



**WORKPLACE — DEMOCRACY:
RECLAIMING THE EFFORT TO FOSTER PUBLIC-PRIVATE
ISOMORPHISM**

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Introduction

Workplace democracy can be viewed as an oxymoron – the juxtaposition of a publicly oriented percept and market governed location. However, since the 19th century the term has also been used to designate a moral or institutional alternative to the public/private divide.¹ This is an option that calls for congruence between traditionally public and private institutions.

The term workplace democracy was used to be associated with very particular institutions – such as a workers’ owned economy (the “Yugoslav model”),² workers’ co-ops,³ the Swedish model of broad tripartite representation of interests,⁴ and even employee stock ownership plans.⁵ At a more general level it can be designated as a normative ideal that requires deploying democratic institutions and norms at different types of locations – public and private alike, inter alia – the workplace. Hence, the first formulation of workplace democracy was that “democracy should be practiced at the workplace”. At the same time the term also carried a second meaning - the idea that the organization of the workplace is instrumental to the quality of state-democracy. For example, more egalitarian wage scales can aid in preventing the fragmentation of class.

¹ Beatrice Webb and Sidney Webb, *INDUSTRIAL DEMOCRACY* (1897)

² On the Yugoslav model – Monty Lynn, Matjas Mules and Karin Jurse, *Democracy without Empowerment: The Grand Vision and Demise of Yugoslav Self-Management*, 40 *MANAG. DECISIONS* 797 (2002).

³ On workers co-ops, See Joyce Rothschild and Allen Whitt, *THE COOPERATIVE WORKPLACE: POTENTIALS AND DILEMMAS OF ORGANIZATIONAL DEMOCRACY AND PARTICIPATION* (Cambridge: Cambridge University Press 1986).

⁴ the “Swedish model” – Mark Blyth, *The Transformation of the Swedish Model: Economic Ideas, Distributional Conflict and Institutional Change*, 54(1) *WORLD POLITICS* 1(2001).

⁵ On ESOPs – Joseph R. Blasé, *EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF?* 7(1988); Pendleton, A., *EMPLOYEE OWNERSHIP, PARTICIPATION AND GOVERNANCE: A STUDY OF ESOPs IN THE UK*. (London: Routledge 2001); D’Art, D. and T. Turner *Profit Sharing and Employee Share Ownership in Ireland: A New Departure?* 27(4) *ECONOMIC AND INDUSTRIAL DEMOCRACY* 543-564 (2006)

Engagement with the idea of workplace democracy peaked in the heydays of post-war Westphalian recovery, the consolidation of the welfare state and the stability associated with the Fordist labor market. In later years, the interest in workplace democracy gradually dwindled.⁶ This can be attributed to several complementary reasons:

First, it seems that there was a growing sense of disenchantment, or at least economic sobriety with regard to some of the institutional forms of workplace democracy – particularly the cooperative forms. The termination of the Yugoslav model, together with the cold war, distanced alternatives to the capitalist system from the roster of options discussed in most developed economies. The co-operative movement continued to present a sustainable alternative to the capitalist firm, but its scope was narrow, and it did not succeed in moving away from the alternative life-style tagging that was stapled to it, despite some examples of successful large industrial co-ops, such as the Mondragon conglomerate in the Basque region in Spain.⁷ Lesser institutional forms of democracy, such as trade unions and collective bargaining, also encountered a challenge in many developed countries.⁸

Second, the two formulations of workplace democracy relied on assumptions of stable spaces in developed states. For the first formulation, stable enterprises served as communities in which democracy was practiced. For example, workers *qua* owners voted and deliberated over the co-op's management; trade unions negotiated collective agreements that governed life-long tenure. The second formulation assumed other forms of stability and unity. For example, corporatist state-wide bargaining, coupled with universal and sector-based social security system, sought to advance relatively egalitarian distribution of wages and opportunities. States were considered to be the source of regulatory provisions that advance democratic alternatives within economic enterprises, overstepping the public-private divide.

The stability that accommodated democratic practices at the enterprise level, at the state level, and at the interface between them, was substituted by marketization. At the same time, processes of globalization undermined the state's regulatory power, particularly in attempts to fully cover the scope of the relevant marketplace. The regime of accumulation that was associated with the Fordist system, was replaced by a post-Fordist regime that is characterized by more frequent transitions to and from employment, a growing disparity between primary and secondary labor markets, disintegration of organizational hierarchies and a diversified workforce.⁹ Uniform institutional prescriptions were no longer useful.

⁶ There are still sporadic, yet rigorous attempts to draw on democracy as a prominent value in designing various institutional components of labor law. See for example: Alan Bogg, *THE DEMOCRATIC ASPECTS OF TRADE UNION RECOGNITION* (Oxford: Hart 2009).

⁷ On Mondragon and its adjustment to the changing environment: Whyte, W. F. and K. K. Whyte *THE MAKING OF MONDRAGON*. (Ithaca: Cornell, ILR Press 1988).

⁸ As will be explained in the following sections, I designate trade union as a lesser form because it maintains the capital-labor form of co-management, rather than the unitary model in which workers are owners.

⁹ On regimes of accumulation, see: Robert Boyer, *THE REGULATION SCHOOL: A CRITICAL INTRODUCTION* (1990); Robert Boyer & Yves Saillard ed., *REGULATION THEORY – THE STATE OF THE ART* (2002).

A derivative of the first two propositions was a growing sense of anomie. Increasing opportunities for exit (as opposed to loyalty and voice) and growing inequality within the nation-state, between states, between classes, sectors and occupations, rendered the praxis of democracy more difficult to carry out.¹⁰ At the same time, individual preferences and group identities diluted collective democratic practices. Some observed the substitution of class politics with identity politics.¹¹ Others highlighted the rise of the new X- and Y- generations, who are concerned with individual rights and self-fulfillment, rather with collective power and social goals.¹² Being both a cause and an outcome, these factors aided in relegating the idea of workplace democracy to the realm of idealistic historicism.

Against this backdrop, debates about the role of the state in governing the labor market persist and questions about the telos of labor law are as relevant as ever. However, the nature of the debate changed, and currently some claim the continuous relevance of traditional objectives – such as economic re-distribution, while others argue that labor law must be reframed in efficiency terms to make sense to a growingly market environment.¹³ Some believe that the state (or an international regulator) has an important role in designing labor market institutions and striving towards more just outcomes. Others find sense only in labor regulation as a form of market-stimulating coordinating institution. In this ongoing legal and political debate, the underlying premises of workplace democracy have been marginalized. Rather than a simple debate about efficiency and distribution, the idea of workplace democracy introduced a broader ideal, one that called for congruence between public polity and private communities; one that viewed both spheres as instrumental one to the integrity of the other; one that focused on active participation and deliberations; one which sought to recognize that human agency is socially embedded.

To what extent is it possible to reclaim the values of workplace democracy as a descriptive and normative theory, even if detached from the original institutions with which it was associated? What interface should be given to the hyphen connecting the new *workplace*, in its post-fordist and post-westphalian setup, and *democracy*? How can democracy be nested in a community that is becoming ever more fluid? I argue that workplace democracy brings with it the understanding of public and private isomorphism, that is – values that are shared by both spheres. I particularly look at the new proceduralism in labor law as a form of integrating such ideas in the new

¹⁰ On growing inequality: Nina Pavcnik, *Globalization and within-country income inequality*, in: Mark Bacchetta & Marion Jensen (eds), *MAKING GLOBALIZATION SOCIALLY SUSTAINABLE*, 233-260 (2011); Brian Goesling & David P. Baker, *Three faces of international inequality*. 26 *RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY* 183-198 (2008). For a review of the empirical challenge in asserting the connection between globalization and the various forms of inequality, see: Melinda Mills, *Globalization and Inequality*, 25 *EUR SOCIOL REV* 1-8 (2009); Bernhard Gunter & Rolf van der Hoeven, *The Social Dimension of Globalization: A Review of the Evidence*, 143 *INT'L LABOUR REV* 7-43 (2004).

¹¹ Two formulations of this tension are presented by: Nancy Fraser, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* (1997); Iris Marion Young, *INCLUSION AND DEMOCRACY* (2000)

¹² Susan Eisner, *Managing Generation Y*, 70(4) *SAM ADVANCED MANAGEMENT JOURNAL* (2005)

¹³ For a historicized account of the debate on the purpose of labor law, see: Judy Fudge, *Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law*, in: Guy Davidov & Brian Langille (eds), *THE IDEA OF LABOUR LAW* 120-136 (2011)

institutional design of workplace democracy. Furthermore, I claim that new forms transcend the two formulations that were presented at the outset. Rather than regulation of the workplace as a locus of democratic practice, or the regulation of the workplace as a vehicle to improving state-level democracy, the new workplace — democracy seeks to offer a set of basic values and institutions that apply (or should be applied) to the privatized public polity, as well as the publicized private sphere. Due process applies to terminations in the workplace, just as much as it is warranted in the democratic polity. Social responsibility is placed on both the state and the private organization. Professionals in private and public polities carry out ever-growing skill-laden tasks; private organizations take over regulation that was conducted in the past by the state, just as much as localities and states act as competitive players.

The first section of this article summarizes the arguments that constitute the case for workplace democracy. The second section suggests a democratic framework to think about the organization of the workplace, one that looks at the community, the process and rights. The third section looks at the growth of process-based regulation as a form of workplace democracy, and demonstrates the nature of current democratic practices that take place in multiple levels, venues and communities.

1. The case for workplace democracy and its institutional interface.

The case for workplace democracy is composed of various justifications, which for the most part can complement each other but do not necessarily imply similar institutional configurations or focus on similar institutional aspects.

(i) The deontological (or the “all subjected”) justification

A prominent deontological argument favoring the introduction of democratic structures into the workplace is that proposed most eloquently by Robert Dahl: “if democracy is justified in governing the state, then it is also justified in governing economic enterprises. What is more, if it cannot be justified in governing economic enterprises, we do not quite see how it can be justified in governing the state.¹⁴” The premises underlying this view are that (a) in any association where its people have to reach collective decisions that will be binding on all members, decisions should be made by all those people who are subject to the decision, as the good of each person is entitled to equal consideration, (b) in general each person in the association is entitled to be the final judge of her own interests, and (c) each adult individual is roughly equally well qualified to decide which matters should be directly decided by the individual and which should be delegated to others. To these premises Dahl adds (d) the principle of fairness, according to which scarce resource should be fairly distributed, and (e) in determining what fairness entails, the considerations of each

¹⁴ Dahl, A PREFACE TO ECONOMIC DEMOCRACY (1985).

affected individual should be taken into consideration. These premises, as Dahl and others have shown, apply equally to both the citizenry of the nation and the economic enterprise.

The deontological nature of the “all-subjected” argument seems to create the strongest argument in favor of workplace democracy. The requirement for democracy in the workplace is rooted in the basic features of the economic enterprise itself, and not in some external values (such as self-fulfillment or democratic practice elsewhere). At the same time, like other deontological assumptions, its truism is a source of controversy. For example, Dahl does not account for the reason why the relevant “association” is the workplace (i.e., a place of a diverse constituency, which includes, at least, the workers of the enterprise), rather than the association of capital owners who hire the services of labor. Otherwise put, Dahl provides a theory of democratic governance, but not of membership. He argues that the right to property does not override the right to democratic governance, and that the right to property does not imply the right of capital owners to control the economic enterprise. Consequently, the argument may be accepted or rejected, *not* on the basis of how should an association that complies with the above-listed premises be governed, but rather on what is the relevant association. Dahl's theory of economic democracy is therefore based on the sorting and grading of competing rights and claims, and on a somewhat axiomatic choice of community. Implicitly acknowledging this method, and in order to sustain the congruity of his argument, Dahl ends up recommending the transformation of the economy into one where ownership of the firm will be by workers through collective ownership, in combination with some national-level profit-sharing arrangements.¹⁵

Unlike the deontological orientation of the first justification, the other justifications are teleological in nature. These justifications are derived from the positive values associated with work: self fulfillment, economic well being, and the well being of others – individuals, communities and the general social good.¹⁶

(ii) The justification of self-fulfillment

The workplace must be organized in a democratic manner, because participation is an activity, fulfilling in itself, that should be equally enjoyed by all autonomous agents. According to this view, work has become the center for personal development, matched only by one's life within the family entity (defined broadly to encompass a broad range of personal relations). Work has become the most time-consuming activity an individual pursues in her personal life, and around the workplace various social institutions evolved. Some of these are formal, including health care, pension funds, non-firm-specific training and education; others are informal, most notably socialization with peers and occupational identity. Similarly, some of these

¹⁵ David Ellerman, *THE DEMOCRATIC WORKER OWNED FIRM* (1990); David Ellerman, *PROPERTY AND CONTRACT IN ECONOMICS: THE CASE FOR ECONOMIC DEMOCRACY* (1992).

¹⁶ Implicit in these arguments is also the attempt to side-step the negative aspects of work, although these are often concealed. On the moral ambivalence of work, see Guy Mundlak: *The Right to Work – The Value of Work*, in: Daphne Barak-Erez & Aeyal Gross, *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* (Oxford: Hart 2007).

institutions are economic by nature, guaranteeing one the ability to pursue complementary activities outside the workplace; others are social and complement self-development in personal domains exceeding the occupational domain.

The argument in favor of a democratic workplace would therefore be as follows: if democracy is intended to enhance self-development, then a democratic process must be implemented in small communities where personal development actually takes place, predominantly the workplace. Through participation, the worker is able to influence the community on which she depends for her self-development. For an effective voice to be granted for all those operating within the workplace environment, equal influence should be granted to all who are affected by it.

The argument about self-fulfillment emphasizes active participation, rather than a general requirement of democracy. Participation at work should be part and parcel of an active democratic environment at multiple levels. Participation and deliberations with others endogenize preferences, encourage a learning process, and enable individuals to assert a multi-dimensional form of voice (as a citizen, a worker, a parent, an environmentalist and more).¹⁷

A participatory environment is not agnostic to all preferences and interests. It seeks to foster participation for the sake of “self-realization”.¹⁸ Self-realization is defined as an act which is aimed toward the achievement of an *external objective*, where in the process the individual (a) *develops capacities* that can be used repeatedly (b) *deploys these capacities*, and (c) makes use of them in some way that benefits a community in which she is member (*externalization*).¹⁹

(iii) The justification of economic well being

Proponents of this argument start with the view of the workplace as the main source for individuals' earnings. Because for most individuals work is the main source of income (compared with a minority whose main source of income is from capital investments, and another minority whose main source of income is welfare), eliminating patterns of socio-economic stratification should be achieved by empowering workers at their workplace. Because economic status is identified as a major determinant of political clout, and because workers, as individuals and a collective, do not usually match the economic power of capital, economic empowerment is tightly linked to the political quality of the national-level democratic regime.²⁰ Without a distributive scheme, workers remain dependent on government; but at the same time capital owners, being self-interest maximizers, resist systematic

¹⁷ Jon Elster (ed.), *THE MULTIPLE SELF* (1986); Cynthia Estlund, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (Oxford: OUP 2003).

¹⁸ The following argument is based on: Jon Elster, *Self Realization in Work and Politics: The Marxist Conception of the Good Life*, in: Jon Elster & Karl Ove Moene, *ALTERNATIVES TO CAPITALISM* (Cambridge: CUP 1989) 127-158.

¹⁹ See Elster *ibid* pp. 130-133. However, I do not adopt Elster's argument wholesale in the text.

²⁰ Thomas H. Marshall, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950).

attempts at economic mobilization and the redistribution of economic, and consequently political, power.

Unlike the other three justifications presented earlier, the emphasis of this argument is on economic empowerment, and it is thus the argument that most directly deals with the distributional question. Because the question posed is how to provide for an equitable distribution of income, the answer may not necessarily be through the democratization of the workplace itself. This is an empirical question. For example, some opt for tax and subsidies as equally valid means of distribution, and more efficient at that²¹, while others hold protective and safety-net regulation as the optimal method²². Alternatively, this argument with some variations has been used to endorse unionism, workers' ownership or the development of social democratic politics at the national level. Common to all such arguments is the focus on the broader society rather than on the organizational design of the particular *workplace*. Nevertheless, the institutions associated with workplace democracy maintain a distinct link to work. Rather than widening the social welfare safety-net, which is a defensive strategy for extreme situations, providing workers with influence and control enables them to extract higher income and non-income benefits (health and safety, satisfaction), while maintaining institutions of competitive markets. The democratic workplace, with its focus on sharing control among the owners of the various production factors, allows a more egalitarian distribution of power that includes the property rights over financial resources as well as over the political institutions of power that generate future distributions of power.

The democratic nature of this argument is in its focus on redistribution of access to power generating institutions, rather than on episodic redistribution of wealth. As such it is an important component of a third-way theory: a theory that accepts an institutional structure in which economic power gained through markets is translated into political power, yet, at the same time, insists on integrating distributive considerations into the structure of markets²³. Moreover, the correction of market failures itself is not to be carried out as a second-order corrective measure, but rather through a first-order redesign of markets, so as to strengthen individuals' bargaining power in the market.

²¹ Louis Kaplow and Steve Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. OF LEGAL STUDIES 667 (1994)

²² Fried, *Individual and Collective Rights in Work Relations*, 51 UNIV. OF CHICAGO LR 1012 (1984); Beatty, *Industrial Democracy: A Liberal Law of Labour Relations*, 19 VALPARAISO UNIV. LR 37 (1984)

²³ On traditional "third way theory" see (despite the title): Gregory Alexander & Garzyna Skapska (eds), *A FOURTH WAY? PRIVATIZATION, PROPERTY AND THE EMERGENCE OF NEW MARKET ECONOMIES* (1994). It is important to distinguish between previous third-way theories and more contemporary ones, such as that which is advocated by Anthony Giddens, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* (Cambridge: Polity Press 1998). With processes of neo-liberalism the economic left-right continuum slides to the right and third way focal point slides as well.

(iv) *The workplace as a learning laboratory*

Participatory democratic behavior has a spillover effect on the political climate of higher-level decision-making processes, all the way up to the national level. This view is different from that of self-fulfillment in two important respects. First, the former argument assumes that the individual can enjoy a higher degree of self-fulfillment when participating in the governance of her workplace. By contrast, the democratization of the workplace as a learning laboratory seeks to improve the political process outside the workplace. The workplace here is instrumental for social reform, not an end in itself. A second difference, implied in the above distinction, is that the previous argument focused on individual objectives — promoting self-fulfillment, while the ends promoted by the current argument emphasize a social good (the improvement of the political process). Consequently, the justifications may indicate different paths if it is found that a democratic structure and job enrichment have differing effects. Complex task assignment, for example – team work in research and development, may be more satisfying with regard to individual self-fulfillment, self-esteem and general interest but may not necessarily contribute to democratic practice and may actually attract the workers' attention and devotion away from political activity outside the workplace. By contrast, active political participation at work may be experienced by some as tiring and unappealing, although it may have a positive spillover effect outside the workplace.

The underlying empirical assumption in this context holds that work (including the nature of work, occupation, degree of participation in the workplace) shapes the individual's outlook (including beliefs and ideologies), her habits and life-style, her status in society and self-esteem. A more social-good-oriented hypothesis is that participation in the workplace may increase group and community identification through a formation of shared interests, as well as increase legitimacy granted to collective actions and compliance with them²⁴. Thus individuals are expected to be willing to cooperate in work (and consequently in arenas outside work), and accept the system in which they are members (the work system, and consequently the larger political system).²⁵ It is therefore necessary to provide individuals with fora that replicate the grand political process to the greatest extent possible, and where they will be able to engage *as equals* in decision-making processes, and in intersubjective exchange of interests and ideals²⁶. The workplace is an appropriate arena owing to the similarity in the decisions it requires and those made in the political state.

²⁴ This point is emphasized most clearly by Pateman who states that “participation has an integrative effect and it...aids the acceptance of collective decisions”. Carole Pateman, *PARTICIPATION AND DEMOCRATIC THEORY* (1970); Also see: R. Golembiewski, *Toward a Positive and Practical Public Management: Organizational Research Supporting a Fourth Critical Citizenship*, 21 *ADMIN. & SOC.* 200 (1989).

²⁵ See Estlund, *WORKING TOGETHER*, *supra* note 17.

²⁶ In the words of Tom Schuller: “Participation cannot act as a comprehensive social glue bonding all sections of society together... Of itself, it will resolve neither technical problems of how to produce goods and service efficiently, nor moral issues to do with equitable distribution or the dignity of work. What it can do is to unsmother issues which are otherwise smothered by the routine continuation of existing practice. It sharpens awareness of the possibility of alternatives, and fosters their development. There is a long tradition asserting the link between education and democracy, and arguing that the experience of democracy is itself a powerful form of education....Perhaps the strongest rationale for worker participation is that it provides opportunities for people to learn from

It is possible to reframe this argument in economic terms, holding that workplace democracy creates a positive externality. Such framing may have important policy implications. For example, it is arguable that such externalities cannot be captured by the democratic firm. Workers in firms that generate individual efficacy are assumed to be better workers (for example, in terms of their attitude toward work), and are likely to be tempted by "non generating" firms offering higher wages, and therefore capturing the general social skills invested by the democratic firm. The democratic firm with empirically and ideologically egalitarian tendencies cannot compete with the autocratic firm, and therefore encounters a disincentive for investment. Similarly, if the democratic firm invests in the general social skills of its workers, it relieves social costs that are placed on the state.²⁷ The two externalities, if proved empirically correct, can serve as a persuasive argument in favor of regulatory support for workplace democracy, encouraging, and maybe even mandating democratic structures. However, the empirical studies of these hypotheses are not sufficiently robust.²⁸

each other by formulating issues, and maybe even solving them, through some form of collective enterprise." Tom Schuller, COMMON DISCOURSE: THE LANGUAGE OF INDUSTRIAL DEMOCRACY 158 (1980). Similar arguments have been made by Carole Pateman, *supra* note 24, Robert Mason, PARTICIPATORY AND WORKPLACE DEMOCRACY: A THEORETICAL DEVELOPMENT IN THE CRITIQUE OF LIBERALISM (1982); Cynthia Estlund, *supra* note 17.

Generally, this view can be traced back to Antonio Gramsci who used the teacher-pupil terminology to explain his focus on certain work structures (most notably — work councils) as advancing the democratic ideal. See in SELECTIONS FROM THE PRISON NOTEBOOKS (1971); Also see: Darrow Schecter, GRAMSCI AND THE THEORY OF INDUSTRIAL DEMOCRACY (1991).

²⁷ For an evolutionary account of the need to steer towards cooperative forms, see: Peter Hammerstein (ed), GENETIC AND CULTURAL EVOLUTION OF COOPERATION (2003); For neo-institutional and game-theoretical accounts of the need to actively engage in creating cooperative forms, see: Christopher Merrett & Norman Walzer, COOPERATIVES AND LOCAL DEVELOPMENT: THEORY AND APPLICATIONS FOR THE 21ST CENTURY (2004); Avner Ben-Ner, W. Allen Burns, Gregory Dow & Louis Putterman, *Employee Participation in Ownership: An Empirical Exploration*, in: Margaret Blair & Thomas Kochan (eds.), THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION 194-233 (2000).

Other than comprehensive accounts and institutional proposals for fostering cooperative institutional forms, some labor market institutions resonate with this logic, such as the French training tax. See: Christine Greenhalgh, *Adult vocational training and government policy in France and Britain*, 15(1) OXF REV ECON POLICY 97-113 (1999).

²⁸ For example: E.G. Steven Peterson, *Workplace Politicization and its Political Spillovers: A Research Note* 13 ECONOMIC AND INDUSTRIAL DEMOCRACY 511-524 (1992) (A sample of 112 interviews held in one small town, with a 35% response rate, finding correlations between individuals' account of having workplace efficacy and the workplace being 'political' (i.e., with formal participation schemes). Moreover, the impact of taking part in decision-making at work on political participation was found to be independent of socioeconomic factors such as age, gender and education. However, the correlations found ranged between 0.2-0.3, thus pointing at somewhat ambiguous results). For a more extensive survey of studies with similar design, see: Steven Peterson, POLITICAL BEHAVIOR: PATTERNS IN EVERYDAY LIFE (1990); M. Elden, *Political Efficacy at Work: The Connection between More Autonomous Forms of Workplace Organization and a More Participatory Politics*, 75 AMERICAN POLIT. SCI. REV. 43 (1981); R. Woodman et al., *Personality Correlates of a Propensity to Engage in Political Behavior in Organizations*, PROC. OF THE S.W. ACADEMY OF MANAG. 131 (1985); Stephen C. Smith, *Political Behavior as an Economic Externality: econometric evidence on the relationship between ownership and decision making participation in US Firms and participation in community affairs*, 1 ADVANCES IN THE ECONOMIC ANALYSIS OF PARTICIPATORY AND LABOUR-MANAGED FIRMS, 123-136 (1985)

2. The institutional interface of workplace democracy

The four justifications for workplace democracy identify a relationship between the organization of work, workplace, the labor market and democratic values. The reliance on democracy as an organizational form does not distinguish between the public and the private sectors. It is a universal argument that substitutes the common assumptions about the organization of work. Instead of drawing on property and contract rights for the private sector and administrative and contract law for the public sector, the values of democracy prescribe distinct institutional forms.

The democratic arguments may be seen as reinforcing one another, but they do not overlap. They may have very different implications. Participatory management may be found to have economic outcomes that undermine the justification of economic well-being. State-wide institutions of voice, such as corporatist bargaining, may undermine the attempt to construct the workplace as a learning laboratory.

The literature on workplace democracy is eclectic. Some of it sits on the shelves of political theory, usually commencing with a theoretical claim about the need to expand democratic practices beyond the nation state and beyond the practices associated with representative democracy. Such claims commonly end with a comprehensive, albeit theoretical, vision for the re-organization of the economy. Other volumes on workplace democracy sit on the shelves of business and organizations. These studies commence with an type of organizational practice, such as ESOPs (employees stock ownership plans) and develop the democratic claim as a form of justification for the organizational form as well as for the state's intervention in the market for the purpose of facilitating or encouraging such institutions. Consequently, the linkage between workplace democracy and institutional design is not altogether clear. The different justifications also account for the very different institutional prescriptions.

To maintain the core understanding of linkage between the organization of work and democracy, it is better to consider democracy as an organizing principle that highlights various options, as well as a normative benchmark. The relationship between democracy and productive organizations would benefit from maintaining pluralism and toleration to different institutional forms. At the same time the democratic framework must present a set of values that are distinct and different from other frameworks, such as efficiency and distribution, that commonly exhaust the discussion of labor law's telos.

I view the democratic framework to be characterized by three major components. First, it assumes the existence of a community. Second, it requires participatory processes that secure a roughly equal distribution of effective power among the community's constituents, and thirdly – it acknowledges the need for substantive rights to protect individuals and groups from unwarranted use of power by others. I will elaborate shortly on each.

There are also studies providing indirect support for the spillover effect. See for example: Melvin Kohn, *Unresolved Issues in the Relationship Between Work and Personality*, in: THE NATURE OF WORK (Kai Erikson & Steven Peter Vallas eds. 1990); Melvin Kohn and Carmi Schuller, *WORK AND PERSONALITY; AN INQUIRY INTO THE IMPACTS OF SOCIAL STRATIFICATION* (1983)

(i) *The community:*

The existence of a community is pertinent for considering democratic institutions. The different justifications suggest multiple assumptions about the role of the workplace community. Some arguments view the organization of work as instrumental to the democratic quality of the nation state. Others hold that the workplace is the basic unit within which democratic practices must take place. The latter option should be further unpacked. Some seek to create a homogeneous community in which all the constituents are equally situated. Various forms of workers' ownership (the Yugoslav model of workers-owned economy, workers' co-ops and to a lesser degree – fully employee owned ESOPs) seek to establish a community in which all the constituents are workers, and no other constituents exist but the workers themselves. This is the unitary model of the community.²⁹ Alternatively, others view the organization as a community of dual or plural distinct constituencies.³⁰ Traditionally, trade unionism was viewed as creating a system of co-governance in which labor and capital are ideally placed in a situation of parity. Other plural forms of community include for example the view of the firm as a multi-constituency forum, which is responsible to the interests of various stakeholders.³¹ In such plural forms it is important to distinguish between requirements for internal democracy *within* each constituency and between the coming together of the constituencies to formulate a democratic environment of difference.

The workplace community is different from the nation-state and intuitively resists at first the application of democratic practice. It is embedded in a social, political and economic environment and the constituents are therefore intrinsically limited in the spectrum of decisions in which they can participate and on which they can decide. It takes part in a competitive market and is therefore measured in its ability to compete according to the dictates of the market. It is also part of a broader economic system in which rules of entry and exit seem to trump voice and loyalty. Although such arguments aid in identifying differences between the nation state and the workplace, these differences do not necessarily undermine the view according to which the workplace is a relevant community for democratic praxis. Similar arguments can be made with regard to local communities, yet it is common wisdom that localities

²⁹ The unitary view has been most developed by human resources scholars, such as Chester Barnard, *THE FUNCTIONS OF THE EXECUTIVE* (1938). A revival of such an approach in legal scholarship can be viewed in: Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 *GEORG. LJ* 39 (1992)

³⁰ Richard Hyman, *INDUSTRIAL RELATIONS: A MARXIST INTRODUCTION* (1975). Alan Bogg, *supra*, note 6 takes the dualist notion further, and matches conceptions of democracy with detailed rules for trade union organizing and collective bargaining.

However, a variation of this argument is often developed by economic skeptics of workplace democracy. Their argument usually focuses on the lack of homogeneity between capital and labor owners, and particularly among workers, making any effort to integrate the two groups into one community likely to fail. The problem is thus not rooted in “class conflict” but by heterogeneity that is viewed as inhibiting economic competitiveness. Henry Hansmann, *THE OWNERSHIP OF ENTERPRISE* (Cambridge MA: Harvard UP 1996).

³¹ On stakeholder/constituency statutes, see generally: Keay Andrew, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado About Little?* 22(1) *EUR. BUS. L. REV.* 1 (2011); On its relationship to the 'third way' ideology, see Sarah Wheeler, *CORPORATIONS AND THE THIRD WAY* (Oxford: Hart 2002).

should be democratically managed. In fact, in blurring the private-public distinction, it is commonly demonstrated that localities and even the nation-state are currently, more than ever before, organized in accordance with market dictates.³²

Despite the claim that the workplace *can* sustain democratic practices associated with territorial communities, it is the fuzzy boundaries of the workplace that have become a critical factor in the gradual disappearance of the democratic workplace. However, because similar processes have taken place at other “places” within the traditionally public and private spheres, that is – at the state and at the private economic organization, there is a widespread sense of a democratic deficit. Consequently, there is a need to rethink the institutions associated with democracy, regardless of the community in which it takes place.

(ii) *The democratic constitutional order:*

Within the community, a democratic constitutional order must prevail. A *constitutional order* prescribes the rules of the game and is therefore process-oriented.³³ Rules that prescribe the constitutional order of the firm may be found in the company's bylaws, in external regulation (such as for example laws that mandate co-determination on the board or works councils within the firm), or in collective agreements (e.g., basic agreements that set up employees' participation). Being polycentric and strongly embedded in other orders (industrial, national, occupational), these rules are different, in form and substance, from the typical constitutional order of the state that is enshrined in a formal constitutional document/s. A *democratic order* is, simply stated, a democratic constitutional order. Conventionally, the public firm is a shareholders' democracy. When considering the very same organizations as a form of workplace democracy we seek to increase the scope of “the people”, the sovereign, and to study the way in which management is made accountable to a more extensive set of interests.

An important aspect of a democratic order is that each individual or constituency should have roughly the same degree of power to affect the outcomes of the firm's decision-making processes at all levels of decision making. Power in this context encompasses both forms of negative power (“exercising power over”) and positive power (the “power to act collectively”).³⁴

Conventionally, a democratic order is associated with voting and a one-person/one-vote (OPOV) principle. Some institutional practices of workplace democracy maybe linked to voting practices, for example – self-management in workers co-ops,

³² Yishai Blank, *Spheres of Citizenship*, 8(2) THEORETICAL INQ. IN LAW 411 (2007).

³³ Charles Sabel, *Constitutional Ordering in Historical Context*, in: CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS (Robert Boyer and Rogers Hollingsworth eds.);

Also see: Gary Herrigel, *Industry as a Form of Order: A Comparison of the Historical Development of the Machine Tool Industries in the US and Germany*, In: COMPARING CAPITALIST ECONOMIES: VARIATIONS IN THE GOVERNANCE SECTORS (Wolfgang Streeck, et al eds, 1992).

³⁴ Steven Lukes, *Introduction*, in: POWER (Lukes, ed. 1992); Also see: Jane Mansbridge, *Using Power/Fighting Power*, 1 CONSTELLATIONS 53 (1994). The positive aspect of power is best considered within Arendt's framework, as presented in Hannah Arendt, ON REVOLUTION (1969).

shareholders voting in fully ESOP firms, voting rules on boards of directors in which workers are represented (co-determination), and even majority rules for ratification of industrial action and collective agreements. However voting rules generally, and OPOV in particular, are not, in themselves adequate to secure a democratic order, and they may also be unnecessary.

First, although a OPOV principle maybe an adequate institutional adaptation of democracy at work, it is more likely to be so in small ideological co-ops. Furthermore, voting is one form of negative power in which some succeed in overriding the power of others. Even studies of small co-ops demonstrate that aside from voting, other (negative) power relations exist.³⁵ Hence, even where voting is a feasible method of self-governance it cannot capture the actual distribution of effective power in the community. Power dynamics are even more difficult to even out in plural workplace communities, where OPOV must withdraw in favor of multi-dimensional formulas of effective power where collective power of a constituency intertwines with the distribution of individual power *within* the constituency.

Second, voting demonstrates one of the simple (and legitimate) institutional forms allowing some to exert power over others. However, at least some of the arguments favoring workplace democracy seek to remedy the problems associated with representative democracy. This for example is best seen in the arguments favoring democracy at work for reasons of fostering self-fulfillment and drawing on the workplace as a laboratory of democracy. Applying principles of subsidiarity to democracy is intended to encourage an active democratic environment. A similar conclusion can be reached by observing the need to complement the negative use of power with positive forms of power that encourage individuals and groups to recognize each others' interest, deliberate and come together in action.³⁶ Infusing communicative action into the economic enterprises provides for participation that assimilates and contributes to participation in the public sphere. It shifts the enterprise from the alienation of individuals merely engaging in production, to an environment in which men and women interact together, working toward a goal they have defined themselves. It reshapes the dichotomy between everyday life at work and political life.³⁷ Communicative action thus provides for more than the neoclassical-favored free flow of information. It redefines the nature of the workplace community, and consequently of the individuals constituted by it³⁸.

Finally, the simplicity of voting is also its major drawback. Voting and even deliberations to consensus are wholly removed from a host of market practices such as subcontracting, temping, hourly workers, off-shoring and informal patterns of work. It is possible to argue that any form of numerical flexibility is inimical democracy. This argument will be discussed in the following section. In the meanwhile, it suffices to argue that workplace democracy may require to consider the

³⁵ Jane Mansbridge, *BEYOND ADVERSARY DEMOCRACY* (1980).

³⁶ Hannah Arendt, *THE HUMAN CONDITION* (1958); Jurgen Habermas, *Hannah Arendt's Communicative Concept of Power*, 44 *SOC. RES.* 1 (1977)

³⁷ Compare to: Michael Piore, *Work, Labor and Action: Work Experience in a System of Flexible Production*, in *TRANSFORMING ORGANIZATIONS* 307 (Kochan & Useem eds. 1992).

³⁸ Stanley Deetz, *DEMOCRACY IN THE AGE OF CORPORATE COLONIZATION : DEVELOPMENTS IN COMMUNICATION AND THE POLITICS OF EVERYDAY LIFE* (1992)

fundamental values of democracy, rather than to adhere to any single institutional form as the *sine qua non* of democracy. These include forms of participation, empowerment, equality of status within and across the boundaries of the workplace. Considerations of democracy should be included in each and every level – from the design of production, the division of labor and work processes, organizational structure and political representation. Following the earlier discussion, instilling a democratic commitment must also be inflicted with reflection that democracy is the privilege of some, potentially at the price of others.

In sum, representative democracy process must be complemented or replaced with deliberative and participatory forms of democratic practices. Working with the two types of power requires designing a democratic system that is measured by its success in forging trust and legitimacy.³⁹ Trust is concerned with the relationship between the individual constituents of the community.⁴⁰ The legitimacy of the organization is twofold: first – in the eyes of the community's constituents (internal legitimacy), and second – in the eyes of those outside the community (external legitimacy).⁴¹ Seeking legitimacy and trust suggests that the effective distribution of power should be measured by the way it is actually perceived and not solely by a theoretical benchmark of equality.

(iii) *The Constituents' Bill of Rights:*

The requirement for a democratic constitutional order within the workplace community (or communities) is process-oriented. It seeks to enable the constituents in either a unitary or a plural workplace environment to engage in self-governance. Reliance on process alone risks unwarranted outcomes. Democratic theory commonly engages with the additional substantive layer of fundamental rights that protect individuals and collectivities from the tyranny of the majority. Although the requirement to transcend representative forms in order to engage in trust-building and fulfilling encounters seems to reduce the perils of tyranny, there are strong arguments favoring adherence to a bill of rights. The democratic process must be reflexive and its outcomes must be constantly assessed. Once the democratic ideal is disconnected from simple rules, such as OPOV, its experimental design requires a bill of rights to prescribe the contours of experimentation.

Basic rights in the workplace can be defined as legitimate and enforceable claims to some desired treatment, situation or resource⁴². Yet not all rights defined as such enter the constitutional order of the firm. Our concern here is only with those fundamental

³⁹ by Alan Fox, *Beyond CONTRACT: WORK, POWER AND TRUST RELATIONS* (1974);

⁴⁰ Claus Offe, *How Can we Trust Our Fellow Citizens?* In: Mark Warren (ed), *DEMOCRACY AND TRUST* (Cambridge: Cambridge University Press 1999) 42-87 ; Donal Langevoort, *The Behavioral Economics of Corporate Compliance With Law*, 2002 COLUMB. BUS. L. REV 96 (2002).

⁴¹ Cathryn Johnson, Timothy J. Dowd and Cecilia L. Ridgeway, *Legitimacy as a Social Process* 32 ANN. REV. SOC. 53 (2006); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches* 20(3) ACAD. OF MANAG. REV. 571 (1995).

⁴² Richard Edwards. *RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST UNION ERA* (Wash DC: Brookings Institution. 1993) at chapter 2. Edwards deals with individual rights, and the definition here is intentionally open to group rights as well.

rights that define the “basic structure” of the democratic community⁴³. These rights are derived from a conception of the membership status in the workplace community, and not from the contractual arrangements prevailing within the community.

Rights are themselves a form of power and the distinction between the process-based component of the democratic order and the substantive protection of rights should not be overstated. Both have positive and negative implications, both span process and substance. Functionally they are used in different situations and are part and parcel of the democratic order. They are instruments that aid in adjusting between due process and just outcomes.

The sources of the constituents’ rights are twofold: sources exogenous to the workplace itself, and sources within. To the former we can attribute general legislation, industrial custom, collective bargaining agreements applied at the national or sectoral level, and the like. To the latter apply such sources as company policy, localized collective bargaining and individual contracts. Not all sources are equal in terms of the right’s strength and the legitimacy accorded to the right. Often there may be a trade-off between the two measures⁴⁴. Rights that are imposed on the workplace community from the outside may be stronger in the sense that they are not vulnerable to the goodwill of the workplace constituency’s majority. By contrast, rights that are established by the community itself emerge from the constitutional decision-making process. As such, they can be altered by the same procedure, unless voluntarily entrenched. At the same time, rights that are imposed on the constituency from the outside may be less acceptable to the workplace constituents than those that are decided by the constituency itself. The more those benefited and constrained by these rights are engaged in the deliberation over the definition of the rights themselves, the more likely they are to feel committed to these rights and to their observance.

The presumed trade-off between the degree of protection and the legitimacy a right enjoys is mitigated, to an extent, by the fact that rights need to be enforced and protected. Unless an elaborate mechanism for the enforcement of rights exists outside the workplace, these rights need to be protected by internal mechanisms. “Authoritative” rights that are imposed from the outside but are not legitimated by the constituents of the workplace community are likely to be de-facto weaker than intended, and a greater discrepancy is expected between the formal constitutional order and its “order in action”.⁴⁵ Conversely, rights that seem to be “flimsy”, for they were devised from within, through a power mechanism that can also serve as the vehicle for their amendments, are likely to be respected if they succeed in capturing the constituents’ recognition of their importance.

⁴³ The term “basic structure” refers to John Rawls, *A THEORY OF JUSTICE*, at p. 7.

⁴⁴ The trade-off described is strongly related to the critique of excessive juridification of the workplace. See: G. Teubner (ed), *THE JURIDIFICATION OF SOCIAL SPHERES* (1987). Also see: William McCarthy, *The Rise and Fall of Collective Laissez Faire*, in: *LEGAL INTERVENTION IN INDUSTRIAL RELATIONS 1* (McCarthy ed., 1992)

⁴⁵ See for example: Anna Pollert, *How Britain’s Low-Paid Non-Unionised Employees Deal with Workplace Problems*, in: Judy Fudge, Shae McCrystal and Kamala Sankran (eds), *CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION* 285 (2012); David Weil, *A Strategic Approach to Labour Inspection*, 147(4) *INT’L LABOUR REV.* 349 (2008),

The list of rights would generally match those of public rights – including civil liberties and social rights, with necessary adaptations. While the negative dimension of rights is generally similar, the positive dimension is different. The workplace is a source of positive rights (e.g., right to livelihood) but its obligations to constituents are different from those of the state or other communities in which individuals take place. However, its role in fulfilling rights maybe as important, with the (relative) declining power of the nation state and rising power of the multinational corporation. Multinational companies have responsibility to the workers in communities from which they draw their source of labor power, and their families. Hence, the bill of rights is not an attenuated form of national rights, and the rights vis-à-vis the organization where one works are not a subset of the state's duties. However, the same set of rights needs to be adapted to different organizational settings, and derived from universal perceptions of humanity.

3. Losing the community and searching for it all over again

The three aspects of workplace democracy – community, deliberative process and rights, provide a framework for a descriptive analysis but they do not offer a precise institutional blueprint. They aid in descriptively highlighting democratic qualities and deficiencies in existing institutions. They focus attention on the multiple work-communities involved, on power relations and on competing prescriptions of workers' rights. The justifications for workplace democracy also provide a normative trajectory. They can serve as a benchmark, whether in incremental reforms or in drawing the contours of a democratic utopia. Like the descriptive component, the normative aspect is not intended to fix a particular institutional setting. However, despite the rich set of values democracy offers, the extensive leeway that is opened by the three focal points – community, process and rights, and the considerable agility of the theory, the discussion of workplace democracy gradually declined.⁴⁶ This can be explained as an outcome of several processes, of which I would like to emphasize what I view to be two dominant and interrelated factors – marketization and globalization.

(i) Marketization

At the methodological level, marketization accounts for the growingly neoclassical - neoliberal emphasis on unfettered markets as the preferred institutional form. Furthermore, it is associated with the sole benchmark of efficiency and economic Darwinism as dictates of institutional choices.⁴⁷ With regard to the organization of the workplace, it refers to the gradual decline in stable work communities, a growing reliance on peripheral, secondary and precarious workforce, as well as a growing

⁴⁶ Steven Deutsch, *A Researcher's Guide to Worker Participation, Labor and Economic and Industrial Democracy*, 26(4) *ECON. & IND. DEMOC.* 645 (2005).

⁴⁷ David Harvey, *A BRIEF HISTORY OF NEOLIBERALISM* (Oxford, Oxford University Press, 2005)

disparity between the primary and secondary workforce. It involves rising labor market inequality, declining mobilization, and growing insecurity.⁴⁸

The implicit image associated with workplace democracy was always of an archipelago of workplaces where autonomous self-management takes place. The state was to establish the regulatory infrastructure for such democratic systems. As an individual left one island she was assumed to immediately join another. The theory of workplace democracy did not address examples associated with experiences of being outside the labor force altogether, unemployment, transitions between work, peripheral work and informal work. It was an industrial image that never really discussed the fundamental problem of exclusion from the workforce. However, when the regime of accumulation was fundamentally Fordist, percepts of workplace democracy resonated with the image of democratic-like stability – an internal labor market with a guarantee of tenure, above-market wages, mutual lock-in, code of behavior, and almost seamless integration of local residence, economic dependence, social rights and cultural obligations.⁴⁹ While generally far from the normative benchmark of democracy, there was a defined community, some form of power sharing (e.g., through collective bargaining) and a certain level of workers' rights enshrined in collective agreements and/or statutes. Absent direct treatment of those who were left outside the workplace polity, the radical discussion of workplace democracy at the time was at risk of elitism. It was somewhat similar to Athenian democracy for the men-heads of households, although it laid the foundations for thinking about democracy and work in a more inclusive fashion.

With the move to post-Fordism, any attempt to continuously adhere to the image of an archipelago collapsed. The share of workers that take part in a stable workplace community where the traditional institutions of workplace democracy can be installed gradually declined. Some institutions that were traditionally associated with workplace democracy remained isolated national practices, for example- board-level co-determination. Others declined although not in all nation states and not to the same level, as was the case of trade union representation. Some arrangements expanded, but in a restricted manner within the western democracies and most notably in Europe, for example – works councils.⁵⁰ Some new institutional forms that were associated with workplace democracy were in fact for the most part loose market-based mechanisms in which the details revealed little conformance with the justification of workplace democracy and its central institutional tenants, as was the case of ESOPs.⁵¹

⁴⁸ Judy Fudge, *Blurring Legal Boundaries, Regulating for Decent Work*, in: Judy Fudge, Shae McCrystal and kamala Sankaran (eds) CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION 1-26 (Oxford, Hart 2012); Jill Rubery, *Introduction: Fragmenting Work Across Organizational Boundaries* in: Michael Marchington et al (eds), FRAGMENTING WORK: BLURRING ORGANIZATIONAL BOUNDARIES AND DISORDERING HIERARCHIES (Oxford, Oxford University Press, 2006)

⁴⁹ For a description of the Fordist era: Peter Cappelli, Laurie Bassi, Harry Katz, David Knoze, Paul Osterman, Michael Useem (eds.), CHANGE AT WORK CHAPTERS 1, 3 (NY: Oxford University Press 1997)

⁵⁰ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council, later amended by Directive 2009/38/EC. On the prevalence of works councils see: Jelle Visser, VARIATIONS AND TRENDS IN EUROPEAN INDUSTRIAL RELATIONS IN THE 21ST CENTURY'S FIRST DECADE." (2011).

⁵¹ see *supra* note 5

In this new market environment, the unfettered market is not the only solution on the map of ideas. Tracing Karl Polanyi's "double movement",⁵² marketization is often followed by various forms of regulation, for example - growing reliance on employment standards,⁵³ and attempts at improving the integration between activity in the labor market and social security⁵⁴. The push and pull forces of [marketization—regulation], [efficiency—distribution], are guided for the most part by acceptance of the following (liberal) script: labor, production and the organization of work are guided by private considerations, the public (the nation-state) guides the private by a set of substantive norms ('employment standards') and only to a limited degree by the establishment of labor market institutions and intervention in the labor process.⁵⁵ Intervention can sometimes be justified in terms of efficiency, while other times it is weighed against distributional concerns ("workers suffer from intrinsic market weakness and therefore labor rules correct the weakness"). This script views discussions of the workplace community as some form of category mistake; it brackets the attempt of forging deliberative democratic process; and it accords weight to the protection of workers' rights, however not as the democratic rights of constituents in a polity but as a remedy to private market inefficiencies or inequalities. The script is not wholly unrelated to the justifications of workplace democracy. It is associated more strongly with some justifications (economic inequality) than with others (the deontological argument, self fulfillment and the workplace as a learning laboratory). However, it is no longer rehearsed in democratic terms.

(ii) *Globalization:*

The hyper-marketization of the labor market is accompanied by hyper-globalization, which affects both private and the public sphere.⁵⁶ This has a dual interaction with marketization. Globalization reduces the regulatory capacity of the state. At the same time it opens options for further disintegration of the workplace community.

In the past, institutional examples of workplace democracy were either a matter of local evolution and not the outcome of state fiat (e.g., the Mondragon conglomerate of cooperatives), or the outcome of regulatory intervention (e.g., shop-floor and board-room level co-determination in Germany). The former are not necessarily affected by globalization; the latter are. To the extent that regulatory attempts to foster workplace democracy encounter the resistance of capital then processes of globalization introduce more opportunities for forum shopping to avoid such regulation. Effective

⁵² Karl Polanyi, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIMES* (1944, reprinted - Boston: Beacon press 2001).

⁵³ Paul Weiler, *GOVERNING THE WORKPLACE* (Cambridge: Harvard University Press 1990); Cynthia Estlund, *REGOVERNING THE WORKPLACE* (New Haven: Yale University Press 2010).

⁵⁴ Gunther Schmid, *Towards a Theory of Transitional Labour Markets*, in: Gunther Schmid & Bernard Gazier (eds) *THE DYNAMICS OF FULL EMPLOYMENT – SOCIAL INTEGRATION THROUGH TRANSITIONAL LABOUR MARKET* 152 (2002)

⁵⁵ Richard Freeman, *Labor Market Institutions Without Blinders: The Debate Over Flexibility and Labor Market Performance*, 19 *INT'L ECON. J.* 129 (2006)

⁵⁶ Dani Rodrik, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (W.W.Norton 2012)

regulation requires to 'trap' the relevant segment of the economy (the labor market as a whole, or the sector) in full. The capacity of organizations to side step the regulatory provision creates an incentive for others to do the same, regardless of the effects of such evasion strategy on the net social gain. In the past states developed various strategies to ensure broad coverage of labor market norms, such as universal statutory provisions, extension decrees or sector-wide bargaining. The growing cleavage between primary and secondary working arrangement can be contained to an extent by regulatory provisions and collective agreements. These institutional solutions are only effective within the confines of the nation state. However the labor market is no longer confined in the same way. The nation-state can attempt to induce a stronger sense of community by rendering subcontracting more difficult, but its power to contain off-shoring to other countries is severely limited. Globalization therefore weakens the regulatory state and opens a host of opportunities for doing away with the a-priori notion of workplace community.⁵⁷ It should be emphasized that while some sense of 'workplace' remains when part of production or services is subcontracted to workers who work on the premises (the 'place'), global arrangements send production and services to far away and remote places, spreads risk by dividing production between numerous contractors and doing away with a sense of shared 'place' to begin with.

Marketization and globalization share a common feature – they both disintegrate a sense of community. It should be emphasized that I state this in a value-neutral way. Communities are a safe haven but also a source of exclusion.⁵⁸ Whether the old sense of community was preferable to the contemporary Dali-esque sense of community is a matter to be taken elsewhere. Regardless, I claim that the two processes are crucial to the loss of interest in the idea of workplace democracy. Considering the organization in which we work to be a 'work-*place* community' is a relic of the past that remains relevant to an ever-shrinking share of the workforce. This process actually matches and trumpets the concerns about the future of state-place democracy. Oddly, to the extent that the concept of workplace democracy sought to synchronize the organization of the public and the private, its decline is because the two are strongly synchronized in their transformation. Emphasizing the changing nature of community, the following questions of identifying the most appropriate democratic process and corresponding rights remain equally challenging.

(iii) Reclaiming the work-place democratic nexus

Are the relative disintegration of traditional work-place and the dilution of state-place communities detrimental to the concept of workplace democracy? Looking at the four justifications that were traditionally offered, not all are damaged to the same extent. The concern of economic inequality on the one hand and inadequate access to material and social resources remains a major challenge, even when multiple

⁵⁷ Guy Mundlak, *De-Territorializing Labor Law*, 3(2) LAW & ETHICS OF HUMAN RIGHTS 189 (2009)

⁵⁸ Sheldon Wolin, *Fugitive Democracy*, 1 CONSTELLATIONS 11 (1994).

communities serve as a framework for the analysis.⁵⁹ Various concerns of social rights and the building of individual capabilities and advancing human flourishing sustain this justification, and preserve the link between democratic participation and outcomes. The literature on capabilities further resonates with the quest for increasing self-fulfillment and well-being in multiple spheres of life.⁶⁰

The view of the workplace as a learning laboratory for democratic practice at the state level remains relevant although it seems that the two ends of the equation have been toned down. The work-place is no longer *the* central locus of practicing democracy, and the nation-state is not necessarily the ultimate end towards which democracy should be practiced. Instead, there is a growing emphasis on multiple representations of identities in numerous arenas, constituting an active civil society that spans across geographical borders.⁶¹

Robert Dahl's "all-subjected" argument remains particularly compelling and timeless because of its deontological nature, but it is also the most difficult to decipher in light of marketization and globalization. The argument reflects the sense of a democratic deficit that is gradually growing with the loss of community; a new anomie of sort. Who are "all those who are subjected"? Who should be accorded with power and rights and who are the bearers of duty?⁶² The growing cleavage between primary and secondary labor markets and the extension of the labor market beyond the boundaries of the nation state severely problematize the image of congregating all those who are subjected to decide on the norms affecting the community

The objectives and justification of workplace democracy remain in place but in attempting to point at what they suggest we need to abandon the Fordist design, and even more so – the assumption that the economic organization can perform in a matter that is similar to the Athenian town meeting, or as a second best to a representative democratic system in a small community. Rather than democracy at the workplace community, we need to rethink work and its organization as part and parcel of a renewed democratic order.

A major challenge in rethinking the relationship between the organization of work and democracy is that the different justifications may have very different implications.

⁵⁹ Bernhard Gunter and Ralph van der Hoeven, *The Social Dimension of Globalization: A Review of the Literature* 143 (1-2) INT'L LAB. REV. 7 (2004).

⁶⁰ The capabilities approach is based first and foremost on the works of Amartya Sen and Martha Nussbaum. Nussbaum, Martha, *Non-Relative Virtues: An Aristotelian Approach*, and Amartya Sen, *The Quality of Life*, both in: Martha Nussbaum & Amartya Sen, (eds.) *THE QUALITY OF LIFE* (NY: Oxford Clarendon Press 1993). On the matter of self fulfillment that connects some of the concerns of traditional workplace democracy and the capabilities approach: see Alan Gewirth, *SELF FULFILLMENT* (Princeton: Princeton Univ. Press 1998)/

⁶¹ Gay Seidman, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS AND TRANSNATIONAL ACTIVISM* (NY: Russell Sage Foundation 2007); Nancy Fraser, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (NY: Columbia Univ. Press 2010).

⁶² On the problems in developing a sound theory of global justice generally, see: Christian Barry and Thomas Pogge, *Introduction* in: C. Barry and T. W. Pogge (ed) *GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE*, (Oxford: Blackwell, 2006); in the labor context note in particular – Marion Iris Young, *Responsibility and Global Labor Justice*, 12(4) *THE JOURNAL OF POLITICAL PHILOSOPHY* 365 (2004).

Some may require considering global arrangements, such as the implications of trade and migration on the supply and demand of work in global labor markets. Questions about the scope of permissible action against dumping, tinkering with labor standards in different countries, the opening of free export trade zones, or the closing of border to migration, may all have a significant impact on employment opportunities and access to work. What does the work-democracy nexus require in determining the movement of labor and capital worldwide?⁶³ At the same time, solutions to such questions are likely to be remote from practice of participation at the shop floor level. Questioning the practices of off-shoring and limits on the movement of capital or workers is unrelated to participatory practice at work, self fulfillment and the workplace as a learning laboratory.

The idea of promoting democracy at work in the Fordist era assumed that democratic practices at the shop-floor and the national level are interrelated. With the processes of globalization and marketization, any truth that was vested in the prior assumption faces more severe challenges.

4. The proceduralization of labor law – beyond employment standards and the invisible hand

Rather than linking workplace and democracy with a fixed set of institutions, it is possible to consider their relationship as denoting isomorphism between the search for new democratic structures at the state and in non-territorial communities such as the workplace.⁶⁴ Alluding to the components of a democratic order – community, a process that takes place between agents with roughly equal power and the protection of rights – these should guide the attempt to reconstruct democracy when the nation-state is no longer sole maker of norms and when the workplace is fragmented and dispersed.

(i) new institutional appearances of workplace – democracy? The proceduralization of labor law

Some of the more recent (well into the post-Fordist era) regulatory attempts pursue the traditional agenda of democracy at the workplace. The Directive on European Works Councils may be a relatively weak example, but one of the last examples of the older tradition.⁶⁵

⁶³ The questions of democracy, work and the global labor market are discussed more extensively in: Judy Fudge & Guy Mundlak, *Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State* (forthcoming 2013).

⁶⁴ The workplace is not the only non-territorial venue for implementing democracy, and democracy can serve as a guiding principle for governing social relationships generally. See: Ian Shapiro, *DEMOCRATIC JUSTICE* (New Haven: Yale University Press 1999).

⁶⁵ *Supra note 50*.

Adaptation of other traditional means associated with workplace democracy are more complex but suggestive of new directions. Consider for example trade unions' activism across borders. Such was the case of the port workers' industrial action around the world, in solidarity with the plight of the Liverpool dock workers at the time of privatization.⁶⁶ Absent effective power to take part in their own work-place, the dockworkers turned to their occupational peers world-wide, who in turn took industrial action in opposition of the Liverpool dock privatization. In this instance globalization and marketization created both the conditions for the workers' disadvantage but also the opportunity. The community of the Liverpool dock intertwined with a global occupational (or sectoral) community. Disempowerment in one community was counter-balanced with the positive power accumulated through cross-border collective action and the negative power the occupational community exerted over the British government and the private employer managing the Liverpool dock. The right to association in various countries made global alliances somewhat possible, but absent a thicker conception of fulfilling the right to association the efficacy of transnational action was truncated.⁶⁷ The role of promoting the right and securing it was taken up more persistently by the ILO thereafter, indicating yet a third community and institutional intervention.⁶⁸ In this example I emphasize the multiple spheres of influence – ranging from individual action at the place of work to the agenda set by the ILO to promote core labor rights, including the freedom of association as a way of promoting a 'fair globalization'.⁶⁹ Moreover, current proceduralization is strongly linked to traditional forms of collective representation, but also challenges them as well, admitting a more diverse set of collective voices.⁷⁰

New process-based labor law is emerging at multiple levels. The most systematic and rigorous account of this new trend was conducted by Cynthia Estlund who emphasized developments in the United States, attributing them in part to the 'ossification of American labor law'.⁷¹ David Doorey offers a similar account that is embedded in Canadian law, but based on general premises that connect proceduralization, with an emphasis on decentering, and democracy.⁷² Developments

⁶⁶ On the plight of the Liverpool Dock workers see: Noel Castree, *Geographic Scale and Grass-Roots Internationalism: The Liverpool Dock Dispute, 1995–1998*, 76(3) *ECON. GEOG.* 272 (2000).

⁶⁷ James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl & Karl Klare (eds), *LABOUR LAW IN AN ERA OF GLOBALIZATION* (Oxford: OUP 2004).

⁶⁸ ILO Declaration on Fundamental Principles and Rights at Work (1998); ILO Declaration on Social Justice for a Fair Globalization (2008); ILO, *FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED. GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK. REPORT OF THE DIRECTOR-GENERAL* (2008).

⁶⁹ For other comprehensive case studies of transnational unionism, see: Kate Bronfenbrenner (ed), *GLOBAL UNIONS: CHALLENGING TRANSNATIONAL CAPITAL THROUGH CROSS-BORDER CAMPAIGNS* (Ithaca: Cornell ILR Press 2007); Also see - ILO, *Fair Globalization: Creating Opportunities for All* (2004) [<http://www.ilo.org/public/english/wcsdg/docs/report.pdf>]; Alan Hyde and Mona Ressassi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionization* 14(3) *CAN. LAB. & EMPL. L. J.* 271 (2006).

⁷⁰ Gay Seidman, *supra* note 61; Guy Mundlak, *Labor Rights as Human Rights: Why Don't the Two Tracks Meet?* 34 *J. OF COMP. LABOR LAW AND POLICY* 7 (2012)

⁷¹ Estlund, *supra* note 53.

⁷² David Doorey, *A Model of Responsive Workplace Law*, OSGOODE HALL. LJ (*forthcoming* 2012).

within European states, as well as at the European level are observed throughout Europe as well.⁷³ However, this new trajectory exceeds the boundaries of North America and appears in both scholarship and practice worldwide. It infiltrates the organizational structure of the single firm, but also affects supply chains, trade arrangements and non-territorial developments in the realm of corporate social responsibility.

The appearances of the new proceduralism are many. With regard to employment standards, there is a turn to process based law (or a continuation of past Fordist practices). Rather than merely setting standards (the level of minimum wage or the maximum number of working hours), compliance is becoming process-based. Dismissals require due process hearings (Israel)⁷⁴ and layoffs require preparation of a social plan (Germany).⁷⁵ Workers' privacy requires clear guidelines and consultation with works councils (Italy)⁷⁶ or information and monitoring by a privacy ombudsman.⁷⁷ Companies are required to conduct self-audits to guarantee compliance with wage requirements as well as occupational health and safety. These reduce the heavy hand of the public regulator.⁷⁸ Anti-discrimination and equal opportunities regulation requires explicitly or implicitly well-documented diversity programs.⁷⁹ Sexual harassment is a matter for internal self-monitoring and enforcement within organizations.⁸⁰ Standardized terms in sector- and nation-wide collective agreements can be derogated at the enterprise level following consultation.⁸¹

⁷³ Deakin & Ralf Rogowski, *Reflexive Labour Law, Capabilities and the Future of Social Europe*, in: Ralf Rogowski, Robert Salais, Noel Whitesdie (Eds), TRANSFORMING EUROPEAN EMPLOYMENT POLICY: LABOUR MARKET TRANSITIONS AND THE PROMOTION OF CAPABILITY 229 (Cheltenham: Elgar Press 2012).

⁷⁴ Sharon Rabin Margalioth, *Regulating Individual Employment Contracts Through Good Faith Duties*, COMP. LAB. L & POL. J. 663 (2011)

⁷⁵ Clyde Summers, *Worker Dislocation: Who Bears the Burden-A Comparative Study of Social Values in Five Countries*; 70 NOTRE DAME L. REV. 1033 (1994-1995).

⁷⁶ Lawrence E. Rothstein, *Privacy or Dignity: Electronic Monitoring in the Workplace*, 19(3) NY L. SCH. J. OF INT'L AND COMP. L., (2000) 379-412.

⁷⁷ On the importance of an ombudsman and an internal grievance mechanism for the clarification of norms, see: Karen Loch, Sue Conger & Effy Oz, *Ownership, Privacy and Monitoring in the Workplace: A Debate on Technology and Ethics*, 17 J. OF BUS. ETHICS 653 (1998). Internal procedures may be mandated by law (e.g., as indicated in Israeli case-law, in National Labor Court 90/08 312/08 Issakov-Inbar et al. – the Commissioner for the Women's Work et al. (8.2.2011)), or promoted as a model business practice, (e.g., in Australia: Australia Fair Work Ombudsman, Best Practice Guide: Workplace Privacy (<http://www.fairwork.gov.au/BestPracticeGuides/08-Workplace-privacy.pdf>)). Internal procedures are also suggested as sound business policies in the shadow of law. See for example: Ian Turnbull, *PRIVACY IN THE WORKPLACE* (2009).

⁷⁸ Eric Tucker, *Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom* OSGOODE CLPE RESEARCH PAPER No. 38/2012 (2012).

⁷⁹ Frank Dobbin, Kim Soohan & and Alexandra Kalev, *You Can't Always Get What You Need Organizational Determinants of Diversity Programs*, 76(3) AM. SOC. REV. 386 (2011).

⁸⁰ Jean Cohen, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (Princeton: Princeton Univ. Press 2002).

⁸¹ Derogation rules in Europe vary from clauses in legislation that enable derogation in collective agreements or even in negotiations with works councils, and derogation that takes place in the interaction between sectoral and enterprise bargaining. See for example in the context of wage

Together with these national regulations, international, supranational and transnational law also point at new processes. These require self-enforcement of labor standards by nation states, coupled with mutual obligations that include reporting and dispute resolution measures. International institutions gradually increase access to the representation of new interests. Although these are currently very limited in scope, there are budding attempts to increase the deliberative space in the making of norms and the resolution of transnational disputes.⁸²

Complementing the local (national) and transnational proceduralization of labor law, corporate social responsibility gains more attention, as well as controversy. Codes of conduct and practice that are developed within multinational corporations are complemented by international standards.⁸³ Some of these standards set substantive norms (SA8000), while others require corporations to comply with their own self-imposed standards (such as ISO26000).⁸⁴ In addition a host of reporting requirements, such as the Equator Principles, generates a growing need of corporations to document and demonstrate the extent of engagement with social (labor or “green”) issues, even if the corporation chose to maintain a level of minimal compliance.⁸⁵ Such requirements also appear in the bylaws of stock exchanges, which require companies that file to be traded to demonstrate a well ordered and documented set of human resource practices.⁸⁶

What are the implications of the proceduralization of labor law and how does it respond to the decline of the traditional praxis of workplace–democracy?

(ii) *proceduralization as democracy*

There are several reasons to the linkage between the proceduralization of labor law and the justifications underlying the work–democracy nexus. Identifying the connection between the normative idea and the institutional developments can also aid in identifying the partial nature of democratic development, its limitations and the way to draw on proceduralization in the future.

Process-based law appears in lieu of traditional workplace processes. Where unions, co-determined boards of directors, works councils (and to a much lesser degree - workers *qua* owners in shareholders meetings) prevailed before, at present communities with a democratic habitus are becoming less common. Where traditional

bargaining - Maarten Keune, *Derogation Clauses on Wages in Sectoral Collective Bargaining in Seven European Countries* (Eurofound, 2010) (<http://www.eurofound.europa.eu/pubdocs/2010/87/en/2/EF1087EN.pdf>).

⁸² See Fudge & Mundlak, *supra* note 63

⁸³ Dara O'Rourke, *Multi Stakeholder Regulation*, 34(5) *WORLD DEVELOPMENT* 899 (2006).

⁸⁴ Dirk Ulrich Gilbert, Andreas Rasche & Sandra Waddock, *Accountability in a Global Economy: The Emergence of International Accountability Standards* 21(1) *BUSINESS ETHICS QUARTERLY* 23 (2010).

⁸⁵ John Conley & Cynthia Williams, *Global Banks as Global Sustainability Regulators: The Equator Principles*, 33(4) *LAW & POLICY* 542 (2011).

⁸⁶ Guy Mundlak & Issi Rosen Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment* 12 *Theoretical Inquiries in Law* 603 (2011).

processes prevail the new process-based law need not undermine them.⁸⁷ The new proceduralization is all the more evident in organizations where such formal institutions are absent.

At the same time, all organizations in which people work are regulated by substantive (minimum) standards, albeit different workers are situated differently in terms of regulatory coverage.⁸⁸ Even the informal sector is often time not wholly devoid of standards. Process-based standards seek to introduce what result-oriented standards avoid – forging a deliberative encounter between individuals and groups who hold different interests – together they can dispute the norms, listen, use force, reason, decide to litigate or even strike, sabotage, or cooperate. These are the encounters that enable, when performed at their best, to assess one's interests in light of those of others, to persuade, to listen, to identify cooperative solutions, to legitimize tradeoffs, to test performance of promises and forge trust. Clearly less ideal are solutions of negative power. However even those equip workers with countervailing powers that are qualitatively similar to the telos of the old labor (even if not to the same degree). There is no need to idealize the deliberative moment, and it is often conducted under circumstances of distorted communications. But process-based law at least facilitates interactive iterations that can be followed upon.

A second feature of the new proceduralization is that it takes place at multiple levels in a method that incrementally creates congruence in norms. In the past, it was somehow assumed, and less frequently practiced, that the representation of workers in the democratic firm would also be translated into an improved democratic process at the public sphere. However it was rarely made clear how the organization of work at the shop floor and enterprise levels, translates into democracy at the state level. Similarly, corporatist nation-wide bargaining was possibly related to enterprise-based participation, but not necessarily so. As marketization and globalization fragmented the organization of work, these possible connections became even more tenuous. What is striking about the current emergence of process-based law is that norms of different kinds draw on similar ideas of visibility (information forcing rules), due process, accountability; the congruence appears with regard to norms at different levels – the enterprise vis-à-vis its workers, the state vis-à-vis plural voices of work providers (trade unions, work centers, identity-based organizations), the state vis-à-vis other states (e.g., the European Employment Strategy that is based on the open

⁸⁷ There are however possible implications to legislative recognition of nonunion forms of representation and to processes without adequate workers representation. These can also impair existing institutions of voice and representation. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation*, 94 COLUM. L. REV. 753 (1994).

⁸⁸ Leah Vosko, *MANAGING THE MARGINS: GENDER, CITIZENSHIP AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* (Oxford: OUP 2011). It is noteworthy that the discussion addresses *workers*, rather than employees, assuming a loose meaning that is intended to capture a host of relationships that extend beyond the formal employment relationship. Mark Freedland & Nicola Kountouris, *THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS* (Oxford: OUP 2011). This is particularly important because institutions of workplace democracy in the past sought to develop alternative means for obtaining work and services, to prevent the dilution of the workplace community. Such practices were fatal to the democratic quality of the community and in some institutional configurations brought to their demise (e.g., the degeneration of workers co-ops).

method of coordination),⁸⁹ international organizations vis-à-vis member states and International NGOs and trade unions (e.g., in WTO dispute resolution processes),⁹⁰ multinational companies vis-à-vis consumers, organizations and financial institutions.

Thirdly, considering the multiple levels of process-based law that is emerging, there is no longer an assumption that workers are constituents of a stable work community. Instead, a more radical form of democracy is being practiced. In this new form, work and the *work-place* are part and parcel of a broader engagement in which agents of different sorts are taking an active part in transformative practices.⁹¹

It is best to demonstrate the meaning of the new form of workplace-democracy to which I am referring by pointing at several studies of “best practice”, all of which are deservingly cautious.

Locke and Romis look at Nike’s self monitoring system, in which a corporate code is applied to and monitored in hundreds of suppliers worldwide.⁹² The quantitative data suggest that corporate codes are hardly a panacea for constant improvement, but they also indicate that self-monitoring and enforcement by a multinational can work in some places and some of the times. In a qualitative study that compares two similarly situated plants in Mexico, they attempt to identify what makes performance better in one factory compared to the other. The findings are aligned with those that demonstrate that a ‘race to the bottom’ is not always the case. The factory with slightly higher labor costs enjoys better productivity. Although it shares with the other factory adherence to the minimum wage and minimum labor standards, it adopts team-work incentives, offers overtime as a gainful option rather than a mandatory requirement, involves workers in participatory management, engages in collaboration with the local trade union, initiates joint committees in areas such as health and safety. It was found that the factory welcomed Nike’s headquarters intervention in its human resource management, working in collaboration on improving human resource practice as part of the production design. This factory is contrasted with the other in which hierarchical relationships prevail, the union is avoided to the extent possible, and the relationship with both the state and the multinational company is hierarchical and minimized as well. Consistent with these findings, the level of workers’ satisfaction in the collaborative plant was higher than in the hierarchical one.

⁸⁹ On the open method of coordination: Jonathan Zeitlin, *Is the Open Method of Coordination an Alternative to the Community Method?*, in Renaud Dehousse (ed.), *THE COMMUNITY METHOD: OBSTINATE OR OBSOLETE?*, Basingstoke: Palgrave Macmillan, 2009; Diamond Ashiagbor, *THE EUROPEAN EMPLOYMENT STRATEGY: LABOUR MARKET REGULATION AND NEW GOVERNANCE* (Oxford: Oxford Univ. Press 2006).

⁹⁰ Andrew Lang, *WORLD TRADE LAW AFTER NEOLIBERALISM : REIMAGINING THE GLOBAL ECONOMIC ORDER* (Oxford: OUP 2011); Andrew Lang, *Trade Agreements, Business and Human Rights: The case of export processing zones*. CORPORATE SOCIAL RESPONSIBILITY INITIATIVE WORKING PAPER NO. 57. (2010); Marcos A Orellana, *WTO and Civil Society*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* (Oxford: Oxford University Press 2009) 671-694.

⁹¹ This resonates with the notion of radical democracy, See: Ernesto Laclau & Chantal Mouffe. *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (London: Verso 1985).

⁹² Richard Locke and Monica Romis, *The Promise and Perils of Private Voluntary Regulation: Labor Standards and Work Organization in Two Mexican Garment Factories*, 17(1) *REVIEW OF INTERNATIONAL POLITICAL ECONOMY*, 45 – 74 (2010).

The comparison between the two factories should also be read as part of the more general transformation in CSR practices in Nike. The multidimensional democratic practice in this example is revealed in shop floor level participation and deliberations, interaction between management and the external union (representing a broader set of interests than merely those of the plant's workers), collaboration of the supplier and the multinational company, and pressure on the multinational company by consumers worldwide. It is the diffusion of democratic practices to the various levels that makes it matter to the workers themselves, as well as to other constituents of the firm.

A rather similar finding can be found in the study of Rodríguez-Garavito of transformative action taken in textile plants in Mexico and Guatemala.⁹³ Like Locke and Romis he warns that corporate social responsibility in itself is not enough and emphasizes the role of external social agents – trade unions and social movements – that draw on CSR instruments to induce change. To further their capacity to do so, he requires strengthening ‘enabling rights’, that is – rights that enable individuals and groups to voice their concerns and make their demands. The workers’ participation in successful instances of change was nested in the community, familiar and local government’s support; unlike other instances where the workers were by themselves. Workers’ voice enabled to impose local pressure, rather than merely rely on the power of consumers worldwide. He identifies successful change as being constituted by new international communities of accountability. In this he warns against unfounded belief that the mere opportunities for deliberations are enough, noting that grave inequalities persist, hence making representation and support by various communities necessary, as well as maintaining minimum international and national labor standards.

Mark Barenberg looks at transnational enforcement mechanisms that nest in trade law, international labor standards and measures of private self-enforcement measures.⁹⁴ Carefully observing the advantages of multiple domains of enforcement he also observes their cumulative weakness, leading to a recommendation of essential ingredients of effective enforcement. What makes the project important is the integration of regulatory technique with the emphasis on components of democracy. One of the features he recommends address democracy explicitly, stating that: “Ensure that the commissions are democratic in the sense that (a) the bodies that formulate the criteria and performance measures and that oversee the investigative staff are comprised of worker representatives and jurists, and (b) prior to worker representatives’ and jurists’ promulgation of the criteria and measures, other interested and knowledgeable actors, such as domestic enforcement officials, specialists in production systems, specialists in occupational health, managerial representatives, representatives of the informal sector, women’s organizations, and village associations, participate in the bodies’ deliberations.”⁹⁵ Moreover, he advocates the active participation of workers in the enforcement process, and enhancing administrative, employers and workers’ capacities to engage in the enforcement process. Finally, his proposal brings together a host of public and private

⁹³ César A. Rodríguez-Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 33 *POLITICS SOCIETY* 203 (2005).

⁹⁴ Mark Barenberg, *Sustaining Workers’ Bargaining Power in an Age of Globalization*, *ECON. POL. INST. BRIEFING PAPER #246* (2009).

⁹⁵ *Ibid* at 23.

measures that equally rely on decision making in the highest international fora and at the shopfloor in a local community.

Kevin Kolben reaches similar conclusions in studying the use of transnational trade and labor laws. He designates his approach as a development approach, although it is different from traditional studies of law and development, which focus mostly on enhancing economic growth. The objectives are – “ that trade and labor regimes should be oriented toward catalyzing and reinforcing the development functions of labor regulation, and toward creating institutions that further labor-development objectives. These objectives include expanding worker capabilities and promoting democracy and citizenship both in the workplace and in the nation-state.”⁹⁶ Kolben underscores the need to devise regional institutions that will bridge transnational norms with localized ones; institutions that will enable transformation at both the global and the local levels.

These examples emphasize renewed conception of the ‘work – democracy’ nexus in a transnational setting, but they are not limited to such setting and can be viewed at the most local settings as well. For example, studies of successful local living wage campaigns emphasize similar factors for success.⁹⁷ These studies demonstrate that successful living wage campaign affects the workplace beyond and above the mere increase of minimum wages. At the same time they also observe that the capacity of workers to organize in trade unions, as well as in other forms of associations, and obtain the support of the local community and other social advocates, aids in achieving living wage legislation.⁹⁸ Hence we see a process of dual causality where public change and the organization of work affect one another.

The notion of democracy that is advocated here is one in which democratic practice is not relegated solely to forms of regulation by democratically elected representatives, but also does not assume the feasibility of direct democracy that resembles old town meetings. Identifying these interactions *within* and *between* workplaces and other spheres of action deviates from the traditional conception that viewed the workplace as a discrete venue of action. Marketization and globalization render the focus on the discrete firm ineffective at best, but also potentially precarious – because the effects of improving the lot of insiders may harm those who remain outside.⁹⁹ The growing reliance on self-regulation, private governance and soft-law methods also obscure

⁹⁶ Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 WAKE FOREST L. REV. 355 (2010).

⁹⁷ Stephanie Luce, *Fighting for a Living Wage* (Ithaca: Cornell, ILR Press 2004); Charles Hecksche and Franciose Carré, *Strength in Networks: Employment Rights Organizations and the Problem of Co-Ordination*, 44(4) BRITISH J. OF INDUSTRIAL RELATIONS 605 (2006); Jane Holgate, *Contested Terrain: London’s Living Wage Campaign and the Tensions between Community and Union Organising*, in COMMUNITY UNIONISM: A COMPARATIVE ANALYSIS OF CONCEPTS AND CONTEXTS 49-97 (J. McBride and I. Greenwood (eds.) 2009);

⁹⁸ Compare to the study of transformative employment practices in a ‘place’ (Los Angeles) in: Katherine Stone & Scott Cummings, *Labor Activism in Local Politics: From CBAs to ‘CBAs’*, in: Guy Davidov & Brian Langille (eds), *THE IDEA OF LABOR LAW* 273 (Oxford: OUP 2011).

⁹⁹ Anne C L Davies, *Identifying ‘Exploitative Compromises’: The Role Of Labour Law In Resolving Disputes Between Workers* CURRENT LEGAL PROBLEM (2012); Guy Mundlak, *The Third Function of Labor Law*, in Guy Davidov and Brian Langille, *THE IDEA OF LABOR LAW* (Oxford: Oxford University Press 2011).

public-private distinctions. States compete among themselves in a private-like manner for direct foreign investment and multinational companies are held accountable for social rights in a public like manner. The state, the firm, the community, the organizations of civil society are not all one and the same but they are gradually becoming subjects of similar set of values. Consequently, there is an extensive reliance on legal rules and social norms that admit new players, legal and social processes that facilitate interaction or aid in forming and resolving social disputes, and incremental congruence between different layers of norms – local and international, hard and soft.¹⁰⁰

Looking back at the three pillars of democratic institutions at work, the examples point at the following conclusions. First, the community of work is disassociated from a 'place' and is de-centered at multiple venues that affect the experience of workers. Second, democratic process remains a central aspect of the democratic order, drawing predominantly on legal concepts that originally governed the public sphere. Thirdly, rights remain an essential ingredient for the democratic quality. These include rights of entry (right to work); procedural rights of participation (including traditional rights to associate in a trade union or participate in elections for a works councils, but also alternative forms, such as the right to protest and demonstrate, rights of displaying solidarity with others, right to speak and persuade within and outside the work communities); and substantive rights that decommodify the workers' gains. Achieving this latter set of rights is potentially the Achilles heel of proceduralization.

(iii) Caution and promise in rethinking workplace – democracy

The proposed view of workplace–democracy is subjected to two opposite claims. On the one hand it may be argued that looking at the proecduralization of labor law as a form of workplace democracy is giving up on the radical transformative potential of what the discourse on workplace democracy was all about – realigning property rights, changing the nature of production, and constituting communities of value. On the other hand, others may see the favoring of renewed and reinvigorated interest in enabling rights and process oriented labor law as an attempt to admit a social democratic agenda through the backdoor; slightly dressed up and modernized, but still an attempt to interfere with markets.

The first claim requires strong consideration because the studies on process-based law indicate that processes may be reduced to rituals or window-dressing, particularly in the absence of labor collectivities and representation in their traditional form.¹⁰¹ The challenge is not to assume that all players are held equal in the new process, but to recognize the ongoing inequality of negative power, as well as differences among stakeholders in the capacity to exercise the right to collective action and their ability

¹⁰⁰ Diane Frey, *A Diagnostic Methodology for Regulating Decent Work*, in: Sangheon Lee and Deirdre McCann, *REGULATING FOR DECENT WORK 339* (Geneva: ILO).

¹⁰¹ There are various formulations of this critique. See for example the words of caution voiced by Harry Arthurs on new trajectories for labor law, in Harry Arthurs, *Labour Law After Labour*, in: Guy Davidov & Brian Langille, *THE IDEA OF LABOUR LAW* (Oxford: OUP 2011)

to rely on positive forms of power.¹⁰² Process based law cannot substitute and replace substantive standards and struggles for expanding minimum rights at the global labor market. Process based law aids in identifying who can take part in these struggles, what makes the use of power effective, and presents entry ports through which social agents can enter and try to impact the organization of work and the labor market. The rights-component of democratic theory is as relevant today as it ever was in the workplace, the local community, the school, the state and the global labor market.

In this sense the emphasis on workplace democracy is not on making the free market/regulation or the efficiency/distribution debates outdated. Instead, it should be viewed as an added layer that looks at values that are bracketed or marginalized – self fulfillment, participation as an end in itself, the positive effects of deliberations, and economic inclusion. These values are translated into institutions that seek to expand capacities for impacting further change, for empowerment of individuals and groups and for creating bases of power that are sustained over time. Some fail while others succeed. The alternative to process-based law is not consistently effective in changing power structures just as much. Command and control regulation and even the tweaking of property rights, at times when the notion of community is punctured, is far and remote, haphazard, and does not necessarily stand empirical tests. Moreover, losses in the content of rights may be offset with gains in the internal legitimacy of norms that are the outcome of deliberations, when compared to the legitimacy accorded to norms that are imposed from weakening regulatory public bodies.

The response to the first critique also leads to the second. Labor market inequalities, the distinction between “contract makers” and “contract takers”, and the positive externalities and benefits of democratic practice at different levels are all relevant at present as they were in the past. This does not render the normative trajectory of workplace democracy or the institutional prescription of process-based law to be a mere rehearsal of archaic institutions. On the contrary, there is a strong adaptation in the renewed focus, given the changing nature of states and enterprises alike.

The theory of workplace democracy always embraced different institutional orientations, including more far-reaching approaches that sought to re-write the norms of property and contract, and approaches that nested comfortably within neoliberal writings and sought to improve workers’ productivity and advance the joint interests of labor and capital. The added value of workplace democracy to current debates on regulation and governance of the labor market and the organization of human resource management should not be measured simply as a matter of weighing baggage. What it does add is the framing of questions that both the ‘Washington consensus institutions’ and national trade unions should be concerned with.

¹⁰² Claus Offe & Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form* 1 POLITICAL POWER AND SOCIAL THEORY 67 (1980).