



Migration and the role of unions

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This paper explores the current challenges and opportunities for unions in the context of the increasingly dramatic phenomenon of international migration as well as of the economic and labour globalisation in general.

After a brief analysis of the current dogmatic as well as socio-economic context of migrations and labor law, the paper aims to highlight the importance of collective bargaining as a nucleus of labor relations regulation.

In some respects, labour in the current historical moment has much more in common with labour in the first industrial revolution than with it in the twentieth century. From the point of view of unions, the representation of collective interests has become extremely pulverised, weakened and ineffective. Competition in the supply side of the labour market explodes again, reviving old challenges to represent fragile and oppressed groups, migrants in particular.

However, despite the current fragility of the collective system of representation of labour interests, migration and the transnationality of the labour market, far from determining the decline of unions representation and action, underscore its urgent need. In this vein, the plasticity of union relations shows its innate ambivalence: the legal system created by the collective autonomy in fact, has the privilege of being “glocal”, to the detriment of norm-law, i.e. it is able to combine at the same time the global and the local dimension of work regulation. Union organisations can and must therefore operate as a catalyst for the dialogue between “the territory and the world” of labour relations, (re) discovering its original vocation.

In this sense, collective bargaining represents the most effective instrument as well as the only one capable of overcoming both the inefficiency of national legalization in a globalized world and at the same time the essential importance of social negotiation at local level. Today’s unprecedented situation

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demands labor regulation instruments capable of combining the global with the local dimension in a dynamic and complex way to respond to the innumerable challenges of the new “social question” of the 21st century.

1. The new „social question” of the 21st century

It is safe to argue that the current political-economic and social situation represents for the union movement one of the most challenging moments since its emergence. The twentieth century witnessed the remarkable conquests of the working class, accompanied by the “bread and roses” anthem, the founding of the International Labour Organisation, which emerged from three industrial revolutions. It was the century of powerful strikes, and conquests which made work the main instrument of social emancipation and to guarantee human freedom.

On the other hand, the twenty-first century dawned by upsetting everything that the union struggles and the values of the social state had built. The last twenty years have put in check the main postulates and basic fundamental guarantees of labour relations. It will suffice to mention a few: the distortions that the concept of heterodirection, as an essential peculiarity of work relations, has created in the productive systems governed by algorithms, the classical concept of *lex loci labouris* in the face of the delocalization and transnationality of companies, together with the use of information technology that makes the place where labour performance is executed completely indifferent; the chronic instability of the markets governed by the financialisation of economy; the ever more serious decline of the union membership rates, a phenomenon directly proportional to the distancing between the workers and their organisations.

The modern version of capitalism, paradoxically, resembles more the primal capitalism of the first industrial revolution than the capitalism of the last thirty years of the last century. In fact, the (old) aim to intensify competition among workers, in order to weaken his bargaining power, is now exasperated more than ever. These changes add to the complexity of the globalized world and to the intense migrations – forced and voluntary, internal and external, in unprecedented numbers – producing *de facto* situations of complex juridical solution.

Migration is, in itself, inherent to humanity - in the sense that it has always been a widespread human practice – but it only acquires legal, political and social meaning of “international” dimension after the emergence of the nation state and the concept of state sovereignty.¹ As Ferrajoli explains², the

¹ José Carlos Jarochinski SILVA: As Migrações internacionais e os seus impactos. In: Liliana JUBILUT Lyra (coord.): *Direito Internacional Atual*. Rio de Janeiro, Elsevier, 2014. 317–318.

² Luigi FERRAJOLI: *Il fenomeno migratorio quale banco di prova di tutti i valori della civiltà occidentale*. In: Emanuele GALOSSO (a cura di): (Im)migrazione e sindacato. Nuove sfide, universalità dei diritti e libera circolazione. VIII Rapporto. Roma, Ediesse, 2017. 26.

oldest of natural rights, today “forgotten” by Western civilisation, is represented by the *ius migrandi*, the right to migrate, theorised by the Spanish theologian Francisco de Vitoria who assumed it as a universal natural right at the base of modern international law in embryo. It was only with the emergence of states and sovereign national borders, that the question of migration begins to acquire a legal dimension. However, it is only with the globalisation of the economy and labour, that the movement (in many cases forced) of people towards countries different from those of origin intensified in an extreme way, acquiring magnitudes never seen before.

Not coincidentally the immigration issue, currently, occupies an important part of the international political agenda. In 2015, the UN estimated that the migrant population was composed of about 244 million people (3.3% of the world’s population)³, meaning that in every thirty people in the world one is a migrant. In light of the rates recorded in the last 15 years – if these were to remain constant – the UN foresees that the migrant population will reach 469 million in 2050⁴.

The numbers related to labour migration are particularly useful for the purpose of this analysis. The latest available estimates of the number of international migrant workers are based on 2013 data.⁵ In that year, the amount of economic migrants was 150.3 million, i.e. two thirds of the total number of international migrants. The analysis is even more interesting if we look at the percentage of migrants in working age, which reaches 207 million people. In absolute terms, currently migrant workers represent more than 70% of the total migrant population. These numbers become even more relevant if observed in perspective. In 2015, the working-age population reached 4.8 billion and, according to UN projections, it will surpass 6 billion in 2050 (+ 26.9%) and 6.7 billion in 2100 (+ 38.3%)⁶.

The analysis above shows us how labour law and international migration law live, evidently in a constant dynamic and dialectical relationship, which today is more intense than ever, because of two essential elements: a social one and dogmatic one. On the one hand, migration has always represented – directly or indirectly – the aspirations of individuals towards better living conditions, making labour law protection the privileged vehicle to guarantee effective social inclusion. On the other hand, from a more strictly dogmatic point of view both mentioned legal spheres share today – albeit to different extents, a certain degree of criticality towards one of the essential postulates of the modern State: national sovereignty. From the point of view of international law, the nation-state has always been conceived as a “filter of effectiveness”. Yet for labour legislation, by making the mandatory rule its

³ In absolute terms, however, only a small part of the world’s population is represented by international migrants. The majority of the population that moves from their own country of origin, or their own habitual residence, to another territory is represented by internal migrants, that is, those who do not go beyond national borders but move within their own country. This category of migration, in 2009, represented 740 million people. IOM. *World Migration Report 2018*. International Organization for Migration (IOM). 2017. 13.

⁴ CENTRO STUDI E RICERCHE IDOS: *Migrazioni, demografia e sviluppo: i dati che smentiscono la narrazione ingannevole*. Dossier Statistico Immigrazione – 2017. 19.

⁵ IOM op. cit. 28.

⁶ Centro Studi e Ricerche IDOS op. cit. 24.

main mechanism of protection, it inevitably faces a crisis once it cannot be conceived in transnational terms as the object that it seeks to regulate.

Therefore, we can affirm that in many aspects the labour issues in the current historical moment has increasingly more in common with those of the first industrial revolution than with work in the 20th century. From the point of view of unions the representation of collective interests is now extremely pulverized, weakened and ineffective. Competition in the supply side of the labour market explodes again, reviving old challenges to represent fragile and oppressed groups, migrants in particular.

Nevertheless, as we can see below, despite the irreversible crisis of the national standard, despite the dramatic changes imposed on employment relations and despite the current fragility of the collective system of labour interests representation and the intensity of the migratory phenomenon together with the transnationality of the labour market, far from determining the decline of union representation and action, underscores their urgent needs. Nevertheless, and in spite of the insubstantiality that the systems of labour representation are subjected to and of the magnitude of challenges they face, this paper seeks to make a case for their urgent necessity.

2. Brief notes on sovereignty, work and migration in the globalized world

First of all, it is necessary to focus our analysis on a fundamental premise: regardless of the personal, social or legal status, all migrant workers are, first of all, workers. Migrants are workers who, in most cases, carry out the so-called *3-D jobs*: dirty, dangerous and demeaning, mostly subject to discrimination treatment (evidently pejorative) because their condition as outsiders.

Although from a legal point of view the argument that a person is “illegal” lacks any significance, issues about migrants often imply the idea of “illegal migrants”: i.e. “against the law”. Those who leave their own country voluntarily, forcibly, or even temporarily, eventually may find themselves in an irregular situation from a legal point of view, but can never be defined as “illegal”. All human beings are legitimate and legal.

Evidently, this “legal regularity”, essential for a person’s residency in foreign territory, derives from the recognition of civil and political rights, and therefore it becomes effective in the community where the migrant chooses to live only through guarantees and the exercise of economic and social rights. In other words, the protection of decent work and social justice that is what makes the guarantee of the preservation of human dignity successful and a fundamental value of any contemporary society. The inherent social value of work⁷ makes it, therefore, a crucial and irreplaceable vehicle for the insertion of the person in society, the only instrument of true inclusive citizenship for migrants.

⁷ As Miguel Reale puts it: “I do not understand how one can say that work is not a creator of values, it is already, by itself, one of the fundamental forms of objectification of the spirit as a transformer of physical and social reality, since that man does not work because he wants to, but because of an undeniable demand of his social being, which is a personal relationship: (...) Work and value,

According to the labour law perspective, the fundamental premise about the axiological vector of work today faces a socio-economic reality with important different contours. From the point of view of labour regulation, the most important consequence derived from globalisation consists in having created a dangerous conflict: the simultaneous concurrence of national labour protection standards (guaranteed by a set of the national labour protections) and, on the other hand, the opening of borders to capital, the globalization of the economy and the circulation of goods and services.

As we highlight in another investigation⁸, the national labour legislation is definitively in crisis, since it is not possible to conceive it in supra-state terms, as the object that it aims to regulate. The protective structure of the labour legislation was built according to the three pillars of the modern state – namely the national sovereignty, the territory and the people. Needless to say, the weakening or the crisis of one of those makes the structure shudder. As Mario Losano explains, the first consequence of globalisation is precisely the crisis of the modern state as the basis of all legal systems, which inevitably comes into a crossroad once “sovereignty stops at the border, where it begins another sovereignty also exclusive and equally impotent”⁹.

Patently, the national dimension of the state sovereignty conflicts with the global dimension of the market. The main principle regulating the relationship between capital and labour (the mentioned mandatory norm imposed to the contractual content) loses its *raison d'être* and faces the “de-nationalization” and “deterritorialization” of global capitalism, producing one of the worse consequences for labour regulation: international competition based on the lower cost of work. The commodification of work is absolute. Here two fundamental and antithetical terms inevitably come into play: the impossibility of reducing the work to a commodity and the renewed existence of a strong competitive relationship among the workers.

3. Collective autonomy in the 21st century according to the “glocal” perspective

3.1. Union action at the transnational level (or the global perspective)

Faced with this scenario, the legal labour universe interrogates itself: what could be the possible instruments or actions that would allow the development of a socially responsible capitalism? What normative method is the most efficient to face the challenges of the new century, when we are witnessing the total crisis of the postulates of the modern state, under which our right has been built? How to avoid the commodification of work as the main reason behind the destruction of social justice?

as well as, therefore, work and culture, are themselves governed by essential dialectic of complementarity. Miguel Reale's preface to the Luigi BAGOLINI: *Filosofia do Trabalho*. 2ª ed. São Paulo, LTr, 1997. 11.

⁸ Francesca COLUMBU:, Dumping social e relações labourais. *Revista dos Tribunais*, vol. 978/2017. Abr., 2017. 143–169.

⁹ Mario Giuseppe LOSANO: *Os grandes sistemas jurídicos*. São Paulo, Martins Fontes, 2007. 65–66.

With regards to the imminent final collapse of national labour systems specifically, labour doctrine suggests few possible regulative measures: inclusion of social clauses (based on the core conventions of the International Labour Organization¹⁰) in international trade agreements, in order to place the basis for a core labour standard reference as the fundament for any investment or trade change; the inclusion of standards related to the “fair labour practises” in bilateral agreements, that is, parallel to the free trade agreements; in order to ensure that fair labour practices enter to compose one of the prerogatives for the fair trade¹¹ also the “best practices of social corporate responsibility and similar forms of soft law are also recommended; and finally, the ultimate aim is to achieve a form of collective bargaining with a transnational dimension, finalized to the composition of transnational collective agreements.

One of the main characteristics of labour law is legal pluralism. Historically the concept of collective autonomy was based on Santi Romano’s notion of the legal system which rejected the simplistic thesis of labour as a legal phenomenon only related to state law. Consequently, the unions’ legal system constitutes a self-sufficient body of normative value and with intrinsic unity, in continuous relationship with the state law yet independent from it. In that point, the plasticity of union relations shows its innate ambivalence: the legal system created by the collective autonomy in fact, has the privilege of being “glocal, to the detriment of norm-law, i.e. it is able to combine at the same time the global and the local dimension of work regulation.

Union organizations represent therefore that bridge that allows the dialogue between “the territory and the world of labour relations, (re)discovering its original vocation.

Very interesting, in this sense, the position of that part of the doctrine¹² that sees precisely in transnational industrial relations the future of collective labour action. We believe that transnational collective agreements are a highly effective, agile and at the same time specific and flexible example of labour regulation. They are potentially the only ones capable of constantly adapting labour relations to fluctuations, advances and sometimes, the setbacks of a productive system increasingly accelerated, diversified and globalized.

Once the norm coming from the state law is unsatisfactory (inefficient), the norm originating from collective autonomy (re)emerges with all its power, free from the “limits” of the state-law, capable of articulating itself in an international way. In particular collective autonomy operates in a specular

¹⁰ Cfr. to the ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998. The Declaration identifies four main areas for establishing a minimum standard needed in the world of work: freedom of association and freedom union and the effective recognition of the right to collective bargaining (Conventions n. 87 and n. 98); the elimination of all forms of forced or compulsory labour (Conventions n. 29 and n. 105); the effective abolition of child labour (Conventions n. 138 and n. 182); and the elimination of discrimination in respect of employment and occupation (Conventions n. 100 and n. 111).

¹¹ Roberto PESSI: *Dumping sociale e diritto del lavoro*. *W.P. Libert  lavoro e sicurezza sociale*, N. 3/2011. Disponivel. <http://giurisprudenza.unimc.it/it/ricerca/publicazioni/liberta-lavoro-sicurezza-sociale/Dumpingsocialeedirittodellavoro.pdf>., 8. Acesso em 20. 11. 2017.

¹² Ibid. 14 ss.

way to its targets and interlocutors, attempting to intervene and actively challenge a rapidly changing capitalism.

In this vein the structuring and collective action at the international level will represent for the union movement the rebirth of its essential mission. Its purpose should be to constitute an indispensable – and perhaps the most effective – tool for the regulation of the social-economic market which, despite being of global dimensions, today strongly insists on the territorial dimension of protection. For the future of collective labour relations, it has now become paramount to build an inclusive pluralist and international system which is able to go beyond its classic role of organiser/negotiator of collective dispute. This must take place through a dynamic representation, particularly with regards to the management the migrations of workers, which are likely represent the future of labour regulation in the world.

3.2. Social negotiation (or the local perspective)

Furthermore, analysing the relationship between unions, labour and migrants from a local perspective (or we could also call it territorial, or horizontal representation of the collective interest) the question of the so-called “social negotiation” is of great interest. Social negotiation represents a form of collective bargaining that seeks to combine rights “of” and “in” work with basics social rights (public policies guaranteeing access to health and education, combating poverty, inclusion in work, etc.).

Social negotiation combines the synergy of collective representation as the main forms of aggregation (category or branch of economic activity) with the horizontal-territorial representation on the model of the old “camere del lavoro” typical of the Italian unionism in the late nineteenth century, aiming to provide the successful synthesis of universality and specificity protection.¹³ Social negotiation can therefore be a successful strategy of inclusive calibration between labour and social rights, with each territory being subjected to the appropriate legislation designed and negotiated according to its specific economic situation, as an instrument of universal and specific social justice.

The alternative to the factory as “the place” of union organisation is the territory, as an organisational reference and meeting point for different work situations that today, as it was in the origins of modern labour law in the capitalist system, have been „dispersed” in the complex heterogeneity of the market.

With regards to migrations in particular, as suggested by ILO experts¹⁴, there are four areas where unions must be protagonists:

¹³ Kurosh DANESH – Beppe DI SARIO – Selly KANE: Contrattazione sociale e immigrazione. Una sfida per l’attività e la rappresentanza sindacale. In: GALOSSÌ (a cura di) op. cit. 117–118.

¹⁴ *In search of decent work – Migrants workers rights: a manual for trade unionist*. Geneva, International Labour Office (ILO), 2008. 10–13.

1. The political debate on migration management, in order to maximise improvements of workers' conditions.
2. Information and awareness campaigns at the national level, particularly to counter racism as a weapon employed to divide workers.
3. Cooperation with unions in other countries, involving unions in countries of origin and countries of destination of migrant workers. According to the ILO, international solidarity in a globalised world is not an option for the union movement, but a necessity.
4. Finally, organise migrant workers, who represent a new vital lymph for the movement, paying special attention to undocumented workers, due to the extreme vulnerability of such a legal condition.

Obviously, the above mentioned four objectives are just some of the possible areas of struggle for the unions, probably the most urgent in the face of the current migration contingency. However, they will be effective only if they are imagined as the simultaneous combination of transnational and territorial collective instruments for the protection and promotion of work. Transnational collective agreements, as well as social or territorial negotiation, serve to remind us once again of the versatility of autonomous norms of labour law, and of union agents. To counter the irreversible crisis of state law before the political-economic-social scenario of the 21st century, we need instruments capable of combining the global with the local dimension in a dynamic and complex way. Those social and economic risks which used to be a prerogative of labour relations in general, have ceased to be specific to the employer-employee relationship, and have therefore become widespread in today's global labour market.

4. Conclusive reflections

This paper aimed to analyse the challenges and opportunities that unions must grasp in the face of migration as well as of the economy and labour globalisation more in general. The role of unions will prove essential for the future of labour relations in the coming years, as well as for the reinvention of work as an instrument of global citizenship. The 21st century threatens to generate a new "social question", almost as if the twentieth century – Hobsbawms's age of extremes – had represented only a "temporary break" from the trouble of those who live off their own toiling. The union movement still remains the mirror of its interlocutor, representing and organising that dialectical tension that by denying servile work transforming that in decent work as an emancipating force of those who offer it.

Unions are not just based on solidarity, they are also its main catalyst. It is important to be reminded the labour movement throughout history, rather than be based on the homogeneity of the base

representation, has also built solidarity.¹⁵ Labour solidarity is an objective that unions constantly pursue and not their precondition¹⁶. In this sense organising work always means eliminating competition between those who offer their work, inventing and reinventing means of solidarity, especially against the social transformations. As a matter of fact without inequalities there would be no need for solidarity. The phenomenon of intense global migration calls for the construction of new spaces for public politics and rights in accordance with the twofold conceptualisation of labour described above as “glocal”.

Reference is made here to the work of women, young people and especially the work of the migrant population that represent the new social and productive model of the XXI century. They are today the most fragile segment of the labour market, victims of discrimination, criminalisation and oppression¹⁷.

Faced with this complex scenario, union action must reinvent itself based on three essential pillars: first, once the union movement was, is, and always will be, a spokesman of work, all those who live off their own toiling in any form that manifests itself, the horizon of labour regulation cannot be limited to the classic employment relationship. It must instead necessarily be extended to comprise a wide network of social norms that assist the individual in the labour market. The union must be able to act as a “co-manager” of the labour market, as an institutional point of reference in the territory; second, the need for the construction of the union movement according to an international perspective of action and organisation is ever more urgent, especially in light of the terrifying similarities that have become apparent between the current labour market and the social question of the 19th century.

The union movement must, once again, be the unifier of all those social segments, often “hidden” behind informal work, and which precisely for that reason are traditionally not very expressive through the (overcome) rhetoric of classic unionism. This cannot overlook the increasing numbers of citizens living below the poverty line and in precarious working conditions, a consequence of to the uncertain, transitory and volatile nature of global economy, as well as the disappearance of national borders. In conclusion, the action of the union must be based simultaneously on both sides the global and the local, converting itself into a catalysing agent of social inclusion through the social value of work.

¹⁵ Gino Giugni’s take on the meaning of the collective interest has never been surpassed “the collective interest [...] is not an ontological essence, but a linguistic convention designating the result of a formalized process of forming the will of a organized plurality of people”. Gino GIUGNI: *Il Diritto Sindacale*. Bari, Cacucci, 2001. 59–60.

¹⁶ Richard HYMAN: *Imagined Solidarities: Can Trade Unions Resist Globalization?* In: Richard HYMAN: *Globalization and labour relations*. Cheltenham, Edward Elgar, 1999. 95.

¹⁷ FERRAJOLI op. cit. 17–18. With the words of Ferrajoli: “[...] the people of the migrants is the constituent subject of a new world order and, at the same time, of humanity as a legal subject”. Ibid. 31.