GLOBALISM AND LABOUR LAW

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When I prepared my report for this seminar, I was remembering my first coming to Italy as a labour lawyer in 1970. At that time, I was told by Italian colleagues, that the most important thing in labour law is the power of the workers. I had never heard similar words in Germany, but the professors referred to the "Autunno Caldo". Social partnership like in Germany is outside our interest, even outside our reasoning; it would restrict the power of the workers instead of developing it. Our contacts became good, because I criticized social partnership, too, and encouraged nobody to follow this way.

If I return now, after more than 30 years, I am confronted with a situation where people would be very happy to have codes of conduct, negotiated in a framework of social partnership. As a rule, codes are unilateral decisions taken by enterprises and multinational groups which promise to follow certain well-sounding principles.

What can we do in this situation? Can codes be useful for workers under certain circumstances? In this context, I will not emphasize the potential power workers can have, but I am quite happy about what my neighbour has said just a few minutes ago. He has mentioned the real forces that can create some changes in labour law.

Let me speak about three points within the broad subject of globalism and labour law. First, I shall deal with the challenges to labour law coming from economic globalisation. The second part will evaluate the instruments of international labour law in a globalized world, and the third point concerns the problem, whether an autonomous resistance, autotutela, is still possible and useful.

Challenges to national labour law.

The worldwide opening of the markets creates pressure on prices and costs. Employers try to reduce labour costs. This is difficult in countries with well-based unions, but it is easier in countries with less union resistance. As unions must often rely on the legal framework the employers exercise their influence in order to deregulate the labour relations because it's easier to reduce costs if there has been deregulation before. They try to reduce taxation of enterprises and contributions to social security. We can take the German example I am familiar with, but I suppose the situation in Italy is not different: Less taxes, less contributions and less legal regulation. This is a slow process, of course, because of the resistance of unions and the complex forces in the political sphere. A lot of employers, therefore, try other ways and prefer to avoid the field of application of labour law: working with self-employed people seems to be a good example. This situates a growing number of persons outside the protection given by labour law.

Globalisation opens a chance for employers to relocate production to other countries. In a lot of collective negotiations this is a real threat. It destroys any balance of power. What can you do as a union or as a works council, if the employer tells you that there is an alternative: we'll reduce the salaries by 30% and stay where we are or we go away and close the factory. What's the bargaining power of the workers in such a situation? You can perhaps go to some journalists and ask them to write articles that the local economy will suffer. Some politicians will perhaps come to the employer and ask him not to leave. Finally you will negotiate a decrease of 25%. In this context, quite an interesting legal problem has arisen in Germany. Is it lawful to organize a strike against plans of relocation? Are the workers allowed to do this or would it be unlawful because of the liberty of enterprise? Recently, German courts have decided that workers can influence only the consequences of relocation but they can develop such high demands that relocation will become extremely expensive. Courts have accepted demands that the employer had to pay the previous salaries still during three years, and had to give afterwards a compensation of another two years of salary. During three years, workers have time for a new qualification which is quite an interesting concept. On the other hand, courts did not accept a strike demanding "no relocation". Even if they did not take this step, the right to organize a strike referring to the consequences is quite an important one.

The trade union movement has lost power for other reasons, too. The most important one is the lack of a real political alternative. They are no more able

to continue based on the perspective of democratic socialism with the exception of speeches on the First of May. In real politics they follow a pragmatic approach and if everyday´s pragmatism does not bring success like the increase of wages, they automatically get into trouble.

Globalisation creates a lot of cases in which decisions are taken abroad, which is very important for systems with codetermination rights. German labour courts have decided that even the American top of a group of enterprises has to respect codetermination rights when it asks directly the German employees a series of work-related questions. That is a good step but probably not so important in the framework of this seminar.

The most important consequence of globalisation is a change of paradigm within labour law. Its justification traditionally results from human rights and human dignity. We protect workers in order to respect them, to realize human dignity even at the workplace. Actually, we do not drop this argument, but it has no real impact. The main question is always: can labour law contribute to the better functioning of the economy? This is said on workdays and not on Sundays or the First of May. Can it really contribute to the good functioning of the economy? We think, it can. And there are a lot of empirical studies showing that, at least in certain branches and in certain activities, codetermination improves productivity. The German economy has a lot of enterprises with a fully developed system of codetermination where productivity is high and the situation in the world-wide competition rather a comfortable one. And we are

at the beginning of a discussion about labour law rules which facilitate innovation. In our situation, it is quite obvious that labour costs in India or in China are much less and that we have no chance, if we want to go into competition in this field with these countries. Our only possibility is producing new things, is innovation, is creating the products of tomorrow. For labour lawyers the new problem is: can we conceive a legal framework which encourages innovation? There are some quite pragmatic ideas about it. Let me give you an example. If you have to work 60 hours a week as an engineer – what often happens in Germany – you will not be very creative in your 61st hour. You need time to be innovative, at least a part of your workday has to be reserved for discussion and possible new ideas. And secondly, you need a certain, at least a certain stability of your labour relationship. If there is no stability, you will not identify yourself with your job and produce no new ideas. One can legitimate in a certain way an effective protection against dismissal by referring to innovation. It is the same with reasonable working time and health protection. This new form of legitimization is a direct consequence of globalisation; labour law has become a factor of productivity.

I would not be very happy if this would be the only way to discuss labour law in the future. But it is a new approach and we should not refuse to play in this field. Employers get into big troubles if we tell them: innovation needs protection against dismissal and a stable employment.

Reactions in international labour law

Let me now go to the second part dealing with the international level. The theory seems to be self-evident: if the market is international, the response has to be international, too. That is the central idea of Bob Hepple's book about "Labour Laws and Global Trade". Which are the international answers to the challenges of globalisation?

Since many years, there have been a lot of ILO conventions, quite unknown among labour lawyers, among unionists and among judges, even if they were ratified by the concrete State. The ILO knows it and therefore concentrates on core labour standards: prohibition of forced labour, prohibition of child labour, prohibition of discrimination and freedom of association and collective bargaining. The last is the most important one, fixed in the Conventions nr. 87 and 98, which gives the instruments to progress in other fields like wages, health protection and working time. But if you have a look at the reality, you must admit that Brazil, China, India, Mexico and the US have not ratified these two conventions. This means, that more than 50% of all workers of the world live in States which have not ratified these core conventions. The ILO has no means to change this situation. There are other obstacles to implement ILO-rules. If we take developing countries as an example: 85% of the working population is in the informal sector, where laws are applied only in exceptional cases. What about ILO-Conventions that even in Italy or in Germany are unknown? They will never reach these people, it's grotesque to think that they will be touched and protected in this way. There is an ILO-campaign in favour of "decent work", a fine thing, of course, but there is absolutely no power

behind it. It is like a proclamation of good principles. Paul O' Higgins wrote in a recent contribution that the ILO is even not able to go into a confrontation with the United States, because 20% of its budget are paid by the US. In the 1970s, the US left the organization because they were dissatisfied by ILO-decisions about Israel and in other cases. The threat to do it again and reduce the ILO´s budget by 20 % is a sufficient reason to do nothing what the US would not like. You see I am very sceptical as to the activities of the ILO.

The second answer on the international level is the social clause which can be found in the foreign trade law of the European Union and of the US. Normally, developing countries get a preferential treatment as to the payment of customs duties. These preferences are taken away if certain principles, for instance the core labour standards of the ILO, are systematically violated. Other States are given additional preferences, if they fulfil their obligations completely and practice e.g. all the core conventions of the ILO. This system gives an economic incentive to realize social aims, a conception which deserves support. In practice, the selection in Europe as in the United States has been made according to political priorities. Additional preferences were applied by the European Union to Sri Lanka and Moldavia, other countries tried to get the same, but the procedure is a very long one. There was a sanction towards Myanmar and it may be the same thing with Lukashenko's Belarus ("White Russia") now, but these are outsider States. You could never do it with a big State, like the US, China, or Russia, even if similar things would happen there.

A third answer on international level are codes of conduct. You know much more about it because the project organizing this seminar has its field of research there. In my view, voluntary commitments of enterprises may be a good thing as long as they exist, but as they are voluntary they can always be withdrawn. I had a personal experience about the subject in recent times. An important German bank wanted to establish a code of conduct, because it had lost a part of its reputation due to some curious things. So they wrote in their draft code of conduct that socially weak, underprivileged persons will enjoy the support of the bank. The central works council asked them: would you give these persons, for instance living from social aid, a bank account? Is the fact that the bank cannot earn any money with these persons now without practical significance? In the next meeting they had dropped the formula, it seemed to be too dangerous. It could have adverse consequences and create responsibility for the bank. What they need are declarations they can always withdraw and this would be the only thing they accept. Framework agreements with unions are much more preferable. Another means is mobilizing consumers. If a firm is in danger to lose customers in case it does not follow its own principles, the directors will take this risk into account. Codes of conduct may bring something, but only under very specific conditions.

Autonomous resistance

Let me come to my third and last part: Is autonomous resistance possible? I think we really should not forget it and study e.g. the activities of the ITF, the

International Transport Workers' Federation. It has developed a model collective agreement for seafarers working on ships under flags of convenience. About eight thousand ships have been forced to accept this agreement which has an income level between that of developing countries and the sums paid in Europe. A German seafarer, for instance, would get about 3000 € a month and the tariff in the ITF collective agreement is about 1500, whereas a Philippine citizen working on a ship without collective agreement would earn about 300 dollars a month. That is the situation. The way of forcing employers to accept the ITF collective agreement is a boycott in the harbours. Such a boycott can be organized not only because there is a spirit of solidarity. Of course this spirit exists, but the essential point is another one: The model agreement contains a rule that the seafarers are not entitled to take over dockers' work. The danger that low paid seafarers replace dockers does no more exist, if a collective agreement is sgned. The essential point is solidarity, and solidarity means in this context that the collective actions – which take place every year – support the seafarers but are based essentially on the own interest of the dockers. This should not be overlooked.

There is another example, GM Europe. In several years, the European Works Council and the unions coordinated actions all over Europe to fight the reduction of working places. After a big action in the end of 2004, they came to an agreement that all locations are maintained and that the reduction of working places is realized under relatively good conditions. This result was reached because there were strikes all over Europe, even in Germany. The

union was not so happy about the strike in Bochum, which was organized by a politically atypical group of workers. Officially it was not a strike but an information meeting organized by the works council, which can be done under German law normally for some hours. But there is no time limit in the law, and it continued over more than one week.

Another form of autonomous action is the inclusion of consumers, who refuse to buy products produced under inhuman conditions in developing countries or elsewhere. There are some campaigns like "rug mark" referring to carpets from India, or "fair trade", where we can buy coffee produced without the interference of big multinationals. These activities give a quite important incentive to certain firms to recognize and practice social standards which they would not practice otherwise.

My thesis is that without these forms of resistance nothing moves. As lawyers, we can develop some ideas and put them into the legal community. This has in itself a certain importance. Codes which are open to the interests of the workers may be useful as a point of reference. But real changes are possible only if there is a certain resistance to the existent living and working conditions among workers.

Conflicts in China

For concluding, let me cite the Chinese experience Luca Nogler was mentioning. There is now a new development in China. About nine months ago I held a seminar in Beijing with about 30 professors coming from different Chinese universities, lawyers, sociologists, economists. They all told a lot of things about bad working conditions and complained that workers have no effective rights and take action to protest against this situation. The forms are quite intensive like blockades of railway tracks. Cases were reported in which workers went to the roof of a skyscraper saying "we'll throw ourselves down if we do not get paid". Newspapers in Shanghai wrote about it, but in other towns similar things happened. There is a lot of industrial unrest, normally outside the union and not only among migrant workers coming from the agricultural part of China to the big cities.

The party leaders and other decision makers in China have learnt a lot from the experience of Eastern Europe and the Soviet Union; if problems arise they try to solve them instead of giving new interpretations. They have now prepared a new law on the labour contract and some other problems which is actually under discussion in Parliament. In April 2006, the draft has been published by internet and there are now more than 190 thousand written reactions by citizens sending an e-mail with their opinion. This has created some practical difficulties because the citizens should receive answers. Probably the Parliament will take a decision only by the end of the year.

In the coming law you can find some new things, for instance a compensation even in the cases of fixed-term contracts. It is similar to the Italian trattamento di fine rapporto which is unknown in Germany and in many other countries. The Chinese legislator wants to reduce temporary work. To prove the existence of a labour relationship is facilitated. This is a practical problem especially for migrant workers. When wages are paid the employer declares: "I never concluded a contract with you, you are a cousin of a person with whom I made a contract", and the worker said "but I worked during 4 weeks" and the employer answers: "well, it may be, but we have no contract". The legislator has to decide which are the conditions of a contract. Is it sufficient if a representative of the employer knows that work is done, or should he say: yes, continue? In our opinion the first alternative is the right one. There is one very central provision in the project concerning work rules: The employer has to establish rules about the way of working, about fringe benefits, about what happens in case of illness and so on. And he has to negotiate these provisions with the unions or the assembly of the workers or the representatives of the workers. If these negotiations are without result, the proposal coming from the workers´ side will prevail. Of course, foreign investors have protested; the American Council on Investment in China declared: China is a good country, but this would be worse than in Europe. On the other hand, the big majority of citizens seems to say that the proposals do not go far enough.

What is interesting is once more the relationship between conflicts on the one hand and legislation on the other. And what was new for me in this seminar 9

months ago, was the fact that people spoke so freely, despite the presence of high representatives of the unions, of the State Council and of the Supreme Court. One colleague from Kunming in South China declared: we have cases in which workers had built bombs to throw them into the factories where they worked. To tell this in a conference with foreign experts is quite an extraordinary thing. In a similar situation in Germany one would be more cautious in order not to create problems for the career. As a retired professor I could do it, but my younger colleagues would not. Once more: There is a close link between collective action and legislation in labour law. Well, I'll end here with my excursion to another world. Thank you very much for your attention.