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REASONING ON THE GLOBAL MARKET AND ON THE FUNCTION OF LABOUR LAW

TOWARDS A GLOBAL VALUE CHAIN APPROACH IN LABOUR LAW: WHICH WAY FORWARD?

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1. Introduction: the present labour relation context

Since the last decades of the 20th century, multinational corporations (MNCs) have benefitted from the globalisation of economy more than their employees. Despite the progressive integration of capital markets, the legal regulation of employment relations is still a national prerogative. Such situation has led to widespread practices of delocalisation and outsourcing in order to exploit differences in labour costs. In fact, global production systems are increasingly organised throughout long chains of independent legal entities driven by MNCs, which are commonly known as global value chains (GVCs) [1].

Furthermore, national labour legislation is based on the contract-of-employment framework. However, individual employment relations can be affected by several commercial arrangements that fall outside of such contract. Accordingly, the contract of employment is becoming unsuitable to guarantee adequate protection to workers whenever their employer have to comply with standards dictated by others (*i.e.* the value-chain leading firms or clients of a different kind).

In light of the above, a change of the regulatory paradigm seems to be

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[1] Among many others, see at least G. Gereffi, J. Humphrey, T. Sturgeon, *The Governance of Global Value Chains*, in *Review of International Political Economy*, 2005, 78 ff.

needed in order to counter this new imbalance of power[2]. Effective employment protections should indeed be shaped by taking into account the (growing) global and "fissured"[3] nature of nowadays labour relations.

With that in mind, this essay aims to pave the ground for the adoption of a GVC approach in labour law, by exploring its theoretical and practical viability. First of all, I identify some possible legal obstacles to such an approach. In particular, I focus on the two principles of legal independence and territoriality of law; and I investigate how such obstacles may be overcome. To this end, I present different solutions available and discuss their effectiveness and shortcomings. Then, I move to regulations specifically designed to ensure the respect of some given social standards in MNCs' GVCs. Finally, I draw the conclusion that the adoption of a GVC approach in national labour laws could be the first step towards a new way to conceive employment relations, by filling the gap between formal and substantial employer[4]. Besides, this approach would guarantee a higher protection for workers inasmuch as it is more consistent with the current practices of business.

2. The principle of legal personality, bilateral relations and the value chain

From a legal point of view, GVCs have no relevance *per se*: they could only be broken down into a number of contracts and arrangements, separate from each other. Indeed, the principle of legal personality entails that each entity in the chain is independent from the others and should not, as a general rule, suffer any legal consequence from their wrongdoings.

In the field of labour law, the aforementioned principle means that only the formal employer may be held liable for a breach of the employment contract as well as for more serious (even criminal) offences. As I mentioned, workers' protections derive from the existence of an employment contract,

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[2] See also V. Brino, E. Gragnoli, *Le imprese multinazioni e il rapporto di lavoro*, in *Rivista giuridica del lavoro*, 2018, I, 209 ff.; and, on a more critical stance, R. Del Punta, *Lost in Externalisation: A Regulatory Failure of Labour Law?*, in A. Perulli, T. Treu (ed. by), *Enterprise and Social Rights*, Wolters Kluwer International, Alphen aan den Rijn, 2017, 93 ff.

[3] D. Weil, *The Fissured Workplace. Why Work Became so Bad for so Many and What Can Be Done To Improve It*, Harvard University Press, Cambridge, MA, 2014.

[4] L. Dorigatti, *Strategie di rappresentanza del lavoro nelle catene del valore: al di là della distinzione fra datore di lavoro «formale» e «sostanziale»*, in *Stato e Mercato*, 2015, 281 ff.

whether written or oral – or even implicitly inferable by the parties' behaviours. When an intermediary (such as a contractor, a subsidiary, a supplier etc.) is put, as a formal employer, between the employee and the GVC leading firm, the latter becomes virtually irresponsible – unless of course the whole operation is the result of some kind of fraud or abuse[5].

Therefore, the narrow scope of the employment contract as a bilateral relation[6], on the one hand, and the very concept of the employer[7], on the other, represent a first obstacle to the adoption of a GVC approach in labour law. Some mechanisms to link workers employed in the value chains with the leading MNC should consequently be found in order to overcome this obstacle.

Several labour law systems provide for some forms of joint liability with respect to specific subjects (maily monetary claims)[8]. For instance, under Italian law, principals are liable for wages and social contributions due to their contractors' employees, within two years after the termination of the contract itself[9]. This way, corporations are encouraged to choose their contractors very carefully, considering not only the price of the service, but also the (social) reliability of the entity that provides such service.

Similar results can be achieved through a due-diligence rule. It obliges undertakings to develop schemes aimed at identifying major risks and preventing serious offences. In other words, MNCs would bear a specific duty

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[5] For instance, the EU directive no. 67/2014, "on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services", lays down a set of norms intended to identify bogus postings across the EU member states. In particular, art. 12 opens the door to special liability rules in subcontracting chains.

[6] In a similar fashion, J. Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *Osgoode Hall Law Journal*, 2006, 616 ff.

[7] S. Deakin, *The Changing Concept of the "Employer" in Labour Law*, in *Industrial Law Journal*, 2001, 72 ff.; and, more recently, J. Prassl, *The Concept of the Employer*, Oxford University Press, Oxford, 2016.

[8] For an interesting, albeit slightly old, overview of joint-liability provisions within the outsourced EU construction sector, read the detailed report by M. Houwerzijl, S. Peters, *Liability in Subcontracting Processes in the European Construction Sector*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2008.

[9] Art. 29 of d.lgs. no. 276/2003. The Italian Constitutional Court recently stated that such rule is applicable in each case of externalisation, notwithstanding the type of contract concretely concluded (decision no. 254/2017 – commented by, among others, M. Del Frate, *La Corte costituzionale sull'applicabilità della responsabilità solidale alla subfornitura: condivisibile il risultato ma non il metodo*, in *Diritto delle relazioni industriali*, 2018, 611 ff.).

of care [10] concerning working conditions in their GVCs. In national legislations, this technique is broadly adopted in the domain of health and safety at work [11]. In fact, the need to prevent serious accidents to occur justifies a more *ex-ante* approach.

For the same reason, the due-diligence rule seems to be preferable than joint liability for the purposes of this essay. In fact, joint liability could be really effective and deterrent only if the damaged workers are actually able to sue the leading firm (either directly or through their representatives). This implies, at least, that: 1) they should be aware of such possibility; 2) they should know precisely who is the principal of the particular job they are carrying out when the harm occurres [12]; and 3) they should have the financial resources required. On the contrary, due diligence targets MNCs directly and in advance. In other words, the MNC's home state authorities can verify the theoretical adequacy of the plan, therefore avoiding many of the hurdles (and shortcomings) related to the joint-liability rule.

Lastly [13], a relatively weaker instrument than the two explained above is social reporting. It consists in a mere obligation to disclose the efforts and

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[10] It should be noted that some legal systems (especially within the common-law family) are already familiar with this concept: M. Bradley, C.A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, in *Iowa Law Review*, 1989, 1 ff.; and, for a more comprehensive overview, S. Leader, *Enterprise-network and Enterprise-groups: Trends and National/International Experiences. The Duty of Care*, in A. Perulli, T. Treu (ed. by), *op. cit.*, 121 ff.

[11] See, for instance, the Italian legislative decree no. 81/2008, which is the consolidated text on health and safety at work in Italy. In particular, where one or more undertakings or self-employed persons are hired to work at the principal's premises, art. 26, par. 3, requires that the latter "promotes cooperation [...] by drafting a risk-assessment document [...] with a view to eliminate [...] risks of interference".

[12] This could be very difficult to determine, since suppliers might realistically work for several different companies at once.

[13] It is not worth mentioning here the so called co-employment, i.e. the situation where two separate entities share the same contract with the same worker. In fact, as it is usually intended in the legal systems where such figure exists, the co-employment framework would not be applicable to workers in GVCs. This is because the latters follow only the directives given by their direct employer, who, in turn, tries to comply with the standards imposed by the client in the value chain. Therefore, it cannot be established a co-employment relation between the MNC and the workers hired through its GVC, unless of course it turns out that the very act of subcontracting actually hides some form of unlawful job intermediation – in which case, other labour-law remedies would be available. For an overview of this topic under the Italian law, read I. Alvino, *Il lavoro nelle reti di imprese: profili giuridici*, Giuffrè, Milano, 2014.

activities put in place by a given company in order to act in a socially responsible way. Apparently, it relies mostly on consumers' awareness. As a consequence, its effectiveness is likely to vary extensively according to the specific features of each market where the MNC sells its products or services.

3. The theoretical and practical problems of extraterritoriality

If the principle of independence constitutes notably a legal issue, the principle of territoriality of law raises also practical questions.

Given that there is no international consensus on labour standards [14], and lacking in this field an international organisation provided with binding powers, protective norms must be enacted, and enforced, solely by nation states. However, whereas states hold the monopoly on the legitimate use of force within their territories, they have no coercive powers outside their borders. On the other hand, it is clear that the purposes of a GVC regulation would be hampered if such norms were applicable only to the national segment of the chain (as in the examples mentioned in the previous section). Therefore, in order to adopt a sound GVC approach, some ways must be found to effectively regulate situations that go beyond the national territory.

The first human-rights extraterritorial instrument of the modern age is probably the 1789 US Alien Tort Claims Act (ATCA). According to this statute, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" [15].

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[14] Of course, the ILO's eight core conventions have a very high number of ratifications (currently ranging from 155 and 182, out of 187 member states – see *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0*, last visited: December 2018). Nevertheless, those conventions stipulate basic protections regarding only fundamental aspects of employment relations. Besides, among the states that have not ratified two or more of them, we find some important and highly populated countries, such as China, Japan and the US – and I did not consider C87 and C98, which are the most controversial and less ratified ones.

[15] Arguably, labour controversies would rarely fall within the scope of this provision. This might be the case when gross infringements of fundamental labour rights (such as the ones incorporated into the ILO core conventions – or some of them) are alleged, as it happened in the Doe v. Unocal lawsuit – where forced labour was involved: C. Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, in *Law & Society Review*, 2009, 271 ff.

This is not the place to debate about the political appropriateness of such a (prospective) intrusion into foreign states' home affairs [16]. Nonetheless, the concrete viability of this solution must be carefully discussed, since strong laws become hollow when they cannot be enforced in practice.

In order for universal-jurisdiction rules to function efficaciously, at least two major and, to some extent, intertwined conditions should be met. First of all, people who are theoretically concerned should be put in such a position as to get actual access to the court. Secondly, state authorities should be able to control (or, at least, get reliable information about) working conditions all along the value chain.

As I argued elsewhere [17], both the aforementioned conditions can be met in a rather satisfactory manner when global unions and, possibly, other international stakeholders (e.g. NGOs) are involved in the monitoring process. In fact, given their worldwide presence and their statutory humanitarian commitments, these actors are best placed to fill the gap between the global scope of laws on GVCs and the enforcement agencies' national powers.

Of course, nation states can also employ different means to extend their sphere of influence beyond their borders. As long as labour law and value chains are concerned, international trade can play an important role. Most notably, I am referring to international treaties [18] – such as free trade agreements (FTAs) and bilateral investment treaties (BITs) – and the generalised system of preferences (GSP) [19].

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[16] For the so called "political question doctrine" and other objection against a broad interpretation of the ATCA, see L. Londis, *The Corporation Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, in *Meine Law Review*, 2005, 141 ff., in particular 169 ff.

[17] M. Murgo, *Global Supply Chains e diritto del lavoro: quale ruolo per il sindacato?*, in G. Casale, T. Treu (ed. by), *Transformations of work: challenges for the national systems of labour law and social security*, Giappichelli, Turin, 2018.

[18] Among several others, see the two reports on this subject presented at the XXII World Congress of the International Society of Labour and Social Security Law: J. Bellace, *The United States: Labour and Global Trade*; and A. Perulli, *The Use of Social Clause on the Latest European FTA's (CETA and EPA) and the Path for its New Legitimation*.

[19] For the two models of the US and EU in a nutshell, visit the websites of the US Government (*https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp*) and of the European Commission (*http://ec.europa.eu/trade/policy/countries-and-regions/ development/generalised-scheme-of-preferences/*).

The logic underlying all the aforementioned instruments is quintessentially the same: to make use of one state's commercial power in order to gain some sort of advantage. From this point of view, a minimum set of social standards is the condition required to get preferential access to the state's national market. In other words, it works as a shield to protect home markets from (unfair) competition on fundamental rights.

At the same time, these instruments could anyway be used to hold multinationals accountable for their foreign operations. Furthermore, they could strengthen cooperation between enforcing agencies in different countries (as well as between other national actors [20]), thus creating platforms for a transnational implementation of GVCs laws.

It should not be neglected, though, that a similar approach is, by its own nature, piecemeal – which contradicts the all-encompassing and monistic rationale behind the GVC approach. Moreover, since it resorts to public-law instruments, it does not, as a general rule, address GVCs directly. Instead, each state that is a party to the treaty is supposed to enforce it within its territory [21] – which bring us back to the issue of extraterritoriality.

Nevertheless, as I suggested above, international trade provisions could still be useful tools to improve the implementation of GVC statutes, rather than to substitute them.

4. The GVC approach in actual examples

In the previous two sections, I analysed a couple of legal (and practical) hurdles to the adoption of a GVC approach in labour law. Here, I am going to compare a few examples of regulations adopting such an approach, in order to identity how they actually coped with the aforementioned hurdles and to assess the relative effectiveness of the proposed solutions.

When I talk about laws/regulations on GVCs, I mean pieces of legisla-

[20] Some cases of transnational trade union cooperation fostered by the North American Free Trade Agreement (NAFTA) are reported in T. Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, in *American Journal of Sociology*, 2005, 715 ss.

[21] In fact, A. Perulli, *Diritto del lavoro e globalizzazione: clausole sociali, codici di condotta e commercio internazionale*, Cedam, Padua, 1999 showed how this situation originated serious loopholes in the implementation of the NAFTA and of the related labour treaty, the North American Agreement on Labor Cooperation (NAALC), only few years after their entry into force.

tion that: 1) take into account the GVC as a whole; 2) regardless of the place where each particular entity is incorporated or established; and 3) laying down a minimum set of labour standards.

Despite the widespread character of GVCs and the serious challenges they pose to national labour-law regimes (which I briefly reported above), so far only few states have enacted laws on that subject[22]. Among the latters, the vast majority contains only transparency requirements, albeit structured in different ways.

This is the case, for instance, of the California Transparency in Supply Chains Act and of sec. 54 of the UK Modern Slavery Act[23]. Leaving aside some negligible differences, both of them stipulate that largest businesses shall disclose their efforts to eradicate slavery and human trafficking from their supply chain[24]. They also provide, in rather general terms, for minimum contents which shall be included in the statement[25].

In this connection, the EU directive no. 2014/95/UE concerning "disclosure of non-financial and diversity information by certain large undertakings and groups"[26] appears to be slightly more detailed, as well as much broader in scope. Indeed, information shall be related to "environmental, social and employee matters, respect for human rights, anti-corruption and

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[22] On this topic, see also V. Brino, *Imprese multinazionali e diritti dei lavoratori tra profili di criticità e nuovi "esperimenti" regolativi*, in *Diritto delle relazioni industriali*, 2018, 171 ff.

[23] For a more in-depth analysis of those two Acts, read M. Koekkoek, A. Marx, J. Wouters, *Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains*, in *Global Policy*, 2017, 522 ff.

[24] Interventions of this kind are under discussion also in the US, with the federal bill no. H.R.3226 (Business Supply Chain Transparency on Trafficking and Slavery Act).

[25] *I.e.* information about the supply-chain structure, audit procedures put in place (whether internal or carried out by an independent organisation), employees' training programs on trafficking. Furthermore, the California statute mentions also "internal accountability standards and procedures for employees or contractors failing to meet company standards" and suppliers certification requirements about the materials incorporated into the product; whereas the UK one considers instead the "effectiveness in ensuring that slavery and human trafficking is not taking place" and the parts of the company's supply chain "where there is a risk of slavery and human trafficking taking place".

[26] Even though the directive expressly mentions only undertakings and groups, information about the GVC should probably be included in the report, as it is argued at whereas no. 6 and no. 8 of the directive itself. In the same vein, M. Ferraresi, *L'adempimento datoriale degli obblighi giuslavoristici: strumenti volontari e incentivanti tra diritto e responsabilità sociale d'impresa*, in *Variazioni su Temi di diritto del lavoro*, 2018, 465.