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Patterns of European labour law in the crisis

Keynote speech
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Abstract: 1. Tuning European labour law into the crisis - 2. A Transnational Pattern: International Framework Agreements (IFA) - 3. A Pattern to fight social dumping - 4. A pattern to remodel the fundamental right to strike - 5. Concluding Remarks

1. Tuning European labour law into the crisis

In this paper I want to address the issue of changes affecting labour law, setting my thoughts in the scenario of the economic and financial crisis that we are still witnessing. The dramatic events occurring in the Summer 2011 – when this paper is written – appear too close to be correctly analysed, as for their long-term impact on labour relations, both on the collective and individual side. We can only observe that ‘employment’ and ‘growth’ are words repeatedly pronounced by those who blame national and global politics for inability to act quickly, searching widespread consensus. Those words are also pronounced by national governments, urged to act, in response to the dominating solicitations sent by financial supranational institutions.

It is hard to refuse the assumption that the weakening of traditional labour law measures is in close correlation with this unprecedented worldwide crisis. It can, however, be maintained that changes in labour law have occurred slowly – and yet continuously – throughout the most recent times, marking its evolution in view of adapting sources and policies to new goals to be reached.

Adaptation to change is indeed a recurring feature in labour law, mainly because of the urgency to understand technological innovations and to respond to corporate and managerial strategies. In the EU changes are also the outcome of integration and of what should be an even closer cooperation among national and supranational administrations. Adaptations have also occurred frequently within unions and employers associations, affecting their structures, as well as their priorities. At a European level these changes are most visible at sector level, where social dialogue has raised consensus around new categories of agreements.¹

However, issues at stake when the challenges of the economic and financial crisis are so threatening, are more complex than in the past, since changes have become unpredictable, due to their interconnection with priorities set by supranational financial institutions. The crisis throws a dark shadow on traditional labour market institutions. The latter are unable to respond quickly, lacking – as they are – reliable information. This serious asymmetry in information may dramatically break the nexus among social partners and have the perverse effect of splitting them in pursuing uncoordinated goals.

At the same time, the crisis forces national governments to seek consensus and to raise awareness, implying the need for proactive measures. The autonomy of collective bargaining

¹ This outcome is also the result of an active role played by the European Commission in setting criteria of representativity. See its Decision of 20 May 1998, introducing committees for promoting sector social dialogue at European level, COM(1998) 322 final. Account of the most recent sector agreements in European Commission, *Industrial relations in Europe 2010*, Luxembourg 2011

systems thus becomes a most relevant prerogative for the social partners, one that should be rescued from constraints imposed by the crisis.

We need to go back to the Nineteen Seventies to find examples of both national and European legislatures bringing innovation in the field of labour law. In those years auxiliary legislation and support for trade union action at the place of work ran parallel to the expansion of collective bargaining. This legislative option occurred in several national systems, albeit with different characteristics. It then developed into much more complicated regulatory schemes, whereby law and collective agreements had to establish an internal equilibrium, acting as parallel sources, often on grounds of an implied principle of subsidiarity.

At the European level equality between men and women set the agenda of enforceable fundamental rights, showing the compatibility of the latter with the regulation of an undistorted market. The same can be said for European secondary legislation providing answers to the first oil-shock, grown into a structural crisis, which heavily affected companies and forced them into constant restructuring.

It is fair to say that when, starting from the Nineteen Seventies, legislatures and the social partners had to face recurrent economic shockwaves, mainly provoked by factors external to national systems of industrial relations, they experienced the many limitations caused by the opening up of domestic borders and were able to respond to such new challenges strengthening the internal market. Secondary legislation enacted in those years included a social dimension that, in a retrospective analysis, should be positively evaluated.

The difference in the current crisis must be found in the weakening of European social policies, accompanied by Member States' reduced capacity to intervene with significant reforms. The scarcity of innovative European secondary legislation, which should have produced a tangible impact on national legislatures and fostered integration, might give way to negative consequences. The full liberalization of the internal market is not bringing new strength to economic actors and growth is not taking place, despite the shelter for economic freedoms provided in the Treaty. The point to underline is that lack of political consensus on social policies is producing a standstill on growth and on proactive employment policies.

The crisis also forces labour lawyers to re-consider the initial enthusiasm on employment policies within the Open Method of Coordination (OMC). Soft law does not respond adequately to the impulses sent by financial markets, because its course of action has been significantly slowed down by the lack of effective coordination.

'Europe 2020',² should be the most relevant policy document setting the agenda at the institutional level. There is a risk, though, that the loose, not binding goals it indicates will vanish away, as a consequence of the crisis.

As it happened with the previous 'Lisbon Strategy', the current proposals should be based on synergies among existing policies and on better integration of all measures to be adopted.³ According to arts 121 and 148 TFEU, Member states must consider economic and employment policies as matters of common concern, therefore the object of coordination. The Council adopts Decisions for the issuing of employment and economic guidelines. However, it is difficult to envisage a coherent plan to create a reasonable balance among social policies and broad economic strategies, since all priorities are now with measures to recover from the crisis.

As a consequence of all this – decline of positive integration through hard law and less coordination through soft law – the European legal system does not witness a long-term perspective for labour law. **This legal vacuum diminishes all chances to counterbalance the effects of the economic and financial crisis. Contingent pressures seem to have an inhibiting impact on**

² Europe 2020, *EU Strategy for Smart Sustainable and Inclusive Growth*, http://ec.europa.eu/europe2020/index_en.htm

³ References to recent documents, proving that emphasis is put by the Commission on monitoring, rather than on coordination, in S Sciarra, *Experiments in the Open Method of Coordination: Measuring the Impact of EU Employment Policies*, *Rivista italiana di diritto del lavoro* 2011, 475

national legislatures while, at the same time, putting them in the uncomfortable position to be the only ones responsible for effective answers to the crisis.

The lack of Social Europe can thus become the origin of all evils and iniquities, spreading disillusionment among citizens. The Monti Report⁴ acknowledges all this, offering suggestions on how to improve the functioning of the internal market.

Hence, even those – such as the present writer – who support integration through law in the field of social policies, have to take into account the widespread feeling that, precisely at the time when it would be most needed, no progressive and unitary formula can be found and, as a consequence, no action is under way.

I have argued elsewhere that solidarity, which used to be the key regulatory tool within national systems of labour law, breaks down into many notions of solidarities in the plural, whenever economic pressure forces legislatures to differentiate measures, rather than adopting uniform standards.⁵ The most vulnerable ones, badly hit by the crisis, are left with no choice, but accept differentiation and struggle to follow new career paths. Entering the labour market in most cases means to accept offers outside the scheme of comparability with standard employment.

Although this pattern of labour law should not in itself be considered a negative one, it is also true that enforceability of fundamental rights, among all the right to equal treatment, may be at risk. Parameters of comparability are also to be established among national and mobile or migrant workers. This is typical for posted workers within a free provision of services, as well as for workers in transnational chains of production.

What are then the patterns of European labour law in the current crisis? And how could labour law be tuned into the aftermath of the crisis? I shall mention only a few issues, affecting both legal and voluntary sources, for which tuning is more controversial, because collective actors, by this meaning unions and employers associations, are involved. They may prove – more than other actors or institutions – unwilling to change, exactly for the reasons expressed before, namely the disenchantment provoked by the silence of ‘Social Europe’. They may also resist changes for an inborn tendency to protect national labour markets and to consolidate a traditional membership.

2. A Transnational Pattern: International Framework Agreements (IFA)

More than one changing pattern of labour law is visible, when dealing with new transnational private and voluntary sources.

First of all, it is worth underlying that IFAs represent a change from the previous practice of Codes of conduct, unilaterally adopted by large multinationals.⁶ Here, bilateral and often multilateral negotiations take place, thus raising new questions of legitimacy for the bargaining agents. Although the transnational nature of issues at stake imply that representation should be granted at a supranational level, the national level still generates the basic rules empowering negotiators.

Here the paradox is that a transnational agenda must be set and yet those who are asked to do so must be selected according to shared criteria, reflecting national traditions. Although IFAs do not have a traditional ‘normative’ function, as in national collective agreements setting salaries and

⁴ M Monti, *A New Strategy for the Single Market*, Report to the President of the European Commission J M Barroso, 9 May 2010

⁵ S Sciarra, *Notions of Solidarity in Times of Economic Uncertainty*, ILJ 2010, 223

⁶ Literature on IFAs is vast. Among the first contributions see A Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, in K Papadakis (ed), *Cross-border Social Dialogue and Agreements: an Emerging Global Industrial Relations Framework*, Geneva ILO-IILS 2008. See also European Commission, Staff working document, *The role of transnational company agreements in the context of increasing international integration*, Bruxelles, 21 July 2008, SEC (2008) 2155; A Baylos, *Un instrumento de regulación: Empresas transnacionales y acuerdos marco globales*, 27 *Quaderno de Relaciones Laborales* 2009; S. Clauwaert, I. Schömann, *European social dialogue and transnational framework agreements as a response to the crisis?*, ETUI Policy Brief European Social Policy Issue 4/2011.

working conditions, they provide *sui generis* rules, which must be enforced. This new process of transnational standard setting could progressively disentangle labour law from its national roots and weaken the authority of legal points of view.

Here the changing pattern in labour law has to do with ways by which states can regain their role as regulators and support transnational collective bargaining, so to enhance new dimensions of social justice. Since the collective interests in question are supranational and so are the targets to be reached, states are forced to proceed within a network of obligations towards and among other states. **Legitimacy of transnational bargaining agents in developing transnational rules – it is suggested in this paper – should be the scope of new auxiliary legislation at EU level. Framework legislation should provide flexible formats to ascertain that bargaining agents are representative.**

Some examples can be found in deliberations taken by European umbrella organizations, such as the European Metalworkers Federation, setting the rule that unions must be present in negotiations and sign IFAs, if necessary assisting European Works Councils (EWC) and World Works Councils (WWC).

Building on the recast EWC Directive,⁷ criteria of representation become more sophisticated, whenever WWC are set up. Some global agreements provide seats with no vote for representatives coming from non-EU countries. Here the changing pattern is that non-EU members can only be exposed to a flow of information, as they are observers with no other power to react, but with the duty to report back to national constituencies. Despite this formal limitation, sitting in a global works council may have important outcomes in creating new bonds of transnational solidarity.⁸

Another important feature emerging in the practice of IFAs – and a changing pattern of labour law to be underlined – has to do with companies organised into subcontracting networks. The hub company extends labour standards towards all other companies affected by the main economic activity and seeks respect of fundamental rights. Problems of legitimacy in this case are raised with regard to monitoring, since subcontractors are forced to comply with unilaterally extended sources.⁹

The interesting outcomes in all these cases are twofold. First of all companies pursue untraditional goals and enhance new models of cooperation among themselves. Networks and supply chains may strengthen small businesses, which are most exposed to the effects of the crisis, and save jobs, which would otherwise be lost. Furthermore, the tendency to demand respect for labour standards beyond the membership of associations, signatories to agreements, is interesting, inasmuch as it shortens regulatory gaps and introduces common practices.

For example, mobility of workers within network companies and even within supply chains may be a way to respond to job shortages. Career paths at a transnational level may also be envisaged as a way of raising workers' skills and professional qualifications, responding to new job demands.

⁷ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 *on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees*, OJ L 122/28, 16 May 2009. Comments in F Dorssemont, T. Blanke (eds), *The Recast of the European Works Council Directive*, Intersentia, Antwerp, 2010

⁸ In June 2011 a meeting took place in Torino, in view of establishing a WWC at Fiat, following controversies among Fiat's ceo and Italian Unions on company restructuring and derogations from national collective agreements. Representatives from the American UAW and from Chrysler were present. WWC are a long-lasting practice in the automotive industry. At *Chrysler*, ever since 1998 a transnational trade union network was active, transformed in 2002 into a WWC, in addition to the one provided for by the European Directive. At *Volkswagen* a similar tradition goes back to the Nineteen Sixties, although a WWC only saw the light in 1999

⁹ A Sobczak, *Codes of conduct in subcontracting networks. A labour law perspective*, Journal of Business Ethics 2003, 225; European Parliament Resolution 26 March 2009 *Social Responsibility of Subcontracting Undertakings in Production Chains* (2008/224 (INI)). It is worth mentioning at this regard a recent agreement signed on 16 September 2009 by employers' organisations and trade unions, involving the network of Tuscan subcontractors within the Gucci group, with the aim of 'supporting' Italian know how and avoiding reduction in employment, through the enforcement of common quality standards. More details on agreements of this kind at a local level in S Sciarra, *Aspectos nacionales y transnacionales de la negociacion colectiva en la crisis*, TL 2011 forthcoming

As for agreements signed by the EWCs, the practice, beyond the obligations complied with in the Directive, has been generated in parallel with what is called ‘anticipation of changes’ in companies’ restructuring. It can be argued that there is unbalance in all such situations. To be informed on corporate restructuring does not necessarily imply that workers representatives can modify strategic decisions. However, the duty to consult EWCs sets in motion alternative measures and may create opportunities for workers, calling for support from other actors, such as local authorities or consortia of companies. It may also be the case that training or other forms of professional education is provided through European means, for example the European Social Fund, or the European Globalisation Adjustment Fund.

To sum up, although IFAs are not necessarily generated by the crisis, they are spreading in times of economic uncertainties. They may be seen by sceptical observers as a way to escape traditionally binding agreements and to set in motion a less strict web of rules. They may also be read as a way to circumvent conflict, if nothing else because there is no visible and unitary counterpart to be addressed. Nonetheless, changing patterns of labour law are there, in the world of facts, ready to be interpreted and framed within new theoretical structures.

3. A Pattern to fight social dumping

Social dumping was not signalled as a widespread practice within the EU in the early days of the common market, neither it occurred when new Member states first joined the Community. Social dumping dramatically came into the public eye, following enlargement to central and eastern countries, whose economies were significantly weaker, when compared to western Member states.

Attempts to build up transnational consensus within the EU represent a possible answer to regime competition. LO, a Swedish confederation, and LBAS, the Free trade union Confederation of Latvia, signed an agreement on cooperation on 13 October 2005 for the prevention of social dumping. As a consequence, the Latvian Construction Workers’ Union should refuse to work at lower wages for Swedish companies. Commentators viewed this example as an opportunity to improve and strengthen communication among unions in different countries and to search solutions, which can anticipate and avoid conflict.¹⁰ Reciprocity here is to be interpreted as a moral sanction, as well as a social norm of cooperation, in the attempt to avoid potentially negative consequences, while introducing new regulatory functions.¹¹

In Norway a government action plan to avoid social dumping was first set up in 2006, and renewed in 2009. The Labour Inspection Authority and the Petroleum Safety Authority Norway are important players in the efforts to combat social dumping, namely in making sure that health and safety provisions and all basic regulations, including collectively agreed wages, are enforced for foreign workers.¹² Part of the action plan was the creation of a registry for TWA operating in the country. Field research shows that, despite a sound level of regulations in the construction industry, social dumping still affects workers, mainly those coming from enlargement countries.¹³

Labour mobility in the construction industry requires new forms of unionization. Hence, the attempt made by the German union IG BAU to set up a new organization European Migrant Workers Union (EMWU), to attract new membership and to break the links with national

¹⁰ K Gajewska, *Transnational labour solidarity*, Routledge, London-New York 2009, 69-70. This initiative did not stop the well known dispute among Swedish unions and the Latvian company *Laval*, which is at the origin of a most controversial ruling of the ECJ

¹¹ With regard to the construction and the metalworkers’ unions, a consensual approach towards wage coordination since the Nineteen Nineties is reported by R Erne, *European Unions. Labor’s Quest for a Transnational Democracy*, Cornell University Press, Ithaca and London 2008, 86-95

¹² <http://www.regjeringen.no/en/dep/aid/topics/The-working-environment-and-safety/social-dumping.html?id=9381>

¹³ A M Ødegård, Ø Berge, K Alsos, *New regulations for temporary work agencies: can a growing informal market be subdued? A case study of the Norwegian construction sector*, paper presented at the IIRA congress Copenhagen 2010

protectionism. This attempt to create a transnational organization, capable to offer specific services to mobile workers, failed for reasons that empirical research cannot easily detect. However, a reluctant attitude from European trade unions is denounced as one of the causes that stopped an innovative experiment in internationalised contracting chains.¹⁴

This pattern of labour law, as previously mentioned, is not in itself an outcome of the crisis. Temporary work agencies and posting of workers within the EU are, by enlarge, well-regulated phenomena. What needs to be underlined is that economic pressures, worsened by the crisis, create unsettled scenarios of competing solidarities and may multiply cases of unjustified protectionism.

Cultural resistance to change should be contested, while acknowledging the urgency to adapt organizations representing collective interests to new transnational realities. New structures within the unions should be fully empowered in order to deal with the effects of the crisis and recruit membership offering new services.

The plea for cultural modernization applies to employers' associations as well. It is a widespread practice, in supply chains and in IFAs, that single employers start unilateral actions or give way to negotiations. The crisis suggests new forms of cooperation, for example at local level in clusters of production or in industrial districts, to face market competition and avoid relocation abroad of productive chains or parts of them.

4. A pattern to remodel the fundamental right to strike

Nothing has been the same under the sky of collective labour law, ever since the rulings of the Court of Justice in *Viking* and *Laval*. The question to be asked here is whether the despair brought about by these decisions may prove counter effective in times of crisis. The other point to be made is whether there are ways of diminishing the negative impact of this doctrine on national systems of industrial relations.

The Monti Report has been mentioned before. It addresses the case law in question, recognizing that it generated anxiety and disillusionment among European citizens. It also suggests solutions similar to the ones enshrined in the so called Monti Regulation, which came into force to respond to threats posed by social unrest to the free movement of goods.¹⁵

Resort to conflict should be, according to Monti, an *ultima ratio*. Conciliation and alternative dispute resolution should be enhanced at national level, whenever posted workers are involved, while keeping EU institutions and Member states informed.

Labour law scholarship addressing very critically the case law in question and approaching it in comparison with the ECtHR's recent pronouncements,¹⁶ suggests alternative solutions, such as establishing compulsory conciliation, resorting to secret ballots, or enacting legislation in support of concession bargaining, namely agreements generated by the crisis, setting lower standards or temporarily waiving workers' rights. It can also be envisaged – and this suggestion has strong comparative grounds in labour law – that legislation on minimum or essential services should support the right to strike.¹⁷

It is worth mentioning that in the decision on BALPA – the union of British pilots threatened by British Airways for what was considered a potentially unlawful strike, limiting the company's economic freedom – the ILO Committee of Independent Experts blamed the UK for not revising

¹⁴ I Greer, Z Ciupijus, N Lillie, *Organizing mobile workers in the enlarged EU: A case study of the European Migrant Workers Union*, CERIC WP n 13/2011. Another paramount example of transnational union organization is in the maritime sector. See N. Lillie, *Union Networks and Global Unionism in Maritime Shipping*, RI/IR 2005, 88

¹⁵ Council Regulation (EC) No 2679/98

¹⁶ *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008; *Enerji Yapi-Yol Sen v Turkey*, Application No 68959/01, 21 April 2009

¹⁷ B Hepple, *Rethinking Laws Against Strikes*, in A Kerr (ed), *The Industrial Relations Act 1990: 20 years on*, Dublin Thomson Reuters 2010, 148

domestic standards. It also went as far as suggesting that consensually agreed minimum services could be a way of enhancing the right to strike, rather than limiting it.

Changing patterns of labour law are interwoven with the crisis, when we discuss the right to strike. The critical point is whether strikes symbolise the most efficient sanction against employers' behaviour in situations such as, for example, social dumping and whether they are a reliable mean of action in defending transnational interests. Union membership is fragmented and attempts made to unionise along different lines may prove unsuccessful, as in the previously mentioned case of construction migrant workers.

Other means of pursuing union goals are possible. In maritime work, for example in the fight against flags of convenience, union inspectors prove most efficient in granting the enforcement of collective agreements. It is well known that the dispute at the origin of the ruling in *Viking* was then settled out of court and an innovative European sector level agreement was signed, inspired by the 2006 ILO Maritime Convention, soon to be enforced as a European Directive.

A task force has been asked to present proposals on how to improve employment conditions and competitiveness in this global sector of the economy. Information and monitoring are the key words used by the experts, who believe that data collection and coordination are essential pre-conditions, in order to fight social dumping.¹⁸

Whenever procedural rights need to be implemented – as it happens with the right to information and consultation – and when managerial plans, rather than binding issues are discussed – as it frequently happens in IFAs – a traditional recourse to conflict may prove inefficient if not impossible. One could argue that there is almost a contradiction in terms in trying to frame the right to strike within a global system of industrial relations and that no plausible interlocutor can be found for unions calling strikes at a transnational level.

These inherent drawbacks in resorting to collective action for the enforcement of transnational agreements, does not in any way eliminate other expressions of protest at supranational level or demonstrations putting pressure on institutions and on governments. The point to stress is that transnational strikes are unlikely to become a form of pressure on employers, as the expression of a countervailing power.

However, this fundamental social right continues to be deeply rooted in the global legal order, as both ILO Committee of Experts and the ECtHR have recently confirmed. It is of paramount importance that new developments in the interpretation of the right to strike should stem from freedom of association. This elaboration in supranational case law shows new ways ahead, even in the asphyxia of the crisis, and confirms that judges deliver positive messages even in times of uncertainties.

5. Concluding Remarks

In this paper I have addressed questions of legitimacy and power raised by the crisis. Theories of democratic representation need to be adapted to transnational processes of standard setting, while keeping a strong nexus with work places.

There are several indications that new patterns of labour law, although not necessarily prompted by the crisis, may prove useful during the crisis. I have mentioned IFAs and agreements within transportation production chains, especially maritime work and internationalised contracting chains, such as supply chains or clusters of production. I have also mentioned consensual solutions to fight social dumping and enhance transnational solidarity.

I have argued that collective industrial action too should be reset, to enhance new transnational interests. Answers to the crisis are affected by economic uncertainties. The crisis shakes the balance of powers among the negotiators and breaks traditional links of solidarity. What can be perceived as

¹⁸ Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, 9 June 2011

a potential marginalisation of conflict, following the case law of the Luxembourg Court in *Viking* and *Laval*, should be evaluated in the light of recent case law of the Strasbourg Court.

It is hard to envisage a global notion of conflict, encompassing all its many meanings and functions. It is equally challenging to set limits to the fundamental right to strike within a global legal order. One could argue that the *Viking* and *Laval* doctrine has opened a wound in the body of labour law, difficult to dress if the cure is not innovative. The wound is not irreversible, and can be cured by European scholarship unconventionally, converting principles of emancipation and social justice into a transnational breadth.

Procedural rights are encompassed within a new dimension of collective labour law. They are not alternative to conflict; they are morphologically different, and yet equally fundamental. They should not be seen as the cause for a changing role of conflict, neither as the origin of a default for organised collective actions. This paper argues that, whereas new patterns of transnational labour law emerging in the crisis are purely voluntary, criteria of representation should be revised by national legislatures and *de jure condendo* should be supported by EU auxiliary legislation.