Labour is not a commodity: The role of labour law between past and future

I. Introduction

"Labour is not a commodity", we all are familiar with this core message of the ILO, enshrined in the Philadelphia declaration of 1994 as well as in the 2008 Declaration on Social Justice for a Fair Globalization. This message is by no means self-evident. The de-commodification of labour is a relatively new insight in a long development. The founders of economic theory in the 18th century had a totally different perception. Adam Smith as well as other economists considered labour to be a commodity as any other commodity. According to this approach the same market rules apply as in any other market where products and services are the objects of trade. This conception remained to be predominant also in the 19th century.

This perception first came under attack by Karl Marx who pointed to the fact that the object of the labour market is not labour but the worker, a person with flesh and blood, who sells the labour power. But the labour power is not an independent entity, since it cannot be separated from the worker as a human being. Therefore, the labour market cannot be the same as any other market and needs specific rules. Marx' view was supported later on particularly by quite a few famous German scholars as for example the social policy theorist Lujo Brentano or the founder of modern labour law Hugo Sinzheimer. But how difficult it was to promote this critical approach against the mainstream economic theory best can be demonstrated by the fact that not even Friedrich Engels shared the view of Marx. He instead wrote: "Labour is a commodity, like any other, and its price is therefore determined by exactly the same laws that apply to other commodities". In other words demand and supply are the decisive factors also in the labour market.

In view of this dominance of the classic economic theory it is no surprise that it took still quite a long time until the formula "Labour is not a Commodity" has been accepted on international level. Even the text of the preamble of the Constitution of the ILO in the Treaty of Versailles in 1919 remains rather cautious when it states "that labour should not be regarded **merely** as a commodity or article of commerce". In

other words: labour is a commodity but not an ordinary one, a formula which left much room for interpretation.

Only when 1944 in Philadelphia the focus was on human rights “Labour is not a Commodity” as an unconditional formula became part of the ILO Declaration and has been reconfirmed many times since.

However, in spite of the fact, that this formula is stressed and reconfirmed, it may well be doubted, whether it is understood and accepted everywhere. Therefore, it seems necessary to clarify it’s implications as concrete as possible.

II. Implications

1. Exemption from Anti-Trust law

We get a first idea on the meaning of this principle when we look at the law where in a national context the formula “Labour is not a Commodity” first was enshrined. This was the Clayton Antitrust Act of the United States of 1914 which bluntly states “the labour of a human being is not a commodity or article of commerce”. The purpose of this provision in the Act was far reaching: to exempt labour unions and collective actions from competition law.”Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labour....organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organisations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof , to be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust law” (section 6).

The possibility to act collectively, to get organised in labour unions and to conclude collective agreements with the employers’ side, is of utmost importance. As long as workers merely act as individuals competing with each other at the labour market, exposed to the mechanism of supply and demand, the danger to a race of the bottom is always present. In particular Karl Marx has drawn the attention to this effect by indicating that in case the supply is lower than the demand for labour impoverishment

might be the result of individual competition between workers. Therefore, the restriction of competition between individual workers should not be forbidden but allowed and encouraged. Only if workers are able to join forces they can prevent the race to the bottom by negotiating and if necessary fighting via collective action for minimum standards fixed in collective agreements. This is the reason why freedom of association including the right to collective bargaining is one of the core labour rights expressed by the ILO Declaration of 1998.

Freedom of association as a basic precondition of modern labour law is uncontested. But nowadays the question is who enjoys this freedom, who can claim the exemption of antitrust laws: only employees in a traditional sense and labour unions acting for employees or also organisations for self employed who provide their labour power in person and who do not have the possibility to delegate their work, so called solo self-employed. They are in a similar position as employees.

This question plays a crucial role in the legal debate of the European Union. According to the Court of Justice of the EU (CJEU) these solo-self-employed are considered to be the object of the anti-trust rules of the Treaty of the Functioning of the EU (TFEU) and, therefore, cannot be included in collective agreements. This narrow-minded view in my view misunderstands the function of anti-trust law which is meant to prevent the abuse of power in the market by forbidding cartels of companies. Collective agreements for solo-self-employed evidently will not lead to such an abuse of market power and. therefore, also should be exempted from anti-trust-rules. It should be kept in mind that according to the ILO convention 87 on freedom of association also independent self-employed workers are fully covered. This problem is becoming more and more important, last not least due to the conditions in the platform economy.

2. Human Dignity

However, the exemption from antitrust laws is only one implication of the insight that labour is not a commodity. The underpinning idea of this principle, as O'Higgins in his seminal article of 1997 has convincingly told us, is the need to protect the human dignity of persons who work. I share this view and, therefore, would like to sketch what this focus on human dignity may mean.

Nowadays human dignity as the overarching goal of labour law is explicitly mentioned in quite a few international legal documents. The key concept of the ILO's decent work agenda is human dignity. And it is particularly prominent in the texts of the EU. It is not only the predominant right of the Charter of fundamental rights of the EU as a whole but particularly mentioned in the chapter on solidarity which contains the fundamental social rights. According art 31 par. 1 "every worker has the right to working conditions which respect his or her...dignity". This reference to human dignity is by the way decisive for the interpretation of all fundamental social rights contained in this chapter of the Charter.

Of course the notion human dignity is as vague as the principle that labour is not a commodity. The literature is full of attempts to develop a definition and to specify the different aspects of this broad concept. Without engaging in this debate, it should be clear from the very beginning that the reference to human dignity is not an empirical description of labour law, meaning that labour law already corresponds to this ambitious goal. Human dignity is a normative concept which is indicating us the way how we have to develop labour law. This is not an easy task, in particular since labour law has to react to changes in the world of work.

Instead of trying to provide a comprehensive description of what human dignity might imply I would like to just give you some evident examples.

2.1. A Human-Centred Agenda

One of the implications, perhaps the most important one, is the necessity to put the protection of the worker as human being in the centre of all reflections on labour law.

This, by the way, is also the recommendation of the recently published report of the Global Commission on the Future of Work. This report was written in order to shape the politics of the ILO at the occasion of its centenary. The report stresses that "people and the work they do are to be placed at the centre of economic and social policy and business practice". This insight confronts us with a very controversial ideological debate.

In the last decades the dominating neo-liberal approach of economic theory has been insisting on the self-regulation by market forces. In this view labour law focussing on workers' protection has been denounced as intolerable disturbance of the markets. The primary focus of this school is not the workers' human dignity but economic efficiency. Thereby, labour law is becoming a residual category totally dominated by the tyranny of economic considerations. This leads by necessity to de-regulation, de-institutionalization and de-collectivisation. Reduction of labour costs is the dominating goal of such a theoretical concept. It is evident that this view which considers labour more or less as a cost factor and nothing else is not at all in line with the formula "Labour is not a Commodity".

The consequences of this approach could best be seen by the austerity measures imposed to some southern European countries in the course of the crisis management during the Euro crisis, leading to reduction of wages and pensions, to weakening of the protection against unfair dismissals or to de-construction of the collective bargaining system. Now one may say that the crisis management was an exceptional situation. However, it has been the normal strategy in the EU for the last decades. If for example we look at the 'Lisbon Strategy' or at the strategy 'Europe 2020', both have subordinated labour regulation to the many instruments developed by the EU for macro-economic governance, culminating in the 'European semester'. The social dimension in this view has remained to be a residual category. Therefore, it is of utmost interest whether the recently proclaimed European Pillar of Social Rights means a new start, emancipating labour law from the economic dominance and finally putting labour regulation in line with the concept of human dignity. Whether this will be the case, still is uncertain.

2.2. Workers' Involvement in Management's Decision Making

Another implication of respect for human dignity is the fact that workers are not supposed to be mere objects of management's decisions but must have an opportunity to influence this decision-making. Gérard Lyon-Caen, the famous French labour law scholar, spoke in this context of the worker as citizen. Already the founding fathers of our field were pleading for a democratic workplace as a precondition for labour law in line with human dignity. This insight of the founding

fathers of labour law is as valid today as it was in the formative era of labour law. In the context of the EU the actuality of this concept particularly is shown by Art.27 of the Charter of Fundamental Rights where “information and consultation” for “workers or workers representatives” “in good time” and “at the appropriate levels” is guaranteed as a fundamental right. The question, however, is whether and how labour law has lived up to this ambitious goal so far and whether this will be possible in the future.

Institutionalised patterns of workers’ participation exist in many countries. However, there are big differences from country to country. These differences refer to the degree of participation, ranging from information and consultation via veto rights up to co-determination where management and workers’ representatives are on the same footing in decision-making for a whole range of topics. They also refer to the level of participation, ranging from the shop-floor level up to the headquarters of companies or groups of companies. The composition of bodies of workers’ participation is different from country to country. Some countries even know employee representation in company boards where again the differences are tremendous, in particular as the percentage of seats are concerned. One of the most important differences between the systems of workers participation refers to the relationship between bodies of workers’ representation and trade unions, thereby, of course also to the relationship between workers’ participation and collective bargaining. And there is one common deficiency of the different systems of workers’ representation: they are not implemented in small companies. And often the threshold established by law does not necessarily correspond with implementation – as for example in Germany – where small establishments of at least 5 employees are included in the works council law but by far not implemented in actual practice.

All systems of workers participation are embedded in the cultural tradition and overall institutional framework of the respective country. Therefore, the institutional arrangements cannot be transferred elsewhere. The institutional arrangement has to fit in the overall structure of each country.

The positive effects of workers involvement in management’s decision making are well documented by many empirical studies. To just mention a few of them: It leads to a change of focus from shareholder value to stakeholder value and tends to

promote sustainability instead of short term effects at the stock markets. It has a big advantage compared to unilateral decision-making by the mere fact that management, who has to justify towards workers' representatives what it wants to do and why it wants to do it, tends to prepare the decisions much more carefully than it would be the case without this obligation. This leads evidently to better decision-making. The consciousness that workers' representatives are involved in management's decision making and that workers' interests are taken into account tends to increase the employees' motivation and thereby the company's productivity. Last not least the permanent dialogue between management and workers' representatives leads to mutual trust, changes the attitudes of both sides and absorbs unnecessary conflicts.

These positive effects were the main reason why the European legislator after long debates established in 2002 a minimum framework of information and consultation for domestic purposes within the Member States, leaving grown structures untouched as much as possible by offering utmost flexibility.

The European Union went even further and provided patterns for trans-nationally operating companies and groups of companies. The starting point in this context was the Directive on European Works Councils of 1994, amended in 2009, followed by Directives on Employee Involvement in the European Company and on Employee Involvement in Trans-National Mergers, to just mention the two most important ones. Some Transnational Corporations even went further and concluded agreements with Global Union Federations to establish World Works Councils covering all subsidiaries of the globe.

Even if so far the instruments of these bodies of workers' representation to promote employees' interests in trans-nationally operating corporations still remain to be rather modest, the importance of this strategy barely can be overestimated. Not only the number of trans-nationally operating companies have increased tremendously. According to the campaign organisation "Global Justice Now" in 2016 69 of the 100 largest economic units in the world were trans-nationally operating corporations and not States. Walmart has higher revenues than the government of Spain, Apple has higher revenues than the government of Belgium and the German MNE Daimler has higher revenues than the government of Denmark, to just give you some examples. It

is evident that the exercise of such power cannot be left to unilateral decisions by management. Workers' participation in these contexts, reaching the headquarters where ever they are located and covering all subsidiaries all over the world, ideally should be established. This, however, is still a dream due to the lack of transnational rules and also due to the lack of strong international actors on the workers' side.

At least for Europe a recent study on "Workers' Voice and Good Corporate Governance" has defined the preconditions for such a scheme and made interesting proposals to which I cannot go into due to time constraints. However, even in Europe the realization of such proposals is far away and more than uncertain.

Instead of further dreaming on more workers' participation within transnational corporations let's have a look on the constitutive elements for the efficient functioning of workers participation in management's decision-making. It needs first an identifiable workplace where – at least in principle - employees are working together in the premises of the employer, secondly employees with more or less homogeneous interests, thirdly a relatively clear method on how to identify who is an employee and finally an identifiable employer, namely a company to which the employees belong. These preconditions have become more and more problematic. And this leads to the question whether and how workers' participation can survive in the future.

The fragmentation, segmentation and dislocation of the workforce is an increasing trend. Not only the diversity of interests of the different groups of employees makes it difficult to articulate a collective voice in participating but perhaps even more the fact that isolation and individualisation prevents collective consciousness. The cooperation in the premises of the employer is fading away. Digitalization to a bigger and bigger extent allows that work can be performed from everywhere.

Vertical structures more and more are replaced by so called flat hierarchies. Instead of subordination autonomy is becoming the new catchword. Thereby the still existing difference of interests between management and employees and the increasing amount of control is becoming less visible.

Not only the fragmentation and segmentation of the workforce, the erosion and dislocation of the workplace and the disappearance of clear-cut hierarchies are

features of the new world of work but also the erosion of the company structures which makes it difficult to define who is the employer. Since quite a while companies have achieved a 'new mobility' as regards company patterns and cooperative structures. It makes sense to talk of a 'volatility' of legal structures, as virtual corporate networks emerge, areas are outsourced, companies are run without formal group structures and transnational cooperation is becoming more and more a common feature. Dis-locating strategies are on the agenda. It often has become difficult to identify the employer. The "fissured workplace" has become a sort of catchword of this extremely complex development.

Digitalisation and globalisation are further and mutually pushing this trend. The transformation is so speedy that the legislator evidently is not able to keep up with all these technological changes. Legislation only can provide a relatively flexible framework. Solutions balancing the needs of the companies and the workers are to be developed on a decentralized level, at the workplace and within the companies. It has to be kept in mind that the consequences of the technological revolution are still quite unclear. But one implication of the new scenario is certain: de-skilling and re-skilling will be of utmost importance. The uncertainty of the quantity of job loss and the certainty of widespread de-skilling and re-skilling imply fears among the workforce which easily might lead to resistance against these new patterns. Unilateral decision-making by management, therefore, might not be able to achieve acceptability in introducing and implementing digital work. The more workers' involvement already in early stages and throughout the implementation process takes place, the higher will be the legitimacy of decision-making. Therefore, a new catchword is now on the agenda: "cooperative turn".

Employee involvement in management's decision making in the era of digitalization is particularly important in areas of life-long-training where decisions are to be made on measures to maintain and further promote employment, in the area of working time in order to shape it in a way which corresponds on the one hand to the employees' autonomous decisions on working time flexibility as well as to the company's needs, in the area of risk management in order to prevent the psycho-social diseases which in view of the new technological environment are growing faster and faster, or in the area of protection of privacy which in the era of digitalization is endangered as never

before. These few examples are by far not comprehensive. But they indicate that employee's involvement in management's decision-making is more urgent than ever.

The question, however, is whether and how workers participation meeting all these challenges can be organised in view of all the indicated changes. The old models might not be able to serve the purpose since – as indicated – the constitutive elements on which they are built no longer exist.

In order to establish functioning patterns of workers' involvement in management's decision making in the era of digitalization it will be necessary to overcome the individualization and isolation of the workers. This applies in particular to tele-workers and to all types of workers in the platform-economy. It is necessary to create a collective consciousness. There are already many attempts, mainly organized by trade unions, to contact the respective workers by digital tools and bring them together in workshops where useful information is provided. These initiatives particularly try to enable the digital workers - as for example crowd-workers – to communicate with each other, thereby overcoming the isolation.

Instead of listing up more challenges I rather would like to sum up by saying that it will be very difficult to establish schemes of workers' participation in the new world of work, even if it might be more urgent than ever.

2.3. Worker's Privacy

My last example of an implication of the respect human dignity refers to the respect for worker's privacy. This is not only an issue which has become dramatic in the era of digitalization. Always there has been the danger, that the employer tries to get as much information as possible on the worker's life, including his or her private behaviour, his or her ideological and political preferences, his or her religious affiliation, his or her economic situation etc. The possibility to collect all these data, to process them and, thereby, to save them to be used for all kind of purposes has increased dramatically by the availability of digital tools. Human dignity, however, requires that this possibility is limited and that the employer only is entitled to get an

applicant’s or worker’s personal data only to the extent which is absolutely necessary to perform the employment relationship.

The laws trying to protect workers’ privacy are getting more and more sophisticated. But they are still far from being satisfactory. This unfortunately is also true for the EU’s General Data Protection Regulation of 2016. At least it contains an opening clause for the Member States to specify in more detail the conditions for data protection in employment relationships.

III. Conclusion

Many more examples of what it means to meet the ambitious goal of workers’ human dignity could be given. But this might be sufficient to show what an enormous challenge this is for labour law.

By way of concluding let me draw your attention to the fact that I am afraid that we are drifting away more and more from the conditions which are required by the principle that labour is not a commodity. Specific modern work patterns evidently are no longer abiding to this principle. If we look to “zero-hours” contracts, to “on-call” or “on demand work” and in particular to the many casual work patterns in the platform economy, we are confronted with a re-commodification of labour. This is a tremendous challenge for labour law. There is a big question mark whether and how these patters can be brought in line with the principle that labour is not a commodity.