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How 'Global' is Labour Law? The Perspective of Social Rights in the European Union

Abstract

The effects of globalization on labour law are analyzed from a multi-disciplinary perspective. The leading idea is that, while accepting the challenges coming from a world economy and the strong constraints on the development of labour law, special attention should be paid to the preservation of 'partial global cultures'. What is meant by this is to develop even further legal systems which are coherent in themselves and respectful of deeply rooted practices, as well as of principles enshrined in the law. The European Union is taken as one of such examples: although elements of differentiation are visible among Member States, the need to strengthen social rights and to 'constitutionalize' them is seen as a necessary measure, parallel to the integration of the market. Pressures coming from the global economy should force the European Union to create a well balanced combination of market and social rules and to include labour law among the core areas of Community law.

Labour Law Is Changing Its Skin. New Theories or New Sources?

Globalization is a word full of mysteries, hence full of fascination for labour lawyers. A search into its many meanings opens up a field for research so vast as to cause what psychoanalysts have come to describe as the Stendhal syndrome: from the overwhelming effects of new sights and new cultures, travellers become irreparably ill and excitement is gradually replaced by discontent and suffering.

Globalization could also foster the fear of finding legal analyses totally dominated by the rules of a 'geo-economic order' in which very little space is left for social and political themes and to discover that this scenario reflects very closely what at the end of last century and at the beginning of the current one was described as imperialism, a society in which international financial institutions imposed their own order over national economic systems.[2]

[1] I am very grateful to Miguel Poiares Maduro, research fellow at the EUI, for his comments on this paper and for his invaluable help and suggestions.

[2] See Touraine, 1996, n. 2, p.126 ff. This very authoritative analysis exemplifies some of the scepticism legal analysis shares in approaching globalization. Touraine implies that it is the individual who

'Individualisation', as a result of the transition from industrial society to risk society, does not result in a negative implication; it reflects individual and personal biographies, often related to a role covered by institutions such as the labour market or the nuclear family,[3] different today from what it was before. This is an issue closely related to globalization, if we accept the view that all social institutions are undergoing a deep transformation, because of the constant challenges and threats imposed by the world economy. It also appears central to an ongoing debate in labour law, exemplified by the tension between the 'individual' and the 'collective' which, in a transitional phase, such as the current one, must be adapted to new social and economic needs.[4]

Individualisation has also been described as the effect of disembedding and then re-embedding people's ways of living, a process which originated in the sixties and proceeded onwards, whereby leaving aside previous traditions and practices meant to conform with the regulations of welfare states.[5] Far from abandoning traditions, theories on reflexive modernisation attempt to reinvent them; the answer to globalization is to justify traditions, because 'traditions only persist in so far as they are made available to discursive justification.'[6]

'Reflexive traditionalization' is yet another process to look at from the perspective of labour law; traditions are given back to communities rather than to individuals, they become common and shared goods, within the place of work as well as in wider geographical areas.[7] Training and craftsmanship, for example, are traditions which create trust and stability, especially when they are the outcome of shared values and become common objectives of management and unions. It is of no surprise that the most coherent proposals which, in recent times, have appeared in the social policies' agenda of the European Community[8] try to connect unemployment trends with education systems and to inculcate the idea of life-long education as a possible answer to unsettled labour markets and to employment instability.

Instability has become a recurring concept for labour lawyers and runs parallel to the notion of risk society, elaborated in social studies as a key concept to understanding modern culture. Labour law was intended to create stability for workers, both in terms of equitable wages and in terms of rights within the workplace; it is now meant to create flexibility, to trade off salaries for the continuation of employment; to invent ways of moving workers across many occupations during their working lives.

Globalization has undoubtedly pushed into this direction; it has forced states into transnational practices and trapped them into so many connections with supranational

demands to be put at the centre of social analysis; his identity must be reconstructed taking into account his desire to be free and yet part of his own culture, despite the fact of being at the crossroad of global flows of communication and information. See also Touraine, 1992, mainly at pp. 264-266 and 428-431

[3] Beck, 1994: 15.

[4] Simitis, 1990: 87 ff.; Wedderburn, 1994a: 13 ff.

[5] This terminology is used by Giddens, 1990: 63 and Giddens, 1991. An analysis along similar lines is developed by Habermas, 1996: 134 ff.

[6] Giddens, 1992: 105.

[7] Lash, 1994, p. 121 ff. and p. 126 in particular.

[8] Such as those presented in J. Delors' White Paper, *Growth, Competitiveness and Employment*, COM (93) 700 final, 5 December 1993

institutions that they have become less relevant as social actors and often less powerful as legislators. This has been described as the third period of post-modern legal pluralism: the 'state as contested terrain' sees the conflict between the local and the transnational, experimenting its inability to intervene and to develop internal pluralism; its regulatory functions 'become derivative, a kind of political franchising or subcontracting[9]'.

The European Union, in particular, fosters a situation in which the tension between political integration and decentralisation of powers is indicative of the dangers caused by possible collisions of different legal traditions but also of the need to find synergism for a more efficient functioning of the internal market. The relevance of a 'partial global culture',[10] such as the one developed within the Member States of the European Union, does not need to be demonstrated, since its outcomes are visible and indeed central to current legal discourse.

As for labour law, there is a further need to stress that the process of creating a global – albeit partial – legal culture is a very slow and at times contradictory one. The lack of a supranational identity for a legal discipline which is so deeply embedded in national traditions may therefore appear to be coherent with maintaining each country's cultural peculiarities as undiminished as possible.

We could borrow the concept of 'reflexive traditionalisation' and so rename in a more inventive way the principle of subsidiarity, central to the interpretation of European law. In so doing, those labour lawyers who are most attentive to the cultural implications of legal transplants would be aware of the risk lurking behind this attitude, namely to weaken the supranational legal system, without strengthening the national ones.[11]

Because of this danger, legal thinking should be aware of the fact that constraints imposed by a world economy require the construction of legal systems wider than the national ones and yet inspired, as much as possible, by common legal values. This is why the search for national constitutional traditions, well acknowledged by the European Court of Justice over the years, becomes the search for European lawyers' cultural roots, those which should be giving blood to the flesh of common supranational principles. The constitutionalisation of such principles is the step to be taken in order to govern a complex society, like Europe, in which, 'nationalism can be replaced by what one might call constitutional patriotism.'[12]

Facing globalization from the perspective of a very significant 'partial global culture', such as the European one, forces labour lawyers to rethink their own identity, either as inherent to a national legal culture, or as a fragment of a supranational legal order, or both.

If, as a consequence of globalization, labour law is changing its skin, theory must be accompanied by such a change. This may imply that labour lawyers – like lizards

[9] De Sousa Santos, 1992, n. 2 p. 133 and 135.
[10] De Sousa Santos, 1995, p. 257, who underlines that partial global cultures are the only possible outcome of the capitalist world economy.
[11] Simitis, 1994: 641 ff.
[12] Habermas, 1996, o.c.: 133.

sitting in the sun – throw away their old skin and generate a new one, by taking fresh views at the subject.

Before undergoing this renewal, it is important to prove that what occurs in legal thinking is not an automated reaction imposed by the overwhelming strength of economic and financial institutions. As for lizards, the change of skin should be a natural phenomenon, enabling them to live better and to face the external world with new energies.

The European dimension, an important part of developing theories in labour law, is one of the causes behind this transformation; when confronted with theories on globalization deriving from other disciplines, it helps labour lawyers to re-locate their discipline in a cultural context which does not release its links with nation-states and yet remains a significant part of a global debate.

Labour law theories, as they have been developed in Europe from the beginning of this century onwards, have been profoundly influenced by the nature of the legal and non-legal sources to be taken into consideration and – what is most interesting – by a combined use of the same.[13]

At a European level a similar theoretical manipulation has not yet been completed, due perhaps to the fact that the hierarchy of relevant Community sources is undefined and so is the legal nature of sources, such as collective agreements, particularly relevant in the shaping of labour law theories. The choice to postpone what would have been a major rationalization of the European legal system as a whole was made at Maastricht[14] and it is certainly indicative of the need to allow time and to experiment first with the credibility of a more integrated political entity.

As a result of the narrow legal basis provided for labour law issues in the Rome Treaty[15] and because of the uncertain solutions proposed in the Social Chapter annexed to the Maastricht Treaty, theoretical perspectives have not been too innovative, as if they had been moving on a slippery floor of rights and principles.

Parallel to this slow course of theory and practice, a complex netting of guide-lines has been reinforced: although they all emanate from European institutions, they are dependent on, and influenced by, strategic decisions taken outside of Europe.

The global bearing of unemployment and the impossibility of conceiving of growth for Europe without looking beyond its borders, is the philosophy which inspires the Delors White Paper[16] – a suitable example to show how global and local economic choices must be jointly redefined and reshaped, using labour law as one among the many available tools.

Global and local are the dimensions of labour law when one looks at monetary policies and at their impact on unemployment; constraints on wage and budgetary policies are similarly to be viewed as the effect of macro-economic choices, caused

[13] It is essential, to this regard, to refer to O. Kahn-Freund's masterly work. See, in particular, Kahn-Freund, 1983 and 1979.

[14] See Declaration No. 16 on the Hierarchy of Community Acts, attached to the Maastricht Treaty

[15] Wedderburn, 1991: 13 ff.; Davies, 1992: 313 ff.; Sciarra, 1995a.

[16] See fn. 8. The Ciampi Reports, so called by the chair of an experts' group set up to reinforce the policy guidelines of the Delors agenda, follow very closely this kind of analysis. See Competitiveness Advisory Group, 1995.

also by the threats of competition in a global market. The development of the Economic and Monetary Union, according to the targets set at Maastricht, is indicative of the way in which labour issues become *dependent on and conditioned* by strategic choices conceived *outside* national boundaries.[17] The Council recommendations on broad economic guidelines, based on art. 103 of the EU Treaty, are issued regularly every six months and are accompanied by the social partners' joint opinions. Although they are not binding on governments, nor on the social partners, they are perceived as extremely important political indications of how to combine national economic performances with supranational targets.

An even stronger symbolic value is attached to procedural developments, relevant both in economic and political terms, if one looks at the first joint Report issued by the ECOFIN and the Social Affairs Council, at the December 1995 Madrid meeting.[18] This is an indication of collaboration going far beyond the mere bureaucratic apparatus of policy-making bodies, displaying the strict dependency of social policies on economic and financial strategies of the Community. Although it can be claimed that this has always been the case, even in past economic contingencies, it is certainly true that the rules of the market have become more and more penetrating, so much so as to influence the function of labour law and to demand the development of new theories.

Looking at all recent European developments, we are due to acknowledge the fact that relevant sources for the making of EC labour law emerge from the ongoing political debate, rather than from consolidated legal texts. This is a sign of the weak foundations of social rights and of their dependence on other interrelated policies, all being shaped in areas different from law-making. Global – and even 'partial global' – flows of guidelines and procedures necessitate legislative reactions from national legislators and possibly from supranational institutions.

Law making becomes more and more complex, influenced by economic and financial constraints beyond the national ones and carried out by institutions, such as the EC Council and Commission, which must produce supranational co-operation without ignoring the voices of national governments. This has led commentators to describe the EC legal system as an example of partnership or joint administration, rather than as the product of a real separation of powers, whereby EC institutions, through their bureaucracies, have an interest in pervading entire sectors of states' activities, in order to gain consensus and allow at the same time national administrations to influence centralised law-making strategies.[19]

In this particular cultural context, hit by the flows of national legal traditions and yet forced by the world economy into a constant confrontation with impelling market demands, a revitalising energy can be found in the constitutionalization of funda-

[17] Busch, 1995: p. 49; Sciarra, 1995b: 64 ff.
[18] Joint Commission Ecofin/Social Council, European Council of Madrid, December 1995. See Agence Europe n. 6619, 4/5 December 1995, p. 10; n. 6620, 6 December 1995, p. 14; n.6626 14 December 1995, p. 2
[19] Cassese, 1991, p. 487 ff., p. 496 in particular.

mental social rights at EC level. The image to suggest is that of an harmonious circle: European social rights are nourished by national constitutional traditions and yet re-invented when they reach the stage of positivization. Not only do labour lawyers have to think in terms of re-interpreting their own constitutional traditions in the light of a new and distinct legal system, but they must do so having in mind that Europeanization is the *outcome* of separate *open* processes and is an open process *in itself*.

Globalization adds uncertainty to this new order: the larger the geographical scheme of reference, the stronger the danger of impoverishing international guarantees, especially when the scene is occupied by 'mixed' international agreements, such as GATT and WTO, accepted by the EC and by its Member States. Still, challenges proposed by globalization break the barriers of each single discipline and impose a healthy change of perspective. It is here argued that management and labour within the European Union constitute a 'political public sphere'[20] in itself, bearing strong links with civil society and capable of generating a process of constitutionalisation of social rights; their strongest power resides in their capacity to interact with governments as necessary partners of national political economy and consequently in their entrance into the supranational scene as interest groups embedded in national traditions.

The 'Global' Labour Lawyer Takes a Journey Across Old and New Worlds

At the beginning of this paper the image of travellers being hit by an excess of images and cultural stimulation was introduced, to illustrate the effects that the debate on globalization, wide and multiform as it is, may have on labour lawyers.

To prevent the negative effects of this syndrome, it is suggested in the following sections that labour lawyers take a step-by-step approach to globalization and travel slowly across old and new worlds, both to rediscover old vicinities and to acquire new connections.

The World of Economics

The journey of the 'global-to-be' labour lawyer through new lands starts with a visit paid to a neighbouring discipline. The world of economics has always been particularly close to that of labour law: inside or outside an institutionalist theory of industrial relations, seen either as a coherent set of variables or as an unpredictable combination of social, economic and political factors, the two disciplines have nurtured mutual interests.

However, communicative difficulties have existed, not for mere semantic reasons, but because of a recurrent lack of shared values and of common objectives. Globalization forces this controversial dialogue into a closer confrontation: competitiveness of the economic systems within a world-wide frame of reference requires the

[20] This expression is used by Habermas (1995: 304) and is referred to the debate following the German Constitutional Court Maastricht judgment, on which see Weiler, 1995: 219 ff.

acknowledgement of differences. Yet a few questions remain to be answered: is competitiveness perceived as an objective by employees; does it bring with it reassuring messages of stability and guarantees; does it conflict with regional if not national traditions? What does labour law gain from competitiveness? or rather what is the scope of labour law in a competitive environment?

The world of economics has traditionally been open to influences from other worlds. In particular, the observation of industrial policies and production organisation creates new elements of a complex analysis, leading towards a redefinition of the firm. This is not without relevance for labour law: its whole history matures within the scheme of an organisational unit, often coinciding with the place of work. Breaking up this model implies, among other things, rewriting the basic rules of the game and finding a fresh perspective for the contract of employment.

Globalization means, therefore, the merging together of different methodologies, all becoming part of a combined strategy: post-Fordist ways of production have favoured the outburst of new legal solutions. The result is a hybrid labour law, torn between the old protective function and the new aspiration towards flexibility. A possible prediction is that globalization will not favour a coherent result out of this long and difficult change of identity: there will be traces, here and there, of past customs and practices; there will be different needs behind legal rationality; there will be new rights and new obligations within individual and collective labour relations.

The French Regulation School[21] has analysed the present period of transition, generated by the end of Fordism and composed of elements from the past entangled with new tendencies. The former show the persistence of mass production and of internationalisation through the activities of multinational corporations and banks; the latter reveal, among other emerging new issues, a more individualistic style in industrial relations practices and a more flexible nature of the contract of employment.

The most important results of comparative research undergone by the Regulation School show that 'each national welfare state is the outcome of deeply embedded compromises and that these compromises were the result of past struggles that shaped social stratification, politics and economic specialisation.'[22] One important reason behind the efficiency of markets is the strength of social rules, including social solidarity implemented by welfare states; the dominance of transnational markets threatens the power of nation states, but does not give rise to a supranational body capable of governing the new order. Globalization fails to produce a fully integrated world economy; one of its most visible effects is the ever rising number of transnational corporations, deprived however of 'democratic accountability' and therefore not reliable for the promotion of growth and stability.[23]

[21] Included by Amin and Dietrich (1990: 6 ff.) in the landscape of new approaches within changing macro-economy. See the authors' introductory chapter in the book, edited by them. This publication is based on a conference of the European Association of Evolutionary Political Economy, born in 1988 to launch alternative analysis to orthodox neo-classical economics. See Boyer, 1990.

[22] Boyer and Drache, 1996: 5.

[23] Boyer and Drache, 1996, o.c.: 7-8. See also Drache's chapter in the same volume, p. 31 ff., for a criticism of theories on globalization which deny the role of national markets and for proposals to strengthen national economies in view of stronger stability in the international regime

The lesson to learn for labour law is to use *adaptability* as a key concept to develop new theories and as an answer to complexity. Social contracts, for example, are not typical outcomes of labour law traditions; they are not comparable to traditional collective bargaining[24] and they might even undermine its foundations and transform its natural habitat, reducing the role of industrial conflict to the point of making it superfluous, if not dangerous, for economic stability. Social contracts have, nevertheless, become central to the reduction of public expenditure, for the recovery of national economies from inflation, and for the introduction of moderate wage policies.[25] In these developments, occurring in Europe as a result of world-wide competition and of more limited economic resources, one can see the betrayal of labour law's original promises and the desertion of its role as an emancipating discipline in the strengthening of employees' rights.

A different perspective can be proposed, which reflects the current state of affairs in most European legal systems. Adaptability, when applied to social contracts, must not imply dismissing the right to strike, although it may very well suggest that social consensus is a way to achieve stability and, in the long run, to protect employment. Even when the state's economic credibility is at stake, employees and their representative organisations must remain the only ones entitled to weigh up the sacrifices imposed on them by the market and to evaluate the fairness of the overall exchange with other parties in the negotiation.

Labour law's fundamental principles must remain independent from the market, precisely because in advanced economies they are acknowledged as important guiding forces of the same. This perspective does not solve all problems. Although it might help economies to seek stability, it will not force governments into active policies to fight unemployment.

One way of addressing the issue of deindustrialisation – which might indeed question the very essence of labour law in the era of globalization – is to accentuate structural changes linked to a new division of labour between manufacturing firms and service sector firms.[26] When complementarity occurs between goods and services, products can be proposed to markets in which it is important to value specification and differentiation, without losing the wider advantages of mass production.

This proposal, supported as it is by empirical evidence, shows yet one more inextricable link keeping together the global and the local. The internationalisation of business services – either complex and large scale, such as financial, legal and commercial services, or more locally oriented, such as those providing flexible specialisation in 'industrial districts' – appears central to the globalization of the world economy, and of parallel importance to the multinationalisation of firms. Its suitability for local and sub-national levels reduces the chances of 'regressive flexibility which downgrades jobs in the labour market'[27] and favours new social compromises, open

[24] As was anticipated by Kahn-Freund, 1979, p. 74 ff. and p. 83, it is stressed that one of the new functions of collective bargaining is to protect the workers as consumers, not only as producers and to do so through centralised agreements

[25] For a comparative overview, see Dore, Boyer and Mars, 1994.

[26] As suggested by Coriat and Petit, 1991: 18 ff.

[27] Coriat and Petit, 1991, o.c.: 42.

to long term plans of action, such as those envisaged in the European Community.

One principle, central to the growth of labour law, remains to be addressed in the theoretical debate as well as in the practice of globalization, and that is the role of collective means of action. Both industrial action and collective bargaining seem to lose their congruity, when eradicated from a local context; they are, by definition, *non-global*, even when no ideology pushes them to become anti-global.

Although parallels with European developments do not always do justice to a wider debate involving world trends, what takes place in the European Community is a confirmation of the difficulties inherent in any mechanical transposition of collective labour law to a supranational level. Yet the relevance of collective confrontations and of active participation of the social partners in the law-making process is now established in the European debate and is the most visible result of the Maastricht Social Protocol's implementation in the years following the coming into force of the EU Treaty.[28]

The influence of labour law is subtle and can be intuitively learned from the need to use agreements or other forms of accords shown by economists whose theoretical approaches take into account political forces and industrial traditions, together with markets and technologies.

Economie des conventions is a perspective as well as a methodology applied to the understanding of production systems.[29] Its central idea is that co-ordination must be pursued between different worlds of production and conventions must be favoured to ascertain the quality of products. Although this may appear an impossible task to achieve in the world market, it is nevertheless the outcome of 'global interconnectedness', which has been shown to reduce the capacity of the nation-states to act powerfully.[30]

Co-ordination among agents of production – whether producers, or consumers and producers, or employers and workers[31] – brings about different outcomes from the ones labour law assigns to collective agreements in relation to individual contracts of employment. It should not, however, seem too adventurous to propose that standardisation of a similar kind to the one achieved through the normative function assigned to collective agreements in some national legal systems can be granted by other kinds of accords, which become binding on economic and political actors. Collective agreements have also shown the way to combine standardisation with differentiation, taking into account regional and local diversities as well as industrial peculiarities in different areas of economic activities. Agreements, developing into other forms of pacts, linking together a multiplicity of parties, leading to political promises and forcing into precise patterns of economic behaviours: this seems to be a way to rediscover collective identities within the global.

Rising complexity in economic and productive systems, on one side, and the firm's loss of centrality on the other, are two indicators of a new function pursued by

[28] Sciarra, 1996b: 189 ff.
[29] Salais and Storper, 1992: 169 ff.
[30] Held, 1991, p. 138 ff. and p. 141 in particular.
[31] Salais and Storper, 1992, o.c.: 179.

collective norms. Rather than being limited to a regulatory function inside the firm, they are required to play a wider role, beyond the employer-employee relationship and to include other institutions – such as public bodies, consumers' associations, regulatory agencies, independent authorities and the like. This is why the very notion of a binding norm changes, together with the changes required for the sanctions attached to it.

Competitiveness is a firm's philosophy as well as a target for the market: it may function as an incentive for optimal work performances, as long as it is counterbalanced by visible advantages for the employees. Traditional sanctions are therefore substituted by common objectives, such as training schemes, flexible working time arrangements, productivity-related payments. Efficiency in employment relationships must not imply a lowering of the labour salaries, nor an on-going loss of rights related to the contract of employment.[32] The answer to over-simplified analysis is found in interdisciplinary legal-economic research: it proves that competitive strategies must include social costs among their most innovative investment costs.[33]

The World of Geography and Cultural Studies

In constructing global theories of labour law the implications of what has been described as 'borderless geographies with quite different breaks and boundaries from what went before'[34] must be taken into account.

A geographical dimension of this kind may seem to add uncertainty to legal analysis, introducing, as it does, a set of unlimited and mutable variables and opening the lawyers' eyes to concepts which are not inborn. In particular, the concepts of 'local' and 'global' need to be clarified, in order to establish whether the local is subjugated by global political economy, thus losing its own autonomy, or whether there are ways of maintaining identities and even distinctiveness of the places, so that 'local in the local amounts to a recognition of place as both "home" and "the world".'[35]

The relevance of all this to labour law is self-evident: challenging the global from the local means maintaining the specificity of local regulations, be they customs and practices at the place of work, or wider regional and national rules. Territorial 'embeddedness', a notion which has already grown to encompass relevant socio-economic actions,[36] may open up even more and include the making – and sometimes the rescuing – of legal norms.

Industrial districts are recurrently quoted as an example of geographic and economic self-inclusiveness, and yet of interdependence with the external world, due also to the active and reliable role played by local government and the social partners.[37]

[32] Wedderburn, 1994b.
[33] Deakin and Wilkinson, 1994: 289 ff.
[34] Amin and Thrift 1994: 5.
[35] Amin and Thrift, 1994, o.c.: 9.
[36] See the research based on experiences in the City of London and Santa Croce sull'Arno, a Tuscan industrial district, by Amin and Thrift (1992: 571 ff.), in which the most interesting outcome is the relevance of institutionalisation within the local area, positively affecting the economy and the actors.
[37] Sabel, 1989.

They are an indication of how co-operation in the social field and the provision of business services facilitates the access to international markets.[38] Even in recent G7 summits it has been repeatedly indicated that small and medium enterprises, flourishing within industrial districts, must be taken as leading examples of how the global market, rather than being a constraint or a threat for local economies, becomes a further aim to pursue, the final prize to gain for the success of the local economy.[39]

A flexible and adaptable notion of 'local' can be combined with a non-suffocating notion of 'global' if one looks at the location of the firm. The most interesting European development at this regard can be found in Directive 94/45, establishing European Works Councils.[40] In the spirit of this document, it is the functioning of the internal market, involving concentrations of undertakings, cross-border mergers, take-overs and joint ventures, which requires the introduction of such new bodies.

Competitiveness is, in this particular case, achieved through the recognition of employees' rights to information and consultation. It remains to be ascertained whether the 'Community-scale undertaking' or the 'Community-scale group of undertakings' – as in the precise phraseology of the Directive – must be described as 'global' or 'local'. The qualification of the employer as European, namely operative in two or more Member States, is a pre-condition for the granting of information rights to the employees. It is then for national law and/or practice to establish who the employees' representatives are, and how they must be selected. Competitiveness appears to be respectful of social norms and to draw its own strength from within national traditions and cultures.

'Glocalization' is a neologism which exemplifies the need to explore new concepts, although in economic terms this may not appear so innovative, close as it is to the notion of micromarketing.[41] What the labour lawyer wants to explore in this case is the relevance of consumers' and producers' traditions in the elaboration of a cultural model which is also respectful of local practices.

The enforcement of anti-discrimination legislation at the place of work – to take only one of many possible examples – must not seem irrelevant or remote from the aims of the market. Respect for gender, ethnic or even regional traditions creates a favourable habitat for cultural open-mindedness and shows the relevance of legal rules in establishing cultural cohesion. Similarly, it can be argued that legislation and collective agreements providing for fair and equitable wages are at the same time influenced by the local environment and able to influence it through the establishment of standardised norms. The latter are generated by market trends, but may also reflect the capacity of organised labour and management to accomplish more satisfactory results or to adapt wage policies to particular characteristics of local production systems and of the expertise of local workers.

[38] Becattini, 1989.
[39] Da Detroit a Lille (passando per Napoli), Roma 1996. Also the Delors, White Paper stresses the important role of medium and small enterprises, as the ideal working environment in which to experiment flexible labour law and as driving forces of the local economies
[40] Council Directive 94/45/EC of 22 September 1994, OJEC No L 254/64, 30. 9. 94
[41] Robertson, 1995: 28.

Furthermore, different sources of regulations referred to in employment contracts are very relevant. Collective and customary sources reflect traditions in a different way from statutory sources; rights to information and consultation may favour non-conflictual relations and have an impact on the socio-cultural environment outside the place of work; the survival of industrial conflict proves that traditional solidarities and collective forms of action may still be adopted.[42]

Whether these examples fall within the tradition of 'institutionalisation', according to which 'there is a global creation of locality',[43] or whether this is yet a confirmation of 'interculturalism',[44] which finds its origins in the early sixties and brings with it all the important acquisitions of what can be conceived of as an historical epoch, it is clear that the multi-cultural dimension of globalization is central to legal discourse and that social traditions, including employment practices and labour law developments, are a significant part of this dimension. The European Union is often referred to as an example of globalization leading to 'both supranational and sub-national regionalism', and international courts are acknowledged as an element of unification, for they encourage claims from different states or regions and even from individuals.[45]

Globalization is not meant to reduce the complexity of legal traditions: both legal practice and more theoretical perspectives bear the heavy weight of fragmentation, which has become a dominant feature of recent developments, even in legal systems in which a high degree of juridification has occurred.[46]

Analyses taking place in the new worlds visited by the travelling labour lawyer give him a more solid base from which to understand globalization and to ascertain for himself whether crossing boundaries implies the abandonment of legal cultures or the re-centralisation of the same.[47] If a reference needs to be made, once more, to EC legal developments, the impression is that legal culture as such has re-acquired centrality in the academic debate, both because of the awareness of national lawyers to maintain their own traditions and because of the necessity to include the supranational dimension in their legal thinking.

Legal culture proudly remains within national boundaries and yet changes because of globalization; it can be maintained for lawyers, as well as for other social scientists, that 'rather than the emergence of a unified global culture there is a strong tendency for the process of globalization to provide a stage for global differences'.[48]

[42] The examples of strikes occurred in France against the Juppé Government in the winter of 1995 is quoted by Touraine (1996, o.c.: 129) as a national reaction to globalization, led by sectors of the middle class linked to the public sector, a 'leftist nationalismí, demanding the state not to diminish welfare rights. On the French situation see Supiot (1996: 115 ff). Different examples are the ones taken into account by Hadjimichalis (1994:239 ff.) where the emphasis is on territorial mobilizations, involving a variety of social groups.

[43] Featherstone and Lash, 1995: 4.

[44] Pieterse, 1995: 45 ff.

[45] Pieterse, 1995, o.c.: 50.

[46] Still relevant the discussion among labour lawyers reported in Teubner, 1987.

[47] As it is suggested in more general terms by Featherstone (1995: 3) where the implication is that culture, from the periphery of social sciences, has moved to the centre and has facilitated inter and trans-disciplinary studies. See also p. 6 ff., where the intention is shown to bring back the issue of complexity to people and groups representing cultures.

[48] Featherstone, 1995, o.c.: 13.

How this process will bring about innovation and progressive achievements remains to be seen; the issue at stake in this transition phase is the visibility of culture and its impact on law-making mechanisms. No doubt labour law provides a privileged perspective, linked as it is to civil society and to the needs of organised groups.

The World of International Relations and International Law

Globalization brings about a different perception of inter-state relationships and a stronger pressure for integration. 'Transnational economic diplomacy'[49] is one visible outcome of this: it leads to the creation of 'plural authority' structures, such as the UN, the G7 and the EU, and to 'new dimensions of interconnectedness', having to do with technological, organisational, administrative and legal factors, as well as with a greater mobility of people, goods and capital.[50]

Although this might seem an old panorama, new light is being shed onto the picture, time after time. The aforementioned Delors White Paper argues that the ways out of unemployment are paved with transnational projects, such as the trans-European networks – in transport, energy transport, telecommunications – financed by a combination of private and public funds. Similarly, the outcomes of recent G7 meetings have stressed the point that global competitiveness is achieved through the transfer of knowledge and through the mobility of people and resources. Openness of the markets must imply openness of the economic actors, including the unions, which are asked to be flexible and not to cultivate prejudicial oppositions to changes.

Let us take a more specific example and look at the World Bank as to a paradigm of a global institution. A whole chapter of a recent World Development Report[51] is dedicated to unions and to the positive effects they can have on the economy; reading it is like going through the pages of a basic labour law text-book, written with the very clear aim not to offer a dogmatic view of the subject and to include as many approaches as possible.

One discovers that a collective voice at plant level may limit the employer's arbitrary behaviour and that grievance-resolution and arbitration may bring stability into the workplace, thus enhancing productivity. One also learns that legislation establishing the right to join a union allows for more than one union to be active and therefore forces them to maintain qualitatively very high services, in order not to lose membership. The latter point is presented as being consequential to the pressures of competitive markets; when unions are limited in obtaining higher wages, they must offer better services to their members. Furthermore, the negative right to join a union is presented as a way of exerting discipline on the union labour market and on the unions' monopolistic behaviour, useful in economic terms to keep monopolistic wage practices under control. Even more important is to ascertain that competitive markets temper wage increases at plant level, thus establishing the need for strong guarantees on union rights.

[49] Amin and Thrift, 1994, o.c.: 4.
[50] Held, 1991, o.c.: 145.
[51] World Bank, 1995: 79 ff.

This selection of labour law topoi is like a small gallery of treasures: efficiency and equity are the two most precious objects kept in it. The combination of both would immensely increment their value. But, would a stronger emphasis on one of them diminish or nullify the value of the other? Is efficiency at all similar to equity? Although the former is a value in economic terms, the latter is a fundamental principle; if labour lawyers had to make a 'tragic choice', what would they do?

In a labour law perspective, the necessity to reach compromises and to trade off established legal solutions, because of the pressures exerted by globalized markets, may cause distortions in ongoing legal traditions and have an ultimately destabilising effect on industrial relations. Equity will have to take into account efficiency, whereas the contrary might not be such an easy target. A developing labour law theory must include fundamental social rights among the guiding principles of a global legal order; their capacity to be functional also in terms of efficiency is a question of adaptability at various levels of decision-making and also within different legal cultures. This perspective is easily lost in any mechanical exercise which gives way to efficiency of the global market, ignoring what is behind any given social system.

A most challenging theoretical perspective is the one offered by the proponents of a liberal theory in international law and international relations.[52] Liberals centre their analysis on all social and domestic constraints which contribute to shape state action and to express collective interests. In pursuing international action, governments put the accent on civil societies; states capable of offering a social substructure to governmental initiatives, make governments' initiative more solid when competing with other actors.

Rational choices and rational state behaviour are leading principles of liberal intergovernmentalism. The emergence of national interests, as a result of internal contradictions and conflicts, is followed by bargaining at an international level, in order to classify and protect those interests. Economic interdependence is significant in that it shapes governmental preferences in international negotiations: liberal thinking accentuates the interest governments must have in pursuing national goals through co-operation and in reducing the risks of international policy externalities.[53]

The link between societies and governments is traditionally expressed by a constitution, which is also the source through which social and economic interests are determined. Comparative constitutional law assumes a key position in the explanation of all factors influencing international behaviour; even the role courts may play becomes very central, as has happened in the EC, in which the active role of the ECJ has – at times –taken the place of a constitution.[54]

In describing transnational interests in the labour law field, we verify that states are put under severe pressure by groups. Unions – to quote one example – are obliged to organise their collective action looking beyond national boundaries; especially when interacting with governments as interlocutors, they bring about issues of transnational relevance into the formation of state policies. Through these mutual

[52] Moravcsik, 1993: 473 ff.; Slaughter Burley, 1993: 205 ff.
[53] Moravcsik, 1993, o.c.: 480-485.
[54] Slaughter Burley, 1993: 228-229.

exchanges and through negotiations, they become quasi-transnational organisations, even when they lack the status of formal institutions, as it is the case in the EC.[55]

Liberal intergovernmentalism, unlike neo-functionalism, envisages a limitation in the role of institutions and an empowerment of national coalitions.[56] In this theoretical framework well established organisations rooted in national traditions become crucial for the creation of strong links between states and the international community, through the political mediation of governments.

Globalization constitutes a further reason for adopting such a theory: it forces local institutions to expand their scope and to be visible in a larger political arena. The accent must be put on the liberal bearing of the theory, allowing the inclusion of quasi-public organised groups – such as labour and employers associations – within the number of influential collective actors capable of influencing governments. It can be argued that the impact of such groups on domestic law-making as well as on income policies and redistributive economic measures is so significant not only in shaping intergovernmentalism but also in laying the foundations of new labour law theories.

Concluding Remarks. Global Labour Law in Search of New Constitutional Foundations

The journey of labour lawyers through old and new worlds finishes here, but is meant to continue in terms of mutual interdisciplinary exchanges. Post-modern legal pluralism offers a very wide angle for interdisciplinary orientations, all strictly interconnected with the other analytical tools more familiar to lawyers. It also favours the adoption of a new language, a sign of the fact that new meanings need to be discovered behind legal norms.

A few *souvenirs* have been brought back, all reflecting the particular tastes of the travellers; they can be mentioned in the form of a brief summary.

(a) Globalization strengthens and enriches the debate on EC developments. The feebleness of European social policies may favour the impression that there is no prospective ahead for a local-global labour law and that a clear identity of the subject will be lost, or rather never constructed, in the process of European integration. This point of view is both unproductive and unimaginative. The adaptation of the contract of employment's relevant features to different economic and productive needs and the constitutionalisation of fundamental rights at a supranational level appear at present a feasible theoretical perspective. As for all exercises in 'institutional imagination'[57] it must be proposed even against all political constraints emerging from the current debate taking place at an institutional level.

[55] See the analysis of the Maastricht Social Chapter and of its relevant provisions in Sciarra, 1996b, o.c.
[56] Moravcsik, 1993: 517-519.
[57] This expression is used by Unger, 1996: 1 ff.
[58] Blanpain, Hepple, Sciarra and Weiss, 1996.

(b) The intergovernmental conference started in 1996 is a point of reference for European labour law; despite the scepticism which is recurrently expressed when putting forward projects of reformulation of the social policies foundations in the Treaties, this event acquires a cathartic function. In addition to proposals put forward by academics,[58] the Commission has strengthened the circulation of ideas by setting up a committee of 'wise people', which produced a document of notable importance.[59]

Social rights are now being discussed in the light of wider reforms which should take place within the EU. They should, on one side, be harmonised with citizens' rights and respond to the needs of a European civil society; on the other side, they should be adapted to national cultures and their implementation should be left to the active intervention of the Member States, thus ensuring the continuation of welfare states traditions, albeit under new economic constraints.[60]

The 'tragic irony'[61] of the German Supreme Court's decision on the Maastricht Treaty can be recalled in this regard. In putting forward the cultural homogeneity that should be at the basis of constitutional states, it also goes against the expansion of citizenship and denies pluralism inside each national society, thus weakening even more their capacity to be part of a supranational system.

Nation states must be viewed as 'a temporal fusion of law's globalizing and localising elements';[62] although in this operation legal culture might be lost as a direct and possibly unique outcome of each nation state, a new one would be developed, through the understanding of shared legal values.

(c) Globalization may bring the individual back to the traditions of a place or of a local community, and compensate for his/her loss of identity by giving a new meaning to membership in an organised group. Unions are forced to rethink their own role and break the tradition of monolithic organisations, in favour of more decentralised structures of representation. Unlike in previous experiences, when decentralisation meant also taking refuge in informality and customary rules within the enterprise, the model to be evoked in present circumstances is that of political confrontation with local governments and of participation in economic choices. This implies that unions are called to take on an institutional role and to be interlocutors of all political actors – be they national or regional, or sub-regional – and to take part in strategic choices.

A new notion of standardization emerges: it is the outcome of collective organizations which are responsible for the establishment of minimum standards in the

[59] *For a Europe of Civic and Social Rights*. Report by the Comité des sages, Bruxelles, October 1995-February 1996, Luxembourg, Office for Official Publication of the EC 1996.

[60] The notion of 'instrumental social rights' has been suggested (Sciarra, 1996a: 13) to indicate that workers' entitlement to states' legislative measures may be seen as a way to enforce fundamental rights at a decentralised level. Parental leaves may be quoted, as an example of instrumental social rights aimed at completing the notion of employment rights beyond contractual obligations; the right to training and to life-long education may also be described as instrumental to obtaining and maintaining an occupation. Lenaerts (1991: 367) talks in a similar line of 'aspirational rights'.

[61] Habermas, 1996: 137.

[62] Nelken, 1995: 440.

labour market and which are forced at the same time to be active in the policy making and to influence the creation of transnational collective interests. This may affect the notion of enforceability of rights, making them dependent on local needs for flexibility. Such a trend does not change the function of labour law, as long as the guiding principles within the supranational legal system acquire a constitutional relevance.

What is new is the combination of redistributive measures of a different kind – monetary, fiscal, social – generated by widespread consensus. Harmonious results are not to be taken for granted; this is why industrial conflict must remain *a counterbalancing value*, strong enough to impose equity as an outcome of social pacts. Within this framework labour law acquires a new legitimacy; it is not swept away by globalization: rather it is reborn.

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