

A Global Theory of Justice for New Governance

From Process to Substance with ‘Parity of Participation’

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I. INTRODUCTION

The level of frustration with governments and international organizations all over the world appears to be rising as international protest movements such as the Occupy movement or the Anti-globalization network receive more and more support in their pursuit of fundamental change. What these movements seem to have in common, despite their many differences, is a deep feeling of dissatisfaction with policies that promote market principles at the expense of human, distributive, social, ecological and cultural concerns.

By and large, decision-making processes in national governments and international organizations are informed by an ideology that has come to be known as neo-liberalism. Neo-liberals believe in the supremacy of market ordering and regard free markets as the key to development and economic growth. These ideas are deeply entrenched within both policy circles and academia and are advocated by powerful corporations and international institutions such as the World Trade Organization (WTO), the World Bank and the International Monetary Fund (IMF).

For decades, progressive groups have battled on different fronts against this form of fundamentalism but their efforts have been extremely disjointed and marked by little success. Many have fought against each other instead of towards a shared goal and a strategy to unite and strengthen these reformist endeavours has not crystallized.

1. A New Strategy to Counter Neo-Liberalism

This thesis proposes a new counter-narrative to the neo-liberal agenda that combines two seemingly disparate bodies of work: New Governance and Nancy Fraser's theory of justice. New Governance is a new and rapidly growing strand of legal thought and practice that has simultaneously developed a following in Europe and the United States. In short, legal scholars in this field of research are advocating a shift away from long-standing command-style, fixed-rule regulation toward more collaborative, bottom-up, and flexible modes of regulation.

New Governance scholars seek to include private stakeholders in the process of rule-making. They contend that these actors are closer to regulatory problems, have superior knowledge about local conditions and vaster resources than many states and organizations. Although there are some who argue for purely private regulatory schemes, most proponents advocate collaborative models that incorporate the state, economic and other stakeholders as equal partners in the pursuit of regulatory ends. New Governance models supplement conventional rules with more flexible prescriptions, such as principles, guidelines or benchmarks and they

accentuate ongoing evaluation, permanent improvement and dynamic learning as fundamental principles in the light of constantly changing circumstances.

New Governance provides an interesting alternative to conventional modes of regulation. Its emphasis on private actors is of special importance to this thesis because it offers the opportunity for a new democratic strategy for social change. Scholars in this field have seldom explored the transformative potential of New Governance on a larger scale and few have seen the possibilities of developing it into a project that could challenge neo-liberal dominance. This thesis seeks to fill this gap by linking New Governance to a global theory of justice.

Nancy Fraser, an American political scientist and critical theorist, has elaborated a theory which synthesises heterogeneous justice discourses into a coherent unifying whole. The core of her framework is the normative principle of ‘parity of participation’ which requires ‘... all members of society to interact with one another as peers.’¹ Impediments to ‘parity of participation’ take root in social structures and their removal necessitates three distinct justice claims: ‘redistribution’, ‘recognition’ and ‘representation’.² People need material resources in order to participate with others as peers (‘redistribution’) but they also need to be free from forms of discrimination (‘recognition’). Moreover, they require a voice to express their concerns and to press for ‘recognition’ and ‘redistribution’ in the first place (‘representation’).

Fraser’s concept of ‘parity of participation’ provides a compelling philosophical basis for integrating struggles against neo-liberalism into New Governance models. Ultimately, however, such a progressive alliance will require scholars and practitioners within the New Governance community to move in two directions: First, they will have to embrace participation fully as an organizing principle for their innovative legal techniques and engage more proactively with the problems and potential risks of participatory processes. Second, they will have to apply their approaches on an international level to tackle forces of injustice that transcend boundaries of national states.

2. The Context of Work

The framework that this thesis will seek to develop could generate legal rules in the social, economic, political, ecological and financial sphere. This is necessary since neo-liberalism is not only an economic model in the narrow sense but a political system which permeates all aspects of our contemporary life. The focus of this thesis will be primarily on issues of work,

¹ Fraser 2010, 365.

² Fraser 2009, 65.

and the aforementioned aspects will be considered insofar as they impact on work relations and institutions of work (national and global regulations, unions and the International Labour Organization (ILO)).

Most people need to work in order to secure an adequate income and social security for themselves and their families. Work has always been a pivotal human activity and a main site of political struggle. Any progressive strategy that seeks to alter societal structures therefore needs to incorporate the dimension of work and to understand how work relations have been organized at a particular point in time. Rittich summarizes the importance of work at the current conjuncture:

‘Work continues to function, in the new economy as in the old, as a dense transfer point at which concerns ranging from social inclusion, stability, equality, and democracy to economic growth and competitiveness, converge, intermingle, and sometimes conflict. For these reasons, appreciating the transformation of work and work norms is central to grasping the changes of pursuing both economic growth along with security and social justice in the contemporary world.’³

Chapter two of this thesis will analyse how the institutions that govern work and work relations have changed since World War Two. A historical perspective is important not least because it gives a clear picture of how market fundamentalism has incrementally dismantled institutions that had previously given a voice and security to workers but also because it provides insight into what a strategy to improve working conditions and protections for the future might look like. To be sure, work patterns have fundamentally changed since the global integration of national markets, and the welfare states of the post-war era were, as we will see, by no means a paradise for all workers. However, some institutional elements or principles that regulated work during that period may be worth rediscovering or revitalizing.

The progressive New Governance model that is advocated by this thesis is based on full and equal participation. All workers therefore who are potentially affected by the regulatory problems that this model attempts to address have a right to participate in it. This is of special importance in a neo-liberal context where great disparities of wealth and influence foreclose opportunities of workers to affect public policies. At bottom participation is about power, and workers need a great deal of it in their daily struggles against repressive forms of injustice.

3. Overview of Chapters

Chapter two will set the background for the main reflections. It will start with a summary of Karl Polanyi’s classic book ‘The Great Transformation’ in which he contends that the implicit

³ Rittich 2010, 565.

goal of market advocates is to disembed the economy from society. The thesis will provide three interpretations of this statement and use the term disembeddedness as an analytical tool to assess the socio-economic and political developments since World War Two. For reasons given above, particular attention will be paid to work relations and institutions of work. The chapter will distinguish between an embedded phase (1945 to about 1975) and a disembedded phase (since about 1975).⁴ After highlighting some contemporary tendencies it will conclude that disembeddedness is still very much the defining characteristic of our present time.

Chapter three will provide an overview of the two building blocks that could, in my opinion, form the basis for a counter hegemonic strategy to the neo-liberal agenda. It will first present the essential features of Fraser's theory of justice and analyse its relevance to the current political economy. The aspect of 'representation' will receive particular attention since it accentuates, as we will see, what is first and foremost missing in a globally integrated market. The chapter will then proceed with some observations about the nature of legal rules and ask under which conditions law can be used as an instrument for social change. Following this, it will trace, in some detail, the origin of New Governance and analyse its defining characteristics. Two examples of New Governance techniques will be presented at this point to highlight the application of these characteristics in practice.

Chapter four will describe how Fraser's theory of justice can be integrated into New Governance models. It will first discuss particular errors and omissions of both New Governance scholarship and Fraser's work and indicate how they could partly be resolved if the two concepts were combined. It is then argued that the best way to achieve successful integration of the two models is by ensuring that participation as a process right fulfils the following three criteria: No restrictions on subject matter; allowance for any and all possible outcomes in the terms of bargaining; and the full inclusion of all potentially affected by decisions in the participatory process.

Chapter five will consider the implications of integrating Fraser's work into New Governance models by analyzing particular strengths, limitations and risks of participatory processes. The chapter will expand around three constitutive questions: 'who?', 'how?' and 'what?' of participation and so, hopes to bring some structure to a discussion that has been widely underappreciated in the academic literature of New Governance thus far. The analysis will be based on theories of power developed by Steven Lukes and John Gaventa and conclude that without a comprehensive examination of existing power relations and specific interventions

⁴ The chapter will draw largely on Standing 2009, who uses the same distinction with reference to Polanyi.

that target power imbalances (redistributive efforts and measures against discrimination), the proposed model will not bring about the fundamental change that it aspires to.

Chapter six will deal with one of the major challenges for labour lawyers and activists in an era of neo-liberal predominance: The regulation of transnational corporations. In order to understand the complex relationships between different parties in global production networks and the situation of workers in particular, the thesis will make use of an analytical and methodological lens known as value chain analysis (VCA). It will then demonstrate how, in practice, the proposed New Governance model can foster ‘parity of participation’ for increasingly marginalised workers within such chains of production.

Finally, the focus will shift to a critique of the ILO’s ‘decent work’ agenda from the perspective of Fraser’s theory of justice. The agenda, it is argued, only superficially touches on key dimensions of ‘parity of participation’ (representation, recognition, redistribution) and is therefore unlikely, on its own, to provide workers with the means necessary to fight the most serious forms of injustice wrought by neo-liberal policies.

The final chapter will consolidate the findings and emphasize two measures as particularly important for the success of the proposed New Governance model: Capacity building by non-economic stakeholders and political pressure backed by collective action.

A word of caution seems appropriate. The nature of this thesis is interdisciplinary, largely theoretical, future-oriented and experimental. A full and comprehensive analysis of all issues that are at stake is beyond the scope of this small project and would require further studies. With that in mind I do, however, hope that the ideas presented in this thesis will stimulate some debate among progressive lawyers who are interested in alternative democratic designs of social life.

II. THE NEO-LIBERAL CHALLENGE

This chapter will, in a cursory manner, chronicle the socio-economic and political developments since World War Two from the perspective of workers. Karl Polanyi's concept of disembeddedness will be used to analyse the relationship between markets and the society in three different periods: The post-war welfare states, the neo-liberal era and the present time. The term disembeddedness will again become pertinent in chapter three where it is argued that Fraser's concept of 'parity of participation' could provide the basis for New Governance models to counter market fundamentalism with a view to re-embed the economy in society.

1. Karl Polanyi's 'Great Transformation'

In his canonical work 'The Great Transformation'⁵ Karl Polanyi depicted the rise of the market economy in the 19th century and its fall in the 1930s as a 'double movement'⁶: 'The market expanded continuously but this movement was met by a countermovement checking its expansion in definite directions.'⁷ The first aspect of this 'double movement' is described as an attempt by financial and industrial capital to create a market society in which land, labour and money were turned into commodities. This triggered a crisis with devastating effects on the fabric of social life. Following the destruction of regulation, mechanisms of redistribution and cultural institutions, people were left with the prospect of starvation, broken social bonds and a severely despoiled nature. Polanyi's famous distinction between an economy that is embedded in society (subject to non-economic regulation) and an economy that is disembedded from society (only governed by supply and demand) has its origin in these observations. Disembeddedness, in Polanyi's view, was an implicit objective of the market society, albeit one that, due to the second aspect of the 'double movement', could not become a reality. In the 1930s, a spontaneous and, according to Polanyi, necessary countermovement emerged which mobilised against the threats to people's livelihoods and pushed for new forms of regulation and social protection.⁸ This countermovement led to fascism and World War Two but also laid the foundation for the post-war welfare states which re-embedded the economy in society.

⁵ For a reappraisal of Polanyi's approach see, inter alia, Block 2003, Bugra and Agartan 2007, Standing 2009, Muukkonen 2009, Fraser 2013.

⁶ Polanyi 1944, 130.

⁷ Ibid.

⁸ Polanyi's countermovement echoes Marxist thought although it is relatively disorganised and transcends class lines. On a theoretical level, there are more fundamental differences between the two thinkers: Polanyi depicts capitalist countries as a battlefield between forces of marketization and social protection, whereas Marx's framework is one of '... class struggles based on a clash of economic interests', Maertens 2008, 142 and 151. For a short critique of Polanyi's two-sided approach see also chapter three, section three.

The concept of disembeddedness has become an indispensable point of reference in current discussions about globalization. It is all the more surprising that a clear definition of the term has not yet emerged. This thesis will develop three different interpretations of this theoretical concept which highlight related but distinct elements of market agendas in particular, and the relationship between the economy and the society more generally.

First, neo-liberals, just like their predecessors in the 19th and early 20th century, believe that the laws of supply and demand should regulate all aspects of human lives. Disembeddedness captures this insight by evoking a picture of imbalance between economic and other interests. The term indicates that the economy has been singled out of a pool of equally legitimate concerns and is receiving unique attention. The prefix 'dis-', moreover, intimates that the economy has moved away from its original and, most significantly, its natural locus. Non-economic aspects need to be taken into account not only because there has always been human interaction outside of markets but also because markets themselves have always been social institutions constituted by people with non-economic motivations and concerns.

Second, and in a similar vein, disembeddedness alludes to a loss of grip and control over economic processes. As we shall see in the course of this and the following chapter, spaces for workers to collectively challenge market hegemony are either closed off, altogether absent or, in the few cases where they are accessible, do not allow for equal chances of interested parties to express their concerns. Institutions such as the International Labour Organization (ILO) and unions provided a powerful voice to workers in the post-war years but their relevance has dramatically waned under the influence of neo-liberal policies.

A third line of interpretation operates on an individual level and examines the degree to which human beings are dependent on market forces for their socio-economic wellbeing.⁹

Understood in this way, disembeddedness alludes to the absence of adequate safeguards which protect those outside labour markets (unemployment benefits, social welfare, disability support etc) or those who work (adequate income, legal protection and social entitlements).

2. The Embedded Phase

In the three decades after World War Two, the main policies and institutions concerned with work were informed by a model of industrial labour which regarded the employer and employee as the two key protagonists.¹⁰ Employees in full-time labour were to receive social and legal protections in return for accepting the employers' control over their work as well as

⁹ It is this last interpretation that figures largely in Standing's canvas.

¹⁰ Standing 2009, 4.

the right to retain profits.¹¹ Redistributive conflicts between capital and labour were resolved through an active fiscal policy¹² and through centralised collective bargaining processes, with governments in a mediating role.¹³

The essential body in forging and disseminating the legal underpinnings of industrial labour during this period was the International Labour Organization (ILO) via its system of conventions and non-binding recommendations.¹⁴ ‘Without saying it, the ILO stood for a model of national welfare capitalism, in which the standard employment relationship was the presumed norm.’¹⁵ The ILO has always been based on a tripartite structure that includes workers, employers and governments in its constituting bodies, the International Labour Conference (ILC) and the Governing Body (GB). Workers and employers each hold one quarter of the seats while governments hold the remaining half. Labour standards promulgated by these three parties were warmly welcomed by politicians of various ideological stripes. They offered a ready formula for stability and increased welfare of the working class who had suffered during World War Two and the Great Depression.¹⁶

Labour unions also contributed to the rise of ‘labourism’.¹⁷ Among their prime concerns figured the enlargement of income and social security for workers in standard employment as well as the maximization of the number of people in such jobs.¹⁸ Meanwhile, freedom of association for other categories of workers, including those in part-time jobs, the self-employed, contract workers, independent contractors and those engaged in service-, agricultural- or domestic work remained largely unrealized.¹⁹

The entire post-war consensus was conceptualised for a world of closed national economies that removed labour costs from competition between states. ‘Trade took place primarily between countries with similar levels of labour security and cost structures ...’²⁰ and was

¹¹ Social and legal protections include: Laws against unfair dismissal, health and safety regulation, assurances of adequate income (to sustain a male breadwinner and his dependants), voice in a union, medical aid, unemployment benefits, maternity leave, disability benefits, pension and so on. Control may refer to eight aspects: Self-government, control over time, control over means of production, control over raw materials, control over work content, control over skill reproduction, control over output and control over income, *ibid.*, 21. The employer’s right to retain profit means that employers receive a ‘disproportionate share of the economic surplus’ for taking the risk of investment, *ibid.*, 37.

¹² ‘The main motors for reducing income inequality were capital taxation, [progressive] income tax and subsidies on goods and services consumed by workers and low income communities’, *ibid.*, 44.

¹³ *Ibid.* See the discussion about the ILO and unions below.

¹⁴ *Ibid.*, 33f.

¹⁵ *Ibid.*, 34.

¹⁶ *Ibid.*, 1.

¹⁷ *Ibid.*, 46f.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, 55.

divided between developing countries that produced primary goods and developed countries that produced manufactured goods and services.²¹ In general, however, import substitution was the prevailing norm of the time, and high tariffs and other trade barriers were the means to implement it. In line with such policies, efforts were made to keep the financial system under control. Restrictive measures on banks and other financial institutions accompanied a myriad of rules to curb international capital movements.²²

Together these institutional mechanisms created an environment of relative embeddedness through which a very specific compromise between capital and labour was preserved. With respect to the first interpretation of the term (dis)embeddedness we can conclude that labourism cut down market excesses and fostered a variety of equally important concerns (relative balance). The policy consensus was that social and human aspects deserve equal attention vis-à-vis economic interests and that adjustments which furthered only one aspect at the expense of others would need to be justified with regard to the public interest. Second, the ILO and unions gave a powerful voice to industrial workers through which they were able to collectively challenge capital interests. At least in developed countries, the level of union membership was high and the ILO was widely regarded as an authority in the field of labour standards. Third, industrial workers and their family members were protected by social and legal entitlements. Labour laws provided security for various risks and contingencies at work and also installed safeguards for many who were without a job. People were thus not completely dependent on market forces for their socio-economic well-being.

However, the system of labourism was flawed in fundamental ways and should not be idealised.²³ Labourism discriminated against women, the service industry, agriculture, home workers and all forms of work that deviated from the standard employment norm.²⁴ It also turned a blind eye to reproductive activities, such as care work, and gave little attention to migrants and occupational communities.²⁵ Socio-economic protection was still largely conditional upon labour market participation and came at a huge price: Those fortunate enough to be in full-time employment lost their freedom to an employer who dictated and controlled the entire work process.²⁶ I hasten to add a feature that has often been overlooked, namely that the welfare systems were partially financed by those newly independent countries

²¹ Ibid.

²² Kennedy 2006, 108.

²³ Standing 2009, 6 and Rittich 2010, 566.

²⁴ Standing 2009, 41ff.

²⁵ Ibid. Care work, mostly done by women, went largely uncompensated although markets would not be able to operate without it.

²⁶ Ibid.

in the south that had been forced into relationships of unequal exchange by their former colonizers.

2. The Disembedded Phase

The post-war consensus was replaced in the 1970s and 1980s by a new doctrine - later termed neo-liberalism - which gave normative priority to competitiveness and efficiency. Laws and institutional arrangements were revised so as to facilitate the allocation of resources to their most productive use.²⁷ Economic imperatives spread not only into governments but permeated all aspects of social life. The most significant change, however, concerned the reach of the market economy. Since national borders were perceived as a hindrance to investment and economic growth, active measures were taken to create a globally integrated market.

At the core of this neo-liberal reform agenda was an unholy alliance between the global financial institutions (the World Bank, the International Monetary Fund and the World Trade Organization)²⁸, powerful transnational corporations²⁹ and the Chicago School of economics.³⁰ Another critical impulse came from technological innovations which simplified and accelerated the movement of goods, services, capital and information.³¹

Once liberalization was underway there was sustained pressure to cut labour costs.³² Firms could relocate to countries where labour was inexpensive and worker protection weak (outsourcing, offshoring) which essentially undermined the bargaining power of workers everywhere in the world.³³ Employers who previously carried the risk of investment (fluctuating demand, poor product quality, the ill health of workers etc) were now able to shift uncertainties and insecurities onto workers who had to make concessions in order to keep their jobs. Other demographic shifts such as the feminization of labour and growing migration contributed to this trend by providing labour markets with additional cheap human resources.

²⁷ Under normal circumstances this meant enabling private transactions.

²⁸ The adoption of neo-liberal reforms by developing countries was often a result of pressure exerted by the IMF and WB (conditionality, structural adjustment), see Kennedy 2006, 131. Alongside the WTO, other free trade regimes (EU, ASEAN, NAFTA, MERCOSUR and many bilateral agreements) have contributed to a globally integrated market.

²⁹ The economic elite have been able to influence state policies in their favour through lobbying, use of the media and political funding.

³⁰ Drawing from Hayek, Friedman and other liberals, this school came to dominate the academic world and government circles in the late 70s. 'Its members took over the main economic journals and powerful committees awarding research funds. It is a measure of their dominance that between 1980 and 2008 no fewer than 17 of the Nobel Prizes in Economics went to former or current Chicago economists', Standing 2009, 62.

³¹ Arthurs 2001, 274.

³² Standing 2009, 58.

³³ Ibid., 63. The threat of outsourcing and offshoring is a powerful political tool but actual outsourcing and offshoring has also been growing – particularly in the financial sector, *ibid.*, 73f.

A key objective of the neo-liberal agenda was the creation of a flexible labour system for the sake of economic growth:³⁴ ‘Flexibility meant a regime of employment at will, where the government imposed no restrictions on hiring, firing or working conditions. Rather, employers and workers were free to choose terms that were convenient for them.’³⁵ A flexible labour regime gave disproportionate power to employers and contributed to the rise of contingent, casual, precarious and informal work.³⁶ Only adaptable, high-end employees could take advantage of the new freedoms and negotiate terms which were favourable to them. For most employees, however, flexibility came with a curtailment of legal and social entitlements. Seen in this context, declining relative returns to workers in relation to those of capital and stagnant real wages³⁷ must be understood as an integral, rather than an accidental part of the regulatory neo-liberal framework.

Collective bargaining had played an essential role in the post-war years but it was now increasingly replaced by individual contracts. The growth of the service industry, where collective bargaining had always been the exception rather than the norm, contributed to this trend. But even in the manufacturing economy the level and density of union membership declined. Moreover, the strongest advocate for collective bargaining on the global level, the ILO, became a target of neo-liberal critique and lost significant influence with the withdrawal of the United States as its most important sponsor.³⁸

A further major change concerned the character of trade: The economic landscape has come to be dominated by transnational companies with production networks and global supply chains in developing countries.³⁹ Risks and employment functions are transferred down by the lead firm to sub-contractors and suppliers with very little bargaining power.⁴⁰ Not only did this development further entrench disparities between countries in the south and the north, it has also raised questions of transparency and accountability: The use of agencies, intermediaries and contract workers can make it extremely complicated to determine who is responsible for employment conditions and wages.⁴¹

Access to state benefits became more difficult. In order to qualify for unemployment benefits, health care and social welfare, people needed to display certain behaviour and verify

³⁴ Other benefits that have at times been attributed to flexible labour regimes are more jobs, greater market participation of women and young people and lower unemployment levels, see Santos 2009 44f.

³⁵ Ibid., 45.

³⁶ Ibid.

³⁷ Standing 2009, 63 and 78f.

³⁸ See also chapter seven, section one.

³⁹ Von Broembsen 2012a, 5.

⁴⁰ For Standing 1999 a characteristic of ‘organizational flexibility’.

⁴¹ Standing 2009, 85.

increased contributions.⁴² With private insurance options thriving, average levels of pensions declined in many countries.⁴³ Here, too, increased levels of contributions were necessary to obtain adequate allowance for retirement.⁴⁴ All these benefits became less universal and more conditional upon market participation.⁴⁵

Fiscal policy in the 80s ceased to function as a mechanism of progressive redistribution.⁴⁶ Anxious to attract or sustain investment, policy makers everywhere began to give more deference to business interests and investor rights. The tax burden on capital was lowered incrementally while, at least relatively, workers' taxes were increased.⁴⁷ Many corporations discovered legal and illegal ways to avoid taxes resulting in empty public pockets which workers were asked to fill again.⁴⁸ Subsidies on goods and services relevant to low income workers were curbed while those for capital were increased.⁴⁹ Newly emerging industries such as telecommunications, computers, internet etc were heavily subsidised by states.⁵⁰ Moreover, corporations and financial institutions that took risks and suffered losses could count on the state to jump in with rescue plans at any time.

The net result was an economy increasingly disembedded from society. Neo-liberalism sacrificed the post-war values of social protection, solidarity and equality for the virtues of competitive markets. The picture of imbalance that underpins the first of the three interpretations of disembeddedness provided above is perfectly incisive. Social, human or ecological aspects were subordinated to the laws of supply and demand and received attention only insofar as they did not impede efficient markets. A measure of unease is also warranted if one considers the declining influence of those organizations that had previously given a powerful voice to workers – the ILO and unions. On an individual level finally, workers increasingly came to rely on market participation and their personal bargaining capabilities to secure an adequate standard of living. In order to avoid outright exclusion from labour markets many were forced to accept jobs on any terms that were offered.

⁴² Ibid., 81.

⁴³ Ibid., 82.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid., 65.

⁴⁷ Corporate tax rates in the OECD moved from 45 per cent in the 80s to below 29 per cent in 2005, see *ibid.*

⁴⁸ Ibid.

⁴⁹ Ibid., 83.

⁵⁰ Chang 2002, 548.

3. The New Free Market: A Wolf in Sheep's Clothing

The present time is characterized by capital being 'more mobile and powerful'⁵¹ than ever before. Financial institutions directly determine the fates of millions of workers through their operations in international stock markets. Virtually no week goes by without a new massive takeover or merger. Private equity funds with little intention for productive investment buy up companies in bulk, cut jobs, and resell what is left to foreign best bidders.

Many financial services are geared towards short term profits and involve highly speculative activities. This produces insecurities not only for workers, but for society as a whole. The amount of money generated by such services has steadily increased during the last decades and few experts believe that the financial meltdown will stop or even reverse this trend.⁵² Particularly alarming are new data on inequality which reveal a widening gap between rich and ordinary people and an increased 'concentration' of wealth within a small fraction of the population.⁵³

Workers today are expected to learn new skills, change jobs more often and accept degrading work conditions as well as low levels of social and legal protection. The significance of collective bargaining is further declining while private contracts proliferate both across industries and geographies.⁵⁴ The omnipresent temptations of outsourcing and offshoring continue to create downward pressure on social and legal protection for workers. Countries who want to remain competitive and attract foreign corporations need to offer a legal environment that is conducive to investment.

Many governments have also failed to adjust their labour laws to new patterns of work. Their laws remain faithful to an employer/employee dualism which excludes a growing number of extremely vulnerable workers – especially those in the informal economy and (in)dependent contractors. Such omissions constitute a form of 'implicit deregulation'⁵⁵ which allows big corporations to transfer many of the risks described in the previous section.

These observations suggest that disembeddedness is still very much the status quo. However, some voices in different academic circles are claiming that a major paradigm shift is happening as we enter the twenty-first century. For instance, Trubek and Santos argue that a

⁵¹ Wedderburn 2007, 397.

⁵² In 2007, financial services accounted for 40 per cent of corporate returns in the United States (as opposed to 10 per cent in 1980), Standing 2009, 59.

⁵³ Rittich 2008, 238ff and Rittich 2010, 567f.

⁵⁴ Union representation has reached post-war low points in many countries, see Arthurs 2011, Fischl 2011a.

⁵⁵ Rittich 2009, 572.

‘new law and development mainstream vision’⁵⁶ is on the rise, which marks a significant departure from neo-liberal ideology. This vision takes on two different forms:

‘Mainstream development thinkers continue to stress the importance of markets as the main mechanism for production and distribution of resources in societies and as the main leverage for economic growth. But they now also recognize that there may be significant market failures, which could justify state intervention. [...] Second, there is an appeal for a reconceptualization of development that would decentre the focus on economic growth. Advocates of this view argue that development policies should broaden their scope in the pursuit of human development, of which income is only an aspect, and equal consideration should be paid to political, social and legal development.’⁵⁷

There is little reason to assume that the first path carries the potential to re-embed the economy in society since it fails to engage with the normative assumptions of the neo-liberal agenda. Proponents of this stream of thought accept the primacy of market ordering and believe that the correction of market failures alone will suffice to set things right. In their professional vernacular is no room for ideas that reach beyond the laws of supply and demand and I worry that following their footprints will, in the long run, reinforce political strategies that should be challenged.

People who oppose market hegemony, that is, ‘... people who persist in thinking and acting as if politics or families or culture or ethics mattered ...’,⁵⁸ are more likely to turn to ideas of the second path. It is not difficult to find contemporary discussion that is informed by these ideas. Indeed, much of what is happening today in epistemic communities and in international financial and economic institutions has the imprimatur of a more holistic version of development.⁵⁹ However, as Rittich has repeatedly pointed out, numerous new strategies that emphasise non-economic aspects remain deeply anchored in a neo-liberal framework.⁶⁰ This can be exemplified with the World Bank’s ‘second generation’ program which is paradigmatic of how the International Financial Institutions (IFIs) have come to respond to critiques on social and democratic deficits. The ‘reformed agenda’ includes a host of social, structural and human concerns but it leaves the legal background rules of efficient and competitive markets largely ‘unmodified’.⁶¹ As a consequence, the central mode to promote

⁵⁶ Trubek and Santos 2006, 4.

⁵⁷ Ibid., 6f.

⁵⁸ Arthurs 2001, 274.

⁵⁹ According to Rittich 2004, a revival of social aspects can be traced back to the World Bank’s comprehensive development framework (CDF) of 1999 and is also reflected on the wider international level through the endorsement of the Millennium Development Goals, see *ibid.*, 200f.

⁶⁰ See, *inter alia*, Rittich 2004, 2006, 2008 and 2010.

⁶¹ Rittich 2004, 225.

social ends becomes the market itself!⁶² This is a very dangerous development since it effectively immunizes neo-liberalism against critique. It also gives new force to the idea of the self-regulating market that can now be articulated in the language of social justice. Similarly, the OECD's 'job strategy' from 2006, the revised version of a highly influential report on labour market regulation and social policy, continues to accentuate flexibility as the main driver not only for growth, but also for social justice and equality.⁶³ The parameter used to measure success both socially and economically is labour market participation – i.e. the number of people in jobs as opposed to the terms of their participation.⁶⁴ Employment securities or social entitlements as part of the employment relationship are perceived as obstacles to the efficient functioning of labour markets and are only tolerated if they flow naturally from bargaining processes between employers and employees.⁶⁵

In the past, liberals have acknowledged the adverse effects of market forces even though most may have succumbed to the idea that, in the long run, everybody stands to benefit from economic growth. In a metaphorical sense then, the market was a wolf in wolf's clothing. The 'job strategy' and the 'second generation' reform program embody a new market idiom that obscures the link between negative social outcomes and neo-liberal ideology. Decorated in the vocabulary of social justice, the free market has come to be the first guarantor of better social outcomes. It has become a wolf in sheep's clothing.

The thesis so far, has given an overview of the socio-economic and political developments since World War Two from the perspective of workers. It has argued that neo-liberal ideas dominate in policy circles and large parts of the academic community and that voices who argue differently (see Trubek and Santos above) need to be treated with caution.

It is now time to move a step further and look at those two building blocks that could, in my opinion, form the basis for a counter hegemonic strategy to the neo-liberal agenda with a view to re-embed the economy in society: Nancy Fraser's theory of justice and New Governance.

⁶² Rittich 2006, 428.

⁶³ Rittich 2008, 251. The only notable extension of that framework is the goal to improve training and skills of workers, *ibid.*

⁶⁴ *Ibid.*, 235.

⁶⁵ *Ibid.*, 267.

III. FRASER'S THEORY OF JUSTICE AND NEW GOVERNANCE

Nancy Fraser provides a clear and comprehensive philosophical framework that takes account of the growing interdependence in a globalizing economy. This chapter will present her theory in general terms before applying it to the context of work. The dimension of 'representation' will receive particular attention since it accentuates what is, in my opinion, the most crucial deficit in a world dominated by neo-liberalism. In order to link Fraser's work to practice, the chapter will refer to a broad school of legal thought known as New Governance. This school breaks with many assumptions typically associated with law-making. Most, importantly, it regards states and private stakeholders as equal partners in the pursuit of regulatory ends and is thus open to 'representation' for various categories of workers. The chapter will trace the origin of New Governance and highlight its defining characteristics. Following that, it will present two examples of New Governance techniques to highlight the application of these characteristics in practice.

1. 'Parity of Participation': A Three-Dimensional Approach to Justice

Nancy Fraser's philosophical framework is built on the notion of 'parity of participation' which she regards as a democratic version of the old principle of equal respect.⁶⁶ 'Parity of participation' requires 'social arrangements' that allow '... all members of society to interact with one another as peers.'⁶⁷ This means that people need to be able to interact with one another on equal terms and as 'full partners' across various spheres of social life, including, inter alia, the economy, politics, family, culture and sport.⁶⁸

'Parity of participation' integrates three different claims of social justice: 'redistribution', 'recognition' and 'representation'.⁶⁹

'Redistribution' forms a critical component of Fraser's framework since people need material resources to participate with others as peers. If they are denied these resources, they are subject to 'distributive injustice' or 'maldistribution'.⁷⁰ Although Fraser does not argue for a particular set of distributive policies, the concept of 'parity of participation' clearly precludes forms of gross disparities of wealth, exploitation and poverty.

⁶⁶ Fraser 2009, 16.

⁶⁷ Fraser 2010, 365.

⁶⁸ Ibid.

⁶⁹ Fraser 2009, 16f. In her earlier work, Fraser only advocated a two-dimensional approach to 'parity of participation' based on 'redistribution' and 'recognition', see Fraser 1998 or 2003.

⁷⁰ Ibid., 16.

‘Recognition’ aims to dismantle ‘... institutionalised hierarchies of cultural value.’⁷¹ In simple terms, this dimension of Fraser’s framework seeks to eliminate forms of discrimination based on race, gender, religion, sexual orientation, nationality, ethnicity etc. People who suffer from discrimination do not have equal chances to attain ‘social esteem’ and are therefore subject to what Fraser calls ‘status inequality’ or ‘misrecognition’.⁷²

‘Representation’, finally, serves the agenda of providing individuals with equal political voice. On one level, unsound procedural rules might hinder people’s ability to express concerns within their own community. The means to remedy such obstacles to ‘parity of participation’ are usually found within the typical political-science discourses over ‘gender quotas on electoral lists’, ‘multicultural rights’, ‘cumulative voting’ and the like.⁷³ Fraser calls this type of injustice ‘ordinary-political misrepresentation’ and contrasts it with ‘misframing’ which according to her constitutes a ‘meta-political injustice’.⁷⁴

The latter occurs if the ‘boundaries’ of political communities exclude people from making claims of social justice.⁷⁵ The crucial question here is whether someone is considered as a subject of justice in the first place. Fraser contends that the Keynesian-Westphalian frame, which regards the sovereign territorial state as the appropriate unit for justice claims and the sole basis for determining the subjects of justice, is unable to resolve the most pressing problems in a globalizing world:

‘Increasingly subject to contestation, the Keynesian-Westphalian frame is now considered by many to be a major vehicle of injustice, as it partitions political space in ways that block many who are poor and despised from challenging the forces that oppress them. Channelling their claims into the domestic space of relatively powerless, if not wholly failed, states, this frame insulates offshore powers from critique and control. Among those shielded from the critique 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 domestic control.’⁷⁶

Thus, if forms of injustice move across borders, claims of ‘redistribution’ and ‘recognition’ can only be successful if the frame is not confined to the nation-state. Fraser herself argues that the frame of justice should be expanded to include all those ‘... who are subject to a

⁷¹ Ibid.

⁷² Fraser 2010, 365.

⁷³ Fraser 2009, 62.

⁷⁴ Ibid., 6, 19.

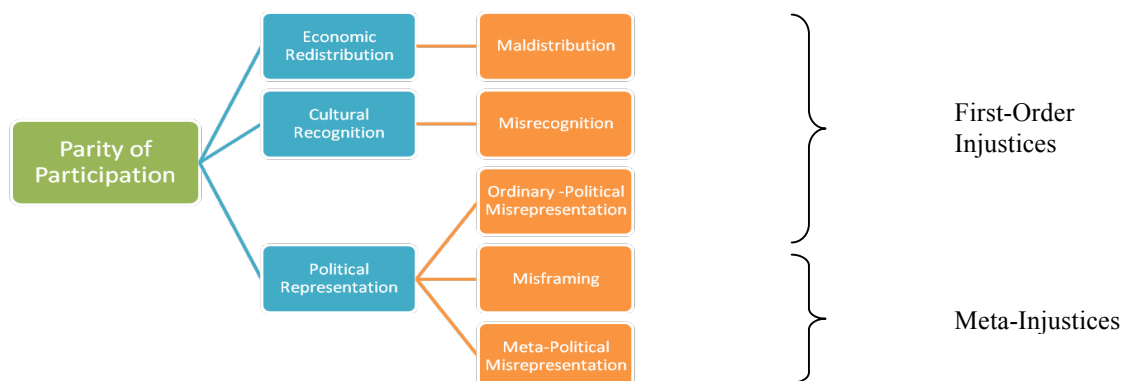
⁷⁵ Ibid.

⁷⁶ Many contemporary philosophical frameworks still operate on a domestic level which makes them unconvincing in times of globalization.

given governance structure' (the 'all-subjected principle').⁷⁷ Establishing the 'who' of justice (its subjects) in this way rejects references to nationality or geographic proximity but demands an answer to the question of whether someone is affected by an institutional or structural framework.

'Representation' is also important on a third level beyond 'ordinary-political misrepresentation' and 'misframing'. According to Fraser, 'parity of participation' requires the democratisation of the rules that determine the subjects of justice. If states or powerful transnational actors 'monopolize the activity of frame-setting' – i.e. if they alone are able to determine who counts as a subject of justice, people suffer from 'meta-political misrepresentation'.⁷⁸ To remedy such forms of injustice, Fraser recommends the creation of new global institutions that can produce binding rules as to the 'who' of social justice. But since the question of the 'who' concerns everybody and cannot be resolved as a mere 'technical matter' she also argues for a second track that complements these institutions. This second track is the civil society which holds the above institutions accountable and allows people to participate in the frame-setting process by means of dialogical and inclusive political debates.⁷⁹

The principle of 'parity of participation' is the benchmark against which progress with regard to 'redistribution', 'recognition' and 'representation' is assessed. Fraser believes that only a combination of all three dimensions will eradicate most obstacles to social justice that can be found in modern societies. She thus declines to prioritise one dimension over the others, which in my opinion is a mistake, since only the removal of obstacles to 'representation' will enable people to fight against 'first-order injustices' of 'maldistribution' and 'misrecognition'. The following graphic summarises Fraser's approach and provides an overview for those not familiar with her terminology.



⁷⁷ Ibid., 65.

⁷⁸ Ibid., 26.

⁷⁹ Ibid., 68f.

2. Fraser and the Context of Work

Picking up the threads of chapter two again, the thesis will now explain in some detail why Fraser's theory of 'participatory parity' could lay the foundation for a strategy to re-embed the economy in society. Issues of work will again be the main focus of attention.

Big economic corporations can exert huge influence on national policies through lobbying, political funding and the control of the media. Their interests coincide with a neo-liberal market agenda in general and a flexible labour regime in particular. Truly independent political parties that have the courage and imagination for radical change are rare and they lack the financial means to play a significant role. It is no coincidence then that workers in many countries have lost their faith in politics and democracy. They feel that their voices are not being heard and that their interests are not reflected in the political course of their governments. A strategy which seeks to counter this tendency would have to reinvigorate democratic structures by enhancing what Fraser calls 'representation'.

'Representation' for workers is also absent on a global level where arguably the most serious forms of injustice have their origin. International corporations, the financial markets, big investors and the neo-liberal governance structure itself are largely beyond scrutiny and control, although they have a huge impact on workers in different parts of the world.

International corporations may serve as a first example to illustrate this point. Their activities are dispersed over various jurisdictions and yet the frame to press social justice claims against them is, as Fraser points out, the Keynesian-Westphalian nation-state. A worker who is subject to exploitative practices will face legal and practical obstacles to press charges against a responsible lead firm in a supply chain, if the latter is located in a foreign country. This worker thus suffers from a lack of 'representation'.

The problem is further aggravated if we consider the International Financial Institutions (IFIs), the WTO or financial markets. The previous chapter has described the two former institutions as part of an 'unholy alliance' that was responsible for the removal of trade barriers and the integration of national economies into a global market. In the context of the IFIs, I have also briefly discussed the World Bank's second generation reform agenda. I concluded that this agenda, despite a new rhetoric, continues to promote free markets as the key to development and economic growth. Discussions within the WTO about the integration of a social clause have also failed to produce any results and, just like the IFIs, this organization continues to be a powerful engine for free markets. The influence of these institutions on labour standards has been fatal. In a global economy, governments compete

with other countries and are under constant pressure to adjust their regulatory environments so as to sustain or attract investment. Business interests prevail while social, human, ecological or distributive aspects are rarely given sufficient attention. The impact of financial markets on the lives of workers has also been discussed in the previous chapter. Speculative activities produce insecurities for workers and society as a whole and are subject to only limited controls. We therefore have to ask if there are forums for workers to challenge institutions such as the IFIs, the WTO and the financial market.

The ILO is the most likely candidate but its tripartite structure has not been adjusted to new patterns of work. The bodies that have access to the Governing Body (unions) are not representative of most workers in a globalizing economy. It is also highly questionable whether the ILO possesses the necessary means to challenge more powerful neo-liberal organizations and financial markets. Conventions are a blunt instrument for social change if they are not ratified by many countries and if the enforcement mechanism does not provide for concrete sanctions.⁸⁰ The limitations of the ILO are discussed in more detail in chapter seven.

An alternative answer to the problem of ‘representation’ may lie within the WTO and the IFIs themselves but I do not believe that this strategy offers the most promising way forward for those concerned with the interests of workers, since the neo-liberal agenda is part of their rationale - indeed their *raison d’être*. The WTO was set up to further global trade and has no authority and expertise in labour and social matters. Similarly, the IFIs are not supposed to consider social or distributive concerns in their lending decisions.⁸¹ Therefore, even if these institutions became more democratic they are unlikely to become guarantors of social and legal protection for workers.

Habermas proposes a multi-level governance system under the auspices of a reformed United Nations (UN) to shield citizens from the pathologies of a global economy.⁸² However, the UN is a weak organization that has no adjudicative power on labour or social matter whatsoever. States would have to shift far-reaching regulatory competences to this organization, which seems like a utopian idea in the light of the current predominance of neo-liberal ideology.

In the following chapter of this thesis I will argue that labour ‘representation’ on a domestic and global level can be enhanced in practice through New Governance models. If these

⁸⁰ The ILO can criticize non-compliance with conventions but only once (in a case against Burma) has it requested its member states to impose sanctions.

⁸¹ *Ibid.*, 236.

⁸² Habermas 2006.

models are founded in a principle of participation they may offer an alternative path to the improvement of working conditions and worker protections which may, in the long run, even translate into formal institutions of adjudication.

3. Fraser and Polanyi

The examples of the previous section suggest that ‘representation’ needs to be the main feature of a counter hegemonic strategy against neo-liberal predominance. It is this aspect of Fraser’s framework that resonates most strongly with the three interpretations of disembeddedness presented in chapter two.

First, ‘representation’ is a precondition for attaining any acceptable balance between economic and other concerns. As long as the voices of workers are marginalised on the domestic level through political parties that exclusively further business interests and through the unfettered power of financial markets and international organizations on the global level, it is unlikely that politics will give more deference to distributive, social and human concerns.

Second, ‘representation’ is also necessary to regain grip and control over economic processes. Workers need a forum where they can challenge neo-liberal policies collectively. Unions or the ILO have provided such options in the past but they are not representative of most workers in a globalizing economy anymore. A counter hegemonic strategy therefore has to create new political spaces of contestation that include workers and that give voice to everybody else who is affected by neo-liberal policies.

Third, ‘representation’ is a foundation upon which the influence of market forces on the individual could be reduced. Workers need a voice to leverage laws that protect those inside and outside labour markets (unemployment benefits, social welfare, disability support, adequate income, legal protection against unfair dismissal and social entitlements). Thus, only once ‘representation’ is sufficiently institutionalised will workers be able to press for ‘first-order’ claims of ‘redistribution’ and ‘recognition’ that are necessary to complete the transition from a disembedded economy to an economy once again re-embedded in society.

Both Polanyi and Fraser understand the capitalist crisis as a multidimensional phenomenon.⁸³ Both acknowledge that if market forces are the only source of social ordering they will inevitably disrupt communities, destroy livelihoods and exploit natural resources. What Polanyi failed to see, however, is that protections designed to constrain markets could

⁸³ Fraser 2012, 5.

themselves produce and entrench new forms of injustice.⁸⁴ This was the case in the post-war welfare states where women were subordinated to men, where several categories of workers were ignored and where social security was built on the back of developing countries.⁸⁵ In other words, the post-war consensus disregarded key dimensions of Fraser's theory of justice. If women do not receive equal protection and opportunities at work they are subject to 'misrecognition'. If former colonies are pushed into unequal relationships of exchange with developed countries and if categories of workers (such as casual, informal or contract workers) are ignored they suffer from a lack of 'representation' and 'redistribution' respectively. We therefore have to acknowledge that regulations themselves can serve to protect some at the expense of others, in the sense that they create new impediments to 'parity of participation'. Fraser's framework urges us to stay alert and to ask critically at any time: Does the social arrangement in question work to ensure 'redistribution', 'recognition', and 'representation' so as to further 'parity of participation'?

Having established the theoretical basis for a counter hegemonic strategy to neo-liberal hegemony, the next step requires us to ask how we can integrate this concept on the political stage so that Fraser's theoretical insights are translated into concrete policies. New Governance models offer alternative mechanisms of law-making that do not rely exclusively on the political will and the capacity of states and international organizations. These models are particularly relevant to this project because they focus primarily on private stakeholders and are thus predestined to fulfil the criterion of 'representation'.

4. New Governance: Introduction

Law has already appeared, albeit tacitly, at crucial places in this thesis. What Polanyi had in mind when he wrote about making markets subject to non-economic control were legal institutions designed to prevent land, labour and money from becoming commodified. The post-war welfare states did exactly that by establishing labour protections, collective bargaining rules and numerous public law institutions to curb international trade. The neo-liberal era was highly dependent on law as a policy instrument as well: The elimination of trade barriers, the development of financial regimes, the protection of property and contract

⁸⁴ Ibid and Fraser 2013. Fraser criticises Polanyi for two further shortcomings: She contends that Polanyi ignores the positive emancipatory effects of markets and that his conceptual dualism of economic liberalism vs. social protection forecloses the possibility of analysing struggles that do not align with either of the two sides. These are valid concerns. However, given that the main features of the current crisis are a result of the predominance of market ordering, Polanyi's framework is still useful for progressive thinkers today.

⁸⁵ Ibid.

rights and much more required far-reaching legislative changes.⁸⁶ Turning to Fraser and her concept of ‘parity of participation’, there can be no doubt that law is an integral and indispensable element of her call to create ‘social arrangements’ that enable people to ‘interact with one another as peers’.⁸⁷

The common thread that runs through these different narratives is the idea of law as an instrument of social change. Legal rules do not only structure human behaviour and expectations, but also distribute authority and resources in fundamental ways. The dangerous flipside, of course, is when people make us believe that legal rules are a neutral or mere technical matter. In these cases the political choices (pertaining to ‘redistribution’, ‘recognition’ and ‘representation’) always inherent in legal rules, are masked.

However appealing law may appear to progressive thinkers in different academic fields, one must resist the temptation of blind legal optimism. There are often striking differences between the law in books and the law in action on the one hand, and the capabilities of people to use the law to their advantage on the other.⁸⁸ Moreover, even those rules that appear most formal are subject to judicial discretion. And finally, legal rules stand in a relation of mutual influence with other, often informal, rules and the consequences of that interplay are often impossible to predict.

Those concerns aside, law can be a powerful instrument of social change, in particular if it is used democratically to include a wide range of different stakeholders.⁸⁹ A new and innovative approach in legal thought and practice that seems to gravitate in this direction is referred to as New Governance or New Governance scholarship. These two phrases have in recent years established a recognised denotation⁹⁰ and stand for a growing and heterogeneous legal field that challenges the way in which law is commonly understood and conceptualised. New Governance scholars advocate collaborative, bottom-up, flexible and dynamic modes of regulation as opposed to state-centred, command-style, fixed-rule regulation.

⁸⁶ Deregulation, a term often used to describe the regulatory development of the neo-liberal period, is misleading. A more accurate term would be re-regulation. See Kennedy 2006 for a more detailed analysis.

⁸⁷ Fraser 2010, 365.

⁸⁸ Developing countries in particular suffer from a lack of regulatory capacities (both in terms of enforcement and rule generation). The second thought is intended to capture two different dilemmas: First, there is the possibility that people do not have the financial means and the information necessary to claim their rights (a problem that can arguably be found in developed and developing countries in equal measure) and second there is also a chance that more powerful actors are able to influence decisions in their favour.

⁸⁹ Critical legal scholars have long rejected law as a vehicle for social change. This has changed with the arrival of second-generation feminist, race and gay theorists, Lobel 2004, 448.

⁹⁰ Karkkainen 2004, 472.

The origin and development of New Governance is best understood as part of a broader shift in legal reasoning triggered by new experiences of complexity and volatility in modern societies on the one hand, and the inadequacy of existing legal theories in achieving social, political, ecological or economic ends on the other hand.⁹¹ The emergence of various New Governance techniques in practice, however, has often been a result of political conflict between civil society, NGOs, corporations and the state.⁹²

New Governance is a broad legal movement that has not yet settled (and likely never will) upon a shared understanding of what forms and what does not form part of its own discipline. Most scholars who consider themselves a member of this movement would, however, distinguish their own approach from ‘systems theory’, a related governance school that is usually associated with the work of Gunther Teubner.⁹³ For Teubner, substantive law constitutes a self-referential, autonomous and normatively closed system which is unable to regulate other subsystems with similar characteristics.⁹⁴ Any attempt to do so inevitably results in a ‘regulatory trilemma’ where law turns out to be either irrelevant, destructive of the regulated subsystem or self-distorted in relation to it.⁹⁵ The solution for Teubner and his followers are ‘reflexive’ legal mechanisms that aim to influence the self-regulating processes of these subsystems without however interfering with them.⁹⁶ Many New Governance scholars do not share Teubner’s diagnosis of legal systems, nor do they embrace reflexive theories as a whole. Certain aspects of ‘systems theory’, however, have entered the writings of different New Governance scholars.

Another school of legal thought that has sometimes been distinguished from New Governance relates to John Braithwaite’s body of work about ‘responsive regulation’.⁹⁷ Many of the ideas developed at greater length in the next chapter are akin to the basic assumptions of his writings (in particular a preference for deliberative practices) but differences to other New Governance scholars are not so serious as to warrant a separate consideration.

⁹¹ In an increasingly complex and volatile world, New Governance contends that legal institutions themselves need to be varied, diverse and revisable, see Lobel 2004, 355ff (distinguishing between internal and external triggers).

⁹² Kolben 2011, 59.

⁹³ Teubner 1983, 1987 and 1997.

⁹⁴ Teubner 1997, 764.

⁹⁵ Teubner 1987, 21.

⁹⁶ Teubner 1983, 274. The classic example is collective bargaining law which regulates the self-regulating activities of various actors.

⁹⁷ Ayres and Braithwaite 1992.

5. Principles of New Governance and Practical Examples

It is beyond the scope of this thesis to flesh out all the fine distinctions and competing ideas that exist between various New Governance scholars. The field has in recent years become so large and complex that even those who have been involved since the beginning struggle to keep track of all its new developments. I therefore focus on a set of recurring principles – a summary of features that build a more or less stable repertoire of (and a loose link between) different New Governance scholars. The following four features stand out to me as the most defining phenomena:

- Decentralisation
- Collaboration and Participation
- Soft Law
- Diversity and Adaptability

New Governance techniques shift regulatory responsibilities from the state to private actors such as firms, NGOs and civil society. These entities do not only decide how policy goals are to be carried out, they also contribute proactively in the search for appropriate regulatory objectives in the first place.⁹⁸ However, although there are proponents who advocate purely private regulatory solutions, most New Governance scholars retain a significant array of functions for the state, including the improvement of private stakeholder capacities; the facilitation and steering of private collaborations; the provision of incentives to abide by norms; the creation of minimum standards and default rules; and the replication of successful approaches.⁹⁹

New Governance views states, civil society groups and NGOs as partners in the pursuit of regulatory ends. It is a collaborative model which stimulates dialogue and requires stakeholders with completely divergent agendas to work together in order to realize their interests. The synergies that emerge from such partnerships are said to result in more effective and context-sensitive outcomes.

Some New Governance scholars advocate bottom-up approaches with broad-scale involvement of citizens in decision-making processes.¹⁰⁰ The merits of participation are fundamental to this thesis: Direct participation enhances the democratic ideal of people's

⁹⁸ Abott and Snidal 2009, 529.

⁹⁹ Ibid., 521ff.

¹⁰⁰ Leading intellectual figures are John Baithwaite and Charles Sable. See, inter alia, Cohen and Sabel 1997, Ayres and Braithwaite 1992.

active involvement in political life¹⁰¹, mitigates advancements of self-interest¹⁰², increases legitimacy of legal rules and empowers those who are most disadvantaged in society.¹⁰³

Conventional forms of regulation are often rendered meaningless in cases where the problems prove complex, disagreements intense and the capacities of the state inadequate.¹⁰⁴ New Governance has therefore incorporated more ‘voluntary’ rules and principles into their models. Whereas hard law is compulsory, often precise and enforced by formal legal procedures, soft law uses more flexible, less clear-cut prescriptions such as standards, guidelines and benchmarks.¹⁰⁵ Sometimes, New Governance techniques simply mandate the disclosure of information, the provision of reports, or even less intrusive, encourage participants to enter into dialogues.¹⁰⁶ For their enforcement, private schemes rely on potential commercial benefits (relief of inspections or sanctions, permission to use eco-labels etc), pressure from consumers, trade unions, NGOs or the media and the implicit threat of the state or background rules to intervene when soft law measures fail.¹⁰⁷

Another characteristic of New Governance is its rejection of one-size-fits-all approaches. Regulatory issues are addressed in diverse ways through different methodologies and practices such as information sharing, networking and creative combinations of formal and informal rules. This allows New Governance not only to respond to extreme complexity and factual uncertainty but also to adapt pragmatically to new information and changing circumstances. Contrary to conventional rules, which are generated and revised through painstakingly slow and cumbersome legislative processes, private schemes are understood to be quickly produced and altered in the light of new realities. Private schemes also compete with and learn from other regulatory experiments, thereby fostering a culture of permanent intervention, ongoing evaluation, constant improvement and dynamic learning. In a sense

¹⁰¹ Countries and international organizations typically rely on elections as the principal means for realizing their democratic commitments. Elections are important instruments to ensure a degree of accountability and responsiveness from governments, but they are seldom truly empowering for the common people. Those who are allowed to vote do not, under normal circumstances, make policies themselves. They are passive recipients of political agendas with only limited control or influence.

¹⁰² During participatory processes people may experience a change in their relationships to others and society in general. Most tellingly, they may develop a new understanding of their significance as a member of the polity and be encouraged to revoke their personal interests in support of a greater good, Steiner 1988, 105.

¹⁰³ Broad political participation opens up avenues for change which is of special importance to marginalised individuals whose voices are regularly ignored by more powerful decision-makers.

¹⁰⁴ Lobel 2004, 393f.

¹⁰⁵ However, the idea that hard law is more easily enforced and likely to bring about the social changes aspired to has already been challenged at the beginning of this section. See also Trubek and Trubek 2005, 355ff

¹⁰⁶ Abott and Snidal 2009, 530f.

¹⁰⁷ Ibid., 543. Soft law only seldom stands alone in complete isolation from mandatory rules. Trubek and Trubek 2007 discuss three ways in which New Governance and conventional law can relate to each other: Complementarity, rivalry and transformation.

then, Lobel was right when she contended some years ago that ‘newness itself becomes the substance of the emerging paradigm.’¹⁰⁸

New Governance ideas have been applied in practice in many policy areas. In the domestic sphere, for instance, they have informed new initiatives against hidden and intricate forms of discrimination. Civil rights are a weak instrument for redressing discriminatory practices that are not the result of someone’s visible actions but rather the cumulative product of ‘... corporate culture, informal norms, networking, training, mentoring, and evaluation.’¹⁰⁹ A work environment can become intimidating or unpleasant notwithstanding any identifiable illegal conduct. Many employers have therefore turned to alternative strategies for relief that contain some of the typical New Governance features. Instead of adversarial legalism, they introduce advisors from outside (decentralisation) to engage with workers (participation, collaboration) in continuous dialogue (adaptability and learning).¹¹⁰ Some firms have systematically begun to gather information about discrimination and to share it with other firms.¹¹¹ Others again have embraced ethical codes (flexible rules) and training programs.¹¹²

New Governance features have also infiltrated approaches to problem solving in the international realm. The most prominent examples are codes of conduct which aim to raise labour standards throughout global supply chains.¹¹³ Big lead firms are pressured by consumers, unions, student activists and NGOs to adopt codes and ensure compliance to labour standards reflected in them by firms further down the chain of production.¹¹⁴ Some firms have voluntarily endorsed these codes to gain more control over suppliers or to increase employees’ productivity.¹¹⁵ Codes of conduct are either produced by companies themselves or in partnership with trade unions and NGOs (collaboration).¹¹⁶ However, workers have not regularly been invited to negotiations (no broad participation). Sceptics criticise inadequate monitoring (assessments are often conducted by the firm itself and only seldom involve an independent third party) and weak enforcement mechanisms (compliance depends on

¹⁰⁸ Lobel 2004, 354.

¹⁰⁹ *Ibid.*, 420.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Without default or background rules ethical codes have usually not been very effective, *ibid.*, 422.

¹¹³ Some scholars hope that the positive effects of such codes will also ‘spill over’ into domestic firms where working conditions are even worse, Hepple 1999, 350. Other issues that may be found in such codes concern the environment, social provisions, development, business practices and the rule of law, *ibid.*, 357.

¹¹⁴ Critics warn that the focus on well known companies such as Nike, Nestle and Disney enables many less familiar manufacturers and retailers in their shadow to operate under competitive advantages (‘free rider problem’), Gereffi and Mayer 2004, 22.

¹¹⁵ Hepple, 1999, 355.

¹¹⁶ There are codes that emanate from state initiatives but private schemes or private-public hybrids are far more common (decentralisation).

consumer pressure or potential benefits).¹¹⁷ The fact that many codes impose only low standards and use very broad conceptual descriptions exacerbates their voluntary nature (soft law).

This chapter has provided an overview of Nancy Fraser's theory of justice and New Governance. 'Parity of participation' is a concept which offers considerable potential for addressing various forms of injustice in a globalizing world. New Governance also responds to globalization, albeit in a different sense. This broad strand of legal thought and practice challenges conventional assumptions about law and, in so doing, clears the path for new and innovative ways of using legal techniques as a vehicle for social change. How these two bodies of work may benefit from each other and how their strengths can be combined in a strategy to overcome market fundamentalism will be the topic of the next chapter.

¹¹⁷ Codes of conduct seldom include consequences of non-adherence such as 'corrective action[s]' or 'termination of contract or business relationship[s]', Hepple 1999, 360.

IV. A COMBINED APPROACH TO COUNTER NEO-LIBERAL HEGEMONY

The purpose of this chapter is to highlight particular omissions of New Governance scholarship and Fraser's theory of justice and to explain how these shortcomings could be partly resolved if the two concepts were combined. However, an integration of Fraser's theory into New Governance models is not a simple task but would require New Governance scholars to refocus their attention on participation and to assign more importance to forms of injustice that overflow national borders.

1. The Omissions of New Governance Scholarship

It is a widely held assumption in the New Governance community that their models are normatively open and thus, in principle, receptive to all parties of the political spectrum:¹¹⁸

‘The premise of the governance model is that, in order for a legal regime to be sustainable, it must encompass a multitude of values and account for conflict and compromise. It must acknowledge the diversity and changing interests of many stakeholders. It must recognize the legitimacy of private economic interests while appealing to public values. ... [T]he obsessive maintenance of traditional boundaries – including those of public and private, profit and nonprofit, formal and informal, theory and practice, secular and religious, left and right – is no longer a major concern. ... On the contrary, the governance model aims to move beyond these pervasive dichotomies in search of sustainable structures. Its objective is not to police boundaries, but rather to seek out and open structures that will facilitate wider imaginative horizons.’¹¹⁹

New Governance's promise to accommodate various political interests from the left to the right hinges on the ability of people with different agendas and endowments to engage in decision-making processes on equal terms. However, case studies in the domestic sphere give a highly unsatisfying account of how participatory methods have been applied in concrete settings.¹²⁰ The bottom line of a recent survey conducted by Abott and Snidal on New Governance in the international realm is equally disappointing:

‘Even from a less purist perspective, the quality of participation and deliberation in Transnational New Governance remains uneven. Firm schemes are limited to economic stakeholders and are not highly deliberative, although a few schemes do incorporate significant input from other groups. Other schemes vary widely in

¹¹⁸ Burca 2010 uses the phrase ‘normatively empty’, *ibid.*, 237. See also Cohen 2010 (indicating a normative ‘suspension of distributive ends’ by New Governance scholars), *ibid.*, 382.

¹¹⁹ Lobel 2004, 379f and 442.

¹²⁰ For an early example see Anderson and Yaffee 1998 (concluding that HCPs which allow for exemptions of the US Endangered Species Act's prohibition on the taking of fish and wildlife species have fallen short of the participatory ideal that their architects had in mind). See also Alexander 2009 (describing the failure of the public housing reform in Chicago to provide for effective participation of residents) and Bach 2010 (indicating ‘an absence of substantive participation by poor communities in goal-setting and program design ...’ with regard to the welfare reform in the US), *ibid.*, 239.

engaging those ultimately affected by regulatory decisions, such as developing country workers, rather than elite groups that claim to speak for them.’

The implications of these findings should not be underestimated. A great deal of New Governance’s legitimacy derives from the underlying assumption that it includes those who are directly affected by policy outcomes in the process of creating them. It would be too easy to ascribe participatory shortcomings to contingent circumstances of particular local settings, temporary difficulties of technical adjustment or inadequate understanding of New Governance theory by practitioners. The exposed problems signal two deeper omissions of New Governance scholarship that will, sooner or later, come to bear on the credibility of the whole movement if they are not addressed: First, New Governance scholarship tends to sacrifice meaningful and broad participation for pragmatism and flexibility. Second, New Governance lacks an analysis of political economy and a robust theory to redress unequal cultural standing.

One would be hard pressed to find a single New Governance scholar who does not accentuate participation in one way or the other but only few give it the attention it deserves. The reason can partly be found in a systemic contradiction between two of the organizing principles of New Governance: The need for pragmatic solutions and quick revisions stand in sharp contrast to the often slow processes of participation. It is no coincidence then that critics see New Governance as a ‘... covert form of deregulation designed to mask reduction of environmental standards and social protection.’¹²¹ The call for flexibility in process design may well translate into flexibility of the kind found in labour markets if those affected by policies do not receive a fair chance to participate. Fraser’s theory of justice requires ‘representation’ for all those who are subject to a given governance structure. Her concept urges New Governance scholars to place participation at the centre of their attention.

New Governance scholarship also fails to address power asymmetries which impede full and equal participation in political debates. Capital is highly organized and has the financial resources to influence and determine the content and the terms of discussions that are taking place. Its power is not restricted to traditional decision-making processes within governments or international organizations but may well extend to new Governance techniques as well. If New Governance scholars advocate forms of participation without addressing power imbalances that root in economic structures, their techniques will, when applied in practice, always run the risk of being undermined by those with superior financial means. A preceding minimum commitment to redistribution therefore will be necessary for all stakeholders to

¹²¹ Trubek and Trubek 2007.

participate and to have a fair chance in challenging more powerful actors on highly uneven political grounds.¹²²

In a similar vein, New Governance scholarship has showed an insufficient interest in inequalities of cultural status despite its overwhelming impact on the ability of people to bargain with each other as peers. Barriers to participation can be embedded in racial, gender, religious or other hierarchies. Lisa Alexander's description of the Chicago public housing reform, for instance, illustrates how racial and gender disparities impinge on people's ability to participate meaningfully in decision-making processes that impact their lives.¹²³

Fraser's theory of justice gives due consideration to both 'economic redistribution' and 'cultural recognition' and may therefore complement New Governance in important and necessary ways. The problem is not, as many commentators seem to suggest, New Governance's promise to be open to all ideological stripes itself, but rather that – to borrow a Kantian phrase – the conditions of possibility for this promise are not fulfilled. New Governance could be an attractive field for progressive thinkers because it has the potential to tilt the political status quo in favour of those who are currently disadvantaged, but only if three preconditions for equal participation are established: There must not be any restriction on subject matter, the terms of bargaining must allow for any and all possible outcomes and all those potentially affected by decisions must be fully included in the participatory process.

2. The Omissions of Fraser

Since the times of Plato and Aristotle, there have always been thinkers that envisioned expanded, large-scale solutions to societal problems. Clarifying the nature and roots of predicaments, assessing the potential for escape and elaborating alternative paths, these theorists and philosophers have sharpened our eye to various ills and have given us many valuable insights into the human condition and the requirements to coexist. Each concept, however, has been embedded in a certain time characterized by its own questions and its own unique set of problems. For reasons given above, Fraser's theory of justice is, at least to me, the most promising concept at the current conjuncture.

Theories of justice have always been a somewhat double-edged sword. Their greatest strengths have often also been their greatest weakness. Ambitious narratives with a high level of abstraction and comprehensiveness may be short on practical solutions and concrete

¹²² The particular redistributive interventions that I consider necessary are discussed in the next chapter.

¹²³ Alexander 2009.

instructions. The most elegant descriptions, the clearest and most explanatory images and the most powerful ideas are not helpful if there is no way to put them into practice.

Fraser's work derives inspiration from current social struggles including feminism, anti-imperialism, environmentalism and anti-globalization which is a reason why her theory is more grounded in realities than many other philosophical accounts. However, there are still many unanswered questions. For instance: How are Fraser's two tracks (institutions and civil society) to be realized in practice and what role should the state play in this endeavour vis-à-vis the civil society? Moreover, how will law figure in the task of realizing parity of participation – in particular, what kind of rules are required and how should they be produced?

New Governance may provide some answers to these questions. Most scholars in this field of research have recognised the importance of the state as a power that looms in the background to step in when New Governance fails. They advocate collaborative models which include the state, economic stakeholders and civil society groups. In these concepts, information flows back and forth, from state to private entities and in the opposite direction, thereby influencing and questioning the ideas that prevail and ultimately the very structure of these institutions. Operating within such a framework, struggles usually assume the form of normal 'first-order' claims of 'redistribution', 'recognition' and 'ordinary-political representation', but over time and due to pressure exerted by progressive groups, these forums could transform into places for the contestation of 'meta-political misrepresentation'. Struggles would be dispersed into many different arenas. Other than Fraser's two tracks, there would be just systems of a kind that cater to civil society, private entities and also to the state as an important player. If we expand this thought-provoking concept even further we might think of ways in which these dispersed efforts could start to network, become more inclusive and grow to the point where they are powerful enough to influence the creation of formal institutions with real power of adjudication.¹²⁴ Networking is a salient feature of many New Governance models and is particularly widespread among 'democratic experimentalists':

'What is required instead, democratic experimentalists argue, is a centrally coordinated and monitored system of parallel local experiments, networked and disciplined through structured information disclosures and monitoring requirements, subject to rolling

¹²⁴ Of course, the situation becomes more difficult if one wishes to regulate international spheres. New Governance would have to incorporate the governments of various countries. This could happen incrementally in the sense that one New Governance experiment in one country would spur other similar experiments in other countries and so on. These models could also start off as purely private schemes and draw in states over time as they increase public acceptance and become more influential.

minimum performance benchmarks but otherwise free to experiment in a continuous and ceaseless effort to improve, learn, and revise.¹²⁵

Admittedly, the idea I am proposing here is quite abstract and warrants further exploration. The crucial point I want to stress is simply that given the resistance one has to expect from organised capital, the creation of formal institutions is more likely to emerge from practical governance experiments over time than from scratch.

To be sure, New Governance models will not bring about significant change without political struggle. Powerful economic stakeholders are unwilling to participate in New Governance models that do not suit their interests. The successful functioning of these models thus depends on legal background rules that come into effect when economic stakeholders fail to engage in such processes or when engagement does not lead to results. On their own terms, however, states are unlikely to provide such rules, which is why political campaigns aimed at bringing various issues to policy tables are so essential. There are some purely private schemes (codes of conduct) that have effectively strengthened the rights and protections of workers without involving the state but these endeavours have been the exception and they have also relied on some kind of political mobilization (in the form of substantial consumer pressures that forces big corporations to implement and comply with certain standards).¹²⁶

With regard to the nature of rules required for ‘parity of participation’ and the process of their creation, New Governance may be of further service to Fraser’s theory. In combination with harder background rules, soft law mechanisms may clear the path for new and creative solutions to old regulatory dilemmas. In situations of intense disagreements and overflowing complexity, soft law measures can be an interesting option, especially if they are considered an interim result in lieu of consecutive negotiations. The potential of soft law and alternative forms of enforcement has not yet been explored exhaustively but they offer new and exciting ways of thinking about law and the ways it could be used for various ends.

With reference to Fraser’s manifest predilection for deliberative processes, New Governance may offer the concrete tools to move beyond elections as the conventional mechanism for political representation. If New Governance scholars place participation at the centre of their approaches, a liaison between this school of legal thought and Fraser’s theory of justice could be a powerful engine for a rich democratic culture.

¹²⁵ Karkkainen 2004, 485.

¹²⁶ For further discussion of the importance of political struggle see chapter five and the conclusion of this thesis.

3. Integration through Participation

At risk of pedantry, let me begin with some hair-splitting over definitions. The concept I am proposing here integrates Fraser's theory into New Governance and not, vice versa, (New Governance into Fraser's theory). To reiterate, the main target audience of my thesis is progressive lawyers in the field of New Governance. I do not seek to alter or improve on Fraser's framework which is perfect as it stands in its openness. There are, of course, as we have seen, issues that would make it worthwhile for Fraser to engage with New Governance scholarship, but any attempt to tie her concept to this school of law will have the irrevocable effect of a straightjacket and may foreclose alternative modes of application. This is not my intention. I will also refrain from using the term merger which has business overtones and suggests the transformation of something lesser into something greater through the death of the former individual parts.

The phrase then that I would like to employ as a description of my endeavour is 'Integration through participation'. Let me explain: Fraser's concept of 'parity of participation' has a procedural and a substantive component:

On the one hand, the principle of participatory parity is an outcome notion, which specifies a substantive principle of justice by which we may evaluate social arrangements: the latter are just if and only if they permit all the relevant social actors to participate as peers in social life. On the other hand, participatory parity is also a process notion, which specifies a procedural standard by which we may evaluate the democratic legitimacy of norms: the latter are legitimate if and only if they can command the assent of all concerned in fair and open processes of deliberation, in which all can participate as peers.¹²⁷

For the purposes of this thesis, I will only focus on the second aspect of 'parity of participation' (hence 'Integration through participation'). It is my belief that if the criteria for fair and equal participation are given¹²⁸, outcomes will, over time, also come to fulfil the substantive requirements of 'parity of participation'. This may sound disappointing or even heretical in times where large-scale redistributive proposals have become almost axiomatic among contemporary left-wing intellectuals. However, there are no routes to justify such measures within the New Governance framework other than for the reason to make participation work. By all means, one must not underestimate the scale of redistribution necessary to fulfil the preconditions of fair and equal participation; neither must one underestimate the capacities of collaborative New Governance models to trigger legal and institutional reform. The next chapter will provide a more detailed analysis of these

¹²⁷ Fraser 2009, 28f.

¹²⁸ See section one of this chapter.

correlations. For the moment, I am simply charting the ideas for an integrative model along general lines.

The focus on the procedural aspect of ‘parity of participation’ has another advantage. It is less intrusive and thus less paternalistic than direct attempts to establish the substantive aspect.¹²⁹

Paternalism, although ubiquitous in every legal system, is problematic because it denies an individual the status of an autonomous person capable of setting his/her own goals.¹³⁰

However, only anarchists who seek to abolish any form of coercion would seriously doubt the legitimacy of paternalist actions in general. If we argue that redistribution and recognition must be pursued only insofar as it is necessary for people to engage in decision-making processes on equal terms we can reduce paternalism to a minimum amount. In general, the closer value judgments come to reflect a consensus in society, the less paternalistic they are. Seeing the impossibility of perfect consensus for most political questions, the next best option in my opinion are decisions based on full and equal participation which is exactly what Fraser’s procedural principle of ‘parity of participation’ iterates.

Realizing the procedural component of Fraser’s theory will require New Governance scholars to place participation at the centre of their approaches. Indeed, they will have to make it their main organizing principle. This will, at least to some degree, necessitate a retreat from flexibility and adaptability, two principles which often anyway stem from pressures to imitate the market. Participation, despite all the modern advances in information technology, is a slow and cumbersome process that requires prolonged efforts and cultivation.

Crucially, New Governance will have to move from the domestic to the international sphere. Fraser teaches us that ‘social processes shaping ... [peoples] lives routinely overflow territorial borders. ... [D]ecision taken in one territorial state often impact the lives of those outside it, as do the actions of transnational corporations, international currency speculators, and large institutional investors.’¹³¹ New Governance models are unfortunately still predominantly applied in the national context of developed countries.¹³² Instead of seeking to increase the overlap between those potentially affected by policies and those entitled to protection (Fraser’s ‘all-subjected principle’), this state of affairs drives an even wider wedge

¹²⁹ Dworkin 1972 defines paternalism as follows: ‘By paternalism I shall understand roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person coerced’, *ibid.*, 20. Thus, two elements need to be present for paternalist action: Someone has to a) act for someone else’s benefit and b) go ahead even if the other person does not consent, Eidenmüller 2005, 359.

¹³⁰ *Ibid.*, 366.

¹³¹ Fraser 2009, 13.

¹³² Abott and Snidal 2009, 509.

between the two groups. New Governance scholars will therefore need to push in two directions: Towards the inclusion of developing countries and across the boundaries of nation states. The collaborative New Governance model is potentially open to more than just one state, a fact that could, for instance, be used to hold transnational corporations operating in two or three countries accountable.

Admittedly, the situation gets trickier when more states are involved or when a public power to issue legally binding background or default rules is not readily available which is the case with the governance structure of the global economy. Fraser argues that the modern territorial state has lost ‘... the administrative ability to steer “its” economy ... and provide for the security and the well-being of “its” citizens’¹³³ This leads her to argue for new formal transnational institutions that can translate discursively formed public opinions into binding rules and administrative action.¹³⁴ Although Fraser’s proposal might finally be the right move, her analysis nevertheless conceals that the global economy is, after all, not a free floating construct, but a system rooted in a legal framework created by the states themselves. In the previous chapter I have briefly discussed the potential of some forums (ILO, WTO, IFIs, UN) to challenge and press for regulatory changes. From a New Governance perspective there have, moreover, been successful examples of purely private regulations in the international realm (codes of conduct) notwithstanding obstacles to enforcement.¹³⁵ I have also indicated, in broad terms, a way how New Governance models might amplify their influence through networks and how this could, in the long run, lead to formal institutions with considerable countervailing power.

One should also not lose sight of a new form of governance that is making itself increasingly felt in the international arena: ‘Transgovernmental regulatory networks’.¹³⁶ These networks have sometimes been described as ‘subunits of national governments’ but many have developed spontaneously outside formal arrangements from a ‘need to work together to address common problems.’¹³⁷ A leading example in the field of financial regulation is the Basle Committee on Banking Supervision which exerts enormous influence in the regulation of banking markets. Progressive labour lawyers, unions, NGOs and other civil society groups that fight for the interests of workers should try to break into this and other largely self-regulating ‘transnational regulatory networks’ to pry them open to non-economic

¹³³ Fraser 2009, 98.

¹³⁴ Ibid., 97.

¹³⁵ Keller 2008 describes improvements for factory workers in El Salvador, Honduras, and Vietnam, *ibid.*, 58.

¹³⁶ See Slaughter 2001. A related field that might spur the interest of New Governance scholars is the global administrative law project, see Cassese 2005.

¹³⁷ Ibid., 1 and 355.

stakeholders. Some prolonged efforts may even result in the infiltration of something resembling an ‘all-subjected principle’. We will need such drastic and creative approaches to curb the financial markets with its far-reaching impacts on people’s lives.

To sum up, this chapter has outlined how New Governance and Fraser’s theory of justice are to benefit from each other and how the latter could be integrated into the former for a progressive legal strategy that is based on participation. The following chapter will analyse obstacles to fair and equal participation and ask whether the expectations typically associated with deliberative processes – fragmentation of power, transformation of relationships, fostering of shared interests and production of fair outcomes – can realistically be upheld. It is, however, beyond the scope of this thesis to provide detailed answers to all the problems which may or may not emerge during the course of participatory processes. The following analysis should therefore be understood as a roadmap which indicates where problems may arise, how serious they could become and in which direction one might move to effectively address them.

V. MAKING PARTICIPATION WORK

The leitmotif that will run through this chapter concerns the ways in which power relationships influence the success of participation on various interpersonal and structural levels. Section one will provide an introduction to the discussion on power by presenting theories of Steven Lukes and John Gaventa. Sections two to four are subdivided along the lines of ‘who’, ‘how’ and ‘what’ with regard to participation.¹³⁸ These sections will apply the power-lens to the three preconditions for fair and equal participation established in the previous chapter: All those potentially affected by decisions must be fully included in the participatory process (‘who’), the terms of bargaining must allow for any and all possible outcomes (‘how’) and there must not exist any restriction on subject matter (‘what’).

1. A Multi-Faceted Concept of Power

Steven Lukes and John Gaventa have made important contributions to the debate on power. Lukes has expanded conventional theories of power that had focused exclusively on individual behaviour. He understands power as a structural phenomenon which is embedded in various societal arrangements and institutions. In his seminal book ‘Power: A Radical View’¹³⁹ he insightfully distinguishes between ‘visible power’, ‘invisible power’ and ‘hidden power’.

Visible power is what most people would associate with power. Individuals or groups who possess it can influence and control decisions or the interests of others when a conflict arises.¹⁴⁰ But visible power is also manifest in legal rules, structures and processes that shape the interactions of human beings in societies.

Hidden power concerns the capacity of some to set political agendas. People who are in possession of this form of power consciously or unconsciously determine which issues reach the policy table and who gets to the table. Patterns of hidden power are entrenched in ‘... values, beliefs, rituals, and institutional procedures (“rules of the game”) ...’ that serve some people to further their interests at the expense of others.¹⁴¹ The self-regulating market with its emphasis on individuals is an instructive example. Not only does it exclude non-economic concerns and stakeholders from debates but it also favours individual over collective action.¹⁴²

¹³⁸ Similar to Fraser’s ‘who’, ‘how’ and ‘what’ of justice.

¹³⁹ Lukes 1974.

¹⁴⁰ Ibid., 12.

¹⁴¹ Bachrach and Baratz, quoted in *ibid.*, 17.

¹⁴² The expansion of private bargaining in work relations is a typical manifestation of this normative bias.

Invisible power refers to norms which have entered the consciousness of people through the control of information, culture and processes of socialisation. This form of power influences the thoughts and desires of people and determines what is normal, acceptable and possible. People living under desperate circumstances may come to accept their situation because alternatives or solutions are blocked from their consciousness. This power thus serves as a potent weapon to entrench certain ideas while banning others. Workers in the informal economy, for instance, often do not see how they could receive social and legal protections or they are not even aware that they might deserve them in the first place.

Gaventa has elaborated further distinctions to Lukes' classification. He argues that Lukes' forms of power stand in direct correlation to certain spaces of engagement. Spaces are widely defined as '... opportunities, moments and channels where citizens can act to potentially affect policies, discourses, decisions and relationships that affect their lives and interests.'¹⁴³ They are either 'closed' (e.g. when elites make decisions without consulting civil society), 'invited' (e.g. when stakeholders are allowed to join a policy table) or 'claimed'/'created' (e.g. when stakeholders demand that spaces be more inclusive or when people come together to create their own spaces).¹⁴⁴ Gaventa also acknowledges that power struggles take place on different levels (local, national, global and many in between).¹⁴⁵ Whereas some reformers tackle power imbalances which take place on village level or even in the intimate place of the household, others focus their energy on contesting national or international powers.

Forms, spaces and levels of power stand in a relation of close entwinement and reciprocal influence.¹⁴⁶ Power is thus not static, as many people seem to assume, but changes all the time. Gaventa also rejects rigid demarcations between those who have power and those who do not have it. Drawing on an insight of Foucault he claims that '... everyone possesses and is affected by power ...' in multiple, dynamic and complex ways.¹⁴⁷ A crucial element of transformative strategies must therefore be to make people aware of their inherent potentials and opportunities.

A real shift in power, according to Gaventa, takes place '... when social movements or social actors are able to work effectively across each of the dimensions [forms, spaces, levels] simultaneously'¹⁴⁸ This requires progressive strategies to develop horizontal links

¹⁴³ Gaventa 2006, 26.

¹⁴⁴ Ibid., 26f.

¹⁴⁵ Ibid., 28.

¹⁴⁶ Ibid., 30.

¹⁴⁷ Ibid., 23.

¹⁴⁸ Ibid., 30

between different organisations and stakeholders and vertical links across local, national and global levels.

Another useful typology of power distinguishes between ‘power to’, ‘power over’, ‘power within’ and ‘power with’. Whereas ‘power to’ concerns the ability to act, make choices and exercise agency, ‘power over’ alludes to forms of domination and the ability of some actors to influence the thoughts and actions of others. ‘Power within’ strongly resonates with Lukes’ ‘invisible power’. It concerns the capacity of people to imagine alternative realities, raise new questions and challenge old paradigms. The concept of ‘power with’, eventually, refers to bonds of solidarity and collective action. In contrast to ‘power over’ it accentuates the opportunity of dialogue and collaboration to achieve certain goals.

2. The ‘Who’ of Participation

The realization of Fraser’s ‘all-subjected principle’ poses several practical challenges. Above all, disparities in the allocation of financial resources might hinder disadvantaged individuals from participating in deliberative processes (‘maldistribution’). People need money to attend meetings that do not take place in their immediate environment. They also need time, which is a very scarce resource for those who work long hours or pursue more than one job in order to sustain their families. Survival is an every day struggle for many people, which commands all their energy and attention. Without substantial redistributive efforts thus, spaces that are potentially open (‘invited spaces’), may nevertheless remain unoccupied.

Redistribution is also necessary to alleviate unequal organizational capacities. Compared to the power of capital, non-economic stakeholders, most notably workers, lack the infrastructure that would allow them to pool their interests and to act as a single influential block. Local units, by themselves, are unable to solve problems of organization and NGOs that could assume this task or at least offer assistance, face increasing financial constraints and are discouraged by sponsors with no interest in political mobilization. At the bottom of this predicament is a lack of what we have called ‘power with’ – the ability to build alliances and partnerships. In an ideal deliberative scenario, this should not bother us since rules and procedures are designed to neutralize the effects of unequal power through the leverage of common reason: ‘[T]he only power that prevails is, as Habermas puts it the “force of the better argument” – and that is a force equally available to all.’¹⁴⁹ Exactly this promise, however, is undermined by capital’s superior ability to organize and effect public discourse via media, business chambers and funding

¹⁴⁹ Cohen and Rogers 2003, 242.

of NGOs that disseminate their policy positions. If the often diverse, complex and contradictory interests of non-economic stakeholders are not coordinated and channelled and if their capacity is not strengthened with a view to inform public opinion, participatory processes are in danger of tilting entitlement in favour of those who are already in better positions.

The capacity and willingness of people to participate also depends on the stimulation of commitment and awareness. Many people are apathetic to politics and have long given up hope for significant change. They accept the circumstances under which they live and cannot even imagine a different future. Von Broembsen describes the importance of increasing what Marx has called ‘critical consciousness’ at the grassroots level.¹⁵⁰ She argues that ‘... [a]n analysis of invisible power and the development of ‘power within’ is a precursor to the social mobilisation which is necessary for social transformation.’¹⁵¹ The most promising transformative strategies will be those that combine the creation of organizational capacities (‘power with’) and critical consciousness (‘invisible power’ and ‘power within’) not only for brief democratic moments but in a sustainable manner so that spaces that are open remain open and spaces that are closed are continuously challenged to become more open over time.

An illustrative example of how this has been achieved in practice through a joint approach of political struggle and developmental activities is provided by the Self Employed Women’s Association (SEWA) in India. This trade union organizes informal women workers to strengthen their bargaining power vis-à-vis more organized employers and trading partners, but it also provides a wide range of services to increase the security of its members in terms of income, health, care, child support and shelter.¹⁵² SEWA is representative of over 1.4 million workers in the informal economy and has established a large web of affiliated organizations (over a hundred SEWA cooperatives, associations and companies) and specialized institutions such as SEWA Bank which provides micro credits to workers under favourable conditions (‘power with’).¹⁵³ In contrast to many civil society organizations, SEWA also attempts to increase the critical consciousness and self-confidence of its members (‘power within’). Supported by SEWA, women workers are able to collectively challenge decision-making processes, practices and norms on the local, national, regional and even international level.

¹⁵⁰ Von Broembsen 2012b, 13.

¹⁵¹ Ibid.

¹⁵² Sinha 2013, 2

¹⁵³ Chen et al 2013, 8f.

Impediments to inclusive participation can also take root in cultural hierarchies of status.¹⁵⁴ Gaventa teaches us that power imbalances are found on various levels which may operate independently of one other. Workers who hold shares in a company, for instance, may feel free to participate on a plant level or within union structures but they may fear retribution from their employers at a board level. This amounts to a form of ‘misrecognition’ which may also have implications for New Governance models where workers face their employers in direct deliberations. Obstacles to participation are also to be found in gender hierarchies. While the number of women in trade unions is constantly growing, their representation in decision-making bodies remains highly uneven.¹⁵⁵ Patriarchal structures in unions and other civil society organizations may deem it normal and indeed appropriate for a handful of people - usually men – to exercise power. Attempts to unravel these and similar hierarchies of status are necessary for the effective functioning of participatory processes.

As these examples suggest, inclusive participation is rendered illusionary without far-reaching interventions that combat ‘maldistribution’ and ‘misrecognition’. The challenges multiply should New Governance proponents seek to regulate spheres that affect large parts of a population. In such cases, forms of representation might indeed be more desirable than straightforward deliberations among thousands of people which are not only difficult to orchestrate but also unlikely to yield meaningful results. The main task then is to identify those bodies (or to create new ones) that are sufficiently representative and that are responsive to and in ongoing communication with their members. Unions and NGOs are candidates that come to mind, but they often do not fulfil either criterion.¹⁵⁶

A second, more purist, approach to the problem of scale would focus on the coordination of parallel local circles of deliberation and seek to aggregate their decisions. One might also entertain the possibility of a mixed system with different stages of deliberations: On a first level, groups of representatives would deliberate on certain principles, values or parameters to which local circles would be bound in their subsequent deliberations. This would tighten up and direct discussions which otherwise, given the quantity of participants, risk becoming futile. For instance in the context of codes of conduct, worker representatives and lead firms of global value chains might agree to a set of labour standards and appropriate mechanisms of enforcement which suppliers, contractors and workers further down the chain (who have

¹⁵⁴ Fraser 2009, 17.

¹⁵⁵ Dean 2006, 8.

¹⁵⁶ NGOs are geared towards specific tasks, cannot sufficiently respond to the complex needs of workers and are prone to capture by sponsor interests. Unions, on the other hand, may have the experience to challenge capital but they are mostly not representative of informal workers (SEWA being an exception) and have at times also been criticised for pushing agendas of certain dominant factions.

superior knowledge about local circumstances and specific needs) would then specify in more concrete terms.

3. The ‘How’ of Participation

The question of ‘how’ concerns the mechanisms of deliberative processes which differ substantially from alternative modes of policy making:

‘Unlike strategic bargaining (in which outcomes are determined by the powers that parties bring to negotiations), hierarchical command (in which outcomes are determined according to the judgement of the highly placed), markets (in which money mediates outcomes), or aggregative voting (in which outcomes are determined according to the quantity of mobilized supporters), ...’¹⁵⁷

deliberative processes encourage participants to persuade others with arguments that are based on reason. This does not mean that there is no legitimate role for emotions or the advancement of self-interest. On the contrary, much of the creative and transformative potential of deliberations depends on it. If people are offered a space where they can express their thoughts and emotions freely without the fear of being rejected and where they are allowed to challenge each other in sometimes heated debates they may come up with surprising ideas and solutions. New bonds and networks may also emerge during such experiences and - notwithstanding tangible outcomes - participants may acquire new skills, grow personally and become more powerful and responsible vis-à-vis their fellow citizens. In addition, deliberative processes may produce legal rules that are widely accepted. It is a natural phenomenon that people are more willing to accept and internalize rules they have helped to create.

Deliberative processes require participants to adopt policy options which enjoy the widest possible support. In contrast to aggregative forms of voting where participants choose an option which is in line with their personal interests, deliberative practices require voters to consider ‘... the reasonableness, fairness, or acceptability of that option to others.’¹⁵⁸ To be sure, this is an ideal which no design structure will be able to provide with certainty but it is helpful as a goal and as a reminder at times when participations may reach a deadlock. The rules of discussions (timetables, demands for respect, requirements to listen, interdicts to interrupt speakers etc) may all be helpful under certain circumstances but they cannot, by themselves, guarantee that participants will deliberate and vote under the umbrella of reason and fairness. Much more important are commercial incentives, concrete pressures and the

¹⁵⁷ Fung and Wright 2003, 26.

¹⁵⁸ Ibid., 19.

foreclosure of exit options.¹⁵⁹ It is here where New Governance scholars need to further explore possibilities and experiment in new directions.

The fact that backgrounds vary between participants should not be regarded as a hindrance to successful deliberations. As long as disparities in wealth and cultural status do not reach levels where some are excluded from participation or dominated in extreme ways (see the previous section), different background conditions may create synergies of the kind that help solve complex problems. From a power perspective, moreover, it stands to reason that some imbalances will indeed, as Habermas argues, be disciplined by the design structure of deliberations which is centred on the premise of reason.

However, the very design structure itself may create new power imbalances which need to be assessed. If reason is the central point of reference, those who have superior deliberative skills and access to information may enjoy unfair advantages over others.¹⁶⁰ Case studies indicate that these problems exist but that their weight should not be overstated.¹⁶¹ Much information will be revealed during the process of deliberation itself and thus becomes freely available to everyone in attendance. Moreover, if we build the organizational capacities mentioned in the previous section, information asymmetries will, to some degree, be mitigated as well.

The fear that benefits might accrue to the rhetorically talented has often been successfully addressed by training programs.¹⁶² These programs are also an essential part of the organizational capacity that needs to be considered as a precondition for fair and equal participation. Here again, it is important that issues are not tackled in isolation from other concerns. Training must be an integral node to address different dimensions of power. On the one hand, it should aim to build argumentative capacities ('power to' or 'power over'), but on the other hand it should also provide political education ('power within', 'invisible power') while simultaneously fostering solidarity ('power with').

Training programs are necessary for yet another reason. Under certain circumstances, they may function as a shield against the tendency of New Governance schemes to become dominated by economic models.¹⁶³ Fischl argues that neo-liberal ideology has undermined the vocabulary of legal professionals and made economic parlance into something of a 'lingua franca'.¹⁶⁴ Wherever economic models take the stage, the deceptive spectre of scientific

¹⁵⁹ See discussion on soft law in chapter three section five.

¹⁶⁰ *Ibid.*, 34.

¹⁶¹ Cohen and Rogers 2003, 245.

¹⁶² Fung and Wright 2003, 29.

¹⁶³ Lobel 2004, 455.

¹⁶⁴ Fischl 2011b, 957.

accuracy follows suit. This can obscure value judgments and depoliticise contested issues (in particular when they are framed as mere technical problems).¹⁶⁵ Progressive legal reformers who claim ‘... again and again that a commitment to market ordering entails this or that progressive intervention ...’ reinforce rather than challenge this trend.¹⁶⁶ Training programs must therefore resist what Fischl calls the ‘... thrill of using “the master’s tools” against him...’¹⁶⁷ and look beyond the apparent inevitability of economic conclusions with a view to preparing participants for a normative engagement with economic stakeholders.

3. The ‘What’ of Participation

In this section we enter the terrain of ‘hidden power’ which determines which debates are taking place and who has a say in them. In Fraser’s ideal world, such issues are resolved democratically – a goal which stands in sharp contrast to current political practices. A strategy which seeks to work incrementally towards Fraser’s ideal would have to face neo-liberal ideology on the level of ideas and increase acceptance of the ‘all-subjected principle’ itself via political struggle.

In an important article, Somers and Block explain how neo-liberal ideas have come to be so dominant and resistant in the face of empirical contradictions.¹⁶⁸ One of their most salient findings is that these ideas ‘... do not have to be rooted in specific historical circumstances to exert powerful influence.’¹⁶⁹ They rely ‘... on abstract thought experiments and naturalistic models that have no empirical referents.’¹⁷⁰ Thereby, they ‘... create entirely alternative definitions of reality and rationality.’¹⁷¹

Compared to this overarching and homogeneous vision, progressive endeavours lack a compelling and unifying counter-narrative. The ‘all-subjected principle’ could in my opinion be the missing link – a common denominator - between many seemingly disparate reformist endeavours and a powerful ethical model against the naturalistic misconceptions of market fundamentalism. The fact that those who are affected by structures or arrangements should be

¹⁶⁵ Moreover, empirical facts are themselves a construct of society (a product of historical contingencies, social theories and normative assumptions), see Fischer 2003.

¹⁶⁶ Ibid. We have encountered this category of reformers in chapter two as one of two groups whose ideas according to Santos and Trubek embody a ‘new law and development mainstream vision’, Trubek and Santos 2006, 4.

¹⁶⁷ Fischl 2011b, 957.

¹⁶⁸ Somers and Block 2005, (describing the importance of the ‘perversity thesis’ – the idea that assistance is hurting the poor – in overturning welfare regimes and deconstructing its underlying assumptions).

¹⁶⁹ Ibid., 281.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

given a voice in their design is so intuitively intelligible and carries such moral force that the burden of proof should reside with those who argue for an alternative concept.

To be sure, ideas alone will not suffice to bring labour issues on policy agendas if they are not combined with concrete pressures by civil society groups. Conversely, however, social movements that seek to bring specific issues on agendas without questioning the underlying normative assumptions of neo-liberalism will only scratch the surface and will not succeed in eradicating the structural causes of agenda denial. Civil society groups will therefore have to engage more proactively with New Governance scholars in places such as the World Social Forum, the ILO or the UN (which are more receptive to progressive ideas than the WTO, the IFIs or other organizations) to develop strategies that tackle institutions which are out of synch with Fraser's 'all-subjected principle' (journals, policy circles, the media and economic networks).

In practice, activists, civil society groups and progressive labour lawyers have used different strategies to push work-related issues on the agendas of national governments and international organizations, such as social mobilization, the use of media or other means of communication, and lobbying within governments, international organizations and policy networks, and attempts to link labour issues to larger concerns, such as social stability and peace, so as to increase awareness of regulatory problems. Thereby, their efforts have been met by strategies of resistance by capital, which endeavours to keep issues off the policy tables.¹⁷²

It has already been mentioned in the previous chapter that most New Governance models rely on a minimum commitment from the state for their effective functioning. Thus, for these models to be used in a progressive way, political struggle to influence agenda setting is an indispensable element. However, once states provide the legal background rules for negotiations, New Governance models themselves may serve as powerful tools to promote alternative ideas and increase awareness of regulatory deficits. If capacity deficits of non-economic stakeholders are addressed, deliberative processes will allow workers to engage

¹⁷² Cobb and Ross 1997 have identified typical strategies of agenda denial by dominant groups along a cost continuum: Low-cost strategies focus on ignoring the existence of problems, treating them as isolated incidents, providing procedural reasons for not addressing them, ignoring the groups who push issues or denying recognition of those groups. Medium-cost strategies consist of discrediting groups (questioning their ethics, behaviour or blaming them for problems) or the issue itself (disputing facts, raising fear, stating that issues are not of public interest, contending adequacy of current policy, claiming victim status or negative spill-over effects etc). Alternatively, problems may be acknowledged but not given due regard (insignificant measures to address problems, postponements, creating Committees to analyse problems, focussing only on a small part of the problem etc). High-cost strategies, finally, involve electoral, economic, legal and even physical threats or sanctions.

with employers, corporations and state officials on equal terms. Participants will be in a position to contest ‘visible’, ‘invisible’ and ‘hidden’ forms of power by exerting pressure on one another. Claims of one group will thus shape that of other groups and vice versa. The inclusion of the state represents a vertical link (from the local to the national level) whereas the connections between different private stakeholders provide horizontal links which could, as I have indicated above, be further expanded through networks between different New Governance schemes.

The question of ‘what’ also urges us to ask whether certain issues should not be subject to the forms of deliberations that the proposed New Governance models advocate. Kolben argues that severe power imbalances require ‘... rights discourse and concrete rights protections backed by an effective state apparatus and rule of law to ensure their respect and enforcement.’¹⁷³ New Governance scholars on the other hand have argued for the supremacy of their approach vis-à-vis a rights regime:

‘The reassertion of facially straightforward rights cannot make a complex situation simple, or avoid the need for ongoing and explicit principles-based problem-solving that is designed to handle complexity. New governance needs to be understood as a response to those very real problems.’¹⁷⁴

What can we make of these diverging positions? For one, New Governance cannot deny the importance of certain rights without getting enmeshed in contradictions. True democratic debates could scarcely take place if freedom of thought and expression, the right to assemble, freedom of the press and protections against discrimination were not guaranteed. In the context of work, freedom of association is arguably the most fundamental principle for meaningful participatory processes but we could equally make a case for other labour rights such as a living wage and even the right to withhold labour without the fear of losing a job.

There are furthermore good reasons to advance human rights for the protection of minorities whose interests would otherwise be at risk of being neglected by a majority vote. However, human rights have often been of little help to people who either lack the knowledge or the financial means to make use of them or who face constraints from ineffective national courts. Moreover, human rights have proven quite unsuccessful on the social and economic front and are facing increasing problems with emerging forms of interdependency.¹⁷⁵ The solution then can only be a system where human rights and New Governance models complement rather

¹⁷³ Kolben 2011, 426. See also Alston 2004 (criticising principles, voluntarism and decentralization as emerging elements within the international labour rights regime).

¹⁷⁴ Ford 2010, 479.

¹⁷⁵ See for instance those subtle forms of discrimination that have been discussed in chapter three, section five.

than substitute each other and where the merits of each approach are assessed carefully in the context of a given regulatory problem. Progressive lawyers, unions and other civil society groups which could make use of New Governance techniques need to work in partnership with human rights scholars and activists ('power with') to strengthen the overall protection of people.

To summarize this chapter: Without a comprehensive examination of existing power relations and specific interventions that target power imbalances (redistributive efforts and measures against unequal status), the democratic strategy that I have elaborated will not bring about the fundamental change that it aspires to. New Governance scholars have often shied away from engaging with issues of power, but if we would like to use New Governance models in a participatory and transformative way we cannot shirk the question of power and will have to face it head on.

The next, slightly shorter, chapter will ask how the approach that I have developed in the course of this thesis can be applied in practice to produce 'parity of participation' for workers within global production networks.

VI. REGULATION OF TRANSNATIONAL CORPORATIONS

This chapter will make use of a value chain analysis (CVA) to highlight how processes and relationships are organized in the context of global production networks. Particular attention will be paid to working conditions and protections of workers. Fraser's concepts of 'redistribution', 'recognition', and 'representation' will serve as the benchmark against which workers' relative positions in global production networks are assessed from a normative point of view. Following this, the thesis will suggest how the New Governance strategy developed in chapters four and five could be applied in this context to improve the rights and working conditions of various categories of workers.

1. Value Chain Analysis

The emergence of transnational corporations has transformed the nature of trade in the globalizing world. Large retailers and successful brand-name merchandisers are sourcing products or components from suppliers in foreign countries to whom they often have only weak 'legal ties' in form of commercial contracts.¹⁷⁶ Although this development has produced new jobs in developing countries much employment at the lower end of the supply chains tends to be flexible and informal with workers facing poor employment conditions and lacking legal and social protections.¹⁷⁷ Powerful global buyers are able to dictate product standards and shift risks and responsibilities down the chain to suppliers who are under constant pressure to ensure steady delivery, maximized efficiency, high quality of goods and who also have to respond to changing consumer demands. While the corporation exploits its position by extracting a large part of the returns that are generated in the economic process, suppliers are dependent on cheap and flexible labour to remain competitive and to meet the diverse requirements set by the lead firm.

¹⁷⁶ Barrientos 2007, 1.

¹⁷⁷ To reiterate: Flexibility means that the employer can easily fire workers or alter the terms of their engagement (e.g. remuneration). An important indicator for flexibility is time: Many workers are only employed for certain periods (temporary, casual, seasonal work) when demand is high. Part-time arrangements are also used to evade social security contributions. Informality indicates that workers do not have an employment contract and lack the social and legal entitlements that are associated with it.

To understand the highly complex relationships between different parties in the production chains as well as the economic processes that take place within them we can draw on a body of work which has been termed ‘value chain analysis’. Its origin can be traced back to the French ‘filière’ approach (1960s) which was used to highlight physical commodity flows in the agricultural sector (albeit confined to the domestic sphere) and to the Global Commodity Chains framework which was developed by Gereffi and others in the 1990s to analyse the impact of globalization on production processes.¹⁷⁸ The latter approach was itself influenced by the work of Immanuel Wallerstein who saw commodity chains not only as a feature of production but as a network with implications for social forces in a world system.¹⁷⁹ The term ‘value chain’ was introduced by Michael Porter who examined how certain company activities could add value to services and products.¹⁸⁰ It was only in 2000, however, when researchers from various disciplines met for a series of workshops that the concept of value chain analysis (VCA) began to take shape.¹⁸¹ Subsequent workshops and publications further developed the theoretical underpinning of the framework and applied the new ideas to diverse case studies.¹⁸²

Value chain analysis follows products from their conception to their final use and explores the value that is added during the production process through activities by lead firms and their trading partners. ‘This includes activities such as design, production, marketing, distribution and support to the final consumer.’¹⁸³ The value chain framework thus serves as a tool for exploring the interrelationships between connected firms and the flows of resources, information and power between them. It works on an intra and inter-firm level, is industry-independent and can be applied across the boundaries of nation states which is essential since many production networks operate across great distances.

The area of value chain analysis that has received the most theoretical and empirical attention thus far is ‘governance’. It concerns the ways in which firms coordinate their activities and describes how knowledge, information and material is allocated within the value chain.¹⁸⁴ Some particular questions stand at the centre of the discussion: Who specifies which goods are produced? What are the terms of their production (product standards, product quantity and price, working conditions etc)? And at what time and where are they produced? As a

¹⁷⁸ Faße et al 2009, 3.

¹⁷⁹ Ridley 2009, 3.

¹⁸⁰ Faße et al 2009, 5.

¹⁸¹ Sturgeon 2008, 3.

¹⁸² Ibid.

¹⁸³ www.globalvaluechains.org

¹⁸⁴ Sturgeon 2008, 8.

consequence, this branch of value chain analysis is fundamentally concerned with power and the distribution of gains within the production chain.¹⁸⁵

Another area of value chain scholarship which is interesting for our purposes concerns the concept of economic and social ‘upgrading’.¹⁸⁶ Scholars writing within this field explore possibilities to improve the relative position of actors in the production process. Whereas economic upgrading is about enhancing efficiency and innovation of firms, social upgrading focuses on decent work, labour standards, rights and social protection.¹⁸⁷ Although value chain analysis mostly evolves around firms, this bottom up approach has the potential to incorporate the role of workers, households, communities etc into the overall framework.

The next section will build on work by von Broembsen who proposes Fraser’s theory as a new narrative for labour law.¹⁸⁸ Part of her argument is that a conceptual shift from the employment relationship to a value chain analysis would foster ‘parity of participation’. I will explain and further develop this idea by answering two questions: What can a value chain analysis contribute to a discussion about ‘representation’, ‘redistribution’ and ‘recognition’ and what does Fraser’s theory tell us about the working conditions within value chains?

2. The Situation of Workers in Global Production Networks

Value chain analysis can help to identify all those who work within a chain of production and provide an overview of their working conditions. From this analysis we can draw who does and who does not enjoy ‘representation’. At one end of the spectrum there are those with formal and permanent employment who are more likely to be represented by a union and to enjoy freedom of association, and on the other end there are those with informal and more flexible employment who often lack representation and the right to associate. Barrientos argues that even within a single firm, conditions of work can vary significantly. Suppliers ‘... maintain a core of regular workers who are able to provide quality of production through their acquired skills and experience, but to meet fluctuating orders they complement this with the use of casual, temporary and contract employment as needed.’¹⁸⁹

An extended value chain analysis could also provide information about the status order of actors within production networks. There are already alarming statistics which indicate that women are increasingly concentrated in informal, flexible and low-paid arrangements.¹⁹⁰

¹⁸⁵ Von Broembsen 2012a, 15.

¹⁸⁶ See Gereffi and Fernandez-Stark 2011, 29.

¹⁸⁷ Ibid.

¹⁸⁸ Von Broembsen 2013.

¹⁸⁹ Barrientos 2007, 11.

¹⁹⁰ Ibid., 9f.

‘Embedded labour market discrimination has traditionally restricted women’s access to full time permanent employment. Women are seen as ‘flexible’ in that they can move between paid productive and unpaid reproductive work in the home as dictated by fluctuating needs of global production.’¹⁹¹

Women therefore suffer from status inequality in the sense that their gender prevents them from accessing full-time, formal and decent work. A value chain analysis that is concerned with social upgrading will need to take status dimensions into account, if it is to improve the well-being of workers in global production networks.

Von Broembsen argues that informality itself is a form of ‘misrecognition’ which denies many workers and businesses equal status.¹⁹² Those firms that are registered and those workers who possess an employment contract enjoy advantages such as enforceable contracts, private property rights, tax breaks, access to subsidies, membership in associations, protection against creditors, clear insolvency rules and social protection.¹⁹³ Without stretching the concept of ‘recognition’ too far, we should include three further categories of workers that are facing unequal status: Migrants, children and (in)dependent contractors. Migrants are increasingly locked into abusive, exploitative and even dangerous work arrangements. Their vulnerability stems from a legal status inequality (the threat of deportation often looms in the background as a fear which employers can take advantage of) but ethnic or racial discrimination may also feed into it. Children are by their very nature more vulnerable and an easy target for intimidation and control. Despite widespread rhetoric against child labour, children are still used as a cheap workforce in many production networks.¹⁹⁴ In contrast to the aforementioned forms of status asymmetries, here we face a situation where rules should work so as to respect and protect rather than to dismantle unequal status. (In)dependent contractors, finally, are enterprises that are regularly treated as employers by law although they may have much more in common with employees (economic dependency, little bargaining power).¹⁹⁵ Small scale and individual enterprises are often struggling to survive among stronger competitors and would benefit greatly from the legal status afforded to employees (which would for instance entitle them to bargain collectively).

¹⁹¹ Ibid., 9.

¹⁹² Von Broembsen 2013, 11.

¹⁹³ Chen 2012, 16.

¹⁹⁴ See ILO Report 2013.

¹⁹⁵ See Arthurs 1965. The number of clients and other criteria that are sometimes used to distinguish a dependent from an independent contractor (such as whether the contractor possesses his own tools) only provide an imprecise measure of their economic (in)dependence.

Lastly, on the topic of ‘redistribution’, a value chain analysis offers a broader picture than the typical employer-employee lens underpinning most labour laws.¹⁹⁶ Issues of ‘redistribution’ are not played out exclusively in the relationships between suppliers and their immediate workers, but along a lengthy vertical line which includes the lead firm, suppliers, trading partners, intermediaries, affiliates, contractors and related workers. Value chain analyses confirm that lead firms are able to extract a majority of the gains of production although the largest share of market value is created by other actors. Through standards and production specifications, lead firms set in motion a process where responsibilities and risks are shifted down from one level to the next until they reach the weakest links of the chain, the individual workers.

The traditional goal of labour law has, as Otto Kahn-Freud famously put it, always been to ‘... be a countervailing force to counter the inequality of bargaining power which is inherent and must be inherent in the employment relationship.’¹⁹⁷ Employers are, by virtue of their property rights, in a better bargaining position than workers and the main task of labour law therefore is to devise rules that create a more level playing field. The rise of neo-liberalism, however, has not made this an easy task. Many workers fall outside the scope of labour laws, as do powerful lead firms which are frequently located in countries where national regulations are unable to reach them. What then could a strategy to produce ‘parity of participation’ for workers in global production networks look like?

3. ‘Parity of Participation’ for Workers in Global Production Networks

I have outlined the theoretical framework for a progressive New Governance model on the basis of Fraser’s theory in chapter four and five and will now attempt to apply this admittedly demanding concept to the context of production networks.

As a first step, an alliance between workers, labour lawyers, NGOs, unions and other civil society groups would have to put substantial pressure on lead firms of global production networks to increase their willingness for negotiations. Major brand companies are vulnerable to negative publicity or consumer boycotts and will respond to such pressures for purely economic reasons. A multifaceted strategy would make use of the media and other social platforms to increase awareness of working conditions and the lack of legal and social protections of workers at the lower end of the value chain but it will also consider more

¹⁹⁶ A notable exception is the Australian supply chain regulation which gave up the concepts of ‘employer’, ‘employee’ or ‘employment contract’ to include informal and contract workers into the framework, see von Broembsen 2013, 15 and Rawling 2007. However, the regulation is limited in scope since it cannot be applied to firms which are located in other jurisdictions.

¹⁹⁷ Kahn-Freud 1972, 7.

radical approaches such as strikes or marches. The higher the pressure, the more likely the lead firm is to enter into negotiations and the more likely it is that those issues will reach the policy table that can make a real difference. The New Governance model that I propose embraces the idea of the ‘all-subjected principle’ on a conceptual level (significant change is most likely to occur where stakeholders have a right to place any conceivable issue on the agenda that has a palpable impact on them) but its practical implementation will depend on various stakeholders to engage in political struggle.

An alternative route would call for the involvement of states as powers that can provide the background rules for deliberations among various stakeholders in a global production network. This strategy is more promising in the context of lesser known companies that are not as vulnerable to consumer pressures. However, such an approach would require the involvement of more than just one state in situations where the lead firm is not located in the country of its suppliers. Political struggles that transcend national borders are particularly difficult to organize if workers in the home country of the lead firm are not negatively affected by its activities. However, if the basis of political struggles in the country where workers suffer the most intense forms of injustice is strong and pressure on the government is kept at high levels, this might induce the government of this country to approach the home country of the lead firm for assistance. A New Governance approach that is initiated by the concerted efforts of two or more states is not impossible since what is required are ‘only’ background rules that compel the lead firm to negotiate and not specific regulations that directly restructure entire value chains.

In a second step, progressive labour lawyers, NGOs and unions would make use of value chain analysis to identify all actors likely to have an interest in deliberations (workers, lead firm, suppliers, intermediaries etc). Every worker would enjoy the same rights with regard to participation irrespective of whether he or she has an employment contract or the specific terms of that contract (‘all-subjected principle’). The previous chapter has argued that certain redistributive efforts and interventions (with regard to inequalities in cultural status) might be necessary to enable deliberative processes on equal terms, and to make sure that no one is unfairly excluded. The Indian trade union SEWA, for instance, has addressed such impediments to participation by strengthening the economic independence of informal women workers through the provision of small loans and through the creation of various cooperatives and producer associations. This trade union has also encouraged women to speak up for their interests and to engage in political struggles despite deeply entrenched patriarchal structures and discrimination based on castes that had long made such efforts impossible. SEWA,

moreover, provides a good example of how NGOs, unions and other organizations (on their own or maybe in tandem with each other) could build the organizational capacity necessary for workers to engage with more organized and powerful economic stakeholders. Since its registration as a trade union in 1972 it has grown not only in terms of its membership but also with regard to its infrastructure. SEWA has established a dense network of affiliated organizations and specialized institutions that offer various services and that account for the growing relevance of this organization as a political player.

Before deliberations take place, training programs are necessary to equip participants with the skills they need in deliberative processes ('power to'). These programs should also serve as platforms to create critical consciousness ('power within') and solidarity ('power with') between workers and their allies. Most importantly, they should provide a forum where workers can come together to align their interests and to exchange information, experiences and ideas.

Depending on the number of participants in the given global production network and the local dispersion of sub-companies, deliberations would either take place at one location or be organized in parallel circles. In the latter case, lead firms would have to send representatives to different plants to ensure that their interests are given due regard. The deliberative outcomes would then be aggregated by a mechanism that gives equal consideration to the results of each circle. The previous chapter has briefly discussed the possibility of a two-stage process that could be useful to tighten and direct deliberations. This scenario would require worker representatives and lead firms to agree on certain principles or benchmarks regarding the rights and protections of workers, but their specific content would be established through deliberations among suppliers and workers themselves.

The results would finally be codified and endorsed by the lead firm and its suppliers. Enforcement mechanisms would depend on the route lawyers, workers, unions, NGOs and other civil society groups have chosen to take at the outset of the process. If their approach was based on consumer pressures they would need to make sure that interest in the activities of the lead firm does not wane. If their approach included the state they would need to put pressure on governments to institute effective enforcement measures. In any of the two cases, independent monitoring and effective complaints mechanisms should be in place to track progress in terms of worker protections and to ensure compliance with the endorsed standards.

The regulation of transnational corporations poses one of the most difficult challenges for labour lawyers, activists and civil society groups in a globalizing economy. This chapter has evaluated the situation of workers in the production networks of such companies through the lens of value chain analysis and Fraser's theory of justice and has outlined how the proposed New Governance model could be applied to improve their position through political struggle, capacity building and deliberations.

The final chapter will provide a critique of the ILO's 'decent work' agenda and ask whether this concept or the proposed New Governance strategy carries more potential for legal and social upgrading in the realm of work.

VII. THE QUEST FOR DECENT WORK

The ILO is still widely regarded as the most important international organization when it comes to labour and social matters. Many thinkers believe that no other organization has equal potential to further the interests of workers against globalizing forces in the future. What happens in this organization therefore is interesting insofar as it may pose a counter hegemonic strategy against neo-liberalism.

For quite some time now the ILO advocates a multifaceted agenda which it has termed ‘decent work’. With this program, the organization attempts to address deficits with regard to the protection and the wellbeing of workers in a global economy. This agenda deserves a refined analysis because it incorporates many of the major tools that the ILO has used in the past and because it claims to be a holistic concept that can transform work relationships in fundamental ways. This chapter will first provide a brief historical overview of the ILO’s activities followed by an exposition of the main principles of the ‘decent work’ agenda. It will then offer a critique of this agenda from the perspective of Fraser’s theory. Since ‘parity of participation’ is the normative foundation of the strategy that I propose a critique through Fraser’s lens will also facilitate a concluding comparison between this agenda and my own approach.

1. The ILO’s ‘Decent Work’ Agenda

The International Labour Organization (ILO) was established in 1919 to curb the negative effects of labour markets. It was, and still is, the only international organization that operates on a tripartite basis, involving trade unions, employer representatives and governments. In its early phase, the ILO was primarily a standard setter that produced conventions and recommendations on various labour and social matters. If a country ratifies a convention, it is obliged to issue periodic reports detailing the measures that have been undertaken to implement the convention and stating the progress that has been achieved in this regard. In addition, the ILO can investigate complaints about non-compliance, but its enforcement capacity is restricted to that of critique, and is therefore rather weak. Recommendations are

purely voluntary and are not subject to supervision. Over the years, the ILO has strengthened its role as a ‘knowledge agency’ by publishing statistics and participating in academic debates.¹⁹⁸ It has also become a ‘development agency’ which provides technical assistance and consultative services on labour policies in member countries.¹⁹⁹

During the almost 100 years of its existence, the ILO’s relevance has undergone cyclical changes. The organization was highly influential in the post-war years when its conventions on discrimination, collective bargaining, freedom of association and social security contributed to the emergence of the welfare states.²⁰⁰ However, several normative assumptions which underpinned the activities of the ILO became subject of critique with the rise of neo-liberalism. This development and the withdrawal of the United States as its primary sponsor in the 70s posed a severe threat to the organization’s future and led to a radical reorientation.²⁰¹ With some minor exceptions, the ILO refocused on poverty reduction as expressed in two theoretical concepts: ‘basic needs’ and the ‘informal economy’.²⁰² While some commentators saw this as a sensible move to retain some relevance in a globalizing economy, critics accentuated the ILO’s lukewarm response to neo-liberal ideology, the labour flexibility debate and structural adjustment programs.²⁰³ After a short phase of reignited confidence in the late 80s (when the ILO was assigned a role in the restructuring of some Eastern European states) and some rather unsuccessful efforts to come to terms with newly emerging patterns of work,²⁰⁴ the ILO launched its Declaration on Fundamental Principles and Rights at Work in 1998 which received much attention and prompted heated debates.²⁰⁵ Shortly afterwards in 1999, the then Director-General Juan Somavia initiated the ‘decent work’ agenda, the ILO’s latest overarching attempt to deal with challenges wrought by globalizing forces. Somavia defined decent work as

‘... productive work in which rights are protected, which generates an adequate income with adequate social protection. It also means sufficient work in the sense that all should have access to income earning opportunities. It marks the high road to economic and social development, a road in which employment, income and

¹⁹⁸ Standing 2008, 355.

¹⁹⁹ Ibid., 356.

²⁰⁰ See chapter two and *ibid.*, 358.

²⁰¹ The USA rejoined in the 80s subject to ‘... concessions and an enlarged role for US nationals in senior positions.’ *Ibid.*, 361.

²⁰² *Ibid.*, 362ff.

²⁰³ *Ibid.*

²⁰⁴ The Home Work Convention No. 177 was only ratified by ten states, a convention on contract labour never reached beyond the stadium of negotiations and the Private Employment Agency Convention No. 181 made concessions to the triangulation of employment relations in spite of the organization’s long-held opposing stance, *ibid.*

²⁰⁵ See the next section for more details.

social protection can be achieved without compromising workers' rights and sound standards.²⁰⁶

The theoretical concept which undergirds decent work (the 'decent work' agenda) consists of four pillars:

1. The promotion of standards and rights at work: Conventions and recommendations remain key strategies in the promotion of decent work. Thus far, the ILO has adopted 189 conventions and 202 recommendations.²⁰⁷ In addition, it has endorsed other texts such as the Declaration on Fundamental Principles and Rights at Work and the Declaration on Social Justice for a Fair Globalization.
2. The creation of employment opportunities: Decent work combines labour standards with job opportunities. The agenda advocates greater cooperation between states on a global level and active market policies on a national level to produce the jobs that are needed for people to earn a living.
3. The improvement of social protection: Decent work seeks to protect workers from the risks and contingencies at work. Social security, pensions and health insurance are seen as 'basic rights' (enshrined in many conventions) and conducive to growth and economic productivity.²⁰⁸ A significant challenge for this agenda is to extend social protection to very vulnerable groups such as migrants, informal workers and those affected by AIDS.
4. The strengthening of social dialogue: Social dialogue includes various types of formal and informal engagements between governments, employer and worker representatives (consultations, negotiations, deliberations, cooperations etc). It can take place on global, national, regional or enterprise level and attempts to promote the other three pillars.

Some commentators have welcomed the ILO's new initiative. Huges and Haworth, for instance, argue that it has enabled the ILO to forge stronger relationships with other international organizations such as the IFIs which has led to '... "regime integration" within global governance.'²⁰⁹ Others have been less forthcoming in their assessment and this thesis will follow in their footsteps, not by providing completely new insights, but by applying a new lens (Fraser's theory of Justice) to scrutinize the 'decent work' agenda.²¹⁰

2. A Critique of the 'Decent Work' Agenda

²⁰⁶ ILO Report 1999, chapter two.

²⁰⁷ <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::>

²⁰⁸ www.ilo.org

²⁰⁹ Hughes and Haworth 2011, 45.

²¹⁰ For a critique of the ILO's 'decent work' agenda, see Standing 2008, 2011, Vosko 2002 (and Alston 2004).

From a conceptual viewpoint there are some interesting similarities between the ‘decent work’ agenda and Fraser’s theory of justice. Both frameworks use a single normative principle to define their main goal and a combination of several interlinked individual subparts to realize it. However, the similarities end there. Whereas the individual subparts in Fraser’s theory are themselves autonomous theoretical concepts which complement each other in a sensible manner, most subparts of the decent work agenda derive from concrete strategies the ILO has pursued in the past and their combination appears more arbitrary. One might question for instance whether the categories of social dialogue or social protection could not be subsumed under the first pillar, namely the promotion of standards and rights. The differences between the two concepts of course become more pronounced if we take a closer look at their content.

Fraser’s concept demands that everyone who is affected by a given ‘governance structure’ must enjoy the same political ‘representation’ with regard to it. The ILO’s emphasis on work, rather than labour and its conventions on home workers and domestic workers indicate the organization’s intention to move beyond traditional concepts of employment and to provide decent standards for everyone including those in the informal economy. However, as far as ‘representation’ is concerned, the ILO’s tripartite structure falls short of Fraser’s requirement. Those worker and employer representatives that form the Governing Body of the ILO (unions and members of the International Organization of Employers (IOE)) are not nearly as representative as one would expect. Worker representatives can only claim to speak for a tiny fraction of the population, namely those who belong to a union (which is not the case for most workers in the informal economy and service industry). Likewise, those bodies that act on behalf of employers are not representative of most small scale enterprises in developed and developing countries whose interests diverge substantially from their bigger competitors. The ILO’s tripartite structure thus poses a serious threat to the goal of decent work for everybody since only equal political ‘representation’ can guarantee that different categories of workers receive equal attention.²¹¹ There has been some debate within the ILO about granting NGOs and other civil society organizations access to the Governing Body but these attempts have quickly been suppressed by workers and employers alike who feared a loss of influence.²¹² NGOs continue to play a significant role in field programs but as far as decision-making in

²¹¹ See chapter two and Standing 2010, 315.

²¹² See Standing 2008, 371ff and Baccaro and Mele 2012, 207ff for more details.

the headquarters is concerned the power rests exclusively with unions, governments and members of the IOE.²¹³

A second objective of Fraser is the prohibition of status inequalities which prevent people from participating in social life as peers. ‘Decent work’ addresses such shortcomings through conventions on discrimination. The Discrimination Convention No. 111 of 1958 and the Equal Remuneration Convention No. 100 of 1951 are among the most ratified Conventions of the ILO (No. 111 has been ratified by 172 states, No. 100 by 171 states). Convention No. 100 promotes equal remuneration for women and men but it does not account for wage disparities that are rooted in other forms of unequal cultural status. Convention No. 111 is significantly broader in scope. Article 2 states:

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.²¹⁴

As important as these two conventions are they cannot address more subtle forms of discrimination that pervade the modern workplace and that are the result of informal norms, corporate culture, training, evaluation etc.²¹⁵ Moreover, anti-discrimination rules do not always yield the desired effects on the local level (communities and households) where cultural hierarchies can be deeply entrenched and where other more direct forms of intervention may prove far more successful.

In a previous section of this thesis the concept of ‘recognition’ has been extended to include informal workers, children, migrants and independent contractors. The ‘decent work’ agenda, at least conceptually, incorporates informal workers into its framework but it also makes clear that countries are not required ‘... to extent the same level of statutory entitlements, protections and benefits afforded to standard workers to all workers in need of protection.’²¹⁶ This might well lead to situations where the relative position of informal workers is improved but where, in contrast to Fraser’s theory, interaction on equal terms remains impossible. The ILO has pushed for the integration of decent work into the Poverty Reduction Strategy Papers of the IFIs and has itself launched field programs (the latest being the Decent Work Country

²¹³ Baccaro and Mele 2012, 210.

²¹⁴ Discrimination is defined in Article 1 as ‘... any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.’

²¹⁵ See chapter three, section five.

²¹⁶ Vosko 2002, 32.

Programmes) to further the agenda for decent work. While the impact of these programs on the informal sector is yet to be assessed, the ILO has also, albeit in very limited form and with very ineffective results, tried to respond to the challenge of informality through its standard setting activity. The Home Work Convention No. 177 of 1996 has been ratified by only 10 states, the Domestic Workers Convention No. 189 of 2011 by only 11 states and a convention on contract labour was eventually dropped due to resistance by the employer faction of the ILO.²¹⁷

Children are protected by the Minimum Age Convention No. 138 (166 ratifications) of 1973 and the Worst Forms of Child Labour Convention No. 182 (178 ratifications) of 1999. Part of the decent work agenda, moreover, is the ILO's International Programme on the Elimination of Child Labour (IPEC) which seeks to progressively eradicate child labour in the world through country-based programs, awareness raising strategies and qualitative research.²¹⁸ Statistics show a significant reduction of child labour in the last decade but the situation in many countries is complex and much more effort is required to reach the IPEC's goal.²¹⁹

Despite their growing number and increasing influence on labour markets, migrants are one of the most neglected categories of workers in the ILO. It is estimated that there are approximately 175 million migrants around the world with about 15 per cent having illegal status.²²⁰ Migrants, like informal workers in general, are not represented within the Governing Body. The Migration for Employment Convention No. 97 of 1949 and the Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975 are only ratified by 49 states (many having elected to exclude certain provisions) and 23 states respectively and are in urgent need of revision.²²¹

A category of workers which has received even less attention in the ILO's 'decent work' agenda are (in)dependent contractors. Worker representatives view them as employers and are unwilling to improve their position at the possible expense of workers. Employer representatives are even more reluctant to take the interests of this group seriously. Larger companies that are able to do business with (in)dependent contractors can avoid the

²¹⁷ Standing 2008, 366. Other conventions which could have an impact on informal workers show equally disappointing numbers of ratification: Plantations Convention No. 110 of 1958 (12 ratifications, but 2 denounced), Working Conditions (Hotel and Restaurants) Convention No. 172 of 1991 (15 ratifications), Work in Fishing Convention No. 188 of 2007 (4 ratifications, however, not in force in any of those countries yet).

²¹⁸ www.ilo.org

²¹⁹ A 2013 ILO Report estimates that the number of child labourers has declined by 57 million instances over the last 12 years. However, 11 per cent of the child population is still in forced labour which constitutes a total of 168 million child labourers.

²²⁰ <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang--en/index.htm>.

²²¹ Standing 2008, 379.

responsibilities and risks associated with hiring employees. (In)dependent contractors are not entitled to labour protections, their income depends entirely on their own efforts (instead of a fixed salary), and they have no right to bargain collectively or be part of a union.²²²

Over decades, the ILO has promoted sectoral or centralized collective bargaining between labour and capital as a way of shifting resources from one party to another. This founding principle has been revised through the concept of social dialogue. Standing has criticized the new notion for its vagueness and argues that it does not ‘... imply any constitutional right of association or right of collective bargaining.’²²³ This argument is not wholly convincing since the Conventions No. 87 and No. 98 on freedom of association and collective bargaining are still in place and considered as fundamental. To be sure, the notion of social dialogue cannot substitute more adversarial forms of collective bargaining but it can provide a sensible extension of that concept which is necessary in the face of new patterns of work and the declining influence of unions.²²⁴ It remains to be seen whether social dialogue is merely used, as Standing worries, to spur dialogue or whether it is harnessed to create institutionalized forms of engagement with broad stakeholder participation.

‘Redistribution’ (Fraser’s third dimension) can also be realized through labour standards. Building up social entitlements and rights such as pensions, unemployment benefits, medical aid, maternity leave, disability benefits, assurances of adequate income etc shift resources from employers to employees.²²⁵ However, low levels of ratification have seriously compromised the ILO’s standard setting activities in recent decades. As a response to this predicament, the ILO refocused on basic principles and approved the Declaration of Fundamental Principles of Rights at Work in 1998 which identified four core labour standards: Freedom of association, the prohibition of all forms of forced labor, elimination of the worst forms of child labor and non-discrimination in employment. The declaration applies to all ILO member states irrespective of whether they have ratified the conventions to which the declaration refers. Critics have argued that the standards enshrined in the declaration are too open-ended and that governments can easily adhere to these standards without having to change their regulatory systems.²²⁶ It has also been stated that the exclusion of social and economic concerns and the focus on ‘process’ rather than ‘result-oriented’ standards

²²² Arthurs 1965, 96.

²²³ Standing 2008, 374.

²²⁴ The New Governance model that I propose strikes a balance between collaborative and adversarial forms of engagement. It accentuates the importance of deliberations based on mutual respect but reserves a place for more confrontational strategies to push issues on the agenda and to raise awareness for fair labour among workers, governments, corporations and consumers.

²²⁵ Standing 2008, 369.

²²⁶ Alston 2004, 476ff.

constitutes a fatal omission which reinforces free market ideology.²²⁷ The most crucial shortcoming, however, in my opinion, is the strictly promotional character of the declaration. The follow up mechanism consists of two completely ineffective elements: First, member states which have not ratified the core conventions are to submit annual reports about their improvements. Second, the ILO issues a global report which provides an overview of the state of implementation. There is no complaints mechanism, no supervision and no substantial critique if states do not comply.

3. Decent Work and New Governance

The ILO's experiments with soft law mechanisms bring the organization closer to ideas that have long been established in the New Governance movement. However, most scholars in this field of research would not subscribe to the manner and degree of softness that is epitomized by the ILO's declaration. In their models, and I include my own submission here, some form of hard law is always present while softness is used carefully and only at selected places.²²⁸ This insight is key to understanding the nature of New Governance as not a covert form of deregulation but a '...formalizing, reason-seeking [and] indeed law-seeking project.'²²⁹

There is another important distinction to be drawn between my own New Governance-based approach and the 'decent work' agenda more generally. Although both frameworks have a largely procedural basis, the 'decent work' agenda is unlikely to translate into substantive outcomes because it does not address the preconditions that are necessary for such a transformation. The approach advanced by this thesis requires that power asymmetries on various levels are addressed through political struggle (by workers, progressive lawyers, unions and other civil society groups) and the simultaneous creation of non-economic capacities in order to ensure first, that all people with legitimate interests in the issues at hand are included in participatory processes, second, that the terms of bargaining allow for any and all possible outcomes and third, that there is no restrictions set on subject matter. Insofar as the 'decent work' agenda relies on social dialogue and collective bargaining (and there is some purchase to this argument seeing that socio-economic rights are largely sidelined) it cannot yield any positive effects for workers unless power imbalances which prevent participants from making meaningful use of these instruments are taken into account. The 'decent work' agenda, however, does not sufficiently address obstacles to participation. It does not support capacity-building of non-economic stakeholders and neither does it redress

²²⁷ Ibid., 487 and Standing 2008, 367.

²²⁸ Karkkainen 2004, 486.

²²⁹ Cohen 2013, 381.

all the forms of ‘maldistribution’ and ‘misrecognition’ which prevent people from participation on equal terms. The agenda, moreover, lacks any sense of political struggle. The realization of the preconditions for fair and equal participation requires political pressure on various national and international spheres which a simple right to organize cannot substitute for.

To sum up, this chapter has scrutinized one of the key initiatives of the ILO – the ‘decent work’ agenda – through the lens of Fraser’s theory of justice. Despite some positive results (primarily in the realm of ‘recognition’), the initiative has revealed serious deficits with regard to all three dimensions of Fraser’s concept. The approach that has been developed in this thesis as an alternative to conventional forms of national and international regulation is based on Fraser’s procedural component of ‘parity of participation’ and is thus able to avoid several pitfalls of the ‘decent work’ agenda. Both my own approach and the ‘decent work’ agenda are largely based on participation. However, only my approach gives equal voice to everybody who is affected by the regulatory issues it attempts to address and accentuates the importance of interventions to redress impediments to fair and equal participation.

VIII. CONCLUSION

Neo-liberalism has produced incredible wealth for a tiny fraction of the global population and decreased security for the majority. Millions of workers face poor working conditions and have no access to legal and social protection. They live in a state of constant anxiety and are extremely vulnerable to shocks such as unemployment, ill health and deflation. There is little reason to assume that exclusive reliance upon the traditional regulatory instruments and practices of states and international organizations will bring about a palpable improvement for workers in the foreseeable future. These institutions manifestly lack the capacity and the will for radical change and barely include the most disadvantaged stakeholders in their decision-making processes.

New Governance offers an alternative route to progressive lawyers, activists and civil society groups that are interested in democratic strategies for social change. Scholars in this field have seldom explored the transformative potential of this approach on a larger scale and few have seen the possibilities of developing it into a project that could challenge neo-liberal dominance. This thesis has sought to fill this gap by linking New Governance to a global theory of justice. Nancy Fraser provides a compelling counter-narrative to market fundamentalism that could lay the groundwork for integrating struggles against structural causes of injustice into New Governance models. Her framework consists of three interrelated claims ('representation', 'recognition' and 'redistribution') which serve the common goal of creating a setting where people are able to '... interact with one another as peers.'²³⁰

Incorporating this theory into New Governance models would require its scholars to embrace two ideas: First, they would have to make participation one of their foremost concerns. Fraser's 'all-subjected principle' requires every person potentially affected by a policy to have a voice in its creation. Second, they would have to be willing to move across boundaries of nation states to challenge transnational corporations, the financial market and the governance structure of the global economy. This thesis has given more attention to the first of these two ideas. It has analysed obstacles to participation on the basis of a power analysis and indicated possible ways to address such concerns.

²³⁰ Fraser 2010, 365.

The requirements necessary for broad, inclusive and fair participation are demanding but so is every concept that aims to change societal structures in fundamental ways. In a nutshell, the model I have proposed would require redistribute and anti-discriminatory efforts to make sure that everyone is able to attend participatory processes. It would furthermore require capacity building by non-economic stakeholders to mitigate gross power imbalances between highly organized capital and largely unorganized workers. NGOs, unions or other organizations would have to assume the role of coordinating workers. Training programs would endow participants with the skills required for deliberative processes but they would also serve the purpose of creating critical consciousness and solidarity among individuals. Most importantly, such programs would constitute a forum where workers and their allies could come together to align their interests and to exchange information, experiences and ideas. These spaces could also be used for other purposes and become permanent democratic institutions for civic engagement.

There is a real danger that economic stakeholders will only engage in New Governance processes if they see an advantage for themselves. Progressive lawyers, activists and civil society groups will therefore need to develop strategies to bring them to the policy table and to foreclose exit options. In a number of cases this has been achieved successfully through the creation of substantial consumer pressure (codes of conduct). Mostly, however, New Governance models will require involvement from the state that is able to compel stakeholders to enter into dialogues with other groups and that has the power to create background rules which come into effect if negotiations fail. Both scenarios hint at what is arguably the biggest challenge for New Governance (and any other theoretical framework that attempts to influence public policy): The mobilization of physical and intellectual forces to bring issues to bear on policy agendas.

Neo-liberalism has transformed the way in which people today think, talk and act and it has established itself as the only possible reality. Progressive groups have fought on different fronts against this form of fundamentalism but they have as of yet not been able to unite their efforts and agree on a common counter-narrative. I have argued that Fraser's 'all-subjected principle' could serve as such a unifying concept.

But political campaigns do not only subsist on powerful ideas. They draw sustenance from their 'physicality'. By this I mean both the size of the group that pushes the issue but also its

visibility, which are two distinct phenomena.²³¹ The term visibility is used here to denote the importance of using the media - television, newspaper, radio and internet - to convey messages to a broader audience but it also refers to protest action and marches which have often proved immensely important for the success of political campaigns. Ideas and 'physicality' are interrelated concepts: The size of a group may depend on the persuasiveness of ideas. Similarly, the more powerful ideas are, the more likely people will resort to methods that increase their visibility.²³² Ideas on the other hand need a medium (a physical group) that transports, develops and propagates them.

The size of a group is fundamentally a question of solidarity. Guy Standing has recently published a book in which he argues that globalization has splintered old and produced new class structures.²³³ He identifies seven groups with class features and analyses one in particular in greater depth: 'the Precariat'²³⁴ which is comprised of all those who do casual, often informal work characterized by low incomes and high levels of insecurity.²³⁵ Although this class is heterogeneous and still in a stage of formation ('... [it] is a class-in-the-making, if not yet a class-for-itself , in the Marxian sense of that term') people within it share vastly similar experiences of frustration and anxiety.²³⁶ Standing argues that this class poses a threat to the stability of societies:

'Tensions within the precariat are setting people against each other, preventing them from recognising that the social and economic structure is producing their common set of vulnerabilities. Many will be attracted by populist politicians and neo-fascist messages, a development already clearly visible across Europe, the United States and elsewhere.'²³⁷

This is not an inevitable outcome. If progressive thinkers and activists can realign their efforts along an agenda such as Fraser's 'all-subjected principle' and prompt people of the precariat to see themselves in one another (which is the essence of solidarity), and if they succeed in turning the precariat's frustration into a productive rather than destructive force, it might well be possible to forge broad and powerful coalitions between workers in different parts of the world against global forces of oppression.

²³¹ A group with common interests can be huge, but people outside the group may nevertheless not know that this group exists or that it shares certain ideas.

²³² Visibility is of course also dependent on the resources a group has at its disposal.

²³³ Standing 2011, 7.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid 7, 19.

²³⁷ Ibid., 25.

In closing, a final thought on democracy: It has been mentioned occasionally throughout the thesis that New Governance has considerable potential to enhance democratic structures. If we are to take seriously what figures prominently in so many constitutions and what is proclaimed by the South African Freedom Charter, namely that ‘The people shall govern!’²³⁸, then we have to depart from a form of democracy that focuses primarily on electoral participation and we have to look elsewhere for more continuous and vital ways of engaging people with political life. For the most part, the electorate’s democratic rights amount to little more than the approval of a party-selected candidate or, as it is practice in many countries, a slate of candidates. These choices do not tell us anything substantial about individual preferences or needs and neither do they further a sense of ownership or responsibility. The problem is exacerbated in a neo-liberal age where the credibility of many political parties is seriously questioned by their proximity to big corporations and financial institutions.

The thesis has mainly focused on issues of work but it has also indicated that the proposed New Governance strategy could generate legal rules in other spheres of human interaction. If we are to use New Governance as a democratic approach we would have to assess how it can play out in various areas of social life and how we would institutionalize it – problems that were beyond the scope of this paper.

²³⁸ South African Freedom Charter.

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