INTRODUCTION

Globalisation, post Covid-19 crisis and international labour law

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1. Labour law

Labour law, as Giuseppe understood, researched and studied, has been developing since the second half of the nineteenth century in the democratic countries. It consists of various rules and sources, kept together by the aim of protecting at different levels the weakest part of the employment relationship (i.e. the worker) as well as other subjects deemed worthy of protection.

Traditionally, these rights are distinguished in trade union law, labour law and social security law. For example, trade union law refers to freedom of association, the right to collective bargaining and the right to strike. Labour law strictly regulates the legal relationship between the parties of the employment contract (employer and worker). The social security law deals with

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the protection of persons against harmful events during their life (i.e. accidents, disability, old age, unemployment).

2. Challenges to international law and international labour law

What challenges do international law and international labour law in particular face today in such an emergency as a result of the Covid-19 pandemic, the socio-economic crisis, the Ukraine war, the Middle East crisis?

War(s) is certainly a symptom and consequence of the malfunctioning of international law, understood as a system and mechanism. However, when diplomacy does not work, we certainly do not have to dismantle it and refuse to use it any further or stop believing in its usefulness. On the contrary, we must find out what went wrong and the reasons why.

With regard to the social consequences of the Covid-19 pandemic *in primis* and the following socio-economic disruptions, the national and international institutions did not turn their backs to the welfare systems. For example, the European Union had responded with the strengthening of the welfare systems of its countries.

International law, and for its part international labour law, lives off crises, lives its crises, and lives in crisis. International law is a legal discourse for crisis, about crisis, and in crisis. In other words, international law is a continuous legal crisis discourse.

International lawyers, and Giuseppe is among them, are the masters of a legal discourse that is all about containing, making, and surviving crises in a managerial and research spirit.

In the collection of essays in this *Liber Amicorum* for Giuseppe, there is a common denominator underlying the dialectic between continuity and change which lies at the heart of international law, which seeks to foster peaceful, just, and sustainability among countries. International law endeavours to govern the future by applying, in the present, norms that are inherited from the past. Nonetheless, everything flows and in an ever-changing world, some change is needed within the international legal system to ensure its stability, especially in times of emergency. Crises not only can constitute the means for the development of international law, including international labour law, but they can test and prove the sustainability of the structure of international law.

The matter evidently assumes a specific relevance because it touches particularly sensitive issues in the field of international law such as the protection of human rights.

These challenges have to be met by current international law, which, be-

ing subject to a gradual transformation, from the right of an interstate community (or "community of states") to the right of a global community, presupposes an equally gradual erosion of the principle of sovereignty with a view to ensuring the universal protection of human rights, including labour rights.

From this perspective, it has emerged the need for an extensive interpretation of the notion of democracy, which, detached from the traditional purely state connotation, can be understood in a global sense. In fact, a notion of democracy based on the global dimension of human rights inspires documents and acts of the United Nations, the ILO, the European Union and other international organizations.

The crises of the recent years outline an international reality in which not only new actors are acting, but new problems, different from the past, have emerged. In particular, from a legal point of view this situation seems to have exacerbated the need to guarantee the protection of the human rights everywhere on the globe. In fact, more and more there is the conviction that the theory of "responsibility to protect" was born precisely to give an impulse, justified by the protection of universal human rights, to the general reluctance of states to limit their sovereignty.

3. International labour law

International labour law has inspired in many countries at different times and with various degrees of development, the creation of social legislation dealing at the very beginning with the work of women and children. Social legislation focused on the working hours, the banning of night work, the prohibition of dangerous occupational activities. In this context, there was a significant advance over traditional civil law and social legislation was gaining ground and being distinguished as a separate legal discipline of what we call today labour law. International labour law was and still is instrumental for the development of social legislation which interacts with a number of specific objectives of the ILO, such as full employment, the raising of living standards, training and learning innovation, better wages, reduction of working hours, health and safety, the effective recognition of freedom of association and the right to collective bargaining, the extension of social security measures, provisions for a basic income to all in need of protection, and medical care.

This has characterised the development of international labour law accompanied by the reforms of social legislation at national and regional level.

4. Consolidation of labour law: constitutionalisation and internationalization

4.1. *The constitutionalisation of labour rights*

In the liberal legal tradition, the Constitution was considered as an organic text law of the State, which regulated the relations between public authorities and individuals. In fact, the Civil Code was generally considered as the main normative body of the, since it was in charge of regulating le-gal-economic relations between individuals in society. The Constitution of Querétaro (Mexico) of 1917 and the Constitution of Weimar (Germany) of 1919 are the two pioneering Constitutions that, for the first time, contemplated in their articles on social rights. Both constitutional texts represent the original landmarks for future Constitutions that expanded rapidly in Europe and other countries, particularly in Latin America. The centrality of labour rights in this process is known and labour rights occupy a major place in the catalogue of new social rights. For this reason, labour law expert talks about the "constitutionalisation of labour law" or of "constitutional labour law".

According to the late Oscar Ermida, the constitutionalisation of labour law has important consequences for the legal system. In fact, the elevation of labour rights to the text of the Constitution denotes: i) the high value of the interests protected by labour law; ii) its intangibility by legislative norms; iii) consideration of specific fundamental labour rights; iv) from a functional perspective, such constitutional rights operate as a limit to deregulatory tendencies.

Regardless of the implications of the constitutionalisation of labour rights for the system of normative sources regulating labour relations, what should be noted is that this process of constitutionalisation of social rights started from the phase of the liberal state towards the social state of law, which is characterised by the intervention in labour relations to correct the inequalities existing in society.

It is interesting to note that labour codes or other forms of comprehensive labour legislation and ministries of labour were not introduced until the 20th century. The first labour code (which, like many of its successors, was a consolidation rather than a codification) was projected in France in 1901 and promulgated in stages from 1910 to 1927. Among the more advanced formulations affecting the general conditions of labour were, as mentioned above, the Mexican Constitution of 1917 and the Weimar Constitution of Germany of 1919, both of which gave constitutional status to certain general principles of social policy regarding economic rights. Pro-visions of this kind have become increasingly common and are now widespread in many regions of the world.

Departments or ministries of labour responsible for the effective administration of labour legislation and for promoting its future development were established in Canada in 1900, in France in 1906, in the United States in 1913, in the United Kingdom in 1916, and in Germany in 1918. They became more general in Europe and were established in India and Japan during the following years and became common in Latin America in the 1930s. A labour office was established in Egypt in 1930, but only in the '40s and '50s did similar arrangements begin to take root elsewhere in Asia and Africa. Of course, under different political circumstances there continue to be wide variations in the authority and effectiveness of such administrative machinery.

4.2. *Internationalisation of labour law*

Throughout the twentieth century, there has been the so-called "internationalization" of labour law, which has run on two fronts: universal and regional. Thus, to the extent that labour rights were included in internation-al human rights treaties, a generic framework was incorporated that incorporates labour rights into economic, social and cultural rights. The development of labour rights in generic international instruments has been progressive since they have been a constant concern of governments. However, there are in the universal scope instruments of specific content, produced by the ILO, which, since its creation in 1919, has become the main body producing international labour standards. Its main characteristic is its tripartite composition, since all its internal organs are integrated by the governments, workers and employers.

The ILO's normative production focuses on two types of instruments: Conventions and Recommendations. Both Conventions and Recommendations seek to "establish a minimum level of social protection in all States", forcing States to adopt this level of protection in its domestic legislation, while ensuring compliance. Thus, the closes link between this process and the constitutionalisation of labour rights can be clearly seen, both of which complement each other in their objective that is to say the effective protection of workers' rights.

Finally, on the internationalisation of labour law carried out under ILO instances, it should be noted that the ILO's programme of action has had to adapt itself to the different conjunctures that the world was facing in the 20th and 21st centuries, starting from the development of its principles enunciated in 1919, then moving towards the need for economic and social cooperation between nations after World War II. This has brought to the transformation of the world (and rights) of work to its present configuration.

The general tendency in the modern development of labour law has been

the strengthening of statutory requirements and collective contractual relations at the expense of rights and obligations of individual employment relationships. How important these remain depends, of course, on the degree of freedom in the given society as well as the autonomy of both employers and workers permitted. In matters such as hours of work, health and safety conditions, or industrial relations, the statutory or collective elements may define most of the substance of the rights and obligations of the individual worker, while with respect to items such as the duration of appointment, the level and extent of responsibility, or the scale of remuneration are provided essentially in individual contracts.

It has long been recognised that some fundamental principles and rights at work need to be respected at all events, regardless of the level of development of the country. While the laws on employment conditions (especially pay) depend on the state of economic development of each country, the fundamental rights can be conceived as preliminary conditions for the free market. Only where the fundamental rights have been defined and respected, it is said, will the labour market function in such a way as to enable a real improvement in employment conditions and a fair distribution of resources and the benefits of economic progress. These rights essentially take the form of internationally recognised human rights, sanctioned at the level of customary law, charters or similar provisions, and therefore binding on the international community.

The ILO was created in 1919 by part XIII of the Versailles Treaty that put an end to World War I. It was created in the wake of immense destruction and division among nations. It was aimed, among others, at avoiding that such events – wars – and the social and economic crisis that flowed from them could occur again. The adoption of 'international labour standards' to improve working conditions, as well as tripartism between governments, employers' and workers' organisations, was perceived to be key factors to ensure lasting peace and to consolidate social justice. In fact, the ILO has been established on the assumption that universal peace can be established only if it is based on social justice (Preamble of the ILO Constitution, 1st Para.), and "whereas conditions of labour exist involving such injustice, hardship and privation (...) produce unrest so great that the peace and harmony of the world are imperilled" Preamble of the ILO Constitution, 2nd Para.).

The ILO has been active in putting forward the protection and respect of specific fundamental human rights. This question was inserted in the agenda of the 86th session of the International Labour Conference (1998), which adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up. Taking its inspiration from its own Constitution, the

ILO's 1998 Declaration is a new type of legal instrument, distinguished by its promotional nature from the other international agreements on labour. The intention is to encourage ILO member States to observe a certain number of the Organization's core standards. The Declaration has been enriched in June 2022 by the insertion of the ILO Conventions Nos. 155 and 187 on occupational safety and health as the fifth category among the fundamental and principles and rights at work.

The adoption of the Declaration marked the seal on the universal acceptance of a set of core labour standards that are recognised as having a special status in the context of the global economy. By virtue of the constitutional value of the Conventions recognised as being "fundamental", both within and outside the ILO, the 1998 International Labour Conference declared that all member States, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: a) freedom of association and the effective recognition of the right to collective bar-gaining; b) the elimination of all forms of forced or compulsory labour; c) the effective abolition of child labour; d) the elimination of discrimination in respect of employment and occupation; e) a safe and healthy working environment.

At the time the Declaration was adopted, seven Conventions were considered to be fundamental: a) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); b) Right to Organise and Collective Bargaining Convention, 1949 (No. 98); c) Forced Labour Convention, 1930 (No. 29); d) Abolition of Forced Labour Convention, 1957 (No. 105); e) Minimum Age Convention, 1973 (No. 138); f) Equal Remuneration Convention, 1951 (No. 100); g) Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The Worst Forms of Child Labour Convention (No. 182), which was adopted in June 1999 and entered into force on 17 November 2000, was added later. As well, the Occupational Safety and Health Convention, 1981 (No. 155) and the Pro-motional Framework for Occupational Safety and Health Convention, 2006 (No. 187) were added in 2022. To complete the list of core Conventions it was also added the Safe and Healthy Working Environment (Consequential Amendments) Convention, 2023 (no. 191).

The Declaration underlines that the Organization is obliged "to assist its members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources" (Para. 3). The Declaration expressly indicates that these means include the mobilisation of its own resources and external sup-

port, and that the Organization should encourage other international organizations with which it has established relations to support these efforts. More specifically, paragraph 3 lists three forms of support: a) offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions; b) assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and c) helping the Members in their efforts to create a climate for economic and social development.

The ILO Declaration of 1998 remains a valuable international document for the promotion of fundamental principles and rights at work. It established a follow-up mechanism that would give a certain level of effectiveness to its content, where member States would prepare annual reports on their progress in the field of labour protection and even report their progress on matters contained in non-binding agreements.

The Declaration of 1998 has to be considered hand-in-hand with the ILO Centenary Declaration of 2019 in which there is a strong call for the need of reinvigorating the Social Contract with a view to sharing economic progress and reinforcing the respect of workers' rights. The Social Contract, which is embodied in the ILO Constitution, needs to be based on a human-centred agenda in which people and the work they do are at the centre of economic and social policy and business practice. In this regard, the human centred agenda consists of three pillars of action, in which there is a harmonious combination of growth, equity and sustainability. This is the main reason why, member States should increase investment in people's capabilities, in the institutions of work and in decent and sustainable work.

In particular, the ILO Declaration of 1998 has assisted member States to bridge the trade-labour divide. After many years, new international bodies started to channel the globalization phenomenon. They include the World Bank and the International Monetary Fund, the World Trade Organization, as well as economic coordinating bodies such as the Organization for Economic Cooperation and Development. For these organisations, opening markets and safeguarding investors' profits was the key to eco-nomic growth, and growth was the key to solving social problems.

Yet international trade is strictly linked to social and political considerations, not just commercial ones. Global commerce and trade agreements had profound, accumulating political and social effects on working people around the world. In many countries, shifting patters of trade and investment uprooted jobs and broke apart social ties. In others, they created jobs and spurred workers migration from agriculture to industry with equally profound effects. These creative and destructive impacts often occurred together.

In this regard, new forms of globalization more recently have started new international labour rights and environment movements. Recent decades also saw the growth of a global supply chain system looking at large multinational apparel and electronics firms to tens of thousands of subcontracted supplier factories around the world. In general, multinationals search for lowest-cost suppliers. Since labour cost is the most elastic, compared with fixed costs of land, machines, materials and energy, workers end up bearing the weight of labour rights undermining in this new global supply chain system.

Most recently and as direct effect of the Covid-19 pandemic, the globalization has pushed labour rights high on the international agenda. One can note that dozens of bilateral and regional trade agreements are referring to a social clause tying trade benefits to respect for workers' rights.

The growing respect for labour rights are accompanied by the action of the ILO and thanks to the Declaration of 1998, there is a growing awareness, even though not uniformly, of the social responsibility in supply chain enterprises.

4.3. *Labour law at regional level*

As for the progression of the rights and the defence of employment at the regional level, it was mainly in Europe that a "social model" emerged and whose fundamental elements were based on national constitutions as well as on social standards adopted at international and European level un-der the aegis of the United Nations and the Council of Europe.

The already mentioned consideration of rights at work is an expression, in the national ambit, of the importance given by the constitutions to specific social rights, such as: i) equality, not only through principles but also through effective measures to help those who are excluded or less-privileged; ii) affirmation of the State's commitment to free its citizens from life's anxieties, as long as it can be addressed in the community; iii) recognition of the groups organised by civil society and their rights to defend their interests in a context of common wellbeing; iv) freedom to work as a right.

In a modern State, characterised by democratic values and the full recognition of the social values, work comes as the key priority for the promotion of fundamental rights. Such rights, principles and values are incorporated in the European Union labour law. For example, the Treaties refer to expressions such as pluralism, non-discrimination, tolerance, jus-tice, solidarity and equality between women and men, to be found in Article 2 of the Treaty on European Union (TEU). These values must be read in the context of the objectives of the EU listed in Article 3(3) TEU: the imperatives of a "highly competitive social market economy". The fact that these values are explicitly

incorporated in the TEU requires that all European Union member States play an active role in pursuing goals of social equity hand-in-hand with the other objectives. These five words – highly competitive social market economy – are immediately followed by a reference to the goals of full employment and social progress. The wording of Article 3(3) suggests that a highly competitive social market economy is one of the elements – together with economic growth, price stability and environmental protection – which constitute the basis for Europe's sustain-able development. Within that context of sustainable development, the syntax of Article 3(3) indicates that full employment and social progress are to function as guideposts for the interpretation of the social market economy notion. In this regard, it is clear the direct connection between the economic and social development, and the efforts made to ensure greater coherence between economic and social policies. New mainstreaming provisions have also been introduced. In particular, Article 9 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take into account the promotion of "a high level of employment, the guarantee of adequate social protection, [and] the fight against social exclusion …". At the same time, Article 3(1) TEU provides that "The Union's aim is to pro-mote peace, its values and the well-being of its peoples".

Other key elements include Article 119 TFEU which requires the member States and the Union to respect the principle of an open market economy with free competition; and Protocol 27 on the Internal Market and Competition which confirms that the Union's internal market is still characterised by a system of distorted competition.

Although it lacks an explicit definition of the European Social Model in the Treaties, it is understood that such a model is well rooted in the European construction and enshrined in primary and secondary law. The European Social Model can be characterised by its comprehensive nature, since its aim is to encompass all important social areas and to cover the greatest number of people, something that has been achieved over decades. European community legislation has progressively been extended to cover more and more labour issues, but also has extended its coverage to new categories of workers. Its different elements constitute part of the EU acquis that the EU member States – depending on different circumstances – have all been implemented in various ways: basic workers' rights and working conditions; universal and sustainable social protection; inclusive labour markets; effective social dialogue; services of general interest; social cohesion. Compared with other countries and regions in the world, EU countries are also characterised by high expenditure on social protection, grounded on the principles of solidarity, equality and social cohesion that represent the cement of European "social market economy".