A NEW 'CONSTITUTING NARRATIVE' FOR LABOUR LAW: A CRITIQUE OF DEVELOPMENT AND MAKING A CASE FOR FRASER'S CONCEPTION OF SOCIAL JUSTICE

Marlese von Broembsen

BA (Stell) LLB (UCT); MA Development Studies (UWC), Attorney of the High Court of South Africa
Senior Lecturer, Faculty of Law, University of Cape Town

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Marlese von Broembsen[1]

I. Introduction

Labour law scholars' efforts to engage with the challenges wrought by the new global order could broadly be conceived of as a two-fold endeavour: First, scholars are grappling with the implications for the future of labour law.[2] They argue that the law of collective bargaining relations is increasingly irrelevant to workers (as they are not unionised, are part of the army of informalised[3] workers without employment contracts, or are working in countries with minimal labour protection) laying labour law open to the charge that it is increasingly 'politically irrelevant and intellectually ossified'.[4] They argue that the 'constitutive narrative' of labour law as 'the law of collective labour

[1] BA (Stell) LLB (UCT); MA Development Studies (UWC), Attorney of the High Court of South Africa, Senior Lecturer, Faculty of Law, University of Cape Town.

[2] See Bob Hepple ' Restructuring Employment Rights ' (1986) 15 *ILJ* 69, 74; See also Hugh Collins, Paul Davies, Roger Rideout (eds) *Legal regulation of the employment relation* (Kluwer Law International, London 2000); Guy Davidov and Brian Langille (ed) *Boundaries and frontiers of labour law : goals and means in the regulation of work*, (Oxford University Press 2006); Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* Oxford University Press (2011); and Michael Fischl 'Running the government like a business: Wisconsin and the assault on workplace democracy' (2011) *Yale Law Journal Online* 39-68 (available at http://yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/E2809C running-the-government-like-a-business E280D:-wisconsin-and-the-assault-on-workplace-democracy/ (accessed 2 April 2012).

[3] Standing's term for workers who previously may have had a contract of employment, but whose work has become 'informalised' as employment rights are eroded through casualization, subcontracting, out-sourcing and permanent employment being replaced by contract work. See Guy Standing *Global Labour Flexibility: Seeking Distributive Justice* McMillan Books, London (1999).

[4] Harry Arthurs 'Labour Law after Labour' (2011) in (eds) *The Idea of Labour Law* at See also A. Hyde 'The Idea of the Idea of Labour Law' (ed*)* GuyDavidov and Brian Langille *The Idea of Labour Law (*Oxford University Press, 2011*)* wherein he concludes that labour law has no future. But Simon Deakin 'The Contribution of Labour Law to Economic and Human Development' in the same edition argues that labour law started off such a low base in the USA and the claim of ossification may be accurate for the USA (and Canada not for Europe or even South America.

relations' has to be replaced by a new 'constitutive narrative'.[5] Langille describes this as labour law's normative challenge.[6]

Second, labour law scholars are grappling with how to extend labour rights to include categories of workers other than employees, what Langille would refer to as labour law's conceptual challenge.[7] Two broad categories of workers who are excluded from labour law (in that they are denied the rights, benefits and protection synonymous with employment contracts and are excluded from collective bargaining) are identifiable. The first category comprises workers in developing countries that work in the informal economy. The second category comprises workers in both developed and developing nations who work in the formal economy, but who are denied the rights associated with the standard employment contract.

In seeking to reinvent labour law's constituting narrative, labour law scholars are exploring three new narratives: human rights[8], constitutionalism and development[9]. Human rights and constitutionalism are inherently universalist and would extend social rights to all citizens.[10] Both human rights and constitutionalism would dislodge the nexus between work and social rights and foreground the state as the primary duty-bearer to realise social rights.

The focus of this paper, however, is to challenge the idea of development as a new constituting narrative for labour law and to argue for a different narrative, namely social justice. I argue that orthodox conceptions of development are not concerned with distributive issues, which I argue has been and should remain (at least one of) labour law's normative goals. Several labour law scholars are citing Amartya Sen's capabilities framework as a new narrative. I argue that

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[5] Authurs ibid; see also Brian Langille 'Labour Law's Theory of Justice' (eds) Guy Davidov and Brian Langille *The Idea of Labour Law* at 101.

[6] Langille ibid at 101.

[7] Brian Langille, supra note 5, at101. Also see Alain Supiot, Beyond Employment – Changes in the Work and the Future of Labour Law in Europe (Oxford University Press 2001).

[8] The primary scholar who is arguing for labour law to be conceptualised in terms of human rights is Philip Alston. See for example Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime' *EJIL* 15 (2004) 457-521; Alston 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' *The European Journal of International Law* Vol. 16 no.3 467-480. Also see Philip Alston *Labour Rights as human Rights* (Oxford University Press 2005).

[9] See Simon Deakin 'The Contribution of Labour Law to Economic and Human Development'(eds) Guy Davidov and Brian Langille *The Idea of Labour Law (*Oxford University Press, 2011*).*

[10] In an age of migration, even citizenship would exclude the most marginal workers, such as illegal migrants and refugees.

Sen's framework is unsuitable as a constituting narrative, as it fails to engage adequately with political economy, and as a corollary, with power. Consequently it is unable to challenge corporate power, which I argue should remain a normative goal. Moreover, it does not address distributive outcomes, nor does it address the global dimension of work relations.

The paper seeks to contribute to the search for a meta-narrative that embodies labour law's traditional normative goals, but at the same holds possibility to respond to two conceptual challenges: first, to incorporate non-standard/atypical work, and second, to reflect a global dimension. Its conceptualisation must extend beyond the territorial state if it is to challenge transnational private and public corporations.

In part two of the paper, I outline my conception of labour law's normative goals as a bases for evaluating whether development is an appropriate constituting narrative. In part three, I briefly discuss two approaches to development that labour lawyers employ and critique development as a new normative goal for labour law. In part four, I make a case for embracing Nancy Fraser's global theory of justice as a new constituting narrative. I argue that Fraser's conception of justice at least conceptually addresses the global dimension of work relations, has a redistributive goal (which development does not) and potentially addresses both the normative and conceptual challenges that labour law faces. Finally, in part 5, I explore how Fraser's concept of justice as parity of participation might be realised in the context of work.

II. Labour Law's Constituting Narrative

There is a rich debate concerning the normative functions of labour law, which I won't rehearse here. Despite some contestation, Otto Khan Freund's imagery of collective bargaining as the 'countervailing force' to the power of capital still seems to capture the dominant ideological underpinnings of what labour law's normative function is and should be. While contemporary labour law scholars recognise that the role of collective bargaining is diminishing and new institutions will have to emerge, the broad church seems to be in agreement that labour law's normative function has to be about addressing the asymmetrical power between capital and labour. Writing about the reform of labour law, Sir Bob Hepple reminds us that 'the prime purpose of labour law is [still]…to

establish countervailing power in the labour market which assures equality of position between employers and the collective organizations of workers'.[11]

Weiss[12] and Dukes[13] argue that that two other foundational values characterise labour law: first, as enshrined in the Philadelphia Declaration, 'labour is not a commodity'. In other words, labour markets are not to be treated like other markets, since we are dealing with human beings rather than products or inputs.[14] Second, labour law is inherently concerned with protecting human dignity. Standing's distinction between work and labour comes to mind. He describes work as an activity that encompasses "creative, conceptual and analytic thinking and use of manual aptitudes". By contrast, labour he describes as:

> "arduous – perhaps *alienated work* – and epistemologically it conveys a sense of pain – *animal laborans*. We may define labour as activity done under some duress, and some form of *control* by others or by institutions or by technology, or more likely by a combination of all three. "[15]

Unmediated labour markets therefore inherently place labourers in a vulnerable position[16], with concomitant risks to their human dignity.

As a bulwark against capital's proclivity to commoditise labour, labour law's 'project' has been both to provide a procedural framework for the bargaining process, as well as substantive minimum protections for employees. [17] Langille makes a salient point, namely that the aim is not for workers to become subjects of 'law's largesse'. Instead, the idea of labour law is that by equalising

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[11] Hepple, supra note 2, at 315; see also Langille, supra note 5, at 105.

[12] Manfred Weiss 'Reinventing Labour Law?' (ed) Guy Davidov and Brian Langille *The Idea of Labour Law* (eds) Oxford University Press (2011).

[13] Ruth Dukes 'Hugo Sinzheimer and the Constitutional Function of Labour Law' (eds) Guy Davidov and Brian Langille *The Idea of Labour Law* Oxford University Press (2011). See also Langille, supra note 5.

[14] Manfred Weiss 'Reinventing Labour Law?' The Idea of Labour Law p 44; see also Fischl 'Labor Law, the Left, and the Lure of the Market' 94 *Marq. L. Rev*. 947 (2011) 947-958 at http://scholarship.law.marquette.edu/mulr/vol94/iss3/7.

[15] Standing, G *Global Labour Flexibility: Seeking Distributive Justice,* Macmilan, London (1999) at 4.

[16] See Guy Davidov 'Notes, Debates and Communications 'The (changing?) idea of labour law' *International Labour Review*, Vol.146 (2007), No 3-4 who argues that labour law's rationale is not based on labour's unequal bargaining power, since many other contracts are characterised by unequal relations, but rather because of the inherent vulnerability of labour vis-à-vis employers.

[17] Langille, supra note 5, at 110.

bargaining power, workers are empowered to exercise agency and become 'co-authors' of contracts.[18]

Judy Fudge conceptualises the normative underpinnings of labour law as those animating social democracy: freedom, social justice and human rights.[19] Similarly, Bob Hepple argues that critical to any new narrative for labour law is 'a clear ideology, one which is capable of forming the basis for a new social consensus', which must be grounded in 'central notions of democracy, rights and freedom'. He adds another rider, namely that it also 'promot[es] collective interests and genuine worker participation'. [20]

As 'freedom', 'social justice' and even 'human rights' are contested terms[21], I would argue for greater specificity in defining the normative function of a new narrative: First, collective bargaining was chosen as labour law's constituting narrative because it was recognised that the power relationship between capital and labour enabled capital to appropriate the surplus created by labour.[22] Thus labour law's normative function is inherently a redistributive one (which is not denying that it also has other functions).[23] A new narrative must therefore be concerned with redistribution.[24] Second, whereas historically redistribution was addressed in a national context, in the new global order (which is characterised by the mobility of capital, vertical disintegration of production and global value chains) labour law's normative function remains unchanged, but the frame is different: it now has to be concerned with global redistribution.

While there may not be 'a single grand theory' that could become a new constituting narrative, [25] development (in its multifarious conceptions), I argue, fails to fulfil the either the redistributive or the global criteria and is thus unsuited as a new constituting narrative for labour law. Below I discuss two

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[18] Langille, supra note 5, at 110.

[19] Judy Fudge 'Labour as a Fictive Commodity': Radically Reconceptualizing Labour Law' (ed) Guy Davidov and Brian Langille *The Idea of Labour Law* (eds) Oxford University Press (2011) at 22.

[20] Hepple, supra note 2, at 312.

[21] For example libertarians', such as Nozick's conception of social justice is limited to procedurally equal opportunity, whereas liberal conceptions, such as those of Rawls and Sen take fundamentally different approaches, both to each other and to Nozick.

[22] See Hales's canonical 1923 article 'Coercion and Distribution in a supposedly non-Coercive State' 38 Political Science Quarterly (1923), 470-478 in which he renders visible the underlying basis for the asymmetrical power of the relationship between capital and labour, being their property relations. For a more contemporary analysis see Guy Davidov 'Notes, Debates and Communications 'The (changing?) idea of labour law' *International Labour Review*, Vol.146 (2007), No 3-4 at 311-320.

[23] See Arthurs, supra note 4, at 13 for a list of other functions of labour law.

[24] See Davidov, supra note 17, at 314.

[25] Langille, supra note 5, at 104.

conceptions of development that labour law scholars use to show that labour law has a developmental function. The first is the orthodox view of development, which is a market-centric one and the second, Amartya Sen's capability approach.

III. Development as a constituting narrative for labour law

Recently one of the units within the ILO commissioned a study to assess labour law's potential to achieve developmental outcomes. The conclusion of the study was that:

> Labour market regulation, designed in a manner which is sensitive to the local environment, can facilitate social and economic development. *Labour market institutions can thus function as development institutions* [my italics].[26]

The justification for this conclusion - that labour market institutions can embody development goals - is based, in broad terms, on two approaches to development.

The first approach, which reflects a predominantly new institutional economics perspective, is to argue that labour market institutions can remedy market failures (caused by factors such as asymmetrical access to information or failure to account for transaction costs[27]) and thereby contribute to the market efficiency and economic development.[28] For example, Deakin argues that minimum wage regulation can remedy market failure caused by asymmetrical information allowing employers to 'depress wages below the market-clearing rate'. Minimum wage regulation can therefore play 'a market correcting role'.[29]

This view fails to challenge the underlying premise of the neo-liberal, orthodox view of development that market ordering is natural and therefore fails to challenge the distributional consequences of market

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[26] Shelley Marshall (ed) 'Promoting Decent Work: The Role of Labour Law' (Monash University, Business and Economics, 2010).

[27] See institutional economist perspectives e.g B. Kaufmann 'Labor law and employment regulation: neoclassical and institutional perspectives (2009) (ed) Dau-Schmidt, K, Hariis, S and Lobel, O. *Labor and Employment Law and Economics,* Edward Elgar, UK, Northhamptown, MA, USA. Also see this argument in Hugh Collins 'Justifications and techniques of legal regulation of the employment relation' (ed) Hugh Collins, Paul Davies and Roger W. Rideout *Legal regulation of the employment relation* London, Kluwer Law International.

[28] See Deakin, supra note, 9 and Kaufman, ibid and Collins, ibid.

[29] Deakin, supra note 9, at 160.

allocation. While strategically it may be an important defence of labour market institutions to argue for their market correcting role, by endorsing efficiency as a value, implicit therein is an acquiescence with treating labour as a commodity.[30] Moreover, this developmental argument for labour law fails to acknowledge that there are many instances in which labour laws oppose efficiency in favour of equity considerations. In such instances the ideological imperatives of economic development and labour law are incompatible. [31]

The second approach (and some authors present a hybrid) is to rely on Amartya Sen's conception of development. Sen rejects the 'narrow' conception of development as economic development only and argues for a different narrative: one that equates development with 'expanding' each person's 'freedoms' to enable them to live a life they have reason to value and, in particular, to participate in the social, political and economic life of their community.[32] He rejects the notion that poverty can be reduced to a lack of income and argues that even if people have income and access to opportunities, they have different sets of capabilities that enable them (or not) to convert these opportunities into freedoms and to live lives that they value.[33] While he recognises that capabilities, such as health and education are 'instrumental' to economic development, he argues that they are also 'constitutive' of development because they contribute to eradicating 'unfreedoms'. [34] Labour rights would, if one ascribes to Sen's vision of development, contribute to expanding workers' freedoms and to their participation in social and economic life, and would thus be constitutive of development, whether or not they contribute to economic growth.

Several labour law scholars embrace Sen's development framework.[35] For example, Kolben argues that:

> [L]abour development should be grounded in a capabilities framework rather than a market freedom or flexibility centred framework. … [A] development approach to labour regulation recognises work as a central source and locus of

[30] See Judy Fudge, supra note 20, at 128.
[31] Davidov, supra note 17, at
[32] Amartya Sen *Development as Freedom*, Anchor Books, USA, 1999.
[33] Amartya Sen *The Idea of Justice,*
[34] Sen, supra note 33, at 124.
[35] See for example Kevin Kolben Labour 'Regulation, Human Capacities and Industrial Citizenship' (ed) in Shelley Marsh 'Promoting Decent Work: The Role of Labour Law' (Monash University, Business and Economics, 2010); Deakin, supra note 9 and Langille, supra note 5.

> unfreedoms. Consequently labour regulation can and should play an important role in achieving development through increasing workers' capabilities.[36]

Kolben therefor supports Sen's capability approach as an alternative to the orthodox view of development as economic growth. He argues that if labour market institutions contribute to developing workers' capabilities, they are developmental. He therefore ascribes to Sen's position that irrespective of the instrumental role that labour market institutions may play (in contributing to market efficiency), labour market institutions are constitutive of development if they increase workers' capabilities.

Langille embraces Sen's capability approach for different reasons. Taking issue with Davidov, he argues that labour law's traditional normative role of redistribution is 'too narrow' in that redistribution should not be a goal in and of itself. Instead, he argues, the normative function of labour law should be redistribution as a means of enabling workers to live lives that they have reason to value. Sen's 'radical ideas' is, Langille argues, an invitation for labour law scholars to ' re-eval[uate] our true ends – as opposed to our means for achieving them '. [37]

Fudge[38] suggests that Sen's appeal for labour lawyers is that labour rights are constitutive of development, and that the capability approach can be married with market orientated efficiency goals. Herein lies the problem: labour law's normative agenda has to be able to contest market ordering.

IV. A Critique of Sen's Conception of Development as Labour Law's Normative Foundation

Sen's vision of 'development as freedom' is undoubtedly a radical re-imagining of development and increasing workers' capabilities undoubtedly realises aspects of freedom in their everyday lives. However, in this section I argue that even Sen's conception of development is inappropriate as a new constituting narrative for labour law as it fails to address the challenges that labour law faces.

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[36] Kolben, ibid.

[37] Langille, supra note 4, at 116. See a critique of Langille's article by Guy Davidov 'Notes, Debates and Communications 'The (changing?) idea of labour law' *International Labour Review*, Vol.146 (2007), No 3-4 at 311-320.

[38] Fudge, supra note 20, at 127.

First, not unlike labour law, development's framework[39] - whether the orthodox neo-liberal conception or Sen's capability approach - is that of the national territorial state. Sen eschews a universal list of capabilities because he believes that each liberal democratic state has to decide which capabilities to realise through democratic public debate.[40] This democratic public discourse's frame is a national frame. But labour law's crisis is attributable to the rise of global value chains and the transnational reach of global capital, limiting the traction of national regulatory frameworks on global work relations. A new constituting narrative therefore has to have a global dimension for it to hold any possibility of acting as a countervailing force to the power of multinational corporations, for it to contest market ordering. Given capital's transnational character, and the global integration of production and relations of work, Sen's theory of development has limited traction to solve the global problems with which labour law scholars engage.

Second, Sen's capability approach is conceptualised in individual rather than collective terms. Sen argues that

> [t]his freedom-centred understanding of economics and of the process of development is very much an agent orientated view. With adequate social opportunities, individuals can effectively shape their own destiny and help each other.[41]

Sen's concept of social change is premised on individual agency. The limitations of Sen's individualistic view of social change has been critiqued by international law[42], labour[43] and development[44] scholars. A detailed discussion of this point falls outside the ambit of this paper, so in brief: 'well- being' and 'living lives that people value' imply some reallocation of resources and opportunities, which will always be contested. Political and economic change inherently rely on collective action. Evan's argument for the role that collectives play sufficiently illustrates the paucity of a theory of social change predicated on individual agency:

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[39] and similarly human rights and constitutionalism

[40] Sen *Development is Freedom* (Random House, New York, 1999) at 110.

[41] Ibid at 11.

[42] See Bhupinder Chimni 'The Sen Conception of Development and Contemprorary International Law Discourse: Some Parallels' *The Law and Development Review*, Vol. 1, Iss. 1 [2008], at 1-22.

[43] See Fudge, supra note 20.

[44] See Peter Evans 'Collective Capabilities, Culture, and Amartya Sen's *Development as Freedom' Studies in Comparative International Development*, Summer 2002, Vol. 37, No. 2.

> Organized collectivities—unions, political parties, village councils, women's groups, etc.—are fundamental to "people's capabilities to choose the lives they have reason to value." They provide an arena for formulating shared values and preferences, and instruments for pursuing them, even in the face of powerful opposition.[45]

Third, and linked to the above critique, the capability approach lacks an analysis of political economy and under-theorises power. At risk of sounding reductionist, asymmetrical power between increasingly unorganised workers and organised capital means that a) democratic debate does not take place on neutral ground and b) together with the global financial institutions, transnational capital shapes the global economic structures, rules and processes, which act as background rules to national discourse.

Evans argues that the concentration of economic power in the hands of the elite, mean that they have 'power over the means of producing and diffusing culture'.[46] The hegemonic culture is a form of power that invisibly limits the nature of items on the agenda for public debate.[47] Morover, it predisposes people to internalise their economic marginalisation and to reproduce views of well-being that do not rely on redistribution. Problems are individualised rather than people demanding structural redress.

From a labour law perspective, arguably the capability approach will improve workers' daily lives, but it holds no possibility of providing a narrative of countervailing force to global capital. Its individual nature and lack of analysis of political economy, means that it depoliticizes distributary struggles.

There is another contender as a new constitutive narrative for labour law, namely Nancy Fraser's conception of social justice. Fraser defines social justice as 'parity of participation'. Her conception of justice is a global one, which is critical for its workability, given the mobility of global capital and the increasingly global nature of supply chains. Moreover, redistribution is intrinsic to her paradigm.

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[45] Peter Evans 'Collective Capabilities, Culture, and Amartya Sen's *Development as Freedom' Studies in Comparative International Development*, Summer 2002, Vol. 37, No. 2 at 56.

[46] Ibid at 56.

[47] See Lukes *Power: A Reader* for a typology of power. Invisible power is one of the three forms of power Lukes describes. The others are visible and hidden. Hidden refers to Marx's idea of false consciousness and describes the internalisation of our place in the world and what we see as possible. Social movements, such as women's movements and the Landless Peoples' Movement, applying Freirian techniques, realise that this hidden power is most critical to fostering the agency of marginalised people to fight for structural social change.

Bob Hepple argued that labour law's normative function 'needs to assume a form which is appropriate to decentralized employment relations and a wide range of methods of participation including consultation'. Fraser's conception of social justice potentially provides such a legitimating meta-narrative.

V. Social Justice as a new constituting narrative for labour law

Political scientist and critical theorist, Nancy Fraser, defines justice as 'parity of participation' which she describes as a 'radical-democratic interpretation of the principle of equal moral worth'.[48] This foundation resonates with the ideological premise reiterated by Langille: the objective of collective bargaining is not to treat workers as subjects of law's largesse, but rather to affirm their *equal status as human beings* and enable them to co-author contracts.[49]

In her earlier work[50], Fraser identified two dimensions of injustice which undermine participation parity. The first dimension is economic privation. Fraser argues that inadequate material means robs people of the necessary resources to participate in democratic dialogue as equals. They suffer from distributive injustice or mal-distribution, which Fraser attributes to the class structure of a given society. [51] Justice in the economic realm predominantly takes the form of socio-economic redistribution. The second dimension of injustice is when people are denied equal standing, and thus suffer from 'status inequality or misrecognition'[52]. Fraser attributes institutionalised hierarchies to cultural norms. An example of a 'status hierarchy' is the exclusion of women or accorded them lessor voice ('misrecognition'), based on their gender. Justice in this cultural realm therefore involves claims of social belonging. Informal workers are misrecognised because of a status hierarchy that denies them standing if they are not registered as formal businesses or have employment contracts.

In her later work[53], Fraser adds another dimension, which she calls a political (as opposed to economic or cultural) dimension. She calls this political dimension of justice, 'representation' and she employs the terms on two levels. The first is the 'ordinary-political' level, which understands misrepresentation

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[48] Nancy Fraser *Scales of Justice*: *Reimagining Political Space in a Globalising World* (Columba University Press, NY 2009) at 16.
[49] Langille, supra note 5 at 110.
[50] Nancy Fraser and Axel Honneth *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso, London, 2003).
[51] Nancy Fraser 'Re-framing Justice in a globalising world' *New Left Review* Dec 2005 at 73.
[52] Ibid at 74.
[53] See Article and *Scales of Justice*, Columbia University Press, 2010

in terms of electoral rules that deny participation parity by a group despite their being incorporated in the polity. This first level of meaning refers to 'lack of voice and democratic accountability' within a polity.[54] The second, symbolic meaning (and the one this paper is concerned with), concerns the 'injustice of boundaries and frames',[55]

Currently, she argues, our conception of justice is conceptualised within a Westphalian frame, wherein issues of justice – recognition and redistribution - are contested within the bounds of the nation state and the national economy. However,

> [D]ecisions taken in one territorial state often have an impact on the lives of those outside it, as do the actions of transnational corporations, international currency speculators, and large institutional investors.[56]

Fraser suggests that making 'first-order claims' for cultural recognition and economic redistribution in the context of the nation state, when the livelihoods of the global working poor are affected at least as much by the activities of global actors, is a case of misrepresentation or of 'misframing' justice.

Using the metaphor of a stage, she argues that this political dimension of justice – the frame within which claims for distribution and recognisiton are made - is critical, since the frame or the stage determines who the actors are, who is 'recognised' and can legitimately participate in contestations in the economic realm. Moreover, it determines how those claims are to be established and adjudicated, in other words, the terms of their participation.[57]

This dimension of justice allow us to ask two important questions: a) 'Do the boundaries of political community wrongly exclude some who are actually entitled to representation?' and b) 'Do the community's decision rules accord equal voice in public deliberations and fair representation in public decision-making to all members?' [58] The first question speaks to the procedural aspect of equal participation, namely are people who should be participating excluded from participating? The second suggests a substantive component – even if

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[54] Kate Nash and Vikki Bell 'The Politics of Framing: an Interview with Nancy Fraser' in Fraser *Theory, Culture & Society* 2007 at 76.
Vol. 24(4): 73–86
[55] Ibid at 147.
[56] Fraser, supra note 50, at 71.
[57] Fraser, supra note 47, at 17.
[58] Ibid at 18.

people are participating, are the rules of the game such that the terms of their participation enable substantive participation, equal to that of their peers?

If the boundaries are 'misframed' to exclude people from participating, this amounts to a 'political death' because people have no possibility to contest first order claims. At most they are relegated to being beneficiaries of charity because their exclusion renders them non-subjects and they therefore cannot make justice claims.[59] In the case of informal or informalised workers, they become beneficiaries of 'development' projects.

Fraser argues that when states and transnational capital 'monopolize frame-setting', thereby exercising the power to deny voice to parties whose interests may be injured by the social and economic processes at stake *and* 'block(ing) the creation of democratic arenas where the latter's claims can be vetted and redressed', this amounts to a meta-injustice. [60]

Fraser spells out the implications of mis-framing justice when we conceive of justice in a national as opposed to a global frame:

> Channelling their claims into the domestic political spaces of relatively powerless, if not wholly failed, states, this frame insulates offshore powers from critique and control. Among those shielded from the reach of justice are more powerful predator states and transnational private powers, including foreign investors and creditors, international currency speculators, and transnational corporations. Also protected are the governance structures of the global economy, which set exploitative terms of interaction and then exempt them from democratic control.[61]

This quote foregrounds the conundrum facing labour law: the impotence of (national) labour law to address the global character of work relations, and the proclivity of transnational corporations to forum shop when it comes to choosing the regulatory environment from which to source products. As Fraser herself would argue, by establishing the frame in which labour makes distributive claims as a national frame, 'transnational malefactors are (shielded) from critique and control'[62]

[59] Ibid at 20.
[60] Fraser, supra note 50 at 58.
[61] Fraser, supra note 50, at 78.
[62] Nash and Bell, supra note at 53, at 76.

So how might we operationalize parity of participation within a global rather than a national frame? There are two components to this question: first, the 'who' part, meaning who is entitled to participate and how does one determine who should be included. The second is the 'how' part: once one has established who should participate, how does one operationalize it? Put differently, what is the institutional framework within which claims would be contested, adjudicated and enforced?

Establishing who is entitled to participate

Fraser proposes employing the 'subjected principle' meaning that 'all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it'.[63] Rather than relying on citizenship of a country or geographical contiguity to establish a polity, 'co-imbrication in a common structural or institutional framework' would establish groups of people as 'fellow subjects of justice'. [64] Applying this conception to labour law, it adds heft to arguments that labour law's conceptual framework needs to shift from the employment contract to value chains.[65] Value chains is the generic name given to production networks and commodity chains.[66] These economic processes are to a large extent governed by transnational corporations.

The concept of commodity chains was introduced in 1977 by world systems theory pioneer, Immanuel Wallerstein. It was a largely sociological framework that sought to challenge the orthodox understanding of globalisation and economic development and their inter-relationships with the geographical expansion of capitalism. [67] In 1994, scholars, most notably Gereffi, began to develop the commodity chains framework by drawing on perspectives offered by international business literature. [68] Between 2000 and 2004 academic researchers from different countries and disciplines met for a series of workshops to develop a more coherent theoretical framework, given the proliferation of literature, academic researchers and disciplinary discourses that

[63] Fraser, supra note 47 at 65.
[64] Fraser, supra note 50, at 82.
[65] See M. Rawling "A generic model of regulating supply chain outsourcing' (2007) *Anu College of Law Social Science Research Network /Legal Scholarship Network* at http://ssrn.com/AuthorID=734493 (accessed 15 August 2011) and Marlese von Broembsen 'People have to work yet most have to labour: Toward Decent Work in South African Supply Chains' *Law, Democracy and Development* Vol. 16 (2012) at 1-228.
[66] See Coe, M, Dicken, P & Hess, M "Introduction: global production networks" *Journal of Economic Geography* (2008) and Blair, note 62 above 2005) for discussion on the differences between world-systems theory, global commodity chains, and production networks.
[67] Bair, J "Global capitalism and commodity chains" *Competition and Change* (2005).
[68] Gibbon, P, Bair, J & Ponte, S "Governing global value chains" *Economy and Society* (2008).

populated the field. This "consensual" framework became known as "global value chains".

The firms imbricated in a value or supply chain might be located within national territorial state, or the value chain might be of a global nature, in that different firms that constitute parts of the chain might be located in different countries. In developing the value chain as a new lens, labour lawyers could draw on a rich body of work: value chain analyses. Value chain analysis is not only a methodological approach to understanding the international division of labour that is characteristic of the new global economic order, but is also an analytical tool whereby a particular supply or value chain is analysed from the inception of a product until its final destination to map the relationships between different actors in the chain, the governance structures, the distribution of value added (and extracted) by each firm and the distribution of power among firms.

"Governance" is a particular focus area for global value chain scholarship. In broad terms, value chain governance theory is concerned with analysing the power relationships in chains. These relationships "determine how financial, material, and human resources are allocated and flow within a chain".[69] Specifically, it refers to three aspects of the relationship between firms: (1) who decides which products should be produced, the buyer or the producer? (2) how should products be produced – that is, what are the terms of production, including the industry standards or specifications, environmental standards and working conditions that are incorporated into the supply agreement?[70] And (3) how the value that is added should be distributed? The second aspect that is concerned with the terms of production, renders visible the regulatory role that corporations play – through for example product specifications and supply agreements.

Arguably, on the basis of the 'subjected principle' labour law's normative goals could, at least theoretically, be realised outside the Westphalian frame to capture the global dimension of work relations. Additionally, the 'subjected principle' might also address labour law's conceptual challenge of how to include non-standard or atypical workers. If, on the basis of the 'subjected principle', conceptually labour law could shift its lens from the employment contract to the value chain, and there is precedent for this in Australia, then the question of whether work is standard, non-standard or atypical falls away. Any work that is imbricated in the value chain becomes the subject of labour law.

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[69] Bair J "Global capitalism and commodity chains: looking back, going forward" (2005) 9 *Competition and Change* 153.
[70] Ibid.

Claims for recognition by informal or informalised workers could, at least notionally, be addressed.

How: the institutional framework to contest, adjudicate and enforce claims

If the frame is the global value chain, which global institution would enforce recognition by small businesses and informalised workers who comprise the chain. Our self-reflexive response is to jettison the idea as utopian because it ostensibly lacks traction. Even if parity of participation is notionally possible, which global institution could adjudicate and enforce claims for economic redistribution within the chain?

Fraser argues that contemporary political science theories presuppose (which she argues is a 'hegemonic presumption') that enforcement is reliant on a single authority.[71] She rejects the idea that justice could be realised by having recourse to a single authority, as the risk, she argues, is that distributive decisions are made by applying technocratic solutions to what is in fact a political struggle.

Whether the dispute resolution authority is public (such as the European Court of Justice) or private (such as the North American Free Trade Agreement arbitration panel), it resolves distributive issues by recourse to terms of WTO treaties, free trade agreements, supply agreements or judicial precedent. By adjudicating these distributive issues within the narrow confines of interpreting treaties, agreements or judicial precedent it allows the political nature of these distributive struggles to be confined to technical matters.

Fraser recognises the limitations of relying on transnational social movements to settle these disputes. She therefore introduces the idea that the institutional structure should comprise two tracks. The one track, a civil society track, should facilitate the 'dialogical processes' of contestation and the second should take the form of a formal institution. She argues for new global democratic institutions for 'resolving disputes democratically, in permanent dialogue with transnational civil society'. This two track model ensures both the legitimacy (because it is democratic) and the efficacy (because it has some traction with market actors) necessary for resolution of distributive claims.

This might seem a utopian ideal, but so was the idea of collective bargaining. Labour regulation's future auxillary role (the framework it legitimises), as Bob Hepple reminds us, 'will be the outcome of processes of conflict between

[71] Fraser, supra note 47, at 68.

different social groups and competing ideologies'.[72] These struggles will need to be multifarious, and the ILO is undoubtedly a key site of struggle.

The ILO as the institutional structure to enable participation parity of all workers

The ILO's tripartite nature means that is conceptually possible (despite guaranteed opposition to the idea) for informal/informalised workers to be represented within the ILO too. Organisations such as Womens' Informal Employment Globalising and Organising (WIEGO) has engaged with the ILO for many years. WIEGO is a membership based organisation of informal workers. Its largest and best-known member is the Self-Employed Women's' Association (SEWA) – a 40 year old trade union in India with a membership of 1.4 million informal working women.

At the heart of the ILO's *Declaration on the Fundamental Principles and Rights at Work* and its *Decent Work Agenda* are organising rights. Both incorporate the right to freedom of association and the right to organise. In addition, one of the four pillars of the Decent Work Agenda is social dialogue. The Decent Work agenda has been extended to the informal economy. Critics argue that the rights both in the Declaration and the Decent Work Agenda are procedural rather than substantive rights.[73]

Alston argues that as the Declaration is 'detached from the various international sources that [could] give it content', [74] and in the absence of an agreed content to these rights, they amount to little more than principles. [75] Principles have little purchase since adherence is voluntary, the ILO has no enforcement mechanism and its role is limited to promoting voluntary compliance.[76] Moreover, the

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[72] Hepple, supra note 2, at 305.

[73] Standing 'The ILO: An Agency for Globalisation? *Development and Change* 39(3) 2008 355–384; Alston; L. Vosko 'Decent Work: The Shifting Role of the ILO and the Struggle for Global Social Justice' *Global Social Policy* 2002 2 at 19.

[74] Alston 2004

[75] Philip Alston 2004

[76] Standing (supra note 73), Vosko (supra note 73) and Alston (2004) argue that the shift from a universalist rights-based approach to voluntarily compliance with principles means that 'hard law' (hard won rights), has been replaced by 'soft law'. The principles have been translated to mean different things in different contexts, at times seemingly undermining the rights that at face value they purport to support. The ILO reported in 2003 that 300 corporate social responsibility initiatives that it had assessment 'contain relatively few references to the fundamental international labour standards', and in some cases the language used 'could be interpreted as undermining' those standards (Alston). See too Standing at 367 who argues that a social clause in the WTO which would be enforced through trade sanctions, has been replaced by corporate social responsibility

realisation of these principles rely on self-regulation, such as corporations signing voluntary codes of conducts (which rely for enforcement on civil society and consumer pressure), corporate social responsibility initiates, and initiatives such as the UN's Global Compact. The principles have been translated to mean different things in different contexts, at times seemingly undermining the rights that at face value they purport to support[77].

Despite this critique, I venture to make three points:

First, enabling rights such as freedom of association and the right to organise (which have been extended to informal workers) mean that procedural parity of participation is at least theoretically possible. The 'enabling right'[78] to organise provides a strategic political space to mobilise and politicise the issue of substantive participation parity for all workers.

Second, the inclusion of 'social dialogue' may also a present strategic opportunity. Despite the concept's lack of substantive content, it is an opportunity to realise procedural participation parity for all workers, including atypical workers. Marshall outlines three moments during the creation of social dialogues institutions in which there should be participation. Her designation of who should participate is remarkably similar to Fraser's all subjected principle. She argues that in the design face, 'those who will be most affected by regulation or their representatives' should participate in the design phase of social dialogue institutions, and 'representative organisations, especially trade unions or NGOs' should participate in monitoring and compliance of the institution. [79]

Even though the ILO lacks enforcement mechanisms, its legitimacy enables it to yield 'considerable influence in practice'.[80] This influence is exerted by for

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initiatives, for a discussion of the implications of the shift from hard to soft law, and his argument that the removal of labour standards from trade agreements; and Vosko at 32.

[77] The ILO reported in 2003 that 300 corporate social responsibility initiatives that it had assessment 'contain relatively few references to the fundamental international labour standards', and in some cases the language used 'could be interpreted as undermining' those standards (Alston). See too Standing (2008) who argues that a social clause in the WTO which would be enforced through trade sanctions, has been replaced by corporate social responsibility initiatives, for a discussion of the implications of the shift from hard to soft law, and his argument that the removal of labour standards from trade agreements; and Vosko, supra note 71, at 32.

[78] See Francis Maupain 'Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' *The European Journal of International Law* Vol. 16 no.3 439-465 at 448.

[79] Marshall, supra note 27 at 43.

[80] Deakin, supra note 9.

example providing technical expertise in conceptualising and implementing labour market institutions and disseminating best practice.

Deakin cites different enforcement mechanisms employed by labour law systems in different jurisdictions. These include modes associated with command-and-control regulatory regimes, such as criminal sanctions, but also include administrative action and 'self-help' measures that are resorted to in the context of industrial action. He argues that 'the diversity of enforcement devices' are both a consequence of different legal traditions, but importantly, also a product of the struggle of different interest groups outside of the legal system.[81]

The task at hand is for the ILO, labour lawyers on the left, and civil society to expand the menu of enforcement mechanisms beyond those that rely only on command-and-control regimes or on civil courts. So for example, it would entail critically assessing enforcement techniques that 'new governance'[82] theories offer or assessing whether and how the Global Administrative Law (GAL) project's aims converge with those of labour law. GAL scholars are for example exploring how corporations could be subjected to global administrative action.

Kevin Kolben's caveat is important. He argues that governance theories, such as systems theory, reflexive law and responsive law have been developed in industrialised countries in contexts that do not involve labour. Consequently.

> … they are not adequately tailored to the traditional goals and values of labor law.Instead of furthering, for example, industrial democracy, redistribution, or core labor rights such as freedom of association, they are agnostic about labor law's core objectives and prioritize deliberative processes and technocratic solutions to regulatory deficits and dysfunction.[83]

These new governance theories are post-statist in that they celebrate the demise of the nation state. Some scholars suggest that these modes of private ordering will

[81] Deakin, supra note 9.

[82] Trubeck's term for the plethora of governance theories, including reflexive and responsive regulation. See Trubeck, David and Trubeck, Louise (2006-2007) 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' *Columbia. Journal of European Law,* Vol. 13, pp. 539-564.

[83] Kevin Kolben 'Transnational Labor Regulation and the Limits of Governance, *Theoretical Inquiries in Law* 2011 (12) at 78.

transform or even replace public law as we know it.[84] Critics object to these forms of private regulation because they are exempt from the democratic participation of public law.[85] These are valid critiques. However, if there is substantive parity of participation for 'all who are subjected' to a particular economic and social process, such as a value chain, the democratic deficit objection falls away. Some of the techniques used by these governance theories, such as benchmarking and peer review, as opposed to the sanctions typically preferred by command-and-control regulatory regimes, might become techniques that the ILO could use to realise its decent work agenda.

VI. Conclusion

I return to Bob Hepple's injunction that a new meta-narrative for labour law has to: (a) be grounded in 'a clear ideology, which is capable of forming the basis for a new social consensus'. This ideology, he argues, has to be congruent with 'democracy, rights and freedom'; and (b) 'promot[es] collective interests and genuine worker participation'.

I have argued that the ideology has to satisfy two further criteria. First, it has to be concerned with redistribution and second, its reach has to be global. The first criteria, namely redistribution, is simply a restatement of the historical underlying premise of labour law, which while contested both by dominant market-orientated discourses and by some labour lawyers, nevertheless retains hegemonic credibility for left leaning labour law scholars. The second criteria (that the meta-narrative's frame has to be a global frame) is based on the observation that in the new global economy characterised by vertical disintegration of production and the rise of global value chains, workers' livelihoods, status and well-being, particularly those in developing countries, are determined at least as much by transnational social and economic processes, as by processes within their national territorial state. Therefore a new constituting narrative has to hold possibility of holding global corporations to account and addressing redistribution in the context of work within global value chains.

Development – whether orthodox conceptions of development as economic growth or Sen's development as freedom – has been found wanting on both accounts. Not only are neither concerned with

[84]See Lobel, O (2004-2005) 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' 89 *Minn. L. Rev*. 342 (89) and Trubeck and Trubeck, supra note 80.

[85] See Kolben, supra note 83, at 58.

redistribution, but neither provide a framework for addressing the normative or conceptual challenges that labour law faces at a global level.

The paper has made a case for Nancy Fraser's conception of social justice as 'parity of participation' to be considered as a new constituting narrative for labour law. Her framework is conceptualised within a liberal democratic context, is construed as a radical interpretation of the equal moral worth of all human beings, and is a good candidate as a new meta-narrative for labour law. To return to Hepple's injunction, it is fundamentally concerned with 'democracy, rights and freedom' and with 'promot[ing] collective interests and genuine worker participation'. Parity of participation, Fraser argues, has to be substantive, which addresses Hepple's concern that participation must be 'genuine'.

Fraser's model is comprised of three components: recognition, redistribution and representation. Recognition challenges 'status hierarchies', namely cultural hegemonies that serve to exclude categories of people from participating because they are not recognised as having legitimate standing. Recognition addresses the conceptual challenges that labour law faces, namely the exclusion of atypical or non-standard workers from the ambit of labour law. Recognition would insist that all workers have standing to participate as equal peers (I will develop this idea in my presentation).

Redistribution, Fraser's second component, is historically labour law's normative goal, and remains the normative goal for the broad church of labour law scholars on the left.

Representation refers to the stage on which or the frame in which recognition and redistribution struggles are fought. Fraser rejects the Westphallian, national territorial frame as 'this frame insulates offshore powers from critique and control'.[86] She includes 'among those shielded from the reach of justice', 'powerful predator states and transnational private powers', which include transnational corporations, which are the lead firms in global value chains, and which empirical studies show dictate the distribution of risk and value (and indirectly working conditions) throughout the chain.[87]

At the heart of labour law's crisis is the mismatch between labour law's national regulatory framework – its national territorial frame – and the increasingly global nature of work relations. In other words, the crisis is one of frame.

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[86] Fraser, supra note 50, at 78.

[87] Stephanie Barrientos 'Global production systems and decent work' (2007) *ILO Working Paper* No 77 Geneva: International Labour Office.

Fraser's conception of justice responds to labour law's crisis of frame. Moreover, it responds to labour law's conceptual crisis, of 'who' is the subject of labour law, since it provides a conceptual response: the 'who' must (ultimately) include all who work. I have suggested that labour law's optic needs to shift from the employment contract to the value chain.

Fraser is an activist, and while little discussed in this paper, her work recognises that social change involves political struggle. She recognises that change will rely both on bottom-up struggle by civil society, but also by a more top-down enforcement activities by a global institution. I have suggested that the ILO is the only logical candidate. I have briefly entertained the idea that while the traditional ideas of enforcement (which rely on a 'command-and-control' imagery) are unlikely to be realised, that the new governance theories (such as reflexive regulation) and the global administrative law project present opportunities to re-think the notion of enforcement in a global context.

In her book, *Unruly Practices*, Fraser discusses strategies for the struggle in establishing new entitlements. She explores the discourses that antagonists use to resist recognition, both of people and their claims, and which enable them to depoliticise the struggle to legitimate new entitlements. Like Hepple, she realises that reaching a new social consensus will involve struggle. Activist academics have a critical role to play in this struggle, particularly in rejecting disempowering hegemonic discourses and constructing new ones.