social and cultural identities of workers, and the obstacles, as well as possible routes, to empowerment, now increasingly broadly understood, that may be attached to them. The specificities of the formal legal status of workers, within complex corporate and contractual relationships, and more widely (for instance, with regard to immigration) may also be taken into account. Moreover, this wider canvas for the articulation of claims is linked in some unions' activity to the substitution of labor procedures prescribed by national law by recourse to non-legal forms of "enforcement" involving new actors (NGOs, media, *etc*.), based on employers" voluntary commitments, and which avoid reliance on state coercion which, in any case, is less reliable than before.[54] In some instances (though this is not yet a general trend), organizing is expressly based upon "dignity and justice",[55] and directed to objectives framed in terms of citizenship, political participation and empowerment.[56] Such "grass roots" developments have been paralleled by pressure on unions to extend full effective access to sectors of the workforce that were previously excluded, stemming from activism drawing authority from international human rights standards.[57]

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[53] Ontiveros, *supra* note 49, 417 defines identity-based organizing as "a way of organizing the whole identity of a human being, not just his or her workplace identity", with reference to personal identity factors including "race, gender, ethnicity, national origin, citizenship status, community, sexual orientation, and religion", as well as class identity factors, these being "job, social class, career, income and wealth".

[54] Fischl, *supra* note 43, 5, even refers to a "law avoidance strategy" by unions in the US, for example, substituting organized ballots with direct action, including "corporate campaigns" seeking to provoke public or contractor pressure on targeted companies who may not be the legal employer, but who may be more visible, locally or nationally, and sensitive to publicity. See Ontiveros, *supra* note 49, 418, relates avoidance of "traditional administrative process used by unions in the USA", on grounds of ineffectiveness. Non-legal action is highlighted as especially important where workers, despite large numbers and longevity of employment, are irregular. For countless further examples of extra-legal organization, see Business and Human Rights Resource Centre (http://www.business-humanrights.org/Home).

[55] Reflecting "specific affronts to human dignity encountered by immigrant workers, as immigrants and workers": See Ontiveros, *supra* note 49, 418, with reference to the Los Angeles Justice for Janitors campaign undertaken by the Service Employees International Union (SEIU).

[56] Ontiveros, *supra* note 49, 421, illustrates with reference to Teamsters Local 890's Citizenship Project in California, addressed to the Latino community (http://www.newcitizen.org). This contrasts with past constructions of "countervailing workers' power" which focused on negotiation within the frame of the long-term contract of employment to the extent that "goals of job enrichment and self-realization" during work performance were often overlooked: Ireland, *supra* note 22, 198.

[57] For example, the campaign for an ILO Convention relating to the rights of domestic workers, see, further, http://communicatinglaborrights.wordpress.com/2008/03/22/domestic-workers-step-towards-an-ilo-international-convention/.

What implications for labor law do labor lawyers draw from such developments? Evidence of unions' progressive adaptation to evolving contexts and worker profiles through systemic internal changes can certainly be viewed as encouraging.[58] Some theorists, however, see in organized labor's relative decline the de-centering of the category of labor and the demise of the "binary capital-labor frame".[59] "Pluralistic" labor relations – a reference to the newly diverse social bases and modalities of worker organization – are, on the one hand, in line with the unmasking of "worker" as a contingent and partial, as opposed to the totalizing identity economic determinism construed it to be; on the other hand, the criss-crossing of received "public-private" legal and policy boundaries by novel worker concerns, illustrated above, is suggested to indicate "de-stabilization" of the social meaning of work.

IV. The Contract of Employment

Contrasting law and economics' depiction of the employer-employee relation as a bargain struck between "private" and freely-contracting individuals in abstraction from both social conditions and individual characteristics, labor lawyers frequently adopt an historicized account of the origins of the contract of employment. This approach highlights the co-originality of employee status with industrialization, over the course of which it gradually superseded other legal arrangements for performance and payment of work, such as master-servant and the contract for hire, and constituted the category (if not the class) of wage-dependent labor. The arrival, in parallel, of workplace and social welfare legislation constituted the enterprise, as employer, *locus* of fiscal revenue collection, bearer of health and safety duties, and, also, with the introduction of compensation schemes (for example, for interruption of earnings through sickness or injury) as a vehicle for redistribution of the risks of industrial production.[60] In like fashion, it has been suggested, collective representation, the articulation of job categories, statutory employment protection rights, and the emergence of larger firms, were subsequently mutually

[58] Ontiveros, *supra* note 49, 420-421, cites AFL-CIO's 2000 reversal of its "traditional nativist approach to immigration".

[59] Klare, *supra* note 26, 13, suggests the assumption of the employment relationship as the "essential substrate of social organization" is no longer valid.

[60] According to Deakin, with reference to regulation, private and social insurance, "…the enterprise became the main conduit for the wider process of risk-sharing at which the laws were aimed": *supra* note 50, 184.

conditioning.[61]

On other (though reconcilable and partly overlapping) readings offered by institutionalism (economic and/or sociological), the contract of employment, in its traditional form, is explained on the basis that it rewarded employees with security in return for subordination - to state authority, legislation and bureaucracies (industrialization coinciding with the consolidation of national government and identities in many countries) and employers. To the latter flowed benefits, first, in the form of decreased information, search and transaction costs, and second, flexibility, in the form of the "managerial prerogative", the exercise of which gave content to an otherwise largely indeterminate agreement. In return, employees were rewarded with resources which facilitated family subsistence and social inclusion to a basic level.[62] Importantly, the state was implicated in this arrangement in a number of ways: exploiting it to collectivize risks via social insurance,[63] it also made the assumption of long-range employment relations between parties of stable identity the platform for a range of social policy interventions.

As with the sovereign nation state and democracy,[64] the gradual embedding of the employment relation in this institutional framework led to their habitual identification. Now, however, welfare and other social systems, and employment, are increasingly prised apart. Short-termism, and geographical dispersal of those engaged by single enterprises, even within individual production lines, and via cross-border service provision, are significant alterations to the context of the employment contract. National borders no longer contain contracting parties or tasks performed, nor do they define applicable regulatory regimes (consider special fiscal arrangements applicable to Export Processing Zones and the increasing role of regional authorities). The "employer" is no longer a local, dependable locus of material or financial resources or administrative infrastructure, nor is its legal identity and longevity assured.

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[61] *Id.*, 182-4, citing Ronald Coase, *The Nature of the Firm* 4 ECONOMICA (NS) 386 (1951); Herbert Simon, *A Formal Theory of the Employment Relation,* 19 ECONOMETRICA 293 (1985), and OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985), Chapter 9.

[62] Klare, *supra* note 26, 12-13, suggests that according to the ideal of typical employment, workers "leave strategic decision-making and risk to the employer in return for a modicum of security, fair-play and (theoretically) a family wage"; employees, during employment, "are and should be command-followers". Supiot refers to the trading of "economic dependence" for "social protection": Alain Supiot, AU-DELA DE L'EMPLOI: TRANSFORMATIONS DU TRAVAIL ET L'AVENIR DU DROIT DU TRAVAIL EN EUROPE. RAPPORT POUR LA COMMISSION EUROPÉENNE (1999), 10.

[63] See Deakin, *supra* note 50, 178.

[64] See Eriksen and Fossum, *supra* note 1. See, also, Michael Zürn, *The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance*, Arena Working Papers WP 99/35 (1999), and Sassen, *supra* note 11.

Moreover, as production becomes a "flatter" affair,[65] workers are called upon to be more entrepreneurial, to collaborate with firms, instead of awaiting their instruction, for example, and to predict future production trends and respond to these proactively. Flexible labor market policies in practice often entail that it is individuals, and not employers, who assume the costs and risks of acquiring new skills and qualifications. Negotiation is complicated by the diminishing portion of workers who are, in technical legal terms, "employees"; others' interests, as discussed above, are still only barely represented by trade unions.[66] In the ultimate result, for many workers, employment's original promise and reward of long-term security and supported career progression has been withdrawn.[67]

Accordingly, it has been concluded, the employment contract is now "less suitable as a vehicle for sharing and redistributing risks among the working population" than before.[68] Nonetheless, this serves only to underline that the employment relationship has been, and remains, an emergent socio-legal institution: a "complex bundle of conventions and norms of varying degrees of formality…"; cumulative, path-dependent, and contingent; and, critically, the product of a multitude of interactions of "…economic organization, dispute resolution, and political mobilization."[69] It "encodes" political solutions to social co-ordination problems, as filtered by court and legislative processes.[70] It captures a compromise between market-making and market-correcting impulses for a given political space and time. But it can only be accurately read and understood in conjunction with the national constitutional and welfare arrangements that it presupposes and, *vice versa*, which presuppose it. Within constitutional nation states, all have been part of the same complex device for sharing the risks of social production and reproduction. The legitimacy of private relations hinges upon the overall distributive outcomes

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65 See THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2005); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY (Neil J. Smelser and Richard Swedberg eds., 1994).

66 For example, with the growth of notional self-employment.

67 See Deakin, *supra* note 50, 178.

68 See Deakin, *supra* note 50, 179.

69 See Deakin, *supra* note 50, 185-6.

70 Deakin, *supra* note 50, 181, in this context, he refers to the classical employment contract as a "relational contract", in which market exchange is enmeshed by "political and social processes of the relation, internal and external" (citing Ian R. MacNeil, *The Many Futures of Contracts,* 47 SOUTHERN CALIFORNIA LAW REVIEW 691 (1974)).

achieved by the wider constitutional systems of which they are part, and democratic legitimacy depends on the protection provided for both public *and* private autonomy, against both public *and* private coercion.

C. Labor rights under globalization : four reconstructions

Recognition of the employment relationship's status as an emergent socio-legal institution justifies the following four attempts by labor lawyers to reconstruct the discipline - that is, having identified a central normative objective, to re-interpret its scope and concrete applications, with the aim of securing its achievement in changed external conditions.[71]

I. Responding to Global Competition: The "Symbiotic" Employment Contract

At least in the "OECD world",[72] it was noted, the social legitimacy of the employment contract formerly rested on the exchange of individual subordination to managerial prerogative for material security and, secondly, on its minimum but progressive terms, set legislatively, rewarding loyalty to national authorities and acceptance of the market mechanism, and providing a bond between individuals and the state, thus supporting the coalescence of national identity and citizenship. When fewer workers enjoy security of employment, or rewards and resources as favorable as those that self-employment paradigmatically presupposes; when social security provision is restricted, even for nationals; and when migrant workers, enjoying few, if any, of the benefits of citizenship, now represent a large proportion of the global workforce, what can the legitimizing basis of the employment contract be? This section considers a reconstruction of the employment contract, intended to answer this dilemma.[73]

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[71] See Mayntz's observation of the "hermeneutic and interpretive" approach of legal studies, in general, with regard to globalization (Mayntz, *supra* note 5).

[72] Michael Zürn's expression: *supra* note 64.

[73] See Hugh Collins, *Is There a Third Way in Labor Law*? in LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 449 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002). Its immediate pretext is Third Way politics and its "reconfiguration" of employment standards (see, for example, ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998). Since these are interpreted as a response to the re-contextualization of national economies and politics within global economic integration it is, however, suggested as an account of potentially broader, perhaps even general, application. Interestingly while Collins (*id*., 450) suggests these trends contradict "aspects of accepted international norms as embodied in the Conventions of the ILO", there would now appear to be a degree of convergence between ILO and Third Way agenda: see, for example, ILO/Peter Auer, *In search of optimal labor market institutions*, Economic and Labor Market Paper 2007/3 (2003), concluding active labor market policies as "optimal labor market institutions" for the contemporary economic setting for developed countries.

In general, OECD states' policies increasingly substitute concern for equality of outcome with the goal of "real equality of opportunity", that is, formal equality supplemented by the "necessary resources in terms of education, training, skills and other financial support, so that they [workers] can participate fully in the opportunities afforded by a flourishing market economy".[74] Similarly, they have adopted a revised (and by now orthodox) understanding of the regulatory role of the state, as rudder, not rower: governments can modulate the operation of market forces, but they take their place only on proof of failure. Thus, there is a tendency to eschew redistribution in the workplace as a legislative goal, hence also concern with labor rights, to the extent these are considered redistributive, and any special commitment to trade unions (non-union entities, such as quality circles, and works councils, being recognized as equivalents). Thirdly, given the *prima facie* legitimacy of markets, individual labor rights' justification is increasingly recast as functional, in promoting efficiency.[75] Against the background of economic integration, this defines a new global function for labor law: to improve competitiveness of business operations located within the jurisdiction (no point being taken on firms' nationality) and to avoid social exclusion, by guaranteeing equal access to labor markets, enhancing employability, and reconciling family and other social responsibilities with labor market participation. Together, these strands displace social democracy's traditional conceptual framework, under which trade unions and collective bargaining, statutory intervention, and individual rights[76] were essential to achieving social equality.[77]

Concerning specific employment policies, in line with this general view, "*Partnership at Work*", a UK legislative initiative, is taken to be exemplary. For trade union rights, this substituted information exchange, and a commitment to use information "…co-operatively to improve the efficiency of the relations of production". Diverging further from historical labor norms, while communication facilitated by information exchange may concern "details and objectives of production", and perhaps business strategy, it will not concern "the price of labor except…as…part of productivity-enhancing agreements".[78] Non-union entities, mentioned above, are recognized for this purpose. Once more, competition provides both practical rationale and normative justification: "countries that pay

74 Collins, *supra* note 73, 452-453.

75 *Id.*, 451.

76 The suggestion is that flexibility discourages the "adoption of mandatory and inalienable rights", which might be inefficient, or obstruct steps to employer-worker co-operation.

77 Collins, *supra* note 73, 455.

78 *Id.*, 457.

high [*sic*] wages" must compete in terms of "quality, design, responsiveness to changes in the market, and technological superiority", as must companies individually, this reflected in the spread of total quality management, just-in-time, and human resources management, and a new emphasis in management (rhetoric) on "partnership inside the firm". Accordingly, the content of "partnerships" varies in line with the competitive needs of firms, whose dynamism precludes statutory specification of any single partnership model.[79] As for the state, it meets labor market access and flexibility objectives through supply-side measures, for example, certifying work-related education, subsidies for low wages via tax credits, and "family-friendly" labor market policies, such as equal treatment for part-time work and promoting access to childcare.

This package is identified as the basis for a reconstruction of employment's legal form, with the "symbiotic" employment contract assuming the role of new regulative ideal.[80] Under this concept, in place of the traditional asymmetric exchange relationship noted at the outset, employers are to provide work and skills in return for co-operation and innovation and – the critical difference - *vice-versa*, the employee. Contrasting with the verticality of the old employment contract (a result of the constitutive role of managerial prerogative), this is a horizontal vision of employment, with potential to make work "more fulfilling and democratic" and to balance work with other parts of life. But traditionally, labor law proceeded from the presumption of the inevitability of a conflict of interest between employer and employee. In partnership, by contrast, mutual trust appears to be foundational. How is this circle to be squared?

The response is that trust is, indeed, foundational – and traditional coercive legal intervention has never been able to compel it. Two alternatives are, on this basis, advocated. First, procedural, reflexive, responsive regulatory approaches, whose capacity to compensate unequal bargaining power between labor and capital is asserted;[81] second, *voluntary* company action on basic and minimal workers'

[79] See William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy*, 17 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 101 (2004).

[80] Collins attributes to Schanze the "symbiotic contract" concept, said to contain the "seeds of a radically new approach to labor law": Erich Schanze, "Symbiotic Contracts: Exploring Long-Term Agency Structures between Contract and Corporation", in FRANCHISING AND THE LAW (Christian Joerges ed., 1991).

[81] "New Regulatory Method" seeks "…to provoke the parties themselves to re-engineer their own economic and social relations through partnerships and contractual agreements"; and aims at "…inducing employers to revise the internal rules of their organization" by describing "explicitly the kinds of procedures required, though leaving the detail to employers to determine, and to provide incentives to adopt these procedures", for example, whistle-blower laws, European Works Council Directive, EC Directive 94/45 of 22 September 1994, OJ 1994 L254, 64464 : Collins, *supra* note 73, 468.

entitlements, which are claimed to yield "credible promises".[82]
If these premises are accepted, *Partnership at Work* can be characterized not as "a policy of abstention from legal intervention",[83] but as a more sophisticated route to achieving "credible commitments to fairness at work".[84] Further regulatory devices pursuant to both symbiotic contract and the two principles just mentioned (*i.e.*, proceduralism and voluntarism) would include, for instance, allowing opt-out from legislatively-specified schemes upon introduction of a company's "own bespoke system";[85] the approval of company rules by independent third parties to transform codes of practice into certification standards;[86] tiered systems of opt-out or modification of rights, according to their categorization in terms of the likely scope for individual (as opposed to collective) employee bargaining to achieve optimal outcomes;[87] and finally, and claimed as ultimately necessary for the realization of true partnerships, profit-sharing measures, such as employee share-ownership schemes, and profit-related pay, to be encouraged, for example, through tax incentives.

Favoring Collins' reconstruction is the undoubted normative appeal of establishing parity of the parties to the employment relationship as a new basis for labor law. Likewise are, it might seem, the general legal theoretical arguments backing procedural approaches and the compromised position of trade unions and national autonomy over employment regulation with global economic integration. Yet do not these last two factors entail that procedural regulation in the workplace will, in

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[82] *Id.,* 463. Collins continues: "If the employer structures its procedures and rules that comprise the organization around respect for fairness, the bureaucracy is likely to carry out these standing orders… [R]eliance upon background legal rights enforceable in an employment tribunal is likely to produce little sense of commitment towards the employer…In order to enhance the credibility of the employer's commitment, the task of legal regulation is not primarily to grant employees legal entitlements that may be enforced by way of compensation in tribunals, but rather to re-engineer the internal rules of organizations so that they present credible commitments towards fairness."

[83] Echoing and implicitly rejecting Kahn-Freund's "collective *laissez-faire*".

[84] It is claimed to aim at inducing "voluntary arrangements for consultation and sharing of information" (Collins, *supra* note 73, 461).

[85] For example, UK Employment Relations Act 1999 incentivizes adoption of partnerships by establishing the possibility of imposed union recognition and collective bargaining where employers decline to introduce own arrangements for consultation and participation.

[86] Collins, *supra* note 73, 465, suggests taking this approach to equal opportunities "…would do more than any legal measures to achieve a change in the culture of management practices and a reduction in discrimination".

[87] Some rights would be categorized as alienable by individuals, others only following conclusion of a collective agreement or after a procedurally fair settlement; and others not at all, along lines shown by the UK Working Time Regulations 1998.

practice, amount to devolving near total discretion to company management over the form and content of legal arrangements governing work, and rights incidental to them – preventing the "symbiotic" dynamic in the employment relationship assumed to legitimate the move from traditional routes of workers interest definition and promotion, and prevent the risks associated with it from eventuating? Various studies of EU labor regulation cast empirical light on this question. However, staying on the normative plane, a second reconstruction superficially appears to indicate that competitive market dynamics and inequality of workplace bargaining power need not be definitive.

II. Responding to De-Unionization: Independently Monitored Self-regulation

Estlund's (2005) starting point is the US' progression, over the twentieth century, from the "New Deal model" of industrial relations, reliant on workers' self-organization and voluntary collective bargaining "over most terms and conditions of employment…", [88] through a "regulatory model" of statutorily-determined minimum standards enforced by administrative agencies,[89] and a "rights model" of judicially enforceable individual workplace rights, [90] concluding with a contemporary gravitation towards "employer 'self-regulation'"[91] and, in parallel,

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[88] The New Deal model's principal elements are identified as: i) the 1935 National Labor Relations Act which, in the perspective of industrial democracy, is also described as a "…'constitution' of the private sector workplace – a framework for self-governance supported by a set of individual and group rights, and an administrative enforcement scheme", and based on a vision of workers as citizens and the workplace as a site of self-determination; ii) the 1938 Fair Labor Standards Act, establishing enforcement duties on the Federal Department of Labor, as well as universal minimum statutory protections (for example, minimum wage and overtime *premia*). Social security legislation setting minimum provisions on retirement security, and subsequent health and safety legislation, by contrast, are described as conferring rights without participation, rendering employees "passive beneficiaries of the government's protection": Cynthia Estlund, *Rebuilding the law of the workplace in an era of self-regulation*, 105 COLUMBIA LAW REVIEW 319, 326 (2005).

[89] Here the Occupational Health and Safety Act 1970 ("OSHA"), targeted by Bardach and Kagan's epochal critique of "regulatory unreasonableness" is taken as paradigmatic: EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

[90] Referring principally to the Civil Rights Act 1964, Pub L. No.88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 USC § 2000e-2 (2000).

[91] Estlund, *supra* note 88, 319, supporting this claim with reference to the Federal Sentencing Guidelines which, for example, allow mitigation for firms "[i]f the offense occurred despite an effective program to prevent and detect violations of the law, provided firm promptly reported violations once occurred (US Sentencing Guidelines Manual § 8C2.5 (f) (2003), footnote 96; and also OSHA's 1982 Voluntary Protection Program, under which employers showing commitment and internal organizational capacity to comply with health and safety standards and improve safety records, and employee involvement in safety programs, could be relieved of regular inspections and "put onto a more conciliatory enforcement track" (Estlund *supra* note 88, 345). Statutorily incentivized self-regulation of this kind is distinguishable from

the "privatization of enforcement".[92] Self-regulation, Estlund defines as "…internal systems for enforcement of rights and regulatory standards – and of legal inducements to self-regulation in the form of reduced public oversight or sanctions". This evolutionary "mega-trend" is explained with reference to interest-driven employer resistance,[93] but also on the basis of "…challenges to the efficacy of regulation and litigation of workplace rights and standards…from scholars and employee advocates…". It is accepted, then, that there are valid normative grounds for employer self-regulation, in the form of (moderate) regulation theory's critique of "command and control".

Yet, noting the US' recent "drastic decline in unionization", at the same time it is acknowledged that self-regulation in the labor domain poses a dilemma: despite potential functional gains, the goals it sets may represent a narrowed agenda, perhaps even tending to de-regulation. How, then, to proceed? Estlund's "monitored self-regulation" ("MSR") proposal draws extensively on two earlier approaches: Ayers and Braithwaite's "responsive regulation"[94] ("RR"), and the *Ratcheting Labor Standards* model ("RLS").[95]

From RR is taken, firstly, the idea of the regulatory pyramid which "situates self-regulation in a broader scheme, in which traditional inspections, enforcement and punitive sanctions continue to operate for the low road or less capable actors at the bottom of the labor market":[96] self-regulation, in other words, in the shadow of law.

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the orientation, for example, of the second Bush administration, to mere voluntary compliance with guidelines.

92 Illustrating this with reference to private civil rights litigation (*id.*, 334); diversity programs, internal dispute resolution, and mandatory arbitration clauses (338). "Non-union grievance procedures", Estlund further notes, "…vary in their complexity from simple open-door policies to multi-step grievance procedures involving peer review, mediation and arbitration", 335. Private labor regulation can be judicially enforced, for example, via defenses of "reasonable care" and where an employee failed to use "preventive or corrective opportunities provided by the employer", (*Burlington Industries and Ellerth* 524 US 742 (1998) and *Farragher v. City of Boca Raton* 524 US 775 (1998). Hepple describes similar phenomena in the UK setting (Bob Hepple, *Enforcement: the law and politics of cooperation and compliance*, *in* SOCIAL AND LABOR RIGHTS IN A GLOBAL CONTEXT. INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 238 (Bob Hepple ed., 2002).

93 Notably, in Estlund's analysis, a phenomenon still defined on the national plane.

94 See IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

95 See Charles Sabel, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, Columbia Law School, The Center for Law and Economic Studies Working Paper No. 185, Public Law & Legal Theory Research Paper Group, Paper No. 21, May 2, 2000.

96 See Estlund, *supra* note 88, 359.

Estlund secondly appropriates from RR the principle of tripartism, précised as based upon the insight that workers' participation in company-level compliance activity "…can introduce flexibility and responsiveness into the regulatory regime, and can reduce the costs and contentiousness associated with litigation, while promoting the internalization of public law norms into the workplace itself".[97]

However, RR, Estlund suggests, demands levels of union involvement that are unlikely to be seen again soon in the US. This leads her to RLS, which re-allocates the policing of labor standards within global production systems from trade unions and national regulatory authorities to market forces, driven by ethical consumer preferences, in turn reflecting information supplied by NGOs and multi-stakeholder initiatives on companies' respective social performance, under codes of conduct and the like.

Under the influence of this approach, MSR gives "independent workplace monitors" – non-trade union, but nonetheless "worker-oriented" bodies[98] - the role of enforcing company-level self-regulation. They are to act as "watchdogs" and help "leverage limited public enforcement resources" with regard to corporate social responsibility norms. Eschewing *any* role for trade unions and state regulation, as RLS does, is, however, seen as expecting too much of companies and consumers.[99] Because they remain in the "…best position to monitor employer compliance with the labor and employment laws", employees retain a supporting role in MSR, as whistleblowers and monitor-informants; likewise, targeted public enforcement action[100] and private statutory rights litigation. Instances of non-union workplace monitoring enhancing employers' conformity with legal obligations on pay and conditions are cited in support.[101]

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97 *Id.*, 323.

98 Idiosyncratic US statutory prohibitions of "employer unions" are suggested as providing an additional reason in favor of this element of MSR: NLRA prohibits most intermediate options between individual bargaining and full union representation, and further "…limits the range of potential experimentation with alternative forms of employee representation within a tripartite scheme…", *id.*, 365.

99 With regard to the former, Estlund observes, "simply ignoring the law is an especially tempting strategy for marginal producers at the bottom of the production chain, who have little fixed capital or stake in their reputation…and who often rely heavily on undocumented immigrant workers who are too fearful or desperate to complain," *id.*, 330, 370.

100 The Fair Labor Standards Act's "joint employer" and hot goods provisions are highlighted as the kind of "hard" inducements capable of convincing employers to "take the [regulatory] high road".

101 Giving as examples: i) the New York State Greengrocers" Code of Conduct, addressing issues including: labor and employment laws including relating to minimum wage and working hours, payroll records, training, and employee information; appointment of employee spokespersons; and regular inspections by monitors, who are appointed by the New York City Attorney General. Monitors report on violations under the Code to the Attorney General's office and a tripartite Code of Conduct Committee, which

The net result, it is claimed, is MSR's hybrid model, which uses conventional "hard" enforcement *(i.e.*, administrative action and private litigation) to induce companies to participate in "monitored, quasi-tripartite self-regulation". Effective self-regulation, it is claimed, would rest on an "…explicit code of conduct encompassing at least employers' substantive legal obligations and employees' rights…to communicate with each other and with monitors and regulators regarding code compliance…[which] would be the responsibility of specified managerial officials and monitored by independent outside monitors accountable in part to workers".[102]

Already made clear by this summary, however, is MSR's assumption of two conditions whose problematisation by economic globalization has been the starting point of labor lawyers' diagnosis of a need for alternative frameworks, as described in Section B above. First, national legislative autonomy in the field of labor regulation. MSR presumes "…the threat of potent sanctions against the worst lawbreakers", and statutorily grounded rights of private action.[103] Second, labor's bargaining power and organization *qua* labor: tripartism cannot function, whatever form it takes, under systemic power imbalance.[104] Estlund recognizes both assumptions.[105] But possible underlying reasons for the seeming disappearance of

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certifies new signatories and marshals disputes. Subscribing to the Code can earn partial amnesty for past statutory breaches. ii) the Maintenance Cooperation Trust Fund, a "non-profit watchdog organization", established by the Service Employees International Union and unionized employers in the janitorial services sector, that was established to monitor compliance with statutory obligations and promote enforcement via private lawsuits, state and federal regulatory action (Estlund *supra* note 88, 353).

102 Estlund suggests that provisions regarding certification and selection of monitors, approved inspection protocols and conflict of interest prohibitions could follow along the lines set by the Sarbanes-Oxley Act.

103 See Estlund, *supra* note 88, 379.

104 "Where there is no power base and no information base for the weaker party, tripartism will not work…" Estlund, *supra* note 88, 358, quoting Ayres and Braithwaite, *supra* note 94. Further revealing confusion on this point, Estlund later states that as a consequence of the problem of "chronic [regulatory] under-enforcement" state regulators must "…come up with strategies to secure compliance that do not depend on intensive continuing oversight…" and so "will need to draw on non-governmental regulatory resources", the latter which she interprets as opening the way for her model's independent monitoring arrangements. However, chronic under-enforcement is endogenous to Ayres and Braithwaite's RR model which, by contrast, demanded that any tripartite agreement address not just substantive issues but "…adherence to the institutional requisites of effective self-regulation...", including granting freedom of association to workers.

105 "Without a greater coercive threat, it will be difficult to induce most employers to take meaningful steps toward effective self-regulation, and perhaps least of all toward employee representation,": Estlund, *supra* note 88, 365. She also states that a move towards self-regulation must be "…part of a regulatory scheme in which serious sanctions also play a role", *id.*, 403.

the first in the US, and further afield, are not investigated. Concerning the second, the hope is expressed that external monitoring may be "…a step toward the liberation of employee voice more generally".[106] But the main examples of MSR provided in evidence of the approach's viability were, in fact, triggered either by state authorities or by established trade unions. Moreover, their major concern has been to improve employer compliance with existing minimum protections set by state or federal law.

In her defense, Estlund does take care to note the shortage, up to the present time, of empirical evidence concerning the impacts of MSR-style projects. And the modesty of MSR's underlying vision,[107] anathema to the social democratic tradition, might be thought to have pragmatism in its favor, for workers outside that "golden circle" – migrant, undocumented, and non-unionized labor whose rising numbers, as noted earlier, are steadily forcing a re-definition of "typical" employment. MSR, then, is at least important in highlighting the heterogeneity that global regulation in the labor domain must accommodate.

But the starting point of this section was the question of whether non-trade union supported labor self-regulation can shore up Collins' "horizontal" employment contract, to prevent its collapse into a form of "partnership" drained of substantive content in terms of employee rights and protections against subordination?[108] The claimed effectiveness of MSR has been shown to depend on either: a) the initiative and engagement of state authorities and trade unions; or b) a radically attenuated vision of labor rights. Consequently, the aspiration of horizontal employment relationship remains as much at risk as before. Can anything be done, then, to restrain the effects - for workers - of the underlying trends leading to de-unionization and/or the weakening autonomy of states with regard to social and labor standards? The two remaining reconstructions converge on a suggested solution.

III. Reconstructing Labor Law via Corporate Law[109]

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106 See Estlund, *supra* note 88, 374.

107 Underlined subsequently with the suggestion that, "Part of what the monitors must monitor is the workers' freedom, individually and collectively, to speak for themselves, both during and in between visits that will necessarily be occasional".

108 Estlund is not insensible to this risk: "Employment law, both its regulatory and its rights dimensions, is in many ways a poor substitute for the system of self-governance envisioned by the labor laws… and collective representation key to rights and regulations enforcement."

109 For a reconstructive approach to corporate law, but from the perspective of human rights, rather than labor law, see JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS (2005).

A widening gap between the legal concept of the corporation and the economic and social functions that provided its original legitimation is highlighted by certain labor lawyers. Historically, the limited liability company promoted enterprise by pooling resources and sharing risk for relatively small numbers of direct investors, and the rights and duties of shareholders reflected their typically "hands-on" engagement in company operations, through which, it may be said, they exercised genuine, rather than merely formal, co-ownership.

Yet, over the last hundred years, the management role of shareholders has diminished and their connections to companies has become steadily more distant. In parallel, directors' and managerial powers have expanded and a separate corporate personality individuated. Company law, particularly its Anglo-Saxon forms, has become primarily concerned with "financial claims on the assets and income streams of the firm"; no longer is it "directly interested in the relations of production, and employees feature either as marginal subjects…or in so far as they happen to be creditors or shareholders."[110] While the legal concept of the *enterprise*, where it applies, still defines a risk management function, this is in tension with company law's explicit content and aims. Individual enterprises are frequently fragmented into "multi-corporate" form, whereas there is still no "generally accepted legal concept of the corporate group adequately expressing this complex social and economic 'reality'".[111]

Labor law, in contrast, remains intrinsically concerned with the relations of production inside enterprises; to this end, for instance, conferring as separate legal identities employer, undertaking, and establishment. During the twentieth century, moreover, labor law in some jurisdictions articulated ideals of "worker participation" and industrial democracy, and concern with power and control. Its more radical forms put on the agenda, *vis à vis* corporate law, "relaxation of the goal of profit maximization", "diminution of shareholder rights" and a more general "re-

[110] See Simon Deakin, *Enterprise-Risk: The Juridical Nature of the Firm Revisited* 32 INDUSTRIAL LAW JOURNAL 97, 98 (2003). See, also, Ireland (*supra* note 21), coming from a more or less Marxist position, shares the view that shareholders ("passive *rentiers*") are "severed from the firm's productive purpose", and further asserts that shareholders benefit from "unpaid labor", *i.e.*, in the form of residual profits, so that there can be no moral case for giving them ownership rights. This is said to explain the relatively recent emergence of the "efficiency case" for shareholder rights. Property and commodity exchange are identified in this perspective as the principal means of extracting surplus labor, relocating social subjugation in the economic sphere, claimed by market liberals as "private", inherently democratic, and a domain of "freedom and voluntary activity".

[111] Deakin, *supra* note 110, 98.

orientation of corporate goals".[112] Not just contingent inequality of capital, then, but the "fundamental institutional framework of capitalist relations of production" and the "institutional design of firms"[113] were implicated in labor law's critique of corporate law, its ultimate ambition to replace capitalistic hierarchy with "democratic" relations in the economic sphere.[114] Derailed by the 1970s' economic crises, to a limited extent such aspirations reappeared in the 1980s and early 1990s, with ideas of "stakeholder democracy", retaining at least some of previous decades' concern with the devolution of control over work to employees and moderation, if not elimination, of institutional hierarchies inside the enterprise.

Against this background, the thesis of "flexibilization as a transformative opportunity" [115] is seen as significant slippage. Its vision of companies as "communities of interest", and "…based upon a micro-corporatist coalition of producers"[116] wherein neither labor, capital nor management has a natural or exclusive claim to control might, momentarily, appear to accord with the ideal of workplace democracy – especially when tied to calls for "enhanced workers' rights" and greater worker involvement in management, perhaps even where such goals are included only for the sake of their instrumental value in contributing to competitive advantage (*i.e.*, via trust). But reflexive corporate governance which, as, for instance, under *Partnership at Work*, stops at *consideration* of workers' perspectives and interests in managers' and directors' formulation of corporate

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[112] Ireland, *supra* note 22, suggests the expression "industrial democracy" usually implied the goal of the "introduction of worker representatives on corporate boards" as under German law. See alternative definitions provided by T.H. Marshall, Philip Selznick (both *supra* note 7) and Harry Arthurs, *supra* note 7 and Harry Arthurs, "The new economy and the demise of industrial citizenship. The new economy and the demise of industrial citizenship, Don Wood Lecture, Industrial Relations Centre, Queen's University, Toronto, *mimeo.*

[113] See Hugh Collins, *Labor Law as a Vocation*, 104 LAW QUARTERLY REVIEW 468 (1989), and *Market Power, Bureaucratic Power and the Contract of Employment,* 15 INDUSTRIAL LAW JOURNAL 1 , (1986).

[114] Ireland, *supra* note 22, notes Kahn-Freund's dissent from this view (Otto Kahn-Freund, *Industrial Democracy*, 6 INDUSTRIAL LAW JOURNAL 65 (1977)), rejecting the possibility of a unity of interest embracing capital and labor, and urging the inevitability of interest pluralism and so fundamental conflict between the two. Chantal Mouffe has criticized deliberative theory's often similar assumptions: Chantal Mouffe, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 CARDOZO LAW REVIEW 1533 (1995); this point is taken up in Conclusion.

[115] With reference to Hugh Collins, *The Productive Disintegration of Labor Law,* 26 INDUSTRIAL LAW JOURNAL 295 (1997), and Hugh Collins, *Flexibility and Empowerment, in* ADVANCING THEORY IN LABOR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT, 117 (T. Wilthagen ed., 1998). See, further, the analysis of Collins' account presented above, Section C.II.

[116] With reference to GUNTHER TEUBNER, LAW AS AN AUTOPOEITIC SYSTEM (1993), 6.

goals, falls far short of *participation*,[117] especially when "socially disembedded liquidity and mobility of shares" are intensifying market imperatives and increasing pressure to subordinate workers' rights in pursuit of greater efficiency.

For some contributors, it is only by excavating to a deeper level of analysis that we can understand this progression. Economic history, they suggest, can demonstrate that the structural necessity of labor's exploitation within systems of capitalist exchange derives not from the relationship between capital and wage labor, but directly from the operation of competition. "Democratizing" companies, whether radically or moderately, cannot, therefore, end labor's instrumentalization, nor can the re-introduction of regulations on capital movements, work councils, stake-holding companies, social clauses, "universal labor standards" or voluntary corporate codes: all such measures are merely "ameliorative".[118] Only by recognizing the historical specificity of current property forms (the company and share first and foremost) and then re-conceptualizing them, will the transformation to non-exploitative modes of production become possible. Consequently, to de-commodify labor, and simultaneously restore political autonomy, fading under the advance of neo-liberalism,[119] requires the reconstruction of corporations as social institutions, and a "process of experimentation in which they are increasingly placed under a combination of worker, community, supplier, and consumer *control*."[120] The rise of flexibility agenda, on the other hand, is said to demonstrate that without such reconstructive measures, social democracy cannot restrain capitalism and "that high labor standards, let alone true industrial democracy, are simply incompatible with it".[121]

IV. Reconstructing Labor Law through Social Rights

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[117] See, also, Catherine Barnard, Simon Deakin and Richard Hobbs, Reflexive Law, *Corporate Social Responsibility and the Evolution of Labor Standards: The Case of Working Time*, ESCR Centre for Business Research, University of Cambridge Working Paper No. 294, (Cambridge: CBR, 2004).

[118] See Ireland, *supra* note 22, 211, citing (footnote 38) Ellen Meiksins Wood, *The Politics of Capitalism*, 51 MONTHLY REVIEW 12 (1999). Pension fund socialism and "shareholder activism" are dismissed for the same reason, *i.e.*, the imperative to maximize returns on shares at multiple points is intrinsic to capitalism, for example, shrinking public pension provision, pension funds subject to competitive pressures.

[119] See Ireland, *supra* note 22, 205.

[120] See Ireland, *id.*, 217 (emphasis added).

[121] See Ireland, *id.*, 211. He also suggests this shows that global economic integration is eroding "national class compacts" on which the corporatist and welfarist capitalisms respectively of Germany and Sweden were based on up to the 1990s.

Were this analysis, for sake of argument, to be accepted, to what ends, precisely, should the re-defined, reflexive corporation be dedicated? By reference to which values or goals could the corporation be born again as a "social institution", instead of one of capitalist exploitation? Scope for explicitly investing corporations with exclusively, or predominantly, social functions, through their *internal* legal constitutions, *i.e.*, the course of action recommended in the last section, would appear politically restricted. Might the same end-point be reached by another route?

In answer to the phenomena described in Sections B and C above, the Supiot Report proposes, in the EU context, a reconfiguration of labor law based upon a new understanding, not of the corporation, but of the goal of individual employment security.[122] Its principal elements are three. First, a new concept of *occupational status*.[123] In the light of trends affecting work and the employment relationship, the aim here is to "protect continuity of a lifelong trajectory rather than the stability of particular jobs". As a substitute for "employee status", which, as observed, historically combined "subordination and security", by contrast, this would "reconcile the requisites of freedom, security and responsibility," thereby rectifying the imbalances increasingly in play in the employer-employee bargain.[124] It would aim to facilitate "career individualization and mobility" on the one hand, and new production processes, demanding higher job turnover and skills upgrading, for instance, on the other. Its practical aspects would include protecting workers during transitions between jobs, establishing new linkages between training and employment, and addressing occupational transitions (for example, between self-employment and salaried work).[125]

Second, an extended concept of *work* would replace employment as the basis for

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[122] Alain Supiot, *supra* note 23, 31, states: "Labor law, whether national or international, is rooted in an industrial model that is currently being undermined by technological and economic changes…", and later, "Employment practices have always varied widely, and the industrial model has never been universal. Yet, it was by reference to this model that the western countries' labor law was developed. To a large extent, the same holds true of international labor law as embodied in the institutions of the International Labor Organization in particular" (*id.*, 33).

[123] Alternatively, "labor market" status (in the original, the expression used is *statut professional*).

[124] Referring principally to the rising intensity of work, a similar degree of dependence, albeit without security of employment, income or social security in return.

[125] Supiot, *supra* note 23, 36. See ILO/Peter Auer, *supra* note 73 for a similar analysis, which concludes the need for "a new combination of employment security and social security", and "new framework of protected mobility (or protected LM transitions)" as "one possible form of an optimal institutional setting for a globalizing world, at least for the developed world"); and "…allowing workforce adjustment in relative security, without jeopardizing productivity and labor market performance".

access to social protection. The inclusion of "non-market work", it is suggested, would contribute to meeting the "requirements of equality between men and women, continuing training, involvement in public-interest assignments, family responsibilities and workers' occupational freedom." Work would, accordingly, be re-defined as activity "…linked to some obligation undertaken voluntarily or imposed by law, which is performed for a valuable consideration or without consideration within some statutory framework or under contract".[126]

Third, a new concept of *social drawing rights,* attached to occupational status and which would permit individuals to "manage their own flexibility" and achieve "active security" under conditions of uncertainty. Supplementary to traditional labor and social rights, these would encompass freedom from employment, and be discretionarily exercisable by the individual. Four clusters of rights within this categorization are distinguished: i) rights accruing specifically from wage employment; ii) rights common to all forms of employment; iii) rights deriving from non-occupational work (such as caring for dependents, voluntary work or self-training); and iv) universal social rights. The content of social drawing rights is to be discerned with reference to international human rights and labor standards: the Working Time Directive's[127] "Fordist definition of free time" and concern only with workers' health and safety falls to be re-appraised, the report suggests, with regard to norms of respect for family life under Article 8 ECHR and ILO Convention No.156.[128]

Finally, the report begins to unpack the implications of its proposed reconfiguration of labor law for the state and for citizenship. On the basis that national autonomy over labor regulation is compromised,[129] it identifies a need for a "new *modus operandi* for state intervention". Flowing from a "comprehensive view of social rights based on solidarity", a new approach is outlined, with both procedural and substantive dimensions. Procedural guarantees are necessary *because the norm of participation can no longer be restricted to political representation*, *on the twin grounds of political legitimacy and regulatory efficacy*. Substantive content is to be derived from rights already located in the EU's Community Social Charter, and ILO instruments,

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126 Supiot, *supra* note 23, 37.

127 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, O.J. L307, Vol. 36, 13 Dec 1993, 18-24.

128 Supiot, *supra* note 23, 39; Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers with Family Responsibilities, 23 June 1981, UN Treaty Series, vol. 1331, 295 (1983). The indication is that law needs to take a broader view of time, and "Work must be adapted to the worker who performs it – not *vice versa*".

129 Supiot, *supra* note 23, 42-44.

although these, it is added "…could usefully be written into constitutional law at the European level…". These two dimensions are then united in the concept of *social citizenship*. This is to be a vehicle for synthesizing reorganized labor *and* social security law, in circumstances where the old concept of social protection is no longer viable. It is also proposed as a new constitutional "cornerstone" at EU level. Amongst its additional advantages are "*inclusiveness*", the linking of social and labor rights to *social integration* (*i.e.*, not only to work), and expression of the *ideal of participation*.[130]

Thus Supiot proposes, for labor law, a reconstructed regulative ideal – *individual security based on occupational status* - and a new substantive agenda, to be defined by reference to EU and international social, labor and human rights standards. Both elements give shape, next, to a broadened notion of social citizenship, which extends participation from the political and civil spheres into the economic sphere, renewing the legitimacy of exchange relations between individual, state and (where there is one) employer – and answering the question from which this section departed.[131] How, though, do these connect, as indicated above, with the claim that the only hope for labor, under global capitalism, lies in a reconstruction of corporate law?

Though beyond the remit of the Supiot Report, possible linkages are signaled by other labor lawyers. Barnard and Deakin see social rights and citizenship as having consequences for corporate law at two levels. At the macro level of "regulatory competition between different legal orders", social rights "…set the parameters within which procedural solutions are sought", to legal determinations affecting corporate law, as other legal domains.[132] At the micro level which, under

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[130] That is, because citizenship "…implies that the people it covers should participate in the framing and realization of their rights" (*id.*, 44) with these words making clear the indebtedness of the Report's vision to Habermas' law-making ideal.

[131] Simon Deakin, *The Many Futures of the Contract of Employment*, *in* LABOR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES, 177, 195 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002), echoing this view, at the same time, reveals a Marshallian genealogy. Suggesting that a conception of social citizenship provided the underlying "normative force" for the employment contract's original function of spreading market risk through the working population while underpinning relations of production at the level of the enterprise, social citizenship "…extend[ed] the bases for social and economic participation in the same way that rights of democratic participation had been extended through political reform".

[132] See Catherine Barnard and Simon Deakin, *Corporate governance, European governance and social rights*, in SOCIAL AND LABOR RIGHTS IN A GLOBAL CONTEXT. INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 149 (Bob Hepple ed., 2002), giving as examples the decisions of the ECJ in *Case* C-84/94, *UK v. Council (Working Time)* [1996] ECR-1 5755, and Case C-67/96 *Albany International v. Stichtung Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

subsidiarity, increasingly refers to standard-setting within the firm or enterprise, social rights act as "general principles", and so as "…reference points capable of 'steering' or 'channeling' the process of negotiation between the social partners", so that social dialogue, at all levels, becomes "framed" by fundamental social rights.

For Barnard and Deakin's account, as for Supiot's,[133] this duality, of external legal framing and self-regulatory process, including at workplace level, is key. Absent explicit constitutional commitments to social citizenship rights, and in the context of economic integration within post-national constellations, procedural law and reflexive governance approaches are unlikely to preserve the "space for local experimentation and adaptation" that provide its main functional rationale. More likely is that they will constitute a "market for legal rules that can lead to a race to the bottom";[134] at minimum, the outcome will not be clearly distinguishable from the "leveling down" to minimum standards achievable via "negative integration".[135]

Hence, even if it is no longer thought appropriate to use law to impose specific distributive outcomes[136] at a national or supranational level, legal standards remain necessary. Procedural and heterarchical forms of governance (of which deliberative cosmopolitanism is one variant) still need laws driven by social objectives, as well as those supporting individual civil and political rights and participation, in order to secure the input legitimacy that is in turn needed if the desired 'second order effects", shown in Section B to be a required element of democratic legitimacy, are to materialise.

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133 See Supiot , *supra* note 23, 44: "The law can do no more than lay down principles whose implementation then falls within the scope of the law of collective agreements. It follows that a collective agreement should no longer be seen simply as a means of adjusting the particular interests of the parties thereto, but as a legal instrument whereby those parties are joined in the pursuit of objectives laid down by the law. In this process of determining the public interest, independent agencies could also play a useful role provided that democratic debate does not become sidetracked under the influence of "experts".'

134 See Barnard & Deakin, *supra* note 132; see, also, Fritz Scharpf, *The problem-solving capacity of multi-level governance,* 4 JOURNAL OF EUROPEAN PUBLIC POLICY 520 (1997).

135 Even given a "…close link, in practice, between procedural rights and substantive outcomes", Barnard and Deakin caution, "…the merits of the procedural approach must be carefully weighed against the costs in terms of uncertainty over the meaning and application of legal rights".

136 Including via comprehensive justiciability of socio-economic rights, for this point citing (*supra* note 132, 148), ANTONIO LO FARO, REGULATING SOCIAL EUROPE: REALITY AND MYTH OF COLLECTIVE BARGAINING IN THE EC LEGAL ORDER (2000), 152.

D. Conclusion: Reframing deliberative cosmopolitanism

Sparely defined by two of deliberative cosmopolitanism's founding fathers, democracy is a "principle which specifies what it means to get political results right". On the other hand, under the cosmopolitan hypothesis, as noted at the outset, democratic legitimacy "…requires public justification of the results to those who are affected by them"; and deliberation embodies the democratic principles of congruence ("those affected by laws should also be authorized to make them") and accountability (the means by which decision-makers can be held responsible to, and ultimately dismissed by, citizens).[137]

I have argued here that, as matters stand, there is a discrepancy between the first, teleological statement and its subsequent operationalisation, deriving not from any necessary defect in deliberative cosmopolitanism's aims, but from a tendency, still, in articulating these, to lean towards the classical liberal assumption of a division between the public and private spheres that confines democracy, constitutions and citizenship to one side of it.

In doing so, deliberative cosmopolitan talk partakes of a venerable orthodoxy.[138] Over decades, jurisprudential analyses have demonstrated that normative constitutional argument tends to experience difficulty in "subjecting private power to greater scrutiny and control".[139] This has given rise to skepticism concerning law's autonomy from the influences of politics and market, this skepticism itself now an established strand of legal scholarship (and one that has survived the strongest, passing, claims of economic determinism or "synchronization"[140]). From this viewpoint, contemporary "hegemonic globalization" articulates with rights-based constitutionalism, and "the most important artifact" of this relationship is a

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[137] See Eriksen & Fossum, *supra* note 1, 4, and to recap, further, at 8: "The *public sphere* located in *civil society* holds a unique position, because this is where everyone has the opportunity to participate in the discussion about how common affairs should be attended to. It signifies that equal citizens assemble into a public, which is *constituted by a set of civil and political rights and liberties*, and set their own agenda through communication" (my emphasis).

[138] As noted by Gavin Anderson, "Until recently, the critique that a constitutionalism which embodied these [classical liberal] values failed to take seriously the threat from private power left mainstream constitutional theory largely undisturbed. This can perhaps be explained by the strong belief that the business of constitutional law is the regulation of the state…": Gavin Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE, 31, 33 (2004), (footnote omitted).

[139] *Id.*, 32, 33, and generally, for discussion of whether Dworkin's "law as argument" approach can counter this claim.

[140] See Scheuerman, *supra* note 79.

"state-civil society divide" that "…serves the crucial legitimating function of obscuring the broader constellation of law and political power – including corporate political power – operating in society".[141]

Labor law, this article has shown, by contrast, paradigmatically focuses on the employment relationship as a site where public and private ordering coincide, and one where individual autonomy and collective self-rule must be guaranteed.[142] Again, to use deliberative cosmopolitanism's terms, it considers the market for labor, too, as *polity* (comprising "authoritative institutions equipped with and organized capacity to make binding decisions and allocate resources") and *forum* ("a common communicative space located in civil society, where the citizens can jointly form opinions and put the power holders to account").[143] Historically, national constitutions, read in conjunction with the broader social risk and resource redistributive arrangements that accompanied them, have usually taken the same view, in Polanyi's double movement.[144]

This is often forgotten by constitutional theory today, deliberative cosmopolitanism included, no doubt at least in part as a result of the ascendance during recent decades of neo-liberal ideology and its representations to the contrary.[145] Yet some constitutional theorists, feminist scholars and those leaning to social democratic values foremost, continue to press the position. "If democratic self-governance is a moral value," according to Iris Marion Young, "then it should be present at places where persons have the greatest stake and where they are vulnerable to domination by others; workplaces are prime among them."[146] Of course, it might be possible to find principled reasons for excluding occupational life and the distributive issues incidental to it from the purview of supranational constitutionalism. It might be seen as necessary, for instance, to restrict the ambit of cosmopolitan deliberation on

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141 See Anderson, *supra* note 138, 58

142 See Fossum & Eriksen, *supra* note 1, 7-8, defining autonomy as "…constituted, when actors have to seek justification in relation to what others can approve of, *viz*., everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions".

143 See Fossum & Eriksen, *supra* note 1, 8.

144 See Block, *supra* note 13.

145 Consider, for example, the "good governance" narrative of the rule of law as market liberalization, discussed in Bevir & Rhodes, *supra* note 5.

146 See Iris Marion Young, quoted in Fung, *supra* note 10, 47. Sciulli was another early advocate: David Sciulli, *Foundations of Societal Constitutionalism: Principles from the Concepts of Communicative Action and Procedural Integrity*, 39 BRITISH JOURNAL OF SOCIOLOGY 377 (1988).

the basis of weaker communication or identification – 'we-feeling' - at supranational level. What cannot be acceptable, though, is for cosmopolitan theorizing to slide into the values of classical liberalism and thin proceduralism[147] by default,[148] while communicating these selections as a neutral, natural, and value-free.[149] European integration, the project of *political* union, it has been observed, depends critically on "the legitimation of shared values", "a particular ethos", and the attraction of a specific way of life".[150] Historically, Europe's constitutional values and political ethos have been as social democratic as they have been liberal. It is not for deliberative cosmopolitan theory, on its behalf, now to give up the ghost.

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147 Anderson, *supra* note 138, 31 (footnote omitted) denotes a "procedural account of democracy, best actualized through the participation of formal equals in popular elections."

148 Scheuerman, *supra* note 79, 118, criticizes the experimentalist reconstruction of democracy, for presupposing "far-reaching social equality" as a condition of its success, with reference to Joshua Cohen & Joel Rogers, *Power and Reason*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, 237 (Archon Fung & Erik Olin Wright eds., 2001).

149 See Nanz's definition of law, adopted here, as "a normative discourse in which competing claims are contested": Patrizia Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*, in CONSTITUTIONALISM, MULTI-LEVEL TRADE GOVERNANCE AND SOCIAL REGULATION, 59 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

150 Habermas, *supra* note 19, 8, (footnote omitted), citing John Erik Fossum, *Constitution-making in the EU*, in DEMOCRACY IN THE EU – INTEGRATION THROUGH DELIBERATION?, 111 (Erik Oddvar Eriksen and John Erik Fossum eds., 2000).