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The future of labour law in the context of global challenges

I.

Talking about the future of labour law is somehow like the weather forecast: one easily can be contradicted by future developments. Therefore, one has to be aware that much is speculation and that the reflections have to be guided by cautiousness and modesty

It is evident that the labour law of the future cannot be the same as we have known it so far. It has to respond to the dramatically changed reality of work. Labour law is a product of industrialization. It has been developed in view of a social and economic reality which is no longer the reality of today.

As we all know, the point of reference for the development of labour law mainly was the Fordist model. The workplace was embedded in a factory of manufacturing industry, a more or less large unit, where employees – mainly blue-collar and only to a small extent white-collar - did not work in splendid isolation but as a collective entity. At least in principle the workforce was relatively homogeneous as were the employees' interests. The prototype of this workforce was the male employee in an undetermined full time employment relationship, the so called standard employment. This male employee regularly was functioning as "breadwinner", responsible for the family's budget. Continuity and stability were a characteristic feature of employment. The enterprise was characterized by a clear structure of hierarchies. It was easy to define subordination and the employer's power to command and control as criteria for the employment relationship: the reference point for labour law. Homogeneous interests of the workforce as well as the experience of being part of the collective were ideal preconditions for unionization. Thereby protection by collective bargaining could be organized without serious problems. Labour law was focusing on the domestic labour market. Globalization was not a real issue.

In our post-industrial era practically everything of this scenario has disappeared. To a bigger and bigger extent the factory as a location where employees cooperate with each other is eroding. Outsourcing, networking, sub-contracting, tele-working, crowd

working and similar dislocating strategies are on the agenda. The enterprise often is turned into a merely virtual entity. Vertical structures are replaced by flat hierarchies. Manufacturing in most developed countries is becoming an ever smaller part of the economy, the service sector is increasing. Due to technological changes work organisation has changed dramatically. The workforce is no longer homogeneous, it is fragmented and segmented into core groups and marginal groups, less traditional employment and more and more new forms of work. The number of part-time jobs, of fixed-term contracts, temporary agency workers and independent contractual workers is significantly increasing. There are increasing numbers of economically dependent self-employed. The labour market is no longer male dominated, feminization of the labour market has become an important feature. The male “breadwinner” model more and more belongs to the past. Balance of work and family obligations, thereby, has become a serious problem. Globalization puts pressure on the national economies. Relocation of production to other countries is on the agenda. New communication technologies allow for easily dividing the process of production and providing services between different countries all over the globe. The global supply chain is an increasing phenomenon.

II.

In view of all these changes the question arises whether the solutions provided by labour law as we know it are sufficient to cope with these challenges in the future or whether and in what way we have to find new answers for what is needed.

The answer to this questions given by the protagonists of the neoclassical school would be simple. It sees labour law regulation as an undesirable distortion of the markets which exclusively should be responsible for the operation of supply and demand. This is particularly the message of the so called Washington consensus. The recommended strategy by this approach would be utmost deregulation and nothing else.

These protagonists of deregulation of labour markets have been stressing negative economic effects of minimum wage systems, of systems of income security, of measures restricting free entry and exit of labour markets, of collective and centralized collective bargaining as well as of working time restrictions. This view,

however, is not only one-dimensional because it exclusively focuses on economic efficiency but it proved to be wrong as extended empirical research demonstrates.

Even if many long-term benefits are indirect and difficult to measure, empirical evidence shows that labour standards result in improved health and human capital which increases the productivity potential of workers. It particularly shows that fair working conditions result in improved motivation and willingness of workers for high performance. Long-term and stable relationship between the worker and the company provides incentives to companies to invest in training of their workers because the company is able to recover returns from training. Job security provides incentives to workers to share their knowledge and skills with colleagues, in particular with young people and apprentices. In addition, it allows the workers to cooperate and increase productivity without fearing the loss of their job. Also at the macro-economic level empirical evidence is available for a positive effect of labour standards on trade competitiveness and growth.

In short and to make the point: the protagonists of deregulation seem to suffer of a reality gap. In my view there should be no doubt that labour regulation is an essential input to a functioning market economy as well as a precondition for comprehensive and sustainable economic development. Therefore, implementation of labour standards should be considered as a form of investment in institutions which on the long run have not only a positive effect for the workers and the economy but a positive impact for the stability and the development of society as a whole. In the era of globalisation it goes without saying that such regulation cannot stop at national borders but has be international.

In addition it should be stressed that the economic dimension is only one among others. Labour regulation primarily are to be seen in the context of human dignity as it is expressed by the actual program of the ILO on decent work for everybody. The fundamental rights perspective is playing an ever bigger role. The famous statement in the ILO's Philadelphia Declaration that "labour is not a commodity" still is valid and indicates that market rules are not sufficient to meet the needs of decent work corresponding to human dignity.

The strategy, therefore, has to be re-regulation and not deregulation. The question, however, still is: re-regulate in what way, in what direction. Here I agree with my

Canadian colleague Harry Arthurs when he writes: "The purpose of labour law should remain unchanged: to enable workers to mobilize to seek justice in the workplace and the labour market". This requires a combination of protective legislation and collective self-regulation by collective arrangements in which all members of the workforce do have a voice. And it has to be made sure that labour law is not merely becoming a residual category whose possibilities are exclusively dictated by economic considerations. To not be misunderstood: This does not mean that economic needs are irrelevant. But in balancing them with the rights of human beings they should not be overstated. The experience with notions like "flexicurity" or "employability", however, tells a lesson on how easily human beings merely are treated as a function of the economy instead of focusing primarily on their well-being.

III.

Nobody can tell how the labour law of the future will look like. Some needs for future labour law, however, can be predicted.

a) Certainly the mode of regulation will have to be very different. Due to the increasing complexity to be regulated substantial rules will be replaced to a bigger and bigger extent by procedural rules. Working time is a good example to illustrate this trend.

It has become evident that traditional rules on working time have to be changed in view of working patterns implied by new technologies, but also in view of providing working time autonomy for employees, in particular for those with family obligations. This implies that traditional protective working time standards have to be substituted: working time protection as such will also in the future remain as important as it ever was, it merely will become much more complex. This will not be put in a general pattern but has to be negotiated to be applied in different circumstances. Legislation only can provide a general framework. The details are to be negotiated. The result depends on the power of the actors and on the institutional framework.

b) In the labour law of the future human rights, in particular fundamental social rights, will play an ever bigger role. This is not only indicated by the ILO of Declaration of 1998 on core labour standards but also by the fundamental social rights in the ESC and in the Charter of fundamental social rights of the EU. The recent case law of the European Court on Human Rights (ECHR) on freedom of association as contained in

the European Convention of Human Rights is perhaps the best example of this trend. There the Court integrates the case law of ILO Committee on Freedom of Association as well as of European Committee on Social Rights and thereby establishes an overall umbrella of fundamental social rights.

c) Not only core labour rights but all the international labour standards developed by the ILO will have to play an ever bigger role. However, the problem is not the lack of international labour standards, the problem is the lack of enforcement. The enforcement mechanisms for international labour standards will have to be restructured. The ILO supervisory system based on reports of the Member States is more than questionable, easily to be manipulated and only to a very limited extent able to prove compliance with conventions. But not only stronger supervisory mechanisms are needed, also the sanctioning side is to be strengthened. Naming and shaming is no longer sufficient, real sanctions - as for example fines for Member States in case of non-compliance - are needed. This might imply a conflict settlement system to which the Member States must have access in case of non-agreement with the sanctions. The tribunal envisaged in Art. 37 par. 2 of the ILO Constitution should come alive.

d) For transitional periods it might be necessary to rely on soft law measures (e.g. Corporate Social Responsibility). However such arrangements based on voluntarism will not be sufficient. It will be important to transform them into hard law.

IV.

It is relatively easy to identify these general needs for future labour law. However, the real difficulties arise when the question is to be answered how specific problems are to be resolved. Let me just give you one example: the already mentioned segmentation and fragmentation of the workforce.

Traditional labour law has been focusing on full time employment for an indefinite period. Other forms of work were considered to be atypical. According to the ILO's World Employment Social Outlook 2015 with the title "The changing nature of jobs" wage and salaried employment only accounts for about half of the global employment, in some regions as Sub-Saharan Africa and South Asia as few as 20 %. Among them only 45 % are employed on a full-time permanent basis and there are indications that even this figure is declining. This indicates that the majority is

engaged in non-standard employment forms of work, not to mention the growing number of those who are independent or self-employed but in the same poor economic situation as those who are in employment relationships. At least the report finds that there have been significant improvements in areas of legislation relating to non-standard employment. However, a closer look shows that this only means that these forms of work have been brought under the umbrella of labour law protection thanks to the equal treatment principle. But first of all this landscape is still very fragmentary. And in addition some forms as for example crowd work are far beyond any regulation at all. Secondly equal treatment is not sufficient. It ignores that employees in new forms of work are in a different situation. To just give an example: If there is a system of protection against unfair dismissal this is useless for the employee in a fixed term contract if the contract comes to an end. Or if it remains possible to reduce part-time work to minimal hours, equal treatment is not very helpful for an employee who wants to make a living by this kind of employment. Instead of merely insisting on the principle of equal treatment labour law has to react to the needs of people in new forms of work by providing tailor made regulations which by necessity will be different of those for people in traditional employment. These rules have to be based on the insight that people in new forms of work are more vulnerable than those in traditional employment and, therefore, need more and not less protection.

In this context also the link to social security has to be seen. Systems of social insurance where the benefits are linked to contributions by the workforce have to be reconsidered and reshaped. As the already mentioned report of the ILO shows, those in non-standard employment relationships generally earn much less than full-timers. But, of course, they may need the same health and old age benefits.

Such a reconsideration may even be necessary for those who are in permanent relationships but do not work full-time. Part-time work to a bigger and bigger extent may be a feasible instrument to facilitate compatibility of family and work responsibilities for men and women. However, the situation of the part-timer is not only shaped by the working conditions regulated by labour law but to at least the same extent of coverage of social security law. The attractiveness of this form of work quickly disappears if it is not reflected in the social security system.

Whether it is still appropriate to limit the scope of application of labour law to the employment relationship in a strict sense, has been the topic of a widespread and intensive discussion for quite a time. The demarcation line between employment and self-employment has become very difficult to draw. To an increasing extent there are persons labelled as being self-employed but in reality being employees. They of course are to be included into the scope of application of labour law, even if it might be difficult to exactly identify their status. Problematic are those which undoubtedly are self-employed but economically in a similar position as employees. Therefore, in many countries a specific category was invented for the economically independent self-employed. In Germany they are called “employee like persons”. However, only some rules of labour law are applied on them. The reason is very simple: if they are only economically but not personally dependent, their situation remains to be essentially different from employees.

Many suggestions have been made on how to cope with this problem. The most far reaching concept a few years ago has been presented by Mark Freedland and Nicola Kontouris by creating the category of personal work relations, thereby overcoming the old demarcation line between employment and self-employment and introducing more comprehensive criteria. I have to admit, that I am undecided. I doubt whether it might be recommendable to extend the full amount of labour law application on economically dependent self-employed. In my view we still need more empirical evidence to allow for a reliable assessment of similarities and differences, before taking such a far-reaching step. It might perhaps be preferable to establish basic principles which govern such economically dependent self-employed as well as employees. This then would allow to elaborate tailor-made protective schemes, taking full account of the specific situation of this group.

The biggest problem arising in the context of segmentation and fragmentation of the workforce in my view is the question on how to establish solidarity between all the diverse interests of the different groups and how to organise efficient collective representation. In other words: The question is whether and in how far traditional collective bargaining patterns and patterns of institutional workers' participation still will be able to play a relevant role.

Whereas in spite of the decline of trade unions - at least in some parts of the world - for traditional employment it still is possible to be protected by collective self-

regulation, this is much more difficult for people in new forms of work. Their unionization rate not only is marginal, it also is extremely difficult for traditional trade unions to integrate their specific interests into a bargaining strategy. Their focus – as far as I can see - still is predominantly on traditional employment. Bargaining for employees who do not belong to the core group of trade union members leads to difficult problems of representativeness. In short: it seems that satisfying collective representation of interests for people in new work forms cannot be provided by traditional trade union and bargaining structures. Whether alternative forms of representation can be organised is an open question.

Fragmentation and segmentation of the workforce also put a question mark behind the institutionalized systems of workers' participation. These systems are built on the assumption that there is a workplace where a collective of employees with more or less homogeneous interests is present. Here it is not only the diversity of the interests of the workforce but in addition the erosion of the factory concept makes it difficult that such bodies can function efficiently. This may still be possible for the core groups. However, for people in new forms of work it is very problematic. For example a representative body in a temporary work agency is almost not accessible for the temporary workers who are never there but in the users' companies. And why should the respective body in the user company care for temporary workers who are there only for a limited time? The question is whether and how such systems of workers' participation can be restructured in order to integrate the whole diversity of interests of the workforce and take account of the new enterprise organisation. I very much doubt whether this is possible at all. And it may be doubted whether the strength of a representative body composed of so many diverse groups with diverse interests would be as strong to defend and promote employees interests as before?

The most difficult problem to be resolved refers to the question whether and in what way rules and collective voice for the informal economy can be developed. We only can take for granted that such rules cannot be a simple copy of the regulations governing the formal economy. Therefore, in my view the formula developed by the ILO of "formalising the informal economy" is irritating. In addition the structures within the informal economy are very different and by no means homogeneous. The situation of the domestic workers cannot be easily compared to those who sell goods on the streets. I have to admit that I have no solution but only a lot of open questions.

V.

Instead of discussing further examples, let me try to draw a conclusion. Labour law undoubtedly will survive and will continue to play an important role also in the future. However, an enormous effort of adaptation to new and ever changing realities is needed. There will be neither the end of labour law nor the end of history as once Fukuyama proclaimed.

The great labour law scholar Bob Hepple, who unfortunately recently passed away, once complained that it is "a temptation for labour law scholars ...to focus their energies on developing an ideal theory of labour rights or social justice". This is not what I had in mind. I simply wanted to draw your attention on some phenomena which I consider to be major challenges for labour law. There is no possibility to predict how the labour law of the future will look like precisely. We only can say what Bob Hepple wrote already 20 years ago: "The labour (law) of the future, like that of the past, will be the outcome of processes of conflict between different social groups and competing ideologies". And it is our task to identify the challenges and to get involved in these processes. The international research potential assembled in ILERA has an important role to play in this very context by identifying the challenges and by showing possible ways on how to reach labour regulations which worldwide will find a fair balance between the protective needs of the workforce and the needs of a prospering economy.